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I. INTRODUCTION

Free speech law often protects emotional expression.[1] However, we lack an understanding of the scope and limits of protection for emotional expression. This Essay seeks to make progress toward such an understanding. A better comprehension of the nature of emotion itself is crucial to achieving this goal.[2] A better grasp of the logic of emotional expression is also important.[3] If we can arrive at an improved understanding of emotions and how they can be expressed, we will be better able to explain when we do—and do not—constitutionally protect the expression of emotion.[4] We will be better able to account for inconsistent or unsatisfactory judicial decisions, as well.[5]

This Essay does not suggest that a better understanding of emotional expression will allow us to dramatically simplify free speech law. Emotions are surprisingly complex, and the expression of emotion is similarly complex.[6] Remarkably, emotions and the logic of their expression turn out to be no less complex than, and no narrower than, the full range of speech in general for free speech purposes.[7] Emotional expression and the logic thereof is not a special, discrete, or narrow category of speech. Instead, emotional expression and its logic already

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1. *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971). *See generally infra* Part II (discussing recurring patterns of emotional expression and their legal status).

2. *See infra* Part III.A (discussing theories and definitions of emotion).

3. *See infra* Part III.B (discussing the emotivism model and interaction between speakers and listeners).

4. *See infra* Part IV (analyzing patterns of emotional expression using an emotion-based approach).

5. *See infra* Part IV (analyzing patterns of emotional expression using an emotion-based approach).

6. *See infra* Parts III, IV (applying an emotion-based analysis to certain emotional expressions).

7. *See infra* Parts III, IV (applying an emotion-based analysis to certain emotional expressions).

imply and encompass all of the major elements, forms, values, limits, and problems associated with freedom of speech. A theory of free speech for emotional speech can thus serve as a theory for free speech in general.

Let us begin by noticing just a few of the uncertainties attending the case law of emotional expression. The classic "fighting words" case of *Chaplinsky v. New Hampshire*[8] is largely about emotion. The Supreme Court in *Chaplinsky* famously observed that "'[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.'"[9]

It is fair to suppose that "[r]esort to epithets or personal abuse"[10] is typically accompanied by some sort of emotion on the part of the speaker. But the Court's main focus in *Chaplinsky*, in the context of "fighting words",[11] is on the emotional reactions of listeners, not speakers.[12] "Fighting words" are "those which by their utterance inflict injury or tend to incite an immediate breach of the peace."[13] The emotional injury—in this instance, the emotional impulse to fight—is inflicted upon the listener, whatever the speaker's emotional state.[14]

8. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

9. *Id.* at 572 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

10. *Id.*

11. *Id.* at 572–73.

12. *See id.* at 573 (discussing how "fighting words" violate the Constitution by sparking violent emotional response in listeners, such as causing a fight).

13. *Id.* at 572.

14. This proposition is not to suggest that the emotional reactions of listeners are irrelevant to a speech's free speech value. The Court has held, for example, that freedom of speech may be at its most valuable when it "stirs people to anger." Texas v. Johnson, 491 U.S. 397, 409 (1989) (flag burning regulation case) (quoting Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (rabble-rousing emotional oration case)). Additionally, "even when a speaker or writer is motivated by hatred or ill will his expression [is] protected by the First Amendment." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988) (libel and intentional infliction of emotional distress case) (citing Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (criminal libel prosecution case)). We can easily imagine that an emotional reaction in a listener could be stirred by speech involving no particular emotion on the part of the speaker or by speech reflecting emotion on the part of the speaker, whether the speaker's and the listener's emotions correspond or not. For example, a largely dispassionate traffic report might provoke strong emotions in some listeners. Similarly, emotionally proud or celebratory speech might provoke anger or disgust on the part of some listeners.

The later Supreme Court epithet case of *Cohen v. California*[15] focused more directly on the emotions of speakers, as opposed to those of listeners.[16] Justice Harlan observed for the Court in *Cohen* that:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as for their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[17]

In this passage from *Cohen*, more than a single distinction may be in play. This passage can be read as creating a distinction between the expression of ideas and the expression of emotions. However, Justice Harlan drew a more literal contrast between precise, detachedly expressible ideas and either emotions in general or some subclass of emotions.[18] "[O]therwise inexpressible emotions"[19] may refer to emotions that cannot be expressed without recourse to arguably offensive epithets. Perhaps Justice Harlan was suggesting that some combination of intense feeling and difficulty in otherwise articulating one's views leads to emotionally charged epithets.

It would be odd, after all, to assume that emotions could never be accurately expressed in a precise, detached way. In some cases, we can almost perfectly articulate an emotion, as in our envy of a rival's success in some competitive activity. The strength or weakness of our envy need not affect how well we convey that emotion. On the other hand, there are a number of non-emotional subjects, such as what it is like for an object to be green in color, which are difficult to articulate.

Justice Harlan also contrasted the cognitive force, or the cognitive content, of an expression with its emotive force, or its emotive

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15. Cohen v. California, 403 U.S. 15 (1971) (discussing an allegedly offensive epithet, in connection with the military draft, written on a jacket worn, or at least carried into, a courthouse building).

16. *See id.* at 26 (noting that speakers often choose their words specifically to express their emotions). *See generally* Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283, 302–03 (arguing that tolerating offensive speech has public value in that offensive speech or language reveals the important social fact of the harboring, by some, of offensive thoughts or beliefs).

17. *Cohen*, 403 U.S. at 26; *see also, e.g.*, Gilles v. State, 531 N.E.2d 220, 226 (Ind. Ct. App. 1989) (Miller, J., dissenting) (quoting *Cohen*, 403 U.S. at 26).

18. *Cohen*, 403 U.S. at 26.

19. *Id.*

function.[20] However, Justice Harlan did not explain whether "force," "content," and "function" were all somehow equivalent or related in some other way.[21] Neither did Justice Harlan reveal whether he intended to distinguish generally between cognition and emotion.[22]

Moreover, we must wonder how Justice Harlan saw any relationships among emotion, the expression of emotion in language, and what he referred to as the emotive force or emotive function of language. More simply, what is the relationship between "emotion" and "emotive"? Is the emotive merely the carrying over or the product of the emotion in speech? Could speech be emotional in some way distinct from its emotive force, function, or meaning? Harlan again left this distinction unclear.

Consider one possible interpretation of the relationship between emotion and the emotive. The twentieth century emotivist moral philosopher, Charles L. Stevenson, explained that "[t]he emotive meaning of a word is the power that the word acquires, on account of its history in emotional situations, to evoke or directly express attitudes, as distinct from describing or designating them."[23] Although Stevenson links emotion to emotive meaning, his main interest seemed to be in the differences between expressing, as opposed to merely describing, reporting, or designating, one's attitudes.[24] Stevenson's interests here may or may not match those of Justice Harlan.

It is thus fair to say that Justice Harlan's discussion of emotion and the emotive in *Cohen* raises more questions than it answers. Let us turn, then, from Justice Harlan's discussion in *Cohen* to the broader case law

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20. *Id.*

21. *See id.* (noting that speakers choose their words for their emotive and cognitive force and that the Constitution protects the cognitive content of such words, yet wondering whether the Constitution protects the emotive functions of words).

22. *Id.* Justice Harlan often considered the emotive element of speech, as somehow distinguished from the cognitive element, the more important element, not just from the speaker's standpoint, but from that of constitutional values more generally. *See id.* Justice Harlan extolled "'the right to criticize public men and measures—and that mean[t] not only informed and responsible criticism but the freedom to speak foolishly and without moderation.'" *Id.* (quoting Justice Frankfurter in Baumgartner v. United States, 322 U.S. 665, 673–74 (1944)). However, this conclusion fails to clarify whether uninformed, irresponsible speech results mainly from cognitive defects, or emotional excesses and inadequacies.

23. CHARLES L. STEVENSON, ETHICS AND LANGUAGE 33 (1960).

24. *Id.* Our use of the basic emotivist paradigm need not rely on any distinctions among expressing and reporting or describing one's attitudes. *See generally infra* Part III.B (discussing the emotivism model), Part IV (applying an emotion-based analysis to specific cases), and Part V (summarizing the impact of this free speech model). The various necessary additions to and complications of the basic emotivist paradigms complicate, but do not deeply affect, the overall free speech analysis.

addressing the protection of emotional speech under the First Amendment. We must comprehend where the law generally protects emotional speech, where the law does not generally protect emotional speech, and where the law seems uncertain or controversial. Then, with the basis of a better grasp of emotion and the logic of emotional expression, we should be in a better position to account for both the achievements and confusions of the free speech law of emotion.[25]

II. THE CURRENT LEGAL STATUS OF EMOTIONAL EXPRESSION: SOME RECURRING PATTERNS

A. Oral Speech and Accusations of Disorderly Conduct

Much, if not all, classic political speech of the highest constitutional value expresses, reports, or somehow evokes emotion in the speaker or the audience.[26] However, the nature, logic, and status of emotional expression may not be best studied in the classic political speech cases. This is because classic political speech, at least initially, seems more multi-faceted and complex than what we may consider more purely emotional speech. We must, of course, not prejudge the nature of emotion. Emotion and its expression may well turn out to be more complex than we imagine. But for the moment, let us assume some difference between the emotional and the cognitive or propositional.[27] Some might then imagine that classic political speech is more structurally complex than, or otherwise distinct from, what might be taken to be "pure" emotional speech.

In order to avoid this possible complication, let us focus on speech of a relatively pure or strongly emotional character, with or without any standard political message. There are certainly a number of such cases under the general heading of *Chaplinsky*-style[28] "fighting words" or oral disorderly conduct cases. In such cases, the speaker, and often one or

25. *See infra* Part IV (applying an emotion-based analysis to specific cases).

26. For a sampling of classic instances, see, for example, Rev. Martin Luther King, Jr., *Letter from Birmingham Jail*, *in* LEGAL AND POLITICAL OBLIGATION CLASSIC AND CONTEMPORARY TEXTS AND COMMENTARY 41 (R. George Wright ed., 1992); Plato, *Crito*, *in* LEGAL AND POLITICAL OBLIGATION CLASSIC AND CONTEMPORARY TEXTS AND COMMENTARY, *supra*, at 1; Henry David Thoreau, *On the Duty of Civil Disobedience*, *in* LEGAL AND POLITICAL OBLIGATION CLASSIC AND CONTEMPORARY TEXTS AND COMMENTARY, *supra*, at 25.

27. *See supra* notes 16–22 and accompanying text (discussing Justice Harlan's distinction between emotional and cognitive in *Cohen*).

28. *See supra* notes 8–14 and accompanying text (discussing the Court's analysis of "fighting words" in *Chaplinsky*).

more listeners, are nothing if not emotional. Often, but not always,[29] the listener-target in such "fighting words" cases is a police officer trained to restrain his or her own emotional responses to verbal provocation.[30] The verbal provocation in such cases often reflects a highly charged emotional state of the eventual arrestee.[31]

Certainly, many of the emotionally charged "fighting words" cases make judicial sense, as the courts are often sensitive to the nuances of

29. *Compare, e.g.*, Nichols v. Chacon, 110 F. Supp. 2d 1099 (W.D. Ark. 2000) (holding that a middle finger gesture does not constitute "fighting words" in an action against an arresting officer); City of St. Paul v. Morris, 104 N.W.2d 902, 903 (Minn. 1960) (holding, in a relatively early case, that use of "foul, vulgar, and obscene expressions," by a defendant against a police officers who had arrested the defendant's half brother constituted "disorderly conduct," over the dissent of Justice Loevinger); Brendle v. City of Houston, 759 So. 2d 1274 (Miss. Ct. App. 2000) (finding arrestee-defendant's use of profane language not within the scope of "fighting words" regarding the arresting officer); People v. Bacon, 340 N.E.2d 465 (N.Y. 1975) (mem.) (finding insufficient evidence of intent to harass police officer based on "abusive and obscene" language directed at officer, as necessary for conviction under Penal Law § 240.25(2)); Commonwealth v. Hock, 728 A.2d 943 (Pa. 1999) (finding that defendant's single profane remark to police officer while walking away did not constitute "fighting words"), *with, e.g.*, Shoemaker v. State, 38 S.W.3d 350 (Ark. 2001) (finding derogatory and insulting language directed at public school teacher not constitutionally prohibitable under a broad statute criminalizing such comments to a teacher irrespective of time and place, and where not all such language would amount to "fighting words"); State v. Hammersley, 10 P.3d 1285 (Idaho 2000) (upholding a conviction where defendant's language contained or expressed no socially or politically important message and was targeted at a specific individual solely for abusive and derogatory purposes); People v. Dietze, 549 N.E.2d 1166 (N.Y. 1989) (finding a "threat statute," a statute punishing the use of "abusive" language with the intent to "harass" or "annoy," unconstitutionally overbroad because only speech that presents a clear and present danger of some serious substantive evil may be proscribed); People v. Yablov, 706 N.Y.S.2d 591 (N.Y. Crim. Ct. 2000) (finding insufficient evidence of statutory harassment based on a series of phone calls and messages including an indefinite threat); Hershfield v. Commonwealth, 417 S.E.2d 876 (Va. Ct. App. 1992) (finding that insulting or profane comments from a distance and across a chain link fence were not within the scope of the face-to-face "fighting words" proscription); State v. Reyes, 700 P.2d 1155 (Wash. 1985) (en banc) (concluding that a statute prohibiting use of vulgar, insulting, or abusive language was vague and overbroad where there was no limitation to words substantially disruptive of a school's legitimate functions).

30. For the standards particularly applicable to law enforcement officers, see, for example, City of Houston v. Hill, 482 U.S. 451, 462 (1987) (noting that Houston's ordinance prohibits not only obscene language directed at police officers, but also prohibits any language that "in any manner . . . interrupt[s]," an officer); Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (finding New Orleans's ordinance overbroad because the ordinance prohibited "opprobrious language" directed at police officers and such language does not fall within the definition of "fighting words"); *see also* Dawn Christine Egan, *"Fighting Words" Doctrine: Are Police Officers Held to a Higher Standard, or per* Bailey v. State, *Do We Expect No More From Our Law Enforcement Officers than We Do from the Average Arkansan?*, 52 ARK. L. REV. 591 (1999) (discussing Arkansas's statute prohibiting speech likely to "provoke a violent or disorderly response," and its application on Arkansas police officers).

31. *See, e.g.*, State v. Suiter, No. 25783, 2001 WL 1002069, at *6 (Idaho Ct. App. Sept. 4, 2001) ("By the nature of their duties, officers regularly have contact with citizens who are in highly emotional states or who have been affected by the use of alcohol or drugs.").

the situation and circumstances; cultural and contextual realities; place and time; the identities, capacities, and limitations of the parties; and the varied shadings of the social meanings of language. However, even if the emotional "fighting words" cases often make sense, they certainly do not explicitly embody a satisfactory theory of the freedom and regulation of emotional expression.

How, then, do the courts analyze emotional speech in the disorderly conduct cases? One extended analysis of such speech concluded that:

> [C]urses, oaths, expletives, execrations, imprecations, maledictions, and the whole vocabulary of insults are not intended or susceptible of literal interpretation. They are expressions of annoyance and hostility—nothing more. To attach greater significance to them is stupid, ignorant, or naive. Their significance is emotional, and it is not merely immeasurable but also variable. The emotional quality of exclamations varies from time to time, from region to region, and as between social, cultural, and ethnic groups.[32]

This analysis seems to avoid the error of assuming that such emotional expression will typically lack value and constitute no essential part of any expression of ideas,[33] while also avoiding the opposite error of assuming that every emotional outburst must bear otherwise inarticulate social meaning, expressing with authenticity and intensity the depths of the speaker's being. Not all emotional outbursts need be unduly romanticized.

The courts also often recognize that the constitutional status of an emotional insult[34] may depend not only on particular circumstances and relations but also on the changing sensibilities, including increased or decreased sensitization, of the broader society.[35] Put perhaps too strongly by one court, "[i]t is not the definition of the words that has evolved over time, it is the 'sensibilities' of our society that has [sic]

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32. Hershfield v. Commonwealth, 417 S.E.2d 876, 881 (Va. Ct. App. 1992) (Benton, J., concurring) (quoting City of St. Paul v. Morris, 104 N.W. 902, 910 (Minn. 1960) (Loevinger, J., dissenting)).

33. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (finding that lewd, obscene, profane, libelous, and insulting utterances are "no essential part of any exposition of ideas"); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (citing the language of *Chaplinsky*, but holding unconstitutional an ordinance that in effect proscribed some but not all constitutionally unprotected "fighting words" on a constitutionally invidious basis). For application, see, for example, *Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1103–04 (W.D. Ark. 2000).

34. One court has defined "insult" as "an act or speech of insolence or contempt." State v. Reyes, 700 P.2d 1155, 1159 (Wash. 1985) (en banc). The court in *Reyes* goes on to conclude that "[m]any insults, then, cannot be categorized as 'fighting words' because these insolent, contemptuous words are not inherently likely to lead to a breach of peace." *Id.*

35. Brendle v. City of Houston, 759 So. 2d 1274, 1284 (Miss. Ct. App. 2000).

changed."[36] At the very least, the courts seem to take the meaning, or lack of meaning, of emotional outbursts as reflecting both the state of mind and intent of the speaker[37] and the likely, if not actual,[38] understandings and reactions of listeners.

However, courts do not uniformly protect emotional outbursts as speech for constitutional purposes. Consider, for example, the case of *State v. Suiter*,[39] in which a citizen speaking with a courthouse records officer regarding a fraudulent check case became frustrated to the point of addressing a single profanity at the officer.[40] In *Suiter*, the Idaho Court of Appeals distinguished *Cohen*[41] on several grounds. First, the oral character of Suiter's brief statement made it impossible for the several listeners to avoid hearing the entire message for its full duration.[42] Second, Suiter's profane epithet, while involving the same objectionable language as in *Cohen*, was directed by Suiter at the particular officer,[43] as opposed to the world in general, which would have been less offensive. Third, Suiter's epithet was considered to be "personally provocative and insulting."[44] Notably, the epithet made no reference to the officer's race or any other personal or group identity. Fourth, in contrast to *Cohen*,[45] there was evidence in *Suiter* that some persons present actually objected to Suiter's language.[46]

Fifth, and most fundamentally, the court in *Suiter* concluded that "unlike the speech in *Cohen*, Suiter's speech in this case conveyed no message of political or social importance. Thus, Suiter's statement to the officer did not contain an essential element of the expression of

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36. *Id.*

37. *See Nichols*, 110 F. Supp. 2d at 1103–04 (citing Burnham v. Ianni, 119 F.3d 668, 674 (8th Cir. 1997)).

38. *See id.* at 1104 (quoting *Burnham*, 119 F.3d at 674) ("Nonverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way.").

39. State v. Suiter, No. 25783, 2001 WL 1002069 (Idaho Ct. App. Sept. 4, 2001).

40. *See id.* at *1.

41. *See supra* notes 15–21 and accompanying text (discussing Cohen v. California, 403 U.S. 15 (1971)).

42. *Suiter*, 2001 WL 1002069, at *4. However, the fact that Suiter's epithet was not further repeated could be said to minimize, if not eliminate, any problem of continuing, inescapable, unwanted, ongoing "bombardment" speech. *Id.*

43. *See id.*

44. *Id.* (citing *Cohen*, 403 U.S. at 20).

45. Apart, of course, from the bailiff or arresting officer in *Cohen*. *See Cohen*, 403 U.S. at 20.

46. *Suiter*, 2001 WL 1002069, at *4. Of course, mere offensiveness or objectionability of language does not withdraw it from free speech protection. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940).

ideas that was entitled to constitutional protection."[47] According to the court, "the unprotected features of the words are essentially a nonspeech element of communication subject to state regulation because they constitute no essential part of any exposition of ideas."[48] Thus, in the case of a generalized, impersonal, profane utterance directed in emotional frustration at a law enforcement officer, where the risk of violent reaction was almost non-existent,[49] *Suiter* indicates that emotional speech is not only unprotected speech, but also not even speech itself for purposes of the free speech clause.[50] The *Suiter* court concluded, "such a personally[51] provocative epithet, delivered in the manner and setting here, cannot be reasonably interpreted as the communication of information or opinion safeguarded by the Constitution."[52]

The epithet employed in *Cohen* was, certainly, linked to a controversial national political institution—the military draft.[53] The same epithet, in *Suiter*, was linked not to any such institution, but to Suiter's frustration with the policies of, or degree of cooperation shown by, the officers in the discharge of their official duties.[54] Certainly, the message in *Cohen*, however vague, was national in scope, whereas the less contextually vague message in *Suiter* was of less than national policy scope. Regardless, this fact would hardly show that Suiter did not intend to convey a distinct message on that lesser policy scale.[55]

There is nothing special about the general lines of analysis in the *Suiter* appellate opinion. Other cases on different facts could be cited as

47. *Suiter*, 2001 WL 1002069, at *4; *see Chaplinsky*, 315 U.S. at 572 ("[S]uch utterances are no essential part of any exposition of ideas . . . ."); State v. Hammersley, 10 P.3d 1285, 1288–89 (Idaho 2000) (citing *Chaplinsky*, 315 U.S. at 572) ("[P]ersonal abuse cannot be reasonably interpreted as the communication of information or opinion safeguarded by the Constitution.").

48. *Suiter*, 2001 WL 1002069, at *2 (citing *Hammersley*, 10 P.3d at 1288).

49. Two other officers were present, and no potential allies of Suiter were present. *See id.* at *1.

50. *See id.* at *2.

51. The epithet in question, of a generalized faux sexual nature, however, cannot be interpreted as making even the mildest invidious reference to the personal status or group identity of any addressee, or anyone else.

52. *Suiter*, 2001 WL 1002069, at *4. Accordingly, "Suiter's statement fell within the area of speech previously recognized as unprotected by the First Amendment." *Id.*

53. *See* Cohen v. California, 403 U.S. 15, 20 (1971).

54. *Suiter*, 2001 WL 1002069, at *1.

55. *See* Nichols v. Chacon, 110 F. Supp. 2d 1099, 1103–04 (W.D. Ark. 2000) (citing Burnham v. Ianni, 119 F.3d 668, 674 (8th Cir. 1997)) (stating that a gesture can be just as effective as spoken words).

well.[56] Without a doubt, the generality of language varies from case to case, as does the logic of the choice of abusive words. Two important points must be borne in mind. First, the generality or specificity of words does not always dictate their political significance. What seems superficially like a personal grievance expressed to an agent of oppression may take on a broader meaning in a political context. For example, a complaint by Rosa Parks regarding bus seating arrangements should be equally a matter of free speech whether or not the focus of her remarks is narrowly personal in a literal sense.[57]

Second, when a citizen has freely taken the initiative in addressing a public official, we should be reluctant to conclude that the citizen's language is being used "with the sole purpose of being derogatory and abusive."[58] Without a doubt, some emotional and abusive language may be of only modest policy import. However, we can also ask why derogatory and abusive or other emotional language is being used in addressing an official. Where one observer may see merely personal abuse, a more astute observer may rightly see an unfolding recognition by the speaker of oppressive mistreatment by others. By analogy, Abusive language by a wife directed at a husband may bespeak a vague frustration on the part of the wife with her broader circumstances.[59] Of course, sometimes, it is not easy to separate apparently personal abuse from the expression of half-conscious, group-based grievances and frustration, often with a genuinely political dimension.[60]

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56. See, for example, *State v. Hammersley*, 10 P.3d 1285 (Idaho 2000), the all-civilian, single epithet case where the speaker and verbal target were in separate cars and thus not particularly likely to fight. The court's conclusion in *Hammersley* was that

> Hammersley's statement to Goodwin neither contained nor expressed any message of social or political importance. The comment was not made generally, but was directed toward a specific individual with the sole purpose of being derogatory and abusive. Such personal abuse cannot be reasonably interpreted as the communication of information or opinion safeguarded by the Constitution.

Id. at 1289; *see also* Commonwealth v. Mastrangelo, 414 A.2d 54 (Pa. 1980) (upholding a disorderly conduct conviction where the defendant followed a meter maid down the street with a stream of abusive language).

57. For background, see A. Leon Higginbottham, Jr., *Rosa Parks: Foremother and Heroine Teaching Civility and Offering a Vision For a Better Tomorrow*, 22 FLA. ST. U. L. REV. 899 (1995).

58. *Hammersley*, 10 P.3d at 1289.

59. *See, e.g.*, HENRIK IBSEN, *A Doll's House*, *in* A DOLL'S HOUSE. THE WILD DUCK. THE LADY FROM THE SEA. (R. Farquharson Sharp & Eleanor Marx-Aveling trans., Dent 1958) (1879). For commentary, see Carolyn Heilbrun & Judith Resnick, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913 (1990).

60. A broader discussion is presented in Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

None of this should suggest that the courts do not often accord a wide constitutional scope for strongly emotional speech, however. Courts often protect emotional invective even where, from the available record, it does not appear either that a social issue is really in play, or that any reasonable balancing of interests would favor the speaker.[61] Consider, for example, the New York Court of Appeals case of *People v. Dietze*.[62] The court specified what it took to be the few relevant facts as follows:

> Complainant and her son, both mentally retarded, were walking down a public street in the Town of Norfolk. Defendant came to her doorway with a friend and, while facing the street, referred to complainant as a "bitch" and to her son as a "dog," and said that she would "beat the crap out of [the complainant] some day or night on the street." With that, complainant fled in tears and reported the incident to authorities. Defendant had been aware of the complainant's mental limitations and had, on a prior occasion, been warned by a police officer about arguing with her again.[63]

Apparently, there were previous hostile interactions between the complainant and the defendant.[64] Based on the opinion, it is impossible to guess the real nature of the defendant's emotionally expressed grievance against a mentally retarded mother and son. The defendant's emotional threats might reflect something like the mere negative attitudes toward or fear of mentally retarded persons recognized by the Supreme Court in *City of Cleburne v. Cleburne Living Center Inc.*[65] Of course, shared irrational fears may sadly translate themselves into more apparently objective phenomena, such as reduced property values.[66] However, in *Dietze*, there is no indication that any significant number of mentally retarded persons was involved, and property values based largely on emotions do not lose their emotional character. Emotion is, in any event, central to the case.

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61. *See, e.g.*, Shoemaker v. State, 38 S.W.3d 350 (Ark. 2001) (dismissing a case on First Amendment and due process grounds where a thirteen-year-old female student was charged under a misdemeanor public school teacher abuse or insult statute for publicly addressing a female teacher as "bitch" after frustration at multiple rejections by the teacher of the student's classroom science project assignment); Commonwealth v. Hock, 728 A.2d 943 (Pa. 1999) (disorderly conduct charge dismissed against speaker who claimed she had been subjected to frequent police harassment, where speaker uttered a single profane, insulting remark directed in a normal tone of voice at a police officer while walking away from the officer).

62. People v. Dietze, 549 N.E.2d 1166 (N.Y. 1989).

63. *Id.* at 1167 (citation omitted).

64. *See id.*

65. City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 445–46 (1985) (holding that the court of appeals erred in concluding that a mental retardation classification was quasi-suspect and required heightened scrutiny).

66. *See id.* at 448.

Surprisingly, emotionally referring to a mentally retarded mother and son as a "bitch" and a "dog" and threatening to beat up the mother at some unspecified future time are sometimes not unprotected "fighting words" under *Chaplinsky*. The mentally retarded woman's reaction was one of fear, rather than a desire to immediately, physically harm her verbal assailant.[67] Thus, there may have been no realistic likelihood of any immediate combative response by the verbal victim.[68] More realistically, one might argue that the defendant's emotional epithets constituted "fighting words" under *Chaplinsky* in a less literal sense. *Chaplinsky*, after all, permits a state to prohibit words "which by their very utterance inflict injury,"[69] even if the victim, in this case a mentally retarded mother with her mentally retarded son, is unlikely to physically retaliate. The victim's fear[70] in this case seems both real and predictable.

Whatever the origins of the defendant's emotional insults and threat of violence, its social value seems obscure. That the threat of violence was not scheduled for execution at any specified time may prevent the threat from amounting to a legal assault,[71] but the very open-endedness of the threat added to the emotional burden on the victim. A looming, open-ended, subjectively credible threat may inflict as much, if not more, "injury"[72] over time than a threat of immediate harm.

Perhaps, underlying the lack of realism in *Dietze* is the distortion caused by mechanically applying the standard First Amendment templates to the case. The defendant and the reviewing court were both aware of the victim-complainant's mental limitations.[73] Yet the court interestingly, if offhandedly, reported that the defendant had previously "been warned by a police officer about arguing with" the complainant.[74] We should not read too much into the characterization of the verbal relation between the defendant and the complainant as an "argument,"

67. *See Dietze*, 549 N.E.2d at 1167.

68. *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (noting that unprotected "fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

69. *Id.*

70. *See Dietze*, 549 N.E.2d at 1167.

71. *See, e.g.*, United States v. Fallen, 256 F.3d 1082, 1087 (11th Cir. 2001) (citing United States v. Renfro, 620 F.2d 497, 500 (5th Cir. 1980)) (stating that forcible assault requires a fear or expectation of "immediate bodily harm"); State v. Smiley, 38 S.W.3d 521, 523 (Tenn. 2001) (quoting TENN. CODE ANN. § 39-13-101 (1997)) (stating that assault required causing another to reasonably fear "imminent bodily injury").

72. *Chaplinsky*, 315 U.S. at 572.

73. *See Dietze*, 549 N.E.2d at 1167.

74. *Id.*

however. The very concept of an argument steers our understanding in the direction of a forensic duel, with verbal thrusts and ripostes, focused on the exchange of more or less persuasive ideas. This model distorts the facts underlying the *Dietze* case.

We, again, do not know much about the underlying motivational facts in *Dietze*. The extent to which anything like the exchange, or even the one-sided expression, of social ideas involved is largely unclear. What seems more clear is that the *Dietze* case was largely about emotional expression by the defendant and the emotional injury or other emotional reaction of the complainant and her son.[75] The court in *Dietze* focused, instead, on the undoubted constitutional value of emotional, even insulting or abusive, language in some contexts,[76] the alleged lack of seriousness of the defendant's threat,[77] and the presumed unreasonableness of the mentally retarded complainant in taking the defendant's threat seriously,[78] despite the defendant's earlier animosity.[79]

To the extent that the court in *Dietze* came to terms with the role of emotion in speech, it did so with insensitivity to the nature, roles, and variability of emotions, emotional expression, and emotional reactions. The speech-protective case of *Dietze* is a mirror image of the speech-restrictive case of *Suiter* discussed above.[80] Neither the emotional speech-restrictive nor the emotional speech-protective cases[81] seem to rely upon, let alone expressly articulate, any sensitive understanding of the role, values, and appropriate limits of largely emotional speech.

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75. *See id.*

76. *Id.* at 1168.

77. *Id.* at 1169–70.

78. *See id.*

79. *See id.* at 1167.

80. *See supra* notes 39–52 and accompanying text (noting that emotionally charged speech, which fails to communicate either ideas or information, is not entitled to First Amendment protection).

81. In a later case, a New York court recounted the *Dietze* case in untroubled fashion. *See* People v. Yablov, 706 N.Y.S.2d 591, 593–94 (2000). The court concluded its summary of the *Dietze* case by reporting that the New York Court of Appeals had found that "although clearly 'abusive' and 'coarse,' 'insulting' and 'harsh,' defendant's language constituted protected expression under the time honored principles underlying free speech as guaranteed by the First Amendment." *Id.* at 594.

B. Commercial Nude Dancing and the Expression and Conveyance of Sexual Emotions

As in the above discussion of emotional expression in disorderly conduct cases,[82] the goal of briefly discussing some of the commercial nude dancing cases is not to decide whether any given case was rightly decided. Rather, a discussion of commercial nude dancing cases serves to illustrate the need for a better theory of the nature and role of emotion and emotional communication as it relates to both speaker and listener.

Nude dancing, even in a commercial context, is commonly thought to involve the expression and the stimulation of erotic emotions or ideas.[83] Eroticism seems to involve both emotion and idea, if we assume that idea and emotion can be kept distinct. Courts generally provide no clear understanding of any relationship or distinction between emotion and idea in this context.[84] The courts have generally taken no position on any identity, overlap, or distinction between the expression of erotic emotions or of erotic ideas through dance. One typical court cited a general encyclopedia for the idea that "'[d]ancing consists in the rhythmical movement of any or all parts of the body in accordance with some scheme of individual or concerted action which is expressive of emotions or ideas.'"[85]

Moreover, the element of eroticism in nude dancing does not help distinguish whether it is ideas or emotions that are being expressed or

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82. *See supra* Part II.A (discussing oral speech and accusations of disorderly conduct).

83. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 587 (1991) (White, J., dissenting) (noting that dancing in general "inherently embodies the expression and communication of ideas and emotions"), *rev'g* Miller v. City of South Bend, 904 F.2d 1081, 1087 (7th Cir. 1990) (en banc); Schultz v. City of Cumberland, 228 F.3d 831, 839 (7th Cir. 2000) (erotic dancing seen as not involving high artistic value, but as expressing "ideas and emotions" different from those of other sorts of dances); DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 409 (6th Cir. 1997) (Souter, J., concurring) (quoting *Barnes*, 501 U.S. at 581) ("[D]ancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience."); Morris v. Municipal Court, 652 P.2d 51, 57 n.11 (Cal. 1982) (quoting *In re* Giannini, 446 P.2d 535, 538–39 (Cal. 1968)) ("[T]he very definition of dance describes it as an expression of emotion or ideas . . . . The dance is perhaps the earliest and most spontaneous mode of expressing emotion and dramatic feeling."); Purple Orchid Inc. v. Pa. State Police, 721 A.2d 84, 89 (Pa. Commw. Ct. 1998) ("[N]ude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators . . . ."); *see also* Clinton P. Hansen, Note, *To Strip or Not to Strip: The Demise of Nude Dancing and Erotic Expression Through Cumulative Regulation*, 35 VAL. U. L. REV. 561, 582 n.145 (2001).

84. *See supra* note 83 (noting that artistic expression communicates, even if it is erotic in nature).

85. *In re Giannini*, 446 P.2d at 538–39 (quoting 7 ENCYCLOPAEDIA BRITANNICA 13–14 (1945)), *quoted in Morris*, 652 P.2d at 57 n.11.

stimulated. We can imagine both an erotic idea and, if we assume that emotions do not already involve ideas, an erotic emotion or "passion." The element of eroticism, sensuality, or sexual expression may actually serve as one way to ensure that the dance in question falls, at least, within the outer perimeters of the free speech clause.

Ordinary social or recreational dancing, interestingly, has been held not to fall within the scope of the First Amendment. In *City of Dallas v. Stanglin*,[86] the Court worried about the possible expressiveness of virtually any sort of deliberate activity.[87] The Court concluded that teenage commercial dance hall patrons engaging in social dancing did not thereby engage in either "expressive association" or expression itself for First Amendment purposes.[88] The Court held that "the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment."[89]

The case law, however, does not illuminate the crucial differences between social dancing and commercial nude dancing. Presumably, the Court would not want to say that social dancing is typically not expressive of anything, in any sense.[90] Should we say then that nude dancing conveys a recognizable emotion-based idea, but that social dancing typically does not? Does commercial nude dancing express or stimulate an emotion, where social dancing does not? Does social dancing really convey neither an emotion nor an emotion-based idea? Would it not be more plausible to say that social dancing merely conveys ideas or emotions—again, assuming ideas and emotions can be separated—that differ from those conveyed by nude dancing?

Could social dancing, for example, not intentionally convey emotional ideas of teenage rebelliousness, sensuality, disinhibition, or, as with some modern social dances, something like alienation? These are obvious possibilities. It is difficult to believe that nude dancing conveys some sort of emotion-based idea but that social dancing does not. If we are to really justify or rebut the decision to constitutionally protect the former, but not the latter, we will need a better understanding of emotion in the communicative process, on the part of either the "speaker" or the "audience."

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86. City of Dallas v. Stanglin, 490 U.S. 19 (1989).

87. *Id.* at 25.

88. *Id.*

89. *Id.*

90. *See id.* (stating that "it is possible to find some kernel of expression in almost every activity a person undertakes").

Would it suffice to say that nude dancing generally conveys its emotions or emotional ideas more clearly or more unmistakably than does typical social dancing? There may be a certain logic to this distinction. But, we do not generally penalize lack of clarity or articulateness in speech by leaving such speech entirely unprotected under the free speech clause.[91] We, thus, need a better theory of emotion and its conveyance and induction if we are to explain why various forms of dancing should or should not be constitutionally protected.[92]

Similarly, we need a better theory of emotion to satisfactorily account for why semi-nude dancing is a constitutionally permissible substitute for a prohibition on nude dancing. It is possible to argue that imposing a limit of semi-nudity is only a de minimus restriction on expression.[93] One can, in some sense, do the same dance and convey essentially the same message, clad or nude.[94] As the Supreme Court has observed, "the requirement that the dancers don pasties and g-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic."[95]

This distinction may sound plausible, but the belief that a dancer can convey essentially the same emotion, or the same emotional message, whether nude or clad, at whatever distance, actually exposes an unresolved conflict among Supreme Court opinions. Would the Court be willing to say that requiring Cohen's jacket to read something like "I strongly object to the Draft," "Down with the Draft," or "Darn the Draft" would leave Cohen's message essentially intact? Would it be essentially the same message, perhaps less intensely conveyed?

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91. By itself, for example, burning an American flag may not begin to convey any relatively precise message one wishes to communicate. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 431 (1989) (noting Johnson's attendant verbal messages, which included, for example, "Reagan, Mondale which will it be? Either one means World War III" and "red, white, and blue, we spit on you, you stand for plunder, you will go under."). The act of burning the flag surely cannot be taken to well articulate all and only Johnson's accompanying oral messages.

92. We assume that classic ballets, such as Tchaikovsky's *Swan Lake*, can be protected on a variety of grounds. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (extending First Amendment protection for pure entertainment); Giovani Carandola, Ltd. v. Bason, 147 F. Supp. 2d 383, 393 (M.D.N.C. 2001) (referring to the "award winning choreography" of a particular nude ballet).

93. *E.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 294 (2000); Schultz v. City of Cumberland, 228 F.3d 831, 847 (7th Cir. 2000) (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991)).

94. *See Pap's A.M.*, 529 U.S. at 294; *Schultz*, 228 F.3d at 847.

95. *Barnes*, 501 U.S. at 571; *see* Ino Ino, Inc. v. City of Bellevue, 937 P.2d 154, 170–71 (Wash. 1997) (en banc) (distance requirement between nude dancers and patrons interpreted as affecting place of conveying erotic message, but not affecting the erotic message itself). *But see Barnes*, 501 U.S. at 587, 592 (White, J., dissenting) (analyzing nudity as having different expressive and emotional impact than partial nudity).

The underlying unresolved tension is illustrated by the opposing strands in *Cohen* and *FCC v. Pacifica Foundation*.[96] *Cohen* emphasized that even slight changes in wording may change the emotive, if not the cognitive, message conveyed, and that there might be no fully adequate substitute available, in some contexts, for particular words.[97] *Pacifica Foundation*, however, concluded that in an indecent radio broadcast case, requiring more decorous language tended chiefly to affect the form, as opposed to the content of the message, and that few indecently expressed thoughts were not expressible in more decorous language.[98]

In *Barnes v. Glen Theatre, Inc.*,[99] a case more akin to *Cohen* than to *Pacifica Foundation*, and in other cases,[100] the Seventh Circuit concluded that:

> [R]estricting the particular movements and gestures of the erotic dancer, in addition to prohibiting full nudity . . . unconstitutionally burdens protected expression. The dominant theme of nude dance is an "emotional one, it is one of eroticism and sensuality." . . . [The restriction] deprives the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance and thereby interferes substantially with the dancer's ability to communicate her erotic message.[101]

Clearly, the differential emotional effects of nudity and near nudity must be better understood if the courts are to reach a consistent understanding of the scope and logic of free speech protection in this area. A useful model of emotional communication is, in this and other respects, desirable.

C. The Expression of Emotion in Commercial Advertising

The courts have made clear that the for-profit or commercial nature of a speaker and its speech does not necessarily deprive the speech of its

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96. FCC v. Pacifica Found., 438 U.S. 726, 743 n.18 (1978).

97. *See* Cohen v. California, 403 U.S. 15, 26 (1971).

98. *Pacifica Found.*, 438 U.S. at 743 n.18.

99. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991).

100. *Cf., e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 318–19 (2000) (Stevens, J., dissenting) (recognizing disputability of the difference in the emotional message conveyed by nude as opposed to semi-nude dancing).

101. Schultz v. City of Cumberland, 228 F.3d 831, 847 (7th Cir. 2000) (citation omitted). The court in *Schultz* concluded by emphasizing that the legal restriction at issue "interdicts the two key tools of expression in this context that imbue erotic dance with its sexual and erotic character—sexually explicit dance movements and nudity." *Id.*; *see also Barnes*, 501 U.S. at 592 (White, J., dissenting).

constitutionally protected status.[102] In this basic sense, expressing emotion for profit remains within the scope of the free speech clause. Commercially expressed, commercially motivated emotion can in some cases be genuine.[103] The *New York Times* could, for example, express corporate as well as collective and personal pride in commercially advertising its winning of a Pulitzer Prize. Self-service, even of a commercial sort, is not incompatible with genuinely expressed emotion.

Nevertheless, commercial speech generally should be assumed to have largely commercial motivations.[104] Of course, professed corporate emotion may not invariably be sincere; that is, what looks like corporate emotion may not be. Consider, for example, the complications of *Bad Frog Brewery, Inc. v. New York State Liquor Authority*.[105] This case involved the Liquor Authority's disapproval of an artistically rendered label used in the marketing of Bad Frog Beer. In particular, the label depicted a four-fingered cartoon frog presenting what is familiarly known as an obscene gesture.[106] Bad Frog Brewery did not deny the depiction of the gesture, or the common interpretation of the gesture as insulting, offensive, and expressing a correspondingly negative emotional state of mind on the part of the gesturer.[107] Bad Frog Brewery also presented its cartoon frog along with several advertising slogans, including "'He just don't care,' 'An amphibian with an attitude,' 'Turning bad into good,' and 'The beer so good . . . it's bad.'"[108]

All in all, one might suspect that Bad Frog Brewery's use of the rudely gesturing amphibian was merely an attempt to cultivate a

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102. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (finding a limitation on display of alcoholic beverages invalid); Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding a limitation on early mailings by attorneys to accident victims as prospective clients); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibition on displaying alcohol content on beer labels); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."). For general criticism, see C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992).

103. For example, commercially expressed or motivated statements can be genuine in the sense that the corporation's principal owners and employees happen to concur in their emotional sentiments regarding the survival or success of the business, a corporate award or prize, a government contract, or a civic achievement.

104. For discussion of commercial speech in terms of the proposal of a commercial transaction, see *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

105. Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87 (2d Cir. 1998).

106. *Id.* at 91.

107. *Id.*

108. *Id.*

vaguely disreputable, minimally rebellious, undomesticated, perhaps pointlessly defiant image in the mind of its target market. Mildly controversial advertising can be a sensible marketing strategy,[109] with or without emotion. This approach was not, however, the strategy officially endorsed by Bad Frog Brewery for purposes of litigation. Bad Frog Brewery argued, with whatever credibility, that "the frog's gesture, whatever its past meaning in other contexts, now means 'I want a Bad Frog beer,' and that the company's goal was to claim the gesture as its own and as a symbol of peace, solidarity, and good will."[110] If Bad Frog Brewery was genuinely seeking a reversal of the ordinary import of the frog's gesture, this sentiment might have been accompanied by some sort of corporate emotion, distinct from whatever emotion Bad Frog Brewery intended to produce in the reader. Thus, the complexities of corporate emotional expression are multifaceted.

To these possibilities of expressed emotions, successfully or unsuccessfully conveyed or provoked, we must add the possibility of commercial pseudo-emotion. By this approach, Bad Frog Brewery itself does not in any sense feel or intend to convey any real emotion, whether of contempt and defiance or of "peace, solidarity, and good will."[111] Pseudo-emotion can be just another marketing strategy. The commercial speaker can argue, however, that even the appearance of emotion can lift the relevant speech from the category of mere commercial speech into the more strongly protected category of non-commercial speech.[112]

Rather than further multiply the possibilities of classifying real and false commercial emotion, let us simply say that we need a theory of emotion and emotional expression that will allow us to do justice to the obscurities of commercial or corporate emotional expression.

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109. R. GEORGE WRIGHT, SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE 135–56 (Richard Delgado & Jean Stefancic eds., 1997).

110. *Bad Frog Brewery*, 134 F.3d at 91 (quoting promotional material included in Bad Frog Brewery's application to New York State Liquor Authority seeking brand label approval and registration).

111. *Id.* For expressed doubt about the capacity of corporations themselves to genuinely have emotions, at least in a strict sense, see Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Limitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 692 (2000).

112. *See Bad Frog Brewery*, 134 F.3d at 94. The court ultimately classified the beer label as commercial speech, as opposed to some sort of satiric political or social commentary evoking full free speech protection. *Id.* at 97.

D. Emotion, Speech, and Workplace Sexual Harassment

Workplace sexual harassment comes in a wide range of forms.[113] Commonly, speech constitutes at least part of the harassment,[114] and almost as commonly, there is an important emotional component to the speech. Emotion may pervade the speaker's words and the harassed party's reactions to the speaker's words.[115] The idea of an "abusive" working environment is often linked to emotional expression, or certainly to emotions in reaction to expression.[116] However, the Supreme Court has not yet issued an explicit holding on the extent to which freedom of speech places any limits on the scope of federal civil rights law[117] in the context of sexual harassment,[118] yet the potential for conflict is clear. Title VII is violated when speech in the form of "discriminatory intimidation, ridicule, and insult"[119] becomes "sufficiently severe or pervasive"[120] as to adversely affect the terms and conditions of the victim's employment.[121]

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113. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751–52 (1998) (clarifying the distinction between quid-pro-quo sexual harassment and hostile work environment sexual harassment).

114. A majority of the cases involve hostile environment claims, perhaps in combination with quid-pro-quo sexual harassment claims, at least according to one substantial sample. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 593 (2001). Although it is possible to construct a hostile environment entirely without the use of written or oral language or other communicative symbols, such communicative elements will commonly be present. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993) (spoken words central to the case); *see also* Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 691 (1997) ("Although most litigated sexual harassment cases involve repeated sexual propositions or physical conduct . . . , some sexual harassment cases rest largely on the display of pornography, the use of sexually offensive epithets, statements of hostility toward women in the occupation or the workplace, or other verbal or graphic expression."). *See generally* Baty v. Willamette Indus., Inc., 172 F.3d 1232 (10th Cir. 1999) (describing sexual harassment incidents).

115. *See, e.g.*, Estlund, *supra* note 114, at 689–91 (referring to typically emotion-laden statements and messages, sent and received, including "intimidation, ridicule, and insult," "taunts, ridicule, or threats," "offensive epithets," "statements of hostility," insults, and innuendos); *Baty*, 172 F.3d at 1237–40.

116. *See, e.g.*, Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270–71 (2001) (quoting Faragher v. Boca Raton, 524 U.S. 775, 786 (1998); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

117. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2001) (the basic text bearing upon sexual discrimination in many workplaces); *see also Meritor Sav. Bank*, 477 U.S. at 64.

118. David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 114 (2001) ("The Supreme Court has yet to rule on the constitutionality of punishing workplace speech . . . ."). *But see* Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993) (First Amendment not violated by penalty enhancement for gender-motivated crimes); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (First Amendment not violated by Title VII).

119. *Harris*, 510 U.S. at 21 (quoting *Meritor Sav. Bank*, 477 U.S. at 65).

120. *Id.* (quoting *Meritor Sav. Bank*, 477 U.S. at 67).

We should, therefore, seek an understanding of the best way to resolve real or apparent conflicts between freedom of speech and basic workplace civil rights. To do this, we must better appreciate the roles of emotion and emotional speech in typical workplace sexual harassment cases. In such cases, most of the directly relevant speech is that of the harasser, as is some of the emotion, but much of the relevant emotion is that of the victim. Consider, for example, the mixture of speech and non-speech, as well as of the emotions of all parties involved in the important case of *Harris v. Forklift Systems*.[122] The trier of fact in *Harris* found that:

> [T]hroughout Harris' time at Forklift, Hardy [Forklift's president] often insulted her because of her gender and often made her the target of unwanted sexual innuendos. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her that she was a "dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of other women, and asked them to pick the objects up. He made sexual innuendos about Harris' and other women's clothing.[123]

This and similar scenarios involve a mixture of language and other behavior. All of the behavior can be said, in some sense, to be expressive, and indeed communicative.

There are, of course, important differences between the verbal and non-verbal conduct in sexual harassment cases and among different forms of verbal expression. These differences should not be minimized. All verbal and non-verbal harassing conduct in any given case can be placed at one point or another on a very broad continuum, with sexual battery on one extreme and the least threatening sort of abstract discussion on the other. The fact that the various kinds of speech and

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121. *Id.* (quoting *Meritor Sav. Bank*, 477 U.S. at 67). This form of "hostile environment" sexual harassment is not the only manner in which Title VII can be violated on the basis of sexual harassment. Speech in the form of quid pro quo sexual harassment, resulting perhaps in some tangible job action against the victim, may also violate Title VII. The underlying facts in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747–48, 750 (1998) (noting a reported statement of "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier"), could be read as, in part, amounting to a speech-based quid pro quo sexual harassment claim.

122. *Harris*, 510 U.S. at 19.

123. *Id.* (citations to the record omitted). For comparison with other patterns of speech, conduct, and emotion, see, for example, Faragher v. City of Boca Raton, 524 U.S. 775, 782 (1998); *Ellerth*, 524 U.S. at 748–49.

other forms of conduct in all of these cases can be ranged on such a continuum does not mean that all the speech and all the conduct must be treated alike for free speech purposes. It will be useful to notice not only the recurring element of emotional expression in sexual harassment but also the differences in how emotions are expressed to the victim, the victim's reactive emotions, how those reactive emotions are expressed or conveyed, and even the harasser's emotions in experiencing the victim's emotional reactions.

Much sexual harassment consists largely of emotional expression, either verbal or non-verbal. The emotional expression may, by itself, be sufficiently gratifying to motivate the harassment. However, in other cases, part of the motivation consists of imagining or observing the emotional reactions of the victim, with the opportunity to then emotionally react to those emotions.[124] Additionally, there is no reason to suppose that verbal sexual harassment will typically be less emotional than non-verbal forms. Surely, it is difficult to convey cognitively subtle messages by tossing coins on the floor,[125] or even by the mixture of verbal and non-verbal elements in the demand to remove coins from one's pocket.[126] Thus, much verbal sexual harassment offers little cognitive subtlety beyond the sexual emotions expressed.[127]

The judicial opinions addressing issues of free speech in the context of sexual harassment are not always convincingly reasoned. One public employment case,[128] for example, involved a claim that a county fire department's sexual harassment policy violated employee free speech rights[129] as applied, in particular, to an employee's private perusal and consensual sharing of a *Playboy* magazine.[130] The court determined that *Playboy* "contains articles relating to politics, sports, art, and entertainment."[131] These subjects were deemed of general public

124. There may be differences in the communicative dynamics of, for example, harassing graffiti about women on the wall of a men's restroom, or in a more public area of the workplace, or any sort of sexual harassment directed at an immediately present, identified victim.

125. *See Harris*, 510 U.S. at 19.

126. *See id.*

127. *See, e.g., id.*

128. Johnson v. County of L.A. Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994).

129. For the basic judicial tests involving public employee workplace speech, see *Rankin v. McPherson*, 483 U.S. 378, 384–85 (1987) (addressing whether an employee's speech was a matter of public concern); *Connick v. Meyers*, 461 U.S. 138, 143 (1983) (briefly addressing the question of whether an employee's speech was on a matter of public concern); and *Pickering v. Board of Education*, 391 U.S. 563, 568–74 (1968) (balancing of government interests, as employer and service provider, with employee or citizen speech rights).

130. *Johnson*, 865 F. Supp. at 1435–37.

131. *Id.* at 1436.

interest, as opposed to the merely self-oriented or parochial job interests of a particular employee.[132] As a result, the court was "compelled to find that plaintiff's reading of *Playboy* amount[ed] to expression relating to matters of public concern."[133]

We may assume that in reading the magazine, the employee, and not merely the author and publisher, was expressing himself on some public issue. The relationship, if any, between the public issue and firefighting we may leave unexplored. We may also assume that the magazine was read only during contractually permissible hours. However, the court left one crucial matter unclear: what were the possible effects on other workers of the private reading, as against whatever benefits accrue to the reader, to the general public, or to any consumers of firefighting services? Also, how would the analysis differ if the articles alone were made available, with the presumably more emotionally evocative materials, including all pictorials, excised? Do the pictorials themselves also count as addressing matters of public concern? Does the consumer of firefighting services, or the general public, benefit from perusals by firefighters of the pictorials?

Further complications arise in a widely cited case regulating employee speech for the sake of reducing workplace sexual harassment. In *Robinson v. Jacksonville Shipyards, Inc.*,[134] the court ultimately rejected a free speech defense.[135] The court did so on the basis of a number of considerations. First, even though in some cases the harassing speech is that of the employer's principal corporate figure,[136] often the corporate employer does not attempt to speak through the employees or other persons who engaged in the actual harassing speech.[137] The corporate-employer defendant did not attempt to speak in *Robinson*.[138] Why should there be a free speech defense for a defendant who does not directly or indirectly engage in the relevant speech?

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132. *See id.*

133. *Id.*

134. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (holding that posting sexually suggestive posters of women in the workplace and making demeaning remarks about women created a hostile working environment for female employees).

135. *Id.* at 1534–37.

136. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993) (discussing how the conduct of the company's president led to a sexual harassment lawsuit).

137. *See Robinson*, 760 F. Supp. at 1534.

138. *See id.* at 1531.

Second, the court in *Robinson* characterized the employee's language as both discriminatory speech and discriminatory conduct.[139] There is a sense that all public speech is also conduct, but discriminatory acts may seem generally less protection-worthy than discriminatory speech,[140] even though the boundaries of speech and conduct are often murky.[141] Thus, this consideration also works against a free speech defense.

Third, the *Robinson* court considered the possibility of classifying restrictions on harassing workplace speech as mere time, place, and manner restrictions.[142] Such restrictions literally regulate the time, place, and manner of speaking, and do not restrict speech, typically, in the privacy of one's home. The problem is that in order to qualify for a reduced level of judicial scrutiny, the restriction on the time, place, or manner of speech must also be content-neutral,[143] and, therefore, only incidentally restrict speech of one type of content more than that of another.[144]

Whether restricting workplace speech for the sake of workplace equality, productivity, efficiency, or non-discrimination as content-neutral is itself controversial. Preventing upset or distress in the target, or victim, of unfavorable commentary is not, by itself, typically thought

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139. *See id.* at 1523–24.

140. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (a physical assault is not protected expressive conduct); *see also* Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) ("Cohen's absurd and immature antic, in my view, was mainly conduct and little speech."); Tinker v. Des Moines Sch. Dist., 393 U.S. 505, 515 (1969) (White, J., concurring) ("[T]he Court continues to recognize a distinction between communicating by words and communicating by acts or conduct . . . ."); United States v. O'Brien, 391 U.S. 367, 376 (1968) (stating, while discussing merely incidental, unintended, or content-neutral restrictions on speech, that the Court "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

141. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 431 (1989) (discussing the deeply contested status of flag burning as political protest); *supra* notes 83–92 and accompanying text (referring to the social versus commercial nude dancing distinction).

142. *See Robinson*, 760 F. Supp. at 1535.

143. For competing Supreme Court approaches to content-neutrality, compare *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (justification of time, place, and manner regulation by secondary effects test), with *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (applying a more direct, literal, or common-sense test of whether speech is being regulated based on its content). For some complications, see Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the "Reasonable Person,"* 58 OHIO ST. L.J. 1217 (1997) (arguing that undirected, as opposed to targeted, hostile environment speech can only be restricted in a content-based, as opposed to content-neutral, manner); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

144. *See O'Brien*, 391 U.S. at 377 (requiring that any incidental restriction on free expression be no greater than that which is necessary to further a substantial governmental interest).

of as a content-neutral aim.[145] However, there is no reason to limit the aims of regulating workplace speech in this way. One can certainly defend the aims of workplace equality, productivity, efficiency, and non-discrimination partly on grounds independent of the victim's adverse reaction to harassing speech. Sexual harassment may, for example, signal to a female employee that her chances of eventual promotion are limited. Of course, preventing the sending of this signal about future employment need not be based entirely on whether any victim of harassment understands this signal, agrees or disagrees with the message, or reacts emotionally to it one way or another. In addition, sexual harassment typically does more than send signals or express emotions, values, or other messages. Whether it is so intended or not, sexual harassment often by itself closes doors or reinforces inequalities. If the government regulates speech in order to prevent doors from being closed, or to prevent the reinforcement of inequalities, its motivation in doing so may, at least in part, be content-neutral.

Alternatively, harassing speech can operate to change, or prevent change, at a workplace to some degree apart from whether any hearer believes, or is persuaded by, any message expressed by harassing speech.[146] Of course, some restrictions on workplace harassment may well be content-based. In such cases, the restriction on speech can be constitutional only if the government can show that the restriction is narrowly tailored or necessary to promote a compelling governmental interest.[147] Thus, we need to incorporate a role for emotion, emotional expression, and emotional reactions in determining whether, for example, equality of opportunity or nondiscrimination could count as compelling interests.[148]

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145. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) ("Listeners' reactions to speech are not the kind of 'secondary effects' we referred to in *Renton*."); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001) ("[G]overnment may not prohibit speech under a 'secondary effects' rationale based solely on the emotive impact that its offensive content may have on a listener . . . .").

146. Suppose the verbal sexual harassment consists of repeated unwelcome references to a victim's physical characteristics. Must the regulating government, logically, deny the truth of any express or implied assertion by the harasser? Must the government dislike or fear the consequences of anyone's being persuaded by or reinforced in their belief of the truth of any express or implied assertion in such a case? Verbal sexual harassment in the form of references to sex with the victim could be analyzed in a similar way. The classic logic of a content-based speech restriction simply need not be present in these and other kinds of workplace sexual harassment cases.

147. *See, e.g.*, United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000); Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

148. For an argument that much of the regulation of workplace harassment can survive strict scrutiny, see Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace?*

Taking a rather different approach, the court in *Robinson* addressed sexually harassing speech in the context of the "captive audience" case law.[149] Under this theory, employees who have no realistic alternative to listening are held captive to the extent their preference not to listen is overridden, and the "audience" for harassing speech thus artificially and involuntarily expands.[150] The captive audience doctrine arose in non-workplace contexts, including automobiles,[151] personal residences,[152] and public buses.[153] How genuinely "captive" to any given speech one really is in any of these circumstances is disputable;[154] captivity may be a matter of degree. Arguably, many women are less realistically free to leave an offending workplace than the "captives" in the above circumstances may be able to avoid the offending speech. If a worker wishes to quit, the loss of wages and benefits may be important. If another job is sought, the applicant may seem unreliable for having quit her previous job. Telling her story may alienate potential employers. There may be little reason to suppose that the next job would involve less sexual harassment. A new job opportunity that realistically promises no harassment may be widely desired for just that reason, and, therefore, more difficult to obtain in a competitive market. These circumstances, to one degree or another, characterize the position of workplace harassment victims.

Free speech law typically accommodates the speaker's interest in seeking out, from among the general public, a sympathetic audience.[155]

Running the Gauntlet of Hostile Environment Harassing Speech, 84 GEO. L.J. 399, 435–46 (1996).

149. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535–36 (M.D. Fla. 1991). For a brief discussion of these and other tacks taken in *Robinson*, see Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1246–47 (10th Cir. 1999).

150. For a discussion, see, for example, J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2310–13 (1999); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 715–17 (1997). The captive audience doctrine in the context of workplace harassment is briefly referred to in *Avis Rent A Car System v. Aguilar*, 529 U.S. 1138, 1138 (2000) (Thomas, J., dissenting from denial of certiorari) (citing Aguilar v. Avis Rent A Car Sys., 980 P.2d 846 (Cal. 1999)).

151. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978) (analyzing car radio broadcasts).

152. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 484–85 (1988) (repeated instances of audible "focused" picketing of private residence).

153. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (political message-bearing signs in public buses).

154. A car radio can be instantly turned off or switched to a less offending station; earplugs, headphones, music, or television may effectively drown out the sounds of sidewalk protesters; one can avert one's eyes from particular offending bus signs. *Cf.* Cohen v. California, 403 U.S. 15, 21 (1971) (averting one's eyes seen as effectively avoiding further bombardment).

155. *See id.* ("[P]resence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.").

In addition, sexual harassment law often accommodates a legitimate, good faith process of seeking a sympathetic audience for the speech in question.[156] Nevertheless, whether a harasser's free speech rights can be limited should depend not only on captive audience concerns or the other arguments discussed in *Robinson*, but on more basic elements of emotional communication. As we shall see, these include the presence or absence of an attempt by the speaker to seek something like greater emotional agreement or emotional congruence with the target-listener.[157]

III. EMOTIONAL SPEECH AS SUFFICIENT FOR A FREE SPEECH THEORY

A. The Nature of Emotion

Today, students of the emotions generally see emotions as more logically structured, more logically assertive, and more vulnerable to logical critique than before.[158] In fact, an emotion-based understanding of free speech can, remarkably, approach the status of a full and complete theory of free speech. At the very least, an emotion-based understanding of free speech can shed light on each of the four problem areas discussed above: disorderly conduct speech,[159] nude dancing or distinctively sexual expressive conduct,[160] commercial emotion,[161] and workplace sexually harassing speech.[162] Our further discussion of emotional speech in these contexts will suggest the sufficiency of an emotion-based approach to free speech.

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156. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("[O]ffhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 768 (1998) (Thomas, J., dissenting) (discussing how sexual harassment requires showing a hostile workplace with harassment so pervasive that it alters terms and conditions of employment). *But see* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 647 (1997) (finding that isolated instances of harassment by many persons may, in the aggregate, be severe and pervasive). For a response to Volokh's commentary, see Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)treatment*, 85 GEO. L.J. 649 (1997).

157. *See infra* Part IV.E (discussing an emotion-based approach to workplace sexual harassment and free speech).

158. *See infra* notes 180–91 and accompanying text (discussing cognitivism as the dominating philosophical study of the emotions).

159. *See supra* Part II.A (discussing oral speech and accusations of disorderly conduct).

160. *See supra* Part II.B (discussing commercial nude dancing and the expression and conveyance of sexual emotions).

161. *See supra* Part II.C (discussing the expression of emotion in commercial advertising).

162. *See supra* Part II.D (discussing emotion, speech, and workplace sexual harassment).

Our references to "emotion" herein are intended to be broadly inclusive. For some purposes, it is admittedly useful to distinguish among "feelings such as joy, moods such as depression, emotions such as love, attitudes such as admiration, virtues such as courage, and traits of character such as bashfulness."[163] But, it is also often proper and more useful, as in developing an emotion-based approach to free speech, to think of all these phenomena as emotions. In this broad sense, emotions, or at least some emotions in the right circumstances, have long been seen as valuable components of psychological, ethical, and social life. However, appreciation of the role of emotions has not been universal.[164] But generally, passion or emotion has been recognized as valuable in at least some instances. The Confucian Analects, for example, enjoin one to "[s]how genuine grief at a parent's death, keep offering sacrifices to them as time goes by, and the people's moral character shall be reinforced."[165] The character of Socrates in Plato's *Symposium* declares "that every man ought to honor love . . . now and always I sing the praises of love's power and courage."[166] The profound value of the emotion of love in particular is, of course, widely recognized.[167] The value of emotions, more generally, has also been historically appreciated.[168]

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163. ANTHONY KENNY, THE METAPHYSICS OF MIND 52 (1989); *see also* Annette Baier, *What Emotions Are About*, 4 PHIL. PERSP. 1, 3 (1990) (distinguishing emotions, as being "about something," from moods).

164. *See, e.g.*, PSEUDO-MACARIUS, THE FIFTY SPIRITUAL HOMILIES AND THE GREAT LETTER, homily 4, § 8, at 53 (George A. Maloney ed. & trans., Paulist Press 1992) (1921) ("We have received into ourselves something that is foreign to our nature, namely, the corruption of our passions through the disobedience of the first man, which has strongly taken over in us, as though it were a certain part of our nature by custom and long habit."); THE UPANISHADS, MUNDAKA UPANISHAD, part 3, ch. 2, at 81 (Juan Mascaró ed. & trans., Penguin Books 1965) (1932) ("A man whose mind wanders among desires, and is longing for objects of desire, goes again to life and death according to his desires."). *But see, e.g.*, ATHANASIUS, THE LIFE OF ANTONY AND THE LETTER TO MARCELLINUS 32–33 (Robert C. Gregg trans., Paulist Press 1980) (1697) (portraying Antony as indeed admiring "freedom from anger" among the desert ascetics, but as admiring as well "the mutual love of them all"); THE BHAGAVAD-GITA, SIXTEENTH TEACHING 135, lines 20–21 (Barbara Stoler Miller trans., Columbia Univ. Press 1986) (1847) ("The three gates of hell that destroy the self are desire, anger, and greed; one must relinquish all three."); *Id.* at 133, lines 1–2 (listing "compassion for creatures" as among the "divine traits"); *see also* MAHATMA GHANDI, NON-VIOLENT RESISTANCE 161 (Bharatan Kumarappa ed., Navajivan 1961) (1951) ("I accept the interpretation of *ahimsa*, namely that it is not merely a negative state of harmlessness, but it is a positive state of love.").

165. THE ANALECTS OF CONFUCIUS 1.9, at 49 (Chichung Huang trans., Oxford Univ. Press 1997) (1900) (attributed to the Master Zeng).

166. Plato, *Symposium: The Banquet*, *in* GREAT DIALOGUES OF PLATO 106 (Eric H. Warmington & Phillip G. Rouse eds., W.H.D. Rouse trans., 1984).

167. *See, e.g.*, GANDHI, *supra* note 164, at 161; MOSES MAIMONIDES, *Laws Concerning Character Traits*, *in* ETHICAL WRITINGS OF MAIMONIDES ch. 2, at 37 (Raymond L. Weiss & Charles E. Butterworth eds. & trans., Dover 1983) (1975) ("The way of the just men is to . . . act

There is much classical sentiment that the emotions, whatever their value, must be controlled,[169] most often by a separate[170] capacity known as reason.[171] The radical distinction between reason and emotion, and the subordination of emotion to the control of reason, is famously argued for in Plato[172] and Aristotle,[173] but is widely held throughout intellectual history, from the Stoics[174] to Spinoza[175] all the way, it is said, to the Vulcan[176] people in general.[177] However, recent

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out of love and rejoice in afflictions."); TERESA OF AVILA, THE LIFE OF TERESA OF JESUS: THE AUTOBIOGRAPHY OF TERESA OF AVILA ch. XX, at 192 (E. Allison Peers ed. & trans., Doubleday 1991) (1960) ("[T]here is produced a great fear of offending so great a God, but a fear overpowered by the deepest love, newly enkindled.").

168. *See, e.g.*, JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 74 (1998) (For St. Thomas Aquinas, "emotions are inherently good, natural, and desirable.").

169. *See, e.g.*, ST. THOMAS AQUINAS, TREATISE ON THE VIRTUES Quaestio LIX, reply to obj. 1, at 96 (John A. Oesterle trans., Univ. of Notre Dame Press 1984) (1966) ("Virtue overcomes inordinate passions; but it produces orderly passions.").

170. St. Augustine seems unwilling to separate emotion, reason, and will in any strict fashion. *See* ST. AUGUSTINE, CITY OF GOD book XIV, ch. 6 (Walsh ed., Doubleday Image 1958) (413) ("The consent of the will in the search for what we want is called desire, joy is the name of the will's consent to the enjoyment of what we desire.").

171. *See* THE REPUBLIC OF PLATO ch. XIII (Francis MacDonald Cornford ed. & trans., Oxford Univ. Press 1988) (1941) (distinguishing and hierarchially arranging the three elements of the soul: reason, the "spirited" element or indignation, and the various good and bad appetites).

172. *See id.*

173. *See, e.g.*, RICHARD KRAUT, ARISTOTLE ON THE HUMAN GOOD 320–21 (1989) ("Aristotle says that 'the function of a human being is an activity of soul in accordance with reason, or not without reason.' When someone has mastered his emotions in the proper way, and made them obedient to reason, the expression of that mastery is one of the activities in which the human good consists." (emphasis omitted)).

174. *See, e.g.*, MARCUS AURELIUS, MEDITATIONS bk. V, No. 26, at 87 (Maxwell Staniforth trans., Penguin Books 1964) (1634) ("Let no emotions of the flesh, be they of pain or pleasure, affect the supreme and sovereign [reasoning] portion of the soul."); EPICTETUS, THE ENCHIRIDION § XXVIII, at 27 (Thomas W. Higginson trans., 2d ed. 1955) ("[D]o you feel no shame in delivering up your own mind to any reviler, to be disconcerted and confounded?").

175. 2 BENEDICTUS DE SPINOZA, *The Ethics*, *in* WORKS OF SPINOZA pt. IV, at 187 (R.H.M. Elwes trans., Dover 1955) (1883) ("Human infirmity in moderating and checking the emotions I name bondage: for, when a man is a prey to his emotions, he is not his own master . . . .").

176. *See* DIANE DUANE, STAR TREK: SPOCK'S WORLD 75 (1988) (arguing that the crucial Vulcan concept of 'Arie'mnu' should be translated as "passion's mastery," thereby acknowledging that Vulcans do "have emotions, but are managing them [by logic or 'truth'] rather than being managed by them").

177. As an important and dramatic variant on this theme, we should recognize that the philosopher David Hume accepted a clear and vital distinction between reason on the one hand and emotion or the passions on the other but argued for the inevitable subordination in practice of the former. *See, e.g.*, J.L. MACKIE, HUME'S MORAL THEORY 2 (1980). Actually, Hume's view of the relationship between reason and the emotions is not entirely clear. *Compare* DAVID HUME, A TREATISE OF HUMAN NATURE bk. III, pt. 1, § 1, at 457 (L.A. Selby-Bigge ed., Clarendon Press 1968) (1789) ("[R]eason has no influence on our passions and actions.") *with* DAVID HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLE OF MORALS, ENQUIRY § 1, at 173 (L.A. Selby-Bigge ed., 2d ed. Clarendon Press 1977) (1777) ("[I]n

intellectual history in particular has not shown a clear distinction between the emotions, on the one hand, and reason, or related cognitive concepts, on the other. Emotion, in and of itself, turns out to presuppose many, if not all, of the familiar cognitive capacities. We cannot here document this developing consensus exhaustively. But, we can at least illustrate some of the broadly cognitive dimensions of emotions, as currently understood.

To begin with, we should recognize that a strict distinction between reason and emotion has not been historically adhered to consistently—even by Plato[178] and Kant,[179] whom we might most expect to make such a distinction. Today, "[c]ognitivism . . . dominates the philosophical study of emotions."[180] With this historical change in approach, "[t]hought replaced feeling as the principal element in the general conception of emotion."[181]

More specifically, major strains of thought today recognize emotions as typically, if not invariably, characterized by intentionality,[182] beliefs,[183] judgments,[184] attitudes,[185] modes of perception,[186] modes of

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order to pave the way for such a sentiment, and give a proper discernment of its object, it is often necessary, we find, that much reasoning should precede . . . .").

178. *See* NICKOLAS PAPPAS, PLATO AND THE REPUBLIC 84 (1995). Regarding the emotions Plato refers to as "thumos" or "spirit," Pappas states that "these emotions entail a judgment over and above the raw feelings of anger. . . . Being angry means doing some thinking." *Id.* For a discussion of Plato on rhetoric, see, for example, Anthony M. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677 (1999), and Ernest J. Weinrib, *Law as Myth: Reflections on Plato's Gorgias*, 74 IOWA L. REV. 787 (1989).

179. *See* ALLEN W. WOOD, KANT'S ETHICAL THOUGHT 122 (1999) ("The unconditional value of rational nature thus includes the capacity for feelings and emotions.").

180. John Deigh, *Cognitivism in the Theory of Emotions*, 104 ETHICS 824, 824 (1994).

181. *Id.*; *see also* CHESHIRE CALHOUN & ROBERT C. SOLOMON, WHAT IS AN EMOTION?: CLASSICAL READINGS IN PHILOSOPHICAL PSYCHOLOGY 3–40 (1984) (deeming emotions to be partly matters of reason and rationality and partly matters of evaluation and cognition); C.D. Broad, *Emotion and Sentiment*, *in* CRITICAL ESSAYS IN MORAL PHILOSOPHY 283, 286 (David R. Cheney ed., 1971) ("Every emotion is an epistemologically objective or intentional experience, i.e., it is always a cognition either veridical or wholly or partly delusive. But every emotion is something more than a mere cognition."); James M'Cosh, *Elements Involved in Emotions*, 2 MIND 413, 414 (1877) ("[A]n Idea of something, of some object or occurrence as fitted to gratify or disappoint a Motive Principle or Appetence . . . [is] an essential element in all emotion.").

182. *See, e.g.*, Joel Marks, *A Theory of Emotion*, 42 PHIL. STUD. 227, 227 (1982); John Morreall, *Fear Without Belief*, 90 J. PHIL. 359, 360 (1993) ("[W]hile most instances of fear in adults involve . . . mental representations and have intentional objects, there are simpler cases of instinctive fear without intentional objects.").

183. *See* Marks, *supra* note 182, at 227 (explaining that emotions are to be "identified with (certain sets of) beliefs and desires"); Jerome A. Shaffer, *An Assessment of Emotion*, 20 AM. PHIL. Q. 161, 161 (1983) (emotions caused and differentiated by beliefs and desires); *see also* Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1978 (2001) (beliefs and abilities dependent upon emotions).

interpreting,[187] or even modes of constructing the world.[188] Emotions are thus not, or certainly not merely, sensations or twinges, but typically involve beliefs, judgments, interpretations or reasonable evaluations of world features. An emotion can thus amount to a judgment, involving particular beliefs that some feature of the world, or some act or state of affairs, is somehow appropriate or inappropriate.[189] Although these cognitive dimensions of emotions have been emphasized of late, writers as far back as Aristotle[190] have recognized that emotion can empower and facilitate—not merely cloud our understanding of the world.[191]

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184. *See, e.g.*, Ronald de Sousa, *The Rationality of Emotions*, *in* EXPLAINING EMOTIONS 127, 127–51 (Amelie Oksenberg Rorty ed., 1980) (discussing emotions as judgments in the sense of "what we see the world 'in terms of' as distinct from articulated propositions"); Robert C. Solomon, *The Logic of Emotion*, 11 NOÛS 41, 46 (1977) ("[M]any emotions are deliberative judgments."). For extended discussion, see RONALD DE SOUSA, THE RATIONALITY OF EMOTION (1987); JON ELSTER, ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS part IV (1999); ROBERT C. SOLOMON, THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE (1993).

185. *See* RICHARD WOLLHEIM, ON THE EMOTIONS 74 (1999) ("[P]hilosophers have come to recognize the place of an attitude or orientation within emotion."); Gabriele Taylor, *Justifying the Emotions*, 84 MIND 390, 391 (1975) (referring to the "commonplace" that "the emotions involve specific attitudes and certain ways of looking at the world," when discussing the idea that conceptual considerations indicate a link between one's emotions and moral life); *see also* JOHN HENRY NEWMAN, A GRAMMAR OF ASSENT 83 (Charles Frederick Harrold ed., Longmans, Green 1947) (1870) ("Conscience . . . considered as a moral sense, an intellectual sentiment, is a sense of admiration and disgust, of approbation and blame: but it is something more than a moral sense; it is always emotional.").

186. *See, e.g.*, Justin D'Arms & Daniel Jacobson, *The Moralistic Fallacy: On the Appropriateness of Emotions*, 61 PHIL. & PHENOMENOLOGICAL RES. 65, 66 (2000) (discussing emotions as involving "evaluative presentations: They purport to be perceptions of such properties as the funny, the shameful, the fearsome, the pitiable, et al."); Nancy Sherman, *Empathy and Imagination*, 22 MIDWEST STUDIES IN PHIL. 82, 83 (1988) ("[W]e step out of our egocentric, and by extension, culturally parochial world through mechanisms such as empathy."); Ronald de Sousa, *Moral Emotions* (explaining that emotions as not only morally assessable, but as revealing or disclosing value, as "modes of perception, and therefore as giving us access to certain sorts of *knowledge*"), *available at* http://www.chass.utoronto.ca/~sousa/moralemotions.html (last visited Feb. 27, 2003).

187. Solomon, *supra* note 184, at 46 ("[E]motions are not sensations of constriction of flushing, but constitutive interpretations of the world.").

188. *See id.*

189. *See supra* notes 182–88 (discussing various characterizations of emotions).

190. *See* NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE 45 (1989) ("Often we see not dispassionately, but because of and through the emotions.").

191. Obviously, some emotions and some expressions of emotions may not carry as much in the way of supporting, propositional belief as others. Consider, for example, the case of someone who expresses a fear of spiders or heights, who admittedly can offer no reasonable account of any danger. Here, emotional expression is hardly unique. Persons can make minimally emotional statements that clearly have no basis in reason. In general, emotion can either undermine or enhance the effectiveness of our speech. In addition to employing emotion as a powerful rhetorical device, we can strategically control our emotions or work ourselves into a highly emotional state in order to seem more forceful.

Thus, emotions and the expression of emotions contain all the basic cognitive and non-cognitive elements essential to an analysis of freedom of speech, and to the values underlying free speech law.[192] By themselves, emotions and their expression actually encompass the full scope of speech for free speech purposes. A complete and satisfactory theory of emotions, of emotional speech, and of the values and limits of emotional speech would, in itself, provide all the elements necessary for a general theory of freedom of speech. That is, it is possible to build a complete theory of free speech based on emotional speech because of the breadth, broad cognitivity, and complexity of emotionality and emotional speech. When we set aside the crude opposition of emotion and reason, we begin to appreciate the broad scope of emotion and emotional expression. Emotion, broadly understood, can encompass cognition in general, intentions, beliefs, judgments, attitudes, modes of perceiving and understanding, and even what we might call world-constructions.[193] Jointly, these concepts of emotions are exactly what we need for a theory of free speech.

Emotions, in themselves, may not be propositions in the sense of public assertions of fact about states of affairs.[194] However, an emotion-based approach to free speech seeks to protect not merely emotions themselves, but the expressing, conveying, and reporting of emotions as well. Protecting emotional expression also requires protecting articulated emotion-based propositions. When we express, for example, in an articulate, explicit way our contempt or admiration for some political actor or political choice, such emotional expression typically has some propositional content.

Emotions can, as the above political example suggests, be critiqued as either reasonable or unreasonable. Emotion-based expression and critiques thereof are central to freedom of speech. Whether critiques of emotion-based expression are fair or not is open to discussion. As one leading student of the emotions has noted, "[e]motional judgments, like any judgments, have presuppositions and entailment relationships with a large number of beliefs."[195] Thus, emotional judgments, whether publicly expressed or not, rely on certain assumptions and imply certain

192. *See, e.g.*, Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (discussing the values or purposes widely thought to underlie freedom of speech).

193. *See supra* notes 178–91 and accompanying text (discussing the history of distinction between reason and emotion).

194. *See supra* note 184 (discussing emotions as judgments).

195. Solomon, *supra* note 184, at 46.

propositions.[196] Emotional judgments can be critiqued in these and other respects. These critiques are a crucial consideration we would expect a theory of free speech to accommodate.

Nevertheless, we might wonder whether it is fair to critique anyone's emotions, even if it is fair to critique the outward public expression of that emotion. This concern assumes that an emotion is invariably beyond our control, or something that just unaccountably happens to us and for which we are not responsible. This is not so. Emotions are often, at least partially, under our control[197]—perhaps more than our beliefs.[198] In this way, we can bear responsibility not just for how or whether we express emotions, but also for the emotions themselves,[199] making them fair game for critique, as we would expect in the realm of freedom of speech.

To see that emotions and emotional expression can be critiqued in the various ways we would expect under the realm of freedom of speech, let us consider the basic emotion of fear. A fear could be unreasonable if based on more or less obviously false beliefs, on admittedly inadequate grounds, on true but obviously superstitious grounds, on an inappropriate object, as in the case of a strong fear of mussing one's hair, or if disproportionate, as in an inordinate fear of something that should inspire only moderate fear.[200] Of course, some fears may be based on mistaken but quite reasonable beliefs, as in fear of a nearby lion that has, without one's knowledge, just recently been recaptured. The reasonableness of an emotion will often depend upon circumstance, and perhaps upon the "[c]hildhood, adolescence, youth, maturity, [or]

196. *See, e.g.*, Robert C. Roberts, *What an Emotion Is: A Sketch*, 97 PHIL. REV. 183, 201 (1988) ("[O]ne very central connection between emotions and beliefs is that they share a propositional content.").

197. *See* Errol Bedford, *Emotions*, *in* ESSAYS IN PHILOSOPHICAL PSYCHOLOGY 77, 91 (D. Gustafson ed., 1964) (analyzing emotions as justified or unjustified, reasonable or unreasonable, etc., based not only on matters of fact, but also on matters of judgment, assessment, or opinion); Roberts, *supra* note 196, at 200; Aaron Ben Ze'ev, *Emotions and Morality*, 31 J. VALUE INQUIRY 195, 195 (1997) ("[W]e have some responsibility over our emotions."); *cf.* Amelie Oksenberg Rorty, *Explaining Emotions*, 75 J. PHIL. 139, 159 (1978) (referring to "the deep conservation of emotional habits," thus indicating that changing the emotions we feel can be as difficult as changing any deeply ingrained habit). Rorty does recognize that some emotions are based on, and dependent upon, mistaken beliefs. *See id.* at 152.

198. *See* Roberts, *supra* note 196, at 200 n.26 ("Emotions are to a larger extent within our voluntary control, and thus within the scope of our immediate responsibility, than our beliefs.").

199. *See* Eugene Schlossberger, *Why We Are Responsible for Our Emotions*, 95 MIND 37, 37 (1986) (arguing that "one is responsible for one's emotions, even if one cannot help feeling them").

200. George Pitcher, *Emotion*, 74 MIND 326, 331 (1965).

old age"[201] of the party in question. All of these things comprise the territory of free speech analysis.

Seen in this broad perspective, in which emotion cannot be separated from the various dimensions of reason,[202] the expression of emotion can raise all the problems and possibilities of free speech theory in general. When we recognize the inseparability of emotion and the various dimensions of reason, we can more fully appreciate how "[o]ur emotional life is deeply intertwined with our history as persons, with the tenor of our consciousness itself."[203] As Martha Nussbaum has written, "emotions are suffused with intelligence and discernment, and . . . contain in themselves an awareness of value or importance."[204]

Speech without any emotion, if that is humanly possible, does not raise any free speech elements, possibilities, or complications beyond

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201. Baier, *supra* note 163, at 19.

202. For a legal discussion of the inextricability of reason from emotion, see Paul Gewirtz, *On "I Know it When I See it,"* 105 YALE L.J. 1023, 1029–30 (1996), and D. Don Welch, *Ruling With the Heart: Emotion-Based Public Policy*, 6 S. CAL. INTERDISC. L.J. 55, 58–59 (1997). *But see* Ilham Dilman, *Reason, Passion and the Will*, 59 PHIL. 185, 188 (1984) ("Hume was wrong to divorce judgment from the emotions in his account of the passions and to represent emotions as inevitably blind. Some emotions blind their subject to reason [but] others, though the forms of apprehension with which they provide him, enrich his contact with his environment."). For a contemporary study of the role of emotion in one form of judgment, see Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, SCIENCE, Sept. 14, 2001, at 2105, *available at* http://www-psych.stanford.edu/~jbt/205/greene.pdf (last visited Feb. 27, 2003). Even the idea that law or legal education improperly devalues emotion at the expense of reason may unduly split the two. *See* Angela P. Harris & Marjorie M. Schultz, *"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1773 (1993). For a refusal to distinctly separate reason and emotion in actual communicative practice, see Peter Brandon Mayer, *Not Interaction But Melding—The "Russian Dressing" Theory of Emotions*, 52 MERCER L. REV. 1033, 1034 (2001) (reason and emotion meld to form meaning).

203. Steven L. Ross, *Evaluating the Emotions*, 81 J. PHIL. 309, 315 (1984).

204. MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 1 (2001). This does not suggest that emotions are beyond rational criticism, as Nussbaum recognizes. *See id.* at 2. For discussion of Professor Nussbaum's work on the emotions and the exercise of judgment, see, for example, Robert C. Roberts, *Emotions As Judgments*, 59 PHIL. & PHENOM. RES. 793 (1999) (arguing that "the propositional content of some full-fledged emotions is not assented to by the subject of the emotion" and that "the very same judgment that is supposedly identical with an emotion can be made in the absence of the emotion"), and Richard Sorabji, *Therapy of Desire*, 59 PHIL. & PHENOMENOLOGICAL RES. 799 (1999). It is doubtlessly true, as in the case of some confessedly irrational fears, that the subject does not believe the propositional content of the emotion in question. Our point is that not all emotions are like this. Whether we should legally protect the expression of genuine emotion the speaker admits to be unjustified should probably be decided in a way sensitive to context. Nor is it crucial that some propositions can be expressed with or without emotion. Not every expression is an emotion-based expression. Removing the emotional dimension from an expression does not add a new element to free speech analysis, as emotions themselves introduce all of the interesting cognitive dimensions for free speech purposes, and emotions can plainly vary in strength, from extremely intense, to subconsciously felt, to nearly zero in intensity, as in a mild sense of tranquility.

speech with emotion. We may view speech as without any trace of emotion—at best, a rarity when matters of politics and government, self-realization, or social issues are under discussion.[205] Alternatively, we may consider the "limiting case" of speech that is almost, but not entirely, lacking emotion.[206] There are no obvious reasons to qualitatively analyze these two closely neighboring, barely distinguishable cases differently. Draining the last fragment of emotion from a nearly, but not entirely, unemotional speech does not trigger any need to qualitatively revise our analysis of the free speech dimensions of the case. Going from a nearly emotionless to an entirely emotionless speech does not add complexity to the free speech analysis of the case.

B. The Model of Emotivism: Speakers, Intent, Listeners, and the Complexities of Interaction

Our broader and more cognitively inclusive understanding of emotions should help us to reconsider the free speech cases introduced above.[207] However, we should do so on the basis of a useful model of emotional communication in a social context. Speech, after all, typically requires a speaker and a listener. Both the speaker and the listener may, in complex and subtle ways, express or react with emotion.

To appreciate the dynamics of both speakers' and listeners' emotions, we can draw upon the models of value judgment,[208] rationality, and

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205. These matters are rarely publicly discussed without some emotion, and, not coincidentally, they constitute something like the core values or purposes underlying freedom of speech itself. For discussion, see, for example, Greenawalt, *supra* note 192, at 125–55.

206. Again, there seems to be no qualitative difference between speech reflecting a very slight, almost unconscious, emotion of mild tranquility on the one hand, and the same speech reflecting no detectable emotion at all. If we have a theory for the first kind of free speech case, we need not significantly revise or complicate that theory to encompass the second.

207. *See supra* Part II (discussing free speech cases involving disorderly conduct, commercial nude dancing, commercial advertising, and workplace sexual harassment).

208. Emotivism is often thought of, narrowly, as a way of understanding ethical language and speech, but it may be taken more broadly as referring to all value judgments, and not merely to ethics. J.O. URMSON, THE EMOTIVE THEORY OF ETHICS 11 (1968) ("The analyses offered by the emotive theory were intended by most of its proponents to cover all cases of evaluation and not merely those found in moral contexts."). The contemporary emotivist, or norm-acceptance-expressivist, Allan Gibbard, is concerned more broadly with rationality and irrationality. *See* ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 7–9, 164, 166 (1990). For discussions of Gibbard's work, see, for example, Justin D'Arms & Daniel Johnson, *Expressivism, Morality, and the Emotions*, 104 ETHICS 739 (1994); Paul Horwich, *Gibbard's Theory of Norms*, 22 PHIL. & PUB. AFF. 67 (1993); Amelie Oksenberg Rorty, *The Many Faces of Gibbard's Wise Choices, Apt Feelings*, 103 ETHICS 318 (1993); Nicholas Sturgeon, *Gibbard on Moral Judgment and Norms*, 96 ETHICS 22 (1985).

communication developed by twentieth century[209] emotivism. We may think of emotivism simply as an approach to value, judgment, rationality, and communication as briefly fleshed out below.[210] We need not be concerned with the overall adequacy or inadequacy of emotivism in itself.[211] Nor do we need to adopt the noncognitivism—the denial of objectivity in morals—typical of emotivist theories.[212] Instead, we may simply borrow emotivism's emphasis on the complexities of speaker intent and the dynamics of both speakers and listeners in the context of emotion and speech. A leading early emotivist, A.J. Ayer, recognized that "ethical terms do not serve only to express feeling. They are calculated also to arouse feeling, and so to stimulate action."[213] Emotivism focuses not only on expressing emotion, but on ways of evoking corresponding emotion in others as well.[214] This dual focus on both expressing and evoking in a listener a corresponding emotion defines emotivism itself.

Emotion, on the part of both speaker and listener, is not, for the emotivist, merely "a peculiar warm feeling inside us."[215] The emotivist

209. While emotivism is largely a twentieth century phenomenon, it is not without historical antecedents. *See, e.g.*, THOMAS HOBBES, LEVIATHAN ch. 6, at 48 (Michael Oakeshott ed., Blackwell 1960) (1651) ("[W]hatsoever is the object of any man's appetite or desire, that is it which he for his part calleth good."); GEOFFREY THOMAS, AN INTRODUCTION TO ETHICS 54 (1993) (discussing David Hume in the context of emotivism).

210. *See supra* notes 215–21 (discussing the emotivism).

211. For a brief, sophisticated defense of emotivism in a legal context, see Jeremy Waldron, *Moral Truth and Judicial Review*, 43 AM. J. JURIS. 75 (1998).

212. *See* Geoffrey Sayre-McCord, *Introduction: The Many Moral Realisms*, *in* ESSAYS ON MORAL REALISM 1, 8 (Geoffrey Sayre-McCord ed., 1988); MICHAEL SMITH, THE MORAL PROBLEM 16 (1994); Horwich, *supra* note 208, at 67; *see also* STUART HAMPSHIRE, JUSTICE IS CONFLICT xii–xiii (2000) ("I have come to weigh and to appreciate the full force of Hume's dictum—'Reason both is, and ought to be, the slave of the passions.' Translated into the linguistic idiom of contemporary philosophy, this dictum becomes—'In moral and political philosophy one is looking for adequate premises from which to infer conclusions already and independently accepted because of one's feelings and sympathies.'"); Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 42 (1918) ("No doubt behind these legal rights is the fighting will of the subject to maintain them, and the spread of his emotions to the general rules by which they are maintained; but that does not seem to me the same thing as the supposed *a priori* discernment of a duty or the assertion of a preexisting right. A dog will fight for his bone.").

213. ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 108 (2d ed. 1946); *see also* CHARLES L. STEVENSON, ETHICS AND LANGUAGE 21 (1944) (using as a serviceable working model, "'This is wrong' means *I disapprove of this; do so as well*") This simple model requires elaboration, as we often wish to do more in speech than declare right and wrong, or to approve or disapprove. The various sorts of modalities and contextual uses for language beyond personal declarations of right and wrong, such as speaking hypothetically, complicate, but do not crucially alter, the logic of the emotional speech approach.

214. *See, e.g.*, Waldron, *supra* note 211, at 94.

215. R.M. HARE, THE LANGUAGE OF MORALS 10 (1952).

can accommodate the modern recognition that emotions are not reducible to feelings, and can therefore make a place for beliefs, judgments, and other cognitive elements in emotional expression.[216] In fact, the simple emotivist models can expand to encompass much more than straightforward personal approvals and disapprovals. They can also take account of reports of emotions in oneself and in others, hypothetical and contingent expressions, expressions of regret, requests, informative statements, expressions of mixed feelings, commands, interrogatories, and so on. Generally, all of these forms of expression involve some degree of emotion, or are treatable as limiting cases of emotional expression. In any event, these kinds of expressions must be protected to some degree if we are to properly protect the core, central free speech expressions of one's current emotions. All of these complications of the basic emotivist model do not change the underlying analysis.

For the emotivist, then, arguments and discussions between two persons can certainly involve much more than the unresponsive volleying of personal feelings. The discussion between speaker and listener typically does not focus on the mere expression or critique of feelings. On an emotivist view, the discussion is more likely to focus on beliefs, or on understanding the relevant facts,[217] and to do so in a way that directly or indirectly, depending upon context, seeks a sort of appropriate mutuality, congruence, or agreement in emotion.

As Ayer puts it, in our discussions and debates with others, we often attempt to show that our interlocutor is wrong about the facts of the case:

> We argue that he has misconceived the agent's motive; or that he has misjudged the effects of the action; or its probable effects in view of the agent's knowledge; or that he has failed to take into account the special circumstances in which the agent was placed. Or else we employ more general arguments about the effects which actions of a certain type tend to produce or the qualities which are usually manifested in their performance.[218]

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216. *See* THOMAS, *supra* note 209, at 53; *see also* WILLIAM K. FRANKENA, ETHICS 106 (2d ed. 1973) (noting C.L. Stevenson's recognition that "to a very considerable extent our attitudes are based on our beliefs, and so can be reasoned about"); R.M. HARE, FREEDOM AND REASON 4 (1963) ("[I]t is possible for there to be logical relations between prescriptive judgments . . . .").

217. *See* AYER, *supra* note 213, at 111.

218. *Id.* Professor William Frankena characterizes C.L. Stevenson's emotivism by stating:

> I may favor a certain course of action because I believe it has or will have certain results. I will then advance the fact that it has these results as an argument in its favor. But you may argue that it does not have these results, and if you can show this, my

Thus, the emotivist does not look simply to tastes and preferences in analyzing the rationality of speech,[219] and certainly not to the tastes and preferences of the speaker alone. Once again, the simple emotivist model can be expanded to encompass the various forms of expression and discussion that do not themselves amount to the expression of the speaker's own current approval or disapproval. The endless permutations complicate, but do not qualitatively change, an analysis focusing on core expressions of approval and disapproval.

Crucially, even in Charles Stevenson's simple emotivist model, there must be some sort of attempt at achieving what we might call emotional congruity, mutuality, or concord between speaker and hearer. Stevenson very roughly summarizes this element in the speaker's presumed injunction to the hearer to "do so as well."[220] To "do so as well" is for the hearer to somehow come, in some measure, to join in or share the speaker's emotion. An attempt at mutuality, or an invitation to the listener to join with the speaker, is thus an essential part of the emotivist model.

The emotivist model can easily accommodate crucial references not only to the speaker and to the listener, and to the speaker's attempt to achieve mutuality, but also to any consideration that might have some persuasive or steadying effect on the broadly emotional attitudes, judgments, or beliefs of the parties. This breadth of reference takes within its scope any sort of speech that the law might consider protecting. Nevertheless, as we shall see below,[221] it is important to remember that the emotivist model requires an expression of emotion, coupled with an attempt at inspiring in a listener some appropriate sort of emotion of a generally shared, concordant, mutual sort.

However, we need not say that only transparent or straightforwardly conveyed emotion is worthy of protection. Speech that is in some respects tentative or hypothetical can be protection-worthy. A speaker who seeks to inspire pride in a listener need not herself always feel or express pride. Some kinds of deviousness and even strategic deception may be protection-worthy as well. In this way, the agreement or harmony sought by the speaker need not always involve a literal match between the speaker's and the listener's emotions. Regardless, the speaker must seek some sort of circumstantially appropriate agreement

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attitude may change and I may withdraw my judgment that the course of action is right or good.

FRANKENA, *supra* note 216, at 106.

219. *See* GIBBARD, *supra* note 208, at 166.

220. *See* STEVENSON, *supra* note 213, at 21.

221. *See infra* Part IV (positing an emotion-based approach to the hard free speech cases).

or attunement of emotions, as expressed, for example, in the speaker's and the listener's tacit agreement that the listener alone should feel pride. But, there is an important difference between an agreement that the listener should feel pride, whatever emotion the speaker feels, and a situation in which a speaker sadistically evokes fear in the listener, without seeking any further agreement in emotion or attitude. For instance, a parent might, in contrast, want a child to feel some mild fear not literally shared by the parent, but also want a broader, relevant harmony of attitudes with the child. This differs from seeking merely to impose or inspire fear in some disliked listener.

IV. AN EMOTION-BASED APPROACH TO THE HARD FREE SPEECH CASES

A. Introduction

At this point, we have seen that the concepts of emotion and emotional expression are sufficiently rich, cognitive, and diverse to accommodate all of the elements needed for a general theory of free speech. Of course, even a sophisticated understanding of emotions and of their expression will not allow us to arrive at some single uncontroversial outcome in hard cases. Nevertheless, an emotion-based approach to free speech offers a fresh and unified understanding of even the most difficult kinds of free speech cases.

Above, we illustrated some of the problems associated with oral disorderly conduct cases,[222] the commercial nude dancing free expression cases,[223] the status and appropriate degree of protection for emotional commercial expression,[224] and with workplace sexual harassment cases typically involving emotions.[225] Again, no approach can allow us to resolve all such cases in an uncontroversial way. Nevertheless, our focus on emotion allows us to intelligently analyze, classify, and draw useful distinctions among these four kinds of hard cases. To begin to see how, we should recognize that even if communication is necessary for a speech to be constitutionally

222. *See supra* Part II.A (discussing inconsistent treatment by courts of emotionally charged "fighting words").

223. *See supra* Part II.B (discussing disparate constitutional protection for commercial nude dancing and social dancing).

224. *See supra* Part II.C (discussing the difficulty in classifying real and false commercial emotion of corporations for constitutional protection).

225. *See supra* Part II.D (discussing the conflict between freedom of speech and civil rights in the workplace in the context of sexual harassment).

protected,[226] mere communication in the broadest sense does not automatically trigger free speech protection. Specifically, as one court has recognized:

> [T]he goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, "communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . . ."[227]

This language, along with the basic emotivist paradigm discussed above,[228] emphasizes that free speech analysis must focus on the speaker's intent as well as the listener. In applicable cases, this analysis should emphasize the speaker's lack of genuine emotion or intent to seek appropriate mutuality or concord. If there is genuine emotion in the speech, does the speaker also seek a reciprocal, corresponding, appropriately equivalent emotion on the part of the listener? Speakers often seek to provoke emotion in a listener—perhaps fear, anxiety, disgust, hostility, or acquiescence—that does not correspond with, reciprocate, or validate the speaker's emotion. Verbal intimidation, for example, would lack this attempt at emotional reciprocity.

Again, this theory, on the basis of a shared tacit or presumed agreement on the importance of the child's avoiding some danger, does not seek to leave unprotected the speech of a parent who seeks to inspire mild, reasonable, appropriate fear in a child. The emotion sought need not be the same as the emotion felt by the listener. However, an underlying relevant general emotional harmony must be genuinely sought. Such speech may be protection-worthy, even if the speaker uses some form of benign deception.

B. Offensive Epithet and Threat Speech

Let us apply these general considerations to the hard cases discussed above.[229] An emotion-based approach to the offensive epithet speech case of *People v. Dietze*[230] may change our view of what seems to be important in deciding the case. We know from cases such as *State v.*

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226. *See* Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 895 (1st Cir. 1988) ("An act not intended to be communicative does not acquire the stature of First Amendment-protected expression merely because someone, upon learning of the act, might derive some message from it.").

227. Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846, 854 (Cal. 1999) (citations omitted).

228. *See supra* Part III.B (discussing the emotivism model).

229. *See supra* Part II (discussing free speech cases involving disorderly conduct, commercial nude dancing, commercial advertising, and workplace sexual harassment).

230. *See supra* notes 62–81 and accompanying text (discussing the court's analysis in *Dietze*).

Suiter that courts are sometimes willing to deny free speech protection to emotionally intense speech, in the form of a single epithet, even when directed at a public authority figure.[231] How does an emphasis on emotion change the analysis in *Dietze*?

The *Dietze* case involved a mentally retarded complainant and her mentally retarded son, who were victims of offensive epithets and apparently credible literal threats of a physical beating at some unspecified future time.[232] Whatever the speaker's motives for this behavior, we cannot deny that the speaker in *Dietze* sought to convey an evidently strongly charged emotional message, and that the speaker's message had a strong emotional impact on the hearer-victims. In this sense, the speech at issue in *Dietze* may seem centrally protected by an emotion-based free speech analysis. However, this is not the case. If we want to say that the speech in *Dietze* need not be constitutionally protected, must we do so on the basis of our dislike of the content of the speaker's message?[233] Should we attempt to merely balance the emotional or other interests of the speaker and the hearers? Actually, an emotion-based approach to freedom of speech, along with the emotivist paradigm discussed above,[234] suggests what is crucially missing in the *Dietze* analysis.

Our emotion-based account of free speech, as developed and illustrated in the emotivist model, makes central not only the expression of emotion by a speaker, but an attempt by the speaker to persuade, or at least to steady or reinforce the hearer in her relevant attitudes, judgments, or beliefs. We see this even in the simplest emotivist model, in which a speaker expresses approval or disapproval of something and simultaneously, enjoins, urges, or encourages the listener to concur, share or join in that same approval or disapproval—to "do so as well."[235]

On even this simple emotivist model, in which we set aside all of the complications and references to various kinds of possible mistakes and

231. *See supra* notes 39–58 and accompanying text (discussing how the court distinguished *Suiter* and *Cohen*).

232. *See supra* note 63 and accompanying text (discussing the facts of *Dietze*).

233. *See supra* notes 143–48 and accompanying text (referencing the distinction between content-neutral and content-based restrictions on speech).

234. *See supra* Part III.B (discussing the basic principles of the emotivist model).

235. *See* STEVENSON, *supra* note 213, at 21 ("This is wrong" as "I disapprove of this; do so as well" (emphasis deleted)). There is certainly a place for reinforcing one's own beliefs in one's own mind, but even if this requires a public hearer, it hardly requires the sort of target-victim found in *Dietze*.

other sorts of arguments available to the emotivist,[236] the speech at issue in *Dietze* is missing any real attempt at emotional mutuality or emotional congruity. There is, as far as we can tell, no real attempt at persuasion. The victim is not being sincerely encouraged to come to the belief that she deserves a beating and that she should think of her son as a dog.

No doubt the crude epithets and threats in *Dietze* evoke a strong emotional reaction in their hearers. At the center of this reaction, we would imagine, would be the continuing emotional fear and anxiety over the ongoing possibility of being physically beaten in the streets. This emotional reaction was presumably intended and expected by the speaker. However, this emotion is not one that the speaker to any degree shares. The speaker does not fear beating the listener. Nor does she fear being beaten, either by herself, by the addressees, or by anyone else. The speech, as far as we can tell, lacks any attempt to arrive at or inspire, directly or indirectly, any relevant emotional congruity or mutuality. There is no attempt to convey the emotivist "do so as well,"[237] or specifically to lead the victim to conclude that she rightfully deserves, for unspecified reasons, a random physical beating. That is, the speaker is not really seeking to change the listener's anti-beating emotions into anything remotely congruent with her own pro-beating emotions.

Thus, a decision not to constitutionally protect the speech in *Dietze* does not require us to say that the emotional injury to the victim-addressees outweighs any interest on the part of the speaker. This sort of emotional interest balancing might well motivate a decision to decline to protect the speech. Instead, we can say that the speech in *Dietze* should be unprotected for free speech purposes because it is crucially, structurally deficient. The speech apparently lacks any attempt[238] at emotional mutuality, at a "do so as well" element, regardless of how much emotion is expressed or intentionally inspired in the hearer.

236. *See supra* note 218 and accompanying text (referencing the emotivist's need during discussions with others to attempt to show the other party that his or her view is wrong).

237. *See supra* notes 213, 220, 224 and accompanying text (discussing the mutuality aspects of the emotivist "to do so as well" model).

238. Obviously, we would not want to penalize speech that seeks some such mutuality or persuasiveness, but simply fails to achieve that purpose. Speech that turns out not to be persuasive or to inspire mutuality, despite the speaker's intent, should not be penalized.

C. *Commercial Nude Dancing and Protected Speech*

A dramatically contrasting set of issues is raised in the case of commercial barroom nude dancing, as discussed above.[239] In *Dietze*, we could fairly assume that the emotions felt by both speaker and hearers were intense and, more importantly, genuine. The genuineness of a purportedly straightforward emotional communication, the first element of the basic emotivist paradigm, in commercial nude dancing is open to doubt, more so than in some event-based, celebratory, spontaneous, uninhibited social dancing.[240] Social dancing often displays the collective expression of genuine emotion, including exuberance or celebration. Consider the phenomenon of dancing in the street at the overthrow of a despised tyrant, or even at the defeat of a traditional football rival. Whether some such potentially shared communicative emotion characterizes social dancing that occurs on no special occasion is admittedly a closer question.

In any event, we might well be skeptical of the claim that commercial nude dancing invariably fits all the elements of our emotional speech communication paradigm. Must we assume that, in accordance with the emotivist paradigm, dancers genuinely approve or believe in whatever erotic emotional message they are communicating to their paying customers? There is, in a sense, certainly more congruence between the emotion-inducing nude dance and the emotions experienced by the customers than we found in the offensive, insulting speech cases. But can we just assume that the commercial nude dancer believes in, wants to communicate, and wants the customers to be persuaded by or to adopt her erotically emotional message? Is it possible that some dancers have no emotional message that they wish to propagate or reinforce through their dancing? Do all paid employees who interact with customers actually believe in their message? Can we say that such cases are like that of a parent who wishes to inspire mild fear in a child without feeling that particular emotion herself, based on a real desire for an agreement with the child, now or in the future, about the danger?

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239. *See supra* Part II.B (discussing the lack of rationale for the constitutional distinction between nude dancing and social dancing).

240. Speech that superficially appears to attempt to express some emotion, but which does not actually attempt to convey that emotion, perhaps because the speaker does not genuinely feel, endorse, or approve of the emotion, now or on any other occasion, and without any appropriate explanation, misses the first element of the basic emotivist paradigm. *See supra* notes 213, 220, 224 and accompanying text (discussing the first element of the basic emotivist communicative paradigm). Contrast the efforts, often successful, at shared, mutual, emotionally expressive communication in the New York City and London celebrations of Victory in Europe ("V-E") Day. *See generally* MARTIN GILBERT, THE DAY THE WAR ENDED—VICTORY IN EUROPE (1995).

Perhaps our focus on the dancer's intent to convey an emotional message on the part of the dancer is misplaced. For free speech purposes, perhaps the commercial nude dancer should be considered as the means through which the bar owner intends to convey to and persuade customers of an erotically emotional message of some sort. Once again, we can set aside as irrelevant to the message being conveyed the complications of questioning, of commanding, of hypothetical or contingent preferences, and so forth. It seems entirely possible that neither the owner nor the hired dancer believes in any relevant emotional message or wishes to persuasively propagate or reinforce such a message. Arguably, for the club owner and hired dancer, the only real intent, short or long-term, is to induce the transfer of wealth from paying customers to the owner or dancer in a way that is thought to have some advantages over other means of obtaining money.

This is not to suggest that speech motivated in substantial measure by a desire to make a profit disqualifies the speech from constitutional protection.[241] However, if in a given case it is admitted or sufficiently established that commercial barroom nude dancing is really only a way of separating customers from their money, an emotion-based account of freedom of speech can sensibly decline to extend free speech protection. In such a case, we may have drifted too far away from the basic emotional speech model.

D. Emotion-Based Commercial Advertising

What can we say, then, about purportedly emotion-based commercial advertising in general, as discussed separately above?[242] Can we assume that when Bad Frog Brewery greets us with a contemptuous, insulting, or loosely "obscene" hand gesture, the corporation is attempting to convey the emotion of contempt for persons, including prospective purchasers? Surely, in a highly fragmented post-modern market, expressing the emotion of contempt even for one's own audience can occasionally be an effective marketing strategy. However, are we also to assume that Bad Frog Brewery, whom we shall assume to be, in some capacity, capable of genuine emotion, intended that a generalized expression of contempt for persons including prospective purchasers would actually come to be shared and agreed with by many of those prospective purchasers?

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241. From the *New York Times* standpoint, a typical paid advertisement is largely intended to raise revenues and is presumably protected speech. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *see also supra* note 102 and accompanying text (quoting *Sullivan*).

242. *See supra* Part II.C (discussing the difficulty in classifying commercial emotional expressions for constitutional purposes).

Bad Frog Brewery can insist that it meets the emotivist paradigm through a hand gesture intended not in any negative sense, but as "a symbol of peace, solidarity, and good will."[243] Perhaps this is so, but can we simply assume that Bad Frog Brewery genuinely intended by its logo to reverse the standard meaning of a familiar gesture? Is it equally plausible that Bad Frog Brewery's corporate emotions actually center on neither widespread expression of contempt nor on general amity nor an implausible means of ushering in Utopia?

Just as the owner of a bar featuring commercial nude dancing may care predominantly about income rather than having customers agree to any particular emotional message, the Bad Frog Brewery may see the content of its logo, advertising, and other marketing as techniques in inspiring purchase by whatever consumer market segment it has targeted. After all, in a competitive marketplace, the company that focuses unduly on sending shared social messages, as opposed to messages inducing eventual purchases, is unlikely to survive long enough to pass along its communicative priorities.[244]

In such cases, an emotion-based approach to free speech must be skeptical of the claim that the corporate speaker wishes both to express a genuine emotion and to somehow inspire the corresponding, and thus shared, emotion within its targeted consumers. This is certainly a possible description of some advertising and marketing, but hardly all. Where the speech at issue is legally found to depart dramatically from the basic emotivist and other satisfactory emotional speech paradigms, we have correspondingly far less reason to extend constitutional protection to such speech.

Obviously, many different forms of commercial speech exist. Not all need be judged alike. Where commercial speech touts a known dangerous or ineffective product, we may conclude that the speaker is not seeking any sort of relevant congruence of emotion with the market. However, even if the commercial speaker in a dangerous product case really seeks such congruence and expresses the relevant emotions, we can still extend appropriate free speech protection while appropriately regulating or prohibiting sales. This alternative solution will often be a

243. *See supra* notes 213, 220, 224 and accompanying text (discussing the first element of the basic emotivist communicative paradigm); *supra* note 110 and accompanying text (discussing the brewery's claims).

244. This is not to suggest that in our overcrowded, fragmented, intense, post-modern marketplace, sending controversial or ultimately ambiguous messages can never be a successful marketing strategy. *See* WRIGHT, *supra* note 109, at 135–55 (discussing the role of intentionally controversial advertisements).

sensible legal response where the commercial speaker is unaware of any defects of, and genuinely "believes in," the product.

E. Workplace Sexual Harassment and Free Speech

In the commercial advertising context, it is useful to wonder whether any purported emotion is at all genuine. In contrast, we may assume that generally, the emotions at issue in the workplace sexual harassment cases discussed above[245] are genuine and often intense. Nevertheless, as we have seen in connection with our discussion of offensive epithet speech,[246] intensity of emotion, without more, does not suffice for a strong case worthy of free speech protection.[247]

Not all sexually emotional speech[248] in the workplace will inspire negative emotional reactions in the way we would expect of typical offensive epithet speech. Some sexually emotional workplace speech may be received with, at least, indifference.[249] Often, the hearer of sexually emotional speech disagrees with the content of the speech at issue. Nevertheless, on many occasions, to say that the hearer-victim disagrees with the content of the speech grossly distorts the nature and content of the harassing speech.

Some sexually oriented workplace speech is, by intention or at least predictably, an emotional imposition on the hearer-victim.[250] It is sensible to hold that workplace verbal sexual harassment often inflicts various kinds of injuries that outweigh any free speech interests at stake. Where verbal sexual harassment is concerned, as in the general

245. *See supra* Part II.D (discussing several examples of emotionally charged language involved in sexual harassment cases).

246. *See supra* Parts II.A, IV.B (discussing treatment of offensive speech in prior case law and under the emotion-based approach).

247. *See supra* Part IV.B (arguing that no constitutional protection should be afforded to offensive speech that does not involve emotional mutuality or congruity between the speaker and the listener).

248. Our focus here on sexually emotional speech is not meant in the slightest to deny that underlying explicitly sexual speech may be the assertion of and quest for various forms of workplace power, dominance, and control. *See, e.g.*, Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 4, 43 (1999).

249. The courts make some effort to distinguish welcomeness or indifference, however constrained, from unwelcomeness of sexually oriented speech in the workplace. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

250. *See, e.g.*, Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 735 (1997) (discussing how workplace speech can be burdensome because the environment compels "close and ongoing personal engagement").

offensive speech cases,[251] it would be possible to judicially engage in such an interest balancing process.[252] However, there should be an alternative to interest balancing in workplace sexual harassment cases.

Much verbal sexual harassment is emotionally charged, with the emotional content usually being obvious. The emotional reactions of the target-hearer may be strong and predictable. Nevertheless, an emotion-based theory of free speech should require more than just an emotional intent and a provoked emotional response in accordance with the models discussed above.[253] In particular, we should require that the speech amount to an attempt not merely to provoke some sort of fearful, disgusted, angry, or disappointed reaction, but some sort of appropriate emotional mutuality, congruence, consonance, or agreement. We need not leave open to penalty, however, speech that amounts to a failed, but genuine, attempt at such relevant mutuality.[254] Speech that is not, under the circumstances, reasonably interpretable as aiming at any such mutuality crucially lacks what we have referred to as the "do so as well" element of the basic emotivist model[255] and is in this sense radically, structurally deficient.

A great deal of the sexually-oriented workplace speech is predictably unpersuasive to bystanders[256] and not even plausibly intended to bring the target-hearer's emotional attitudes into any sort of consonance with those of the speaker. After all, it is not uncommon for such harassing speech to continue well after the harasser has been confronted and has promised to refrain.[257] We may reasonably assume, though, that a harasser would not continue to badger his or her own direct supervisor on any matter once the harasser has been told that the supervisor wants the matter dropped. Thus, it is fair to conclude that much harassing speech is not genuinely intended to somehow miraculously convert an obviously unwelcoming victim. No matter how reflective of the

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251. *See supra* Part II.A (discussing the Court's rationale in *Suiter* and *Dietze* and problems with those approaches).

252. *See supra* Part IV.B (illustrating an emotion-based approach to deciding *Dietze*).

253. *See supra* notes 213, 220, 224 and accompanying text (discussing the mutuality of emotion essential to the emotivist model).

254. *See supra* note 238 and accompanying text (discussing the lack of attempt at emotional mutuality in *Dietze*).

255. *See supra* notes 213, 220, 224 and accompanying text (discussing the mutuality of emotion element in the basic emotivist communicative paradigm).

256. *See* Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMMENT. 71, 98 (1996).

257. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993); Shanoff v. Ill. Dep't of Human Servs., 258 F.3d 696, 704 (7th Cir. 2001) ("[R]epeated incidents of verbal harassment that continue despite the employee's objections are indicative of a hostile environment.").

harasser's own emotions, such speech need not be constitutionally protected under our analysis.

V. CONCLUSION

We have considered emotional speech, and what can appear to be emotional speech, as well as various sorts of emotional reactions to speech. Centrally, we have focused on the scope and nature of emotions[258] and on an emotivist model of communication.[259] We have also applied our understandings to four difficult emotional speech contexts: offensive epithet and threat speech,[260] commercial nude dancing as speech,[261] purportedly emotion-based or emotion-provoking commercial advertising,[262] and emotionally-based workplace sexual harassment speech.[263]

Our general study of emotion and communication leads to the surprising conclusion that, given the remarkable breadth, subtlety, varied cognitivity, and inclusiveness of the idea of emotion, an emotion-based approach to speech, if fully developed, could actually produce a full account, albeit inevitably uncertain and controversial, of the scope and limits of freedom of speech.[264] More specifically, our model of free speech allows us to question the scope of free speech protection accorded in the four particular contexts discussed above.[265] In some commercial contexts, for example, it is reasonable to ask whether there is any genuine intent on the part of the commercial speaker to express and communicate a genuine emotional message at all. If the intent to express or even report a genuine emotion is absent, we may say that the speech in question inexcusably fails to meet the first element of the simple emotivist paradigm and is thus structurally defective.[266] If,

258. *See supra* Part III.A (discussing the historical development of views of emotions).

259. *See supra* Part III.B (discussing the basic rationale underlying the emotion-based approach to free speech).

260. *See supra* Parts II.A, IV.B (discussing the treatment of offensive speech by courts and the treatment under the emotivist approach).

261. *See supra* Parts II.B, IV.C (discussing the court's analysis and the emotivist approach to expression in commercial nude dancing).

262. *See supra* Parts II.C, IV.D (discussing the nuances of treating emotional expression in commercial advertising for free speech purposes).

263. *See supra* Parts II.D, IV.E (discussing the court's analysis of emotional expression in sexual harassment cases and applying the emotion-based approach to the same cases).

264. *See supra* Parts III.A–B (explaining basic theories of emotions and the emotivist model in the context of free speech protection).

265. *See supra* Part II (discussing free speech cases involving disorderly conduct, commercial nude dancing, commercial advertising, and workplace sexual harassment).

266. *See supra* Parts III.A–B (explaining basic theories of emotions and the emotivist model in the context of free speech protection).

additionally, the speech cannot be characterized as cognitive, as the limiting or minimalist case of emotional speech, there is ample logic in denying the commercial speech constitutional protection.

On the other hand, under our model, in some contexts, verbal offense, threat, or harassment is structurally defective for missing not the first, but the second, element of the basic emotivist paradigm[267]—the attempt to achieve or reinforce some sort of general mutuality, concord, harmony, or attunement between speaker and hearer based on relevant persuasion of the hearer.[268] Such speech, thus, need not be constitutionally protected.

An emotion-based approach to freedom of speech allows us to address all of the significant aspects of freedom of speech in a unified manner. On such a basis, we can appropriately extend or limit the scope of free speech protection[269] without unnecessarily denying that the expression at issue is speech at all and without unnecessarily engaging in interest balancing.

267. See *supra* notes 213, 220, 224 and accompanying text, along with Part III.B more generally, for a discussion of the mutuality of emotion essential in the emotivist model.

268. *See supra* Parts III.B, IV.B, IV.E (discussing examples of cases where emotional expression lacks general mutuality between speaker and hearer).

269. *See supra* Parts IV.B–E (applying an emotion-based approach to cases of offensive speech, commercial nude dancing, emotional commercial advertising, and workplace sexual harassment).