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PSYCHOSOMATICS AND THE FIRST AMENDMENT

By

EMILY MARX*

Freedom of speech and breach of the peace are traditional courtroom antagonists. Their latest bout¹ was won by "peace," to which all champions of controversial causes must now salaam²—until "freedom" regains the crown. A college student addressed a street audience for twenty minutes on a subject of major sociological significance—the inequalities suffered by negroes at the hands of the whites. "The crowd was restless and there was some pushing, shoving and milling around" as the student, in a "loud, high-pitched voice," told 75 to 100 whites and negroes that negroes "don't have equal rights and they should rise up in arms and fight for them." At least one white onlooker threatened violence unless the police interfered. "To preserve order and protect the general welfare," the police thrice asked the student to step off his soap box. When he refused, he was arrested, convicted of breach of the peace and jailed. The Supreme Court affirmed because the student was not arrested or convicted "for the making or the content of his speech" but only for "the reaction which it actually engendered." The local police, said the Court may interfere with a speaker who "passes the bounds of argument or persuasion and undertakes incitement to riot."

Unfortunately for the defeated "freedom," people who stop to listen to an outdoor speaker frequently become restless, angry, vocally demonstrative and threatening when their prejudices and preconceptions are challenged or their resentments and grievances are championed. Less than two years ago, the Supreme Court reminded the now defeated "freedom" that it best serves "its high purpose" when "it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."³ Having sought to fulfill its exalted role, freedom of speech has now been told by the umpire that the rules were changed in the interval and that it became a lawbreaker when it presented to a mixed audience as well-known a blot upon our national escutcheon as the unequal treatment of negroes by the whites.

Under the former rules, the speaker was on safe ground as to subject-matter. He was not advocating the murder of the governing class,⁴ or counselling resist-

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¹ *Feiner v. New York*, 340 U. S. 315, 317, 324, 319-21 (1951).

² Fear of subsequent punishment eliminates "freedom" from "freedom of speech." *Thornhill v. Alabama*, 310 U. S. 88, 101 (1940). Freedom of speech is at an end if the speaker is compelled to hedge and trim, to confine himself to innocuous and abstract discussion. *Thomas v. Collins*, 323 U. S. 516, 535, 536 (1945).

³ *Terminiello v. Chicago*, 337 U. S. 1, 4 (1949).

⁴ *People v. Most*, 171 N. Y. 423 (1902); *People v. Most*, 128 N. Y. 108 (1891).

ance to military service in time of war,⁵ or urging the proletariat to annihilate the bourgeoisie state by labor strikes or military force,⁶ or encouraging violation of a valid criminal law,⁷ which then constituted the tabooed fields of oratory. Only such utterances had been held sufficiently threatening to the public peace to sustain state statutes forbidding speeches thereon. His cause had long been championed by the Supreme Court. In the face of legislative findings that equal treatment of negroes would precipitate breaches of the peace and riots, it had directed that negro voters, students, travelers, property owners, litigants, workmen, be given the same privileges and opportunities as their white counterparts.⁸ A presidential committee had found the unequal treatment of the negroes by the whites "creating a kind of moral dry rot which eats away at the emotional and rational bases of democratic beliefs."⁹ Legal periodicals had warned that racial discrimination among our citizens "is the greatest single danger to our foreign relations" and could create "a threat to American security."¹⁰ Clearly his topic was one on which he might speak without fear of imputation of disloyalty. His words were not lewd, obscene, profane, libelous or insulting, which then constituted the "fighting words" not protected by the First Amendment.¹¹ And yet, because the speech engendered resentment, restlessness and a threat of violence by at least one member of the audience, the speaker is in jail. No word or act of his is being punished, the Supreme Court took pains to point out; "Feiner was stopped not because the listeners or police officers disagreed with his views but because these officers were honestly concerned with preventing a breach of the peace."¹² That phrase connotes "a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community."¹³ The speaker on negro inequality is in jail because, as the result of his utterances, there was a "troubling of the wonted calm"¹⁴ of a sizeable segment of the community in which he spoke.

⁵ *Schenck v. United States*, 249 U. S. 47, 52 (1919); *Debs v. United States*, 249 U. S. 211 (1919); *Pierce v. United States*, 252 U. S. 239 (1920).

⁶ *Gitlow v. New York*, 268 U. S. 652 (1925); *Dennis et al. v. United States*, 183 F.2d 201 (C. A. 2nd 1950), cert. granted 340 U. S. 863 (1950); *Whitney v. California*, 274 U. S. 357 (1927).

⁷ *Fox v. Washington*, 236 U. S. 273 (1915)—nudism; *Giboney v. Empire Storage Co.*, 336 U. S. 490 (1949)—restraint of trade agreements; *Hughes v. Superior Court*, 339 U. S. 460 (1950)—racial bases of employment; *Florsheim Shoe Store Co. v. Shoe Salesmen's Union*, 288 N. Y. 188 (1942)—defiance of Labor Board decision.

⁸ *Sweatt v. Painter*, 339 U. S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U. S. 637 (1950); *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Hurd v. Hodge*, 334 U. S. 24 (1948); *Henderson v. United States*, 339 U. S. 816 (1950); *Smith v. Allwright*, 321 U. S. 649 (1944); *Pierre v. Louisiana*, 306 U. S. 354 (1939); *Graham v. Brotherhood of Firemen*, 338 U. S. 232 (1949).

⁹ President's Committee on Civil Rights, *To Secure These Rights* 139 (1947).

¹⁰ 36 AM. BAR ASSN. J. 270, 273 (1950).

¹¹ *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942).

¹² *Niemotko v. Maryland*, 340 U. S. 268, 288 (1951).

¹³ *People v. Chesnick*, 302 N. Y. 58, 60 (1950). *Feiner v. New York*, note 1, was a conviction under the New York Penal Law.

¹⁴ *People v. Chesnick*, note 13, p. 61; *Feiner v. New York*, note 1, p. 331—"this record shows an unsympathetic audience and the threat of one man to haul the speaker from the stage" (Douglas, J. dissenting).

In spite of the Supreme Court's statement that Feiner was arrested and convicted only because of "the reaction" his speech engendered in his audience, there is implicit in its affirmance the notion that the convicted speaker controlled that reaction, that the same speech could have been delivered without engendering the forbidden reaction and without troubling the wonted calm of his listeners. He could not be prevented from starting his speech, on the streets or in the public parks;¹⁵ but the police officers lawfully stopped him, summarily, when they reached the determination that his audience was on the verge of violence.

Experiments now being conducted at the Cornell Medical College and the New York Hospital conclusively show that if audience reaction determines when a speaker must step from his soap box, the only speeches with a fair chance of uninterrupted delivery are those presented to a hand-picked audience or on subjects in which the general public has no particular interest.

In an endeavor to ascertain the causes of nonmicrobic diseases, the Cornell experimenters subjected diseased and healthy persons to carefully selected oratory, aimed at eliciting the entire gamut of human emotions. Concomitantly, the behavior of the internal viscera, blood vessels and skin of the patients was measured with special apparatus and photographed. Positive correlations were discovered between certain topics and abnormal functioning of these organs. In the selection of such topics, the patients were of little assistance; usually they were unaware of the effect upon their bodies of the topics selected and even denied any emotional feelings about them. The subject-matters causing visceral reactions varied with each patient; each reacted differently to discussions directed at a group. But there was always a topic to which one or more organs of the body of each reacted by hypo or hyperfunctioning. In some the stomach behaved as when receiving a poison; gastric digestion ceased, followed by distention, belching, dyspepsia, nausea and ultimately vomiting. In some the stomach acted as when digesting food; its mucous lining became engorged, motile, secreted gastric juices and continued such activity until bleeding occurred. Ultimately such abnormal behavior results in peptic ulcers.¹⁶ In some the muscles of the intestines contracted as during violent exercise and remained contracted for prolonged periods, causing constipation. In some the intestines became overactive, vascular and turgid, causing diarrhea and hemorrhages. Ultimately this results in ulcerative colitis.¹⁷ In some the heart rate, cardiac output and blood pressure elevation increased as dur-

¹⁵ *Niemotko v. Maryland*, note 12; *Kunz v. New York*, 340 U. S. 290, 293 (1951); *Saia v. New York*, 334 U. S. 558 (1948); *Schneider v. State*, 308 U. S. 147, 163 (1939)—"the streets are natural and proper places for the dissemination of information and opinion." But see *people v. Hass*, 299 N. Y. 190, 194 (1949), appeal dismissed for want of fed. question 338 U. S. 803 (1949), upholding a license requirement for park speeches "for the safety, comfort and convenience of the people."

¹⁶ *LIFE AND BODILY DISEASE*, published by the Assn. for Research in Nervous and Mental Diseases (1950), pp. 628-73; 1064| This Volume contains detailed reports prepared by 132 experts in the field, amply supporting the conclusions herein stated.

¹⁷ *Op. cit.* 679-88; 724-30; 1065.

ing violent exercise; in others, these decreased. Continuance of such abnormal behavior results in permanent heart disease, improper functioning of the kidneys and illnesses stemming from interference with the circulatory system.¹⁸ In some the clotting time and fluidity of the blood decreased, a condition causing or predisposing to coronary and cerebral thromboses.¹⁹ Some experienced breathing difficulties;²⁰ some attacks of migraine headache,²¹ asthma,²² backache,²³ hives.²⁴ In some the nose and airways became occluded, distended, turgid, with vigorous mucous secretions, and the tear ducts and eyes behaved as in weeping, causing the condition known as hay fever.²⁵ Having thus demonstrated to the experimenters that their bodies felt these verbal discussions to be as menacing and threatening as physical assaults, microbic invasions and injections of noxious chemical substances, the patients were treated with discussions of neutral topics, diversion and reassurance. This terminated the abnormal functioning of the agitated organs.²⁶ Without such medical aid, the abnormalities might have continued for days, weeks or months; they do not cease automatically with the termination of the discussions engendering the bodily reactions.

Stenographic records were kept of the patients' verbal utterances while their viscera were misbehaving. These expressed the same emotional reactions as the affected organs.²⁷ Hypofunctioning of the stomach was accompanied by words indicating that the patient, like his stomach, felt the topic under discussion to be one of which he wished to rid himself. Asthma, by words indicating that the patient, like his nose and bronchi, wanted to shut out the disturbing subject and prevent it from intruding upon him. Constipation, by words indicating that the patient, like his intestines, was resolved to hold on to the aggravating job or marriage with which he was saddled although it was not to his liking and he saw no possibility of its improvement. High blood pressure, by an expressed readiness to meet all comers and permit none to beat him to the draw. Backache, by words indicating that the patient, like his overcontracting muscles, wanted to activate his entire body, to "get out of here." Development of hives—a reaction similar to the swelling resulting from an external blow—was accompanied by words indicating that the patient felt he was being whipped and beaten. The patient

18 *Op. cit.* 799-816; 929-52; 1070-3.

19 *Op. cit.* 818-31; 1074.

20 *Op. cit.* 583-94; 1069.

21 *Op. cit.* 609-14.

22 *Op. cit.* 56-81.

23 *Op. cit.* 750-71.

24 *Op. cit.* 987-1007.

25 *Op. cit.* 545-64.

26 *Op. cit.* 666; 1090—cure does not require a removal of the cause but the substitution of new credits such as "self respect, satisfaction from activities, belief in himself, his potential and in those about him."

27 Address delivered before New York Academy of Medicine (1951) by Harold G. Wolff, the leading authority in the United States on psychosomatics under whose direction the Cornell experiments are being conducted; Unpublished results of current experiments, made available by Dr. Wolff for the purpose of this article.

with overactive intestines wanted "revenge" and threatened "to get back at" and "get even with" the person involved in the situation under discussion. Hyperfunctioning of the stomach was accompanied by the patient's expressed desire "to wring the neck" of the employer then being discussed. The patient in whom clinical discussions produced cold and moist hands—the usual accompaniment of bodily exercise as the blood vessels under the skin constrict to prevent heat loss—wanted to "strangle" or "put a knife through" the man responsible for his business difficulties. These were spontaneous utterances.²⁸ That they truly reflected the patient's emotional reaction to the clinical discussion was verified by the behavior of his internal organs. In every instance the words spoken were but an oral expression of what the internal organs were inwardly saying to medical observers trained to understand their language. The verbal utterances of retaliation, aggression, assault, mayhem were generated by the same stimuli as the angered overactive stomach, the resentful overcontracting muscles, the hostile diarrheal intestines and the outraged constricting blood vessels. The stimuli were words having some special significance to the patient, not because of their dictionary or import to the neighbors, but because they symbolized life problems and situations with which the patient had previously been confronted and been unable to cope with to his satisfaction.

Why some individuals react to such stimuli through their stomachs and others through their blood vessels, skin, intestines or muscles has not yet been discovered. But their bodies and their utterances consistently present the same type of reaction each time they meet or are reminded of the distressing problem. The reaction may vary in intensity, but not in the particular bodily organ functioning abnormally or in the purport of the concomitant verbal utterances. The individual stirred to words of contemplated violence by discussions of his unsolved difficulties will repeat such words whenever that matter, or one he associates with it, is discussed.²⁹

Efforts at typing individuals on the basis of racial stock, physical growth, intellectual development, showed that certain types are more readily disturbed by insurmountable interpersonal and societal conflicts. But the particular situation that will cause a bodily reaction and the magnitude of that reaction cannot be predicted. This depends in large measure on capacity to postpone satisfaction, withstand frustrations and deprivations, tolerate anxiety and repression, adapt to changing circumstances, endure prolonged monotony, as to which even individuals of well-defined types differ radically.³⁰ The only generalization permitted by

²⁸ Out of 127 persons examined during a current experiment, no exception occurred; each patient in whom the clinical discussion (lasting approximately one hour) produced overactive intestinal reactions simultaneously uttered words of revenge; each in whom the discussion produced cold and moist hands wanted to "strangle" or otherwise assault someone. Note 27.

²⁹ See note 27.

³⁰ *Op. cit.* 1085. Such capacities frequently change during life, so that conflicts of great importance in youth may become unimportant at maturity, and vice versa, although the external situations remain the same and still present insolvable conflicts.

the experiments was that in a community such as ours feelings of frustration, anger, humiliation, conflict and anxiety develop—*without* specific external pressure or stimulus—in individuals who feel that others are immune to or unduly protected from the blows of fortune, that their lot in life might be improved, that they are being exploited, or that the difficulties they have accepted as inevitable and imminent might be avoided if others acted differently.⁸¹ This conclusion was reached from scientific experiments conducted by 132 physicians of national reputation, although it bears a striking resemblance to the exhortations current in the early days of labor unionization and peaceful picketing.⁸² A person to whom such grievances are of overruling importance (consciously or unconsciously) will react to them, through his viscera and oral utterances, whenever the subject is discussed directly or by an associated symbol. Over the visceral reactions, he has no control. The more frequently his body is exposed to the situation it deems threatening, the more accentuated the internal reactions and concomitant oral utterances become. A person to whom such grievances are insignificant—using bodily reaction as a criterion—will show less and less visceral and verbal response to such subject.⁸³ These are the human bodies and the vocal chords to which the public speaker addresses himself.

The Cornell experiments furnish the first scientific explanation of audience reaction to causes that seem important to some of us but fail to strike a responsive spark in others. If the reaction is genuine and not stage play, the reactor has had prior contact with the cause being discussed, or with a situation to which he relates that cause. He, like the Cornell patient, harbors within him resultants of interpersonal and societal conflicts experienced during his life. These may be vague, latent hatreds, fears, resentments about his economic insecurity, the burden of his marital status, his inability to meet neighborhood standards, dissatisfaction with his place in the scheme of things. The forum topic, like the clinical topic, may be the one he associates with his personal problem and to which his body and his vocal chords react with like emotions. The stronger his feelings about his personal grievance, the stronger will be his feelings about the forum topic which, unconsciously, he makes his own.⁸⁴ The speaker acts upon him in the same manner and by almost the same method as the physician acts upon his patient. Both are exposing their auditors to a verbal barrage in the hope of evoking a strong emotional response.⁸⁵ The physician has the advantage of closer personal contact and scientific procedures for determining the situations likely to evoke these

⁸¹ *Op. cit.* 1087. . .

⁸² See cases cited in note 63, *infra*.

⁸³ *Op. cit.* 1063.

⁸⁴ Cahn, *THE SENSE OF INJUSTICE* (1949) 24.

⁸⁵ As long as the speaker confines himself to oratory, he may run the gamut of rhetorical tricks and devices to cajole his hearers into exchanging their ideals and institutions for his. *Feiner v. New York* note 1, p. 329. "The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, note 2, p. 540.

responses. The speaker must employ a trial and error method. Were he better informed, he would know that he cannot inject emotions into his audience merely by emitting them from a soap box.³⁶ He cannot arouse consternation, alarm, fear, hatred or resentment in persons to whom his cause has no prior emotional meaning. Nor can he incite such persons to violence. But he can and in all probability will rearouse such reactions in all persons who come to him—as did the patients to the Cornell experimenters—with conscious or unconscious fears, hatreds, resentments, anxieties concerning situations similar to or associated with the subject-matter of his speech. A person who had no prior contact with minorities or the problem of minorities might be interested in Feiner's speech; but if he threatened violence after less than twenty minutes on the spot, it would clearly be a faked reaction, colloquially known as heckling.

The right to speak to persons "most receptive" to the speaker's utterances and at the moment of their greatest receptivity, gives the First Amendment its only real value.³⁷ It enables the community to discover which of its economic, sociological and political institutions its members fear, hate, resent to such an extent that their entire beings are permeated with such feelings. It warned the "money changers" that their days were numbered, and resulted in the Securities Exchange Act. It warned employers and labor unions that their methods of settling disputes were obnoxious, and resulted in the Labor Relations Act. It warned the Congress and state legislatures that the 18th Amendment was a mistake, and resulted in its repeal. It warned the industrial executives that their employees resented dependence on others during sickness and senility, and resulted in Workmen's Compensation, Employers' Liability Acts and Social Security. Throughout our national existence, soap box orators, editorial writers and authors have performed for our body politic the same service the Cornell experimenters are presently rendering to their patients. Economic and societal fears, hatreds, resentments, anxieties were thereby ferreted out.³⁸ Sometimes they were cured by legislative or judicial removal of the conditions causing the fears. Sometimes they were ignored—with the same result to the ills of the community that similar non-treatment of the ills of the Cornell patients would have, i.e. the fears, hatreds and resentments are

³⁶ The repeated reference to the man who shouts "fire" at a crowd when there is no fire (Schenck v. United States, note 5 and most subsequent freedom of speech cases) as an instance of speech which the state may prohibit because it creates a clear and present danger, is not medically sound. A person who has never seen a fire or been told of its disastrous effects, would not become violent or riotous at the sound of the word "fire". The "fire" theory of freedom of speech resembles the dangerous instrumentality theory of the negligence cases, and imposes on the speaker a duty to anticipate the emotional reactions of his audience. In some sections of this country, a speech on negro inequality would create a much greater disturbance than the shout of "fire" at a crowd familiar with its dangers.

³⁷ Bridges v. California, 314 U. S. 252, 269, 278 (1941).

³⁸ Butterfield, *THE AMERICAN PAST* (1947) 71, 79, 97, 150, 271, 313, 331, 339, 362, 375, 381, 420, 423 showing the effects of: Webster's reply to Hayne, Garrison's *Liberator*, Stowe's *Uncle Tom's Cabin*, the Dred Scott decision, the cartoons of Nast and Keppler, Bryan's *Cross of Gold*, Theodore Roosevelt's *Big Stick*, Sinclair's *The Jungle*, Tarbell's *History of the Standard Oil Company*, Wilson's *Fourteen Points*, Palmer's tirade against aliens and reds, John L. Lewis, Coughlin, *Willkie's One World*, and others less well-known.

still with us.³⁹ The Cornell experiments show that even those fears—caused by conditions which the community cannot or does not wish to alter—are alleviable by changing the attitudes of the fearful or resentful persons to the economic or societal situations which disturb them. In our past, the persons who effected these legislative and judicial cures and changed attitudes were the auditors and readers in whom the speeches and writings engendered feelings of anger, resentment, alarm and the concomitant verbal and physical reactions. They formed associations in favor of or in opposition to the cause discussed, wrote letters pro and con to editors and congressmen, picketed, rebelled and rioted until the societal advances to which we now point with pride were achieved.⁴⁰ Had these auditors not been aroused to activity, we might still be living in the horse and buggy age. The First Amendment needs for its continued vitality speakers and writers sending up trial balloons to audiences in whom these speeches and writings crystallize and bring into focus longstanding and deeply felt unsolved interpersonal and societal conflicts. The Cornell experiments show that the inevitable concomitant of such speeches and writings is the "pushing, shoving and milling around" crowd and its threats of violence.⁴¹

The Cornell experiments require reexamination, also, of the conclusive presumption that violence sufficient to endanger the public peace is "imminent" when a defamatory or inflammatory word is uttered in public. Innumerable⁴² criminal offenses are committed by such utterances, all variants of "breach of the peace" for which Feiner was incarcerated. The utterer of defamatory words is punished today for the reaction his words tend to engender in others, just as he was for criminal libel in the Star Chamber proceedings of the 16th century. As in civil actions, no proof of damage from or reaction to the utterance is necessary; words traditionally libelous per se are by statute declared to be injurious to the public peace and welfare, just as they were at common law.⁴³ But behind the statutory declaration stands the heretofore unchallenged assumption that they are "fighting words," i.e. words which will cause the addressee to fight back. These are words tending to injure an individual's reputation, attributing to him traits, conduct or thoughts abhorrent to the community and likely to cause him to be shunned, avoided, hated or ridiculed by a "noticeable part" of the society in which he lives.⁴⁴ They are

³⁹ *Op. cit.* 126—Under Horace Greeley, the New York Tribune's star foreign correspondent was Karl Marx; *op. cit.* 375—Under A. Mitchell Palmer, an anti-red hysteria pervaded the land. See cases cited in notes 5, 6.

⁴⁰ *Op. cit.* note 38 which lists one petty rebellion and riot after another from the Boston Tea Party through the "public-spirited" assassination of Huey Long.

⁴¹ Unless the crowd has been pre-tested and all persons eliminated who might become physically or vocally threatening when under emotional stress.

⁴² New York's Penal Law contains twelve separate offenses committed by the use of such words, plus a "dragnet" to cover newly invented crimes or existing offenses that cannot be readily classified or defined," including the use of offensive or outrageous language not already penalized. *People v. Tylkoff*, 212 N. Y. 197, 201 (1914); *people v. Casey*, 188 Misc. 352, 357 (City Ct. Utica 1946).

⁴³ Although "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." *Bridges v. California*, note 37, p. 264.

⁴⁴ *Sweeney v. Schenectady Union Pub. Co.*, 122 F.2d 288, 290 (C. A. 2nd 1941), *affd.* 316 U. S. 642 (1942).

deemed to endanger men's main source of contentment—the approbation of their neighbors—and likely to anger the person defamed. Such anger may give rise to violence by the individual directly affected as well as by his family, friends and neighbors. Therefore the utterance of such words is a breach of the peace.

If the defamatory accusation is true, a civil action for libel will not succeed. But truth is not a defense in a criminal prosecution. Since the question there is whether the community will excuse the utterance of truths which are likely to cause a reaction of violence, the utterer must convince the court that he had "good motives" and "justifiable ends" in mind. If his motives were not "good" and his ends "justifiable," he will be punished for disturbing the public peace.⁴⁵ His criminal act is the utterance of words not an "essential part of any exposition of ideas" and "by general consent" known to cause their addressees to fight back.⁴⁶ Calling a man a communist or accusing him of having communistic sympathies and affiliations is such a 'fighting word.'⁴⁷ Others are: calling a public official a "racketeer" and "fascist,"⁴⁸ a business executive a "liar,"⁴⁹ a married woman the "latest lady love of a roue,"⁵⁰ a white man "a negro,"⁵¹ a young girl a "concert-hall singer and dancer at Coney Island,"⁵² a small-town citizen "unprincipled" and a "curse" to the community.⁵³ Hurling such epithets at groups or classes of persons is similarly a breach of the peace.⁵⁴

While there is no constitutional privilege to utter such words, the conclusive criminal effect given to them tends to discourage public discussion and criticism. Although animosity, anger and resentment may be engendered thereby, the Cornell experiments cast doubt on their tendency to cause sufficient violence to disturb the public peace. If there is in fact no such tendency, the community is depriving itself of the socially desirable spreading of truth and free criticism of all matters of public interest.⁵⁵ For this reason, the Supreme Court has repeatedly held that,

⁴⁵ e.g. N. Y. Penal Law, sec. 1342. In *New York*, by constitutional provision, the jury determines the facts and the law in a prosecution for libel. *People v. Sherlock*, 166 N. Y. 180, 186 (1901).

⁴⁶ *Chaplinsky v. New Hampshire*, note 11, p. 572, 573. *Cf. King v. Philipps*, 6 East 464, 102 Reprints 1365 (1805)—letter reading: "You have behaved like a blackguard. I shall expect to hear from you on the subject and will punctually attend to any appointment you may think proper to make," held to incite addressee to challenge sender to fight a duel and therefore a breach of the peace.

⁴⁷ *Mencher v. Chesley*, 297 N. Y. 94 (1947); *People v. Gunther*, 193 Misc. 838 (Mag. Ct. N. Y. 1948); *Kaminsky v. Am. Newspapers, Inc.*, 283 N. Y. 748 (1940). Words held libelous *per se* in civil suits would also be criminally libelous.

⁴⁸ *Chaplinsky v. New Hampshire*, note 11.

⁴⁹ *People v. Moore*, 116 Misc. 525, 528 (Gen. Sess. N. Y. 1921).

⁵⁰ *Sydney v. McFadden Newspaper Pub. Corp.*, 242 N. Y. 208 (1926).

⁵¹ *Upton v. Times Democrat*, 104 La. 141 (1900); *Flood v. News and Courier Co.*, 71 So. Car. 112 (1905).

⁵² *Gates v. New York Recorder Co.*, 155 N. Y. 228 (1898).

⁵³ *Abell v. Cornwall Industrial Corp.*, 241 N. Y. 327 (1925).

⁵⁴ *State v. Beauharnais*, Ill. , 19 N. W. 2383 (1951); *Abrams v. United States*, 250 U. S. 616, 617 (1919). *Contra: People v. Edmondson*, 168 Misc. 142, 153-4 (Gen. Sess. N. Y. 1938).

⁵⁵ A public retraction will undo the conclusively presumed damage of the libel *per se* in California. *Werner v. So. Calif. Assd. Newspapers*, 35 Calif. 2d 121 (1950).

while use of intemperate language may be in poor taste, it does not deprive the user of the "prized American privilege to speak one's mind."⁶⁶ There should be more substantial proof than the presently accepted historical presumption that the so-called "fighting words" tend to cause a serious public disturbance, before free discussion is curtailed or punished when such words are used. The Cornell experiments indicate that there is no such tendency, except on those rare occasions when the "fighting words" are addressed to persons already in a fighting mood and ready to conflagrate before the criminally libelous words were uttered.

That courts have their doubts on the imminence of violence as a result of the utterance of "fighting words" is evident whenever they agree with the libeler that a social evil exists which the public should recognize under its true colors.⁶⁷ Or when they believe that the community will suffer from the suppression or discouragement of the speaker.⁶⁸ When he has a message the courts wish the people to hear, the "imminent violence" becomes trivial or nonexistent. So obvious is this judicial approach in courtroom conflicts between breach of the peace and freedom of speech, that law students premise their reviews of the pertinent cases on the presumption that the First Amendment excludes "utterances which have no redeeming social importance" and those which infringe "more important interests."⁶⁹ Fortunately for "freedom," there has been no such stratification of causes or interests—which is the hallmark of the totalitarian state—but recognition that the "imminence" of violence is usually determined by the subjective emotional reactions of legislator and judge.⁶⁰

Peaceful secondary picketing—the workingman's utterance⁶¹ of the accusation that the open-shop employer is unfair to labor—was outlawed by the legislatures of the industrial states because shopkeepers, pedestrians and customers were annoyed, angered and resentful of the picketers and the signs they carried on the streets. But for police interference, violence and riot would have occurred.⁶² The Supreme Court held such statutes unconstitutional⁶³ because "the danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent," or because such picketing presented "no clear and present danger of substantive evils."⁶⁴ A group of Jehovah's Witness-

⁶⁶ *Bridges v. California*, note 37, pp. 263, 270; *Williamson v. United States*, 184 F.2d 280, 283 (C. A. 2d 1950, Jackson, C. J.).

⁶⁷ *Kline v. McBride and Co., Inc.*, 170 Misc. 170 974, 980 (Sup. Ct. N. Y. 1939).

⁶⁸ *Near v. Minnesota*, 283, U. S. 697, 722, 728 (1931).

⁶⁹ 51 *COL. L. REV.* 98 (1951).

⁶⁰ The "likelihood" of violence is "a question of proximity and degree that cannot be completely captured in a formula." *Bridges v. California*, note 37, p. 261.

⁶¹ *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 2897, 293 (1941). Today picketing is deemed a "hybrid"—action, of which communication is but one phase. *Teamsters Union v. Hanke*, 339 U. S. 470, 474 (1950); *Hughes v. Superior Court*, note 7, p. 464-5; *Building Service Union v. Gazzam*, 339 U. S. 532, 537 (1950).

⁶² *People v. Nixon*, 248 N. Y. 182, 188 (1928); *People v. Kaufman*, 165 Misc. 670 (Mag. Ct. N. Y. 1937); *People v. Bellows*, 281 N. Y. 67 (1939).

⁶³ *A. F. of L. v. Swing*, 312 U. S. 321, 325 (1941); *People v. Muller*, 286 N. Y. 281, 284 (1941); *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, note 61, p. 296.

⁶⁴ *Thornhill v. Alabama*, note 2, p. 106; *Carlson v. California*, 310 U. S. 106, 113 (1940).

es played a victrola record on the street attacking all organized religious systems, particularly the Catholic Church. A state statute requiring a license for such activities was held unconstitutional because "although the contents of the record not unnaturally aroused animosity, it raised no such clear and present menace to public peace and order" as to render the communicant liable to conviction for breach of the peace.⁶⁵ Newspaper editors were held in contempt of court because of intemperate and defamatory editorials deemed by state courts to anger and confuse the trial judges, thus tending to interfere with the fair administration of justice. The Supreme Court found that the danger of such interference "has not the clearness and immediacy necessary to close the door of permissible public comment;"⁶⁶ it failed "to see how the editorial could in any realistic sense create an imminent and serious threat."⁶⁷ Refusal to salute the American flag and the public display of the Soviet flag—both being speech by symbol—were declared by state legislatures to be criminal acts inciting or tending to incite violence. The Supreme Court could find neither a tendency to incite nor incitement in the condemned behavior.⁶⁸ The socialistic utterances that *were* outlawed because so obviously fraught with power to generate violence and so obviously menacing to the public peace, seemed to the Supreme Court's great dissenters mere trivialities which "it is not conceivable that any man of ordinary intelligence and normal judgment" would take seriously,⁶⁹ "poor and puny anonymities" which have to be "squeezed to turn the color of legal litmus paper."⁷⁰ The anarchistic editorial held clearly dangerous to the public peace and safety because McKinley was assassinated on the day of its publication, proved to be a reprint of one published some fifty years previously in an adjoining state.⁷¹ The communistic exhortations of the negroes in the "black belt," held by the state courts to be incitement to insurrection, seemed to the Supreme Court "innocent" documents, "consistent with peaceful action for a change in the laws."⁷²

The scientific facts disclosed by the Cornell experiments require that breach of the peace, whether predicated on libelous, "fighting words" or "imminence of violence," be unshackled from the emotional reactions of the final governmental or judicial authority. Feiner's conviction was supported by the trial court's finding that the police officers "were fully justified in *feeling* that a situation was developing which could very, very easily result in a serious disorder."⁷³ The Supreme Court similarly has relied on *its* feelings to decide the recurring conflicts between

⁶⁵ *Cantwell v. Conn.*, 310 U. S. 296, 311 (1940).

⁶⁶ *Pennekamp v. Florida*, 328 U. S. 331, 350 (1946); *Bridges v. California*, note 37.

⁶⁷ *Craig v. Harney*, 331 U. S. 367, 378 (1947).

⁶⁸ *Taylor v. Mississippi*, 319 U. S. 583 (1943); *Board of Education v. Barnett*, 319 U. S. 624 (1943); *Stromberg v. California*, 283 U. S. 359 (1931).

⁶⁹ *Pierce v. United States*, note 5, p. 272.

⁷⁰ *Abrams v. United States*, note 54, p. 629.

⁷¹ *People v. Most*, note 4 (1st case), p. 425.

⁷² *Herndon v. State*, 178 Ga. 832, 846, 860-5 (1934), appeal dismissed for lack of jur. 295 U. S. 441 (1935); *Herndon v. Lowry*, 301 U. S. 252, 260 (1937).

⁷³ *Niemotko v. Maryland*, note 12.

breach of the peace and freedom of speech. The Cornell experiments show that it is not the feelings of the police or the trial court or the appellate court or even the speaker that determine whether the public peace is actually being endangered.. That question is determined by the intensity of feelings of the addressees or audience. The more vital the subject of discussion has been and still is to these listeners, the more intense their feelings will be. Breach of the peace, in the light of the experiments, is the exposure of an audience to discussions of matters in which they already have a direct or associated vital interest. What the police, trial court and appellate court "feel," is the intensity of that interest and whether it is sympathetic or antagonistic. The speaker who elicits audible expressions of his audience's intensity of feeling does not differ much from the clinician to whose discussions the Cornell patients reacted. The medical experimenters have demonstrated how vital their discussions are to the physical and mental welfare of their patients.⁷⁴ Our history has demonstrated how important public discussion of sociological and political controversies is to the economic and societal welfare of our citizens. The methods used by the physician to relieve his patients' fears, resentments and hatreds are much the same as those used by the soap box orator. Jail-ing the orator has no greater curative effect on his audience's emotional reactions to societal conflicts than incarcerating the physician would have on the psychosomatic ills of his patients.

The punishment of the utterer of breach of the peace speeches and words does not solve the problem faced by a peace-loving community, i.e. what to do with the persons so affected by insuperable family, employment or societal problems that public allusion thereto moves their viscera and their tongues to reactions verging on violence. Our ancestors made presidents, governors and legislators of them.⁷⁵ The Cornell experiments show they can be cured of their sensitivity to fighting words and controversial causes only by eliminating the social or economic situations they resent or fear, or by changing their attitudes toward them. Which brings us back to the soundness of the "fundamental right of free men to strive for better conditions through new legislation and new institutions" and to secure them "by argument to fellow citizens,"⁷⁶ even if the stabler members of the community are thereby exposed to the spirited vocalizations bordering on violence⁷⁷ (which they, in turn, resent or fear). The therapeutic value of this procedure has now been demonstrated medically, as well as politically. When the resentments of an agitated audience cannot be eliminated by argument, and there is in fact a "clear and present danger of riot, disorder, interference with traffic upon the public

⁷⁴ *Op. cit.* notes 16, 26. Illnesses of psychosomatic origin are cured by substituting new personal and social values, new life goals and different attitudes toward the problems found responsible for the diseased condition of the viscera.

⁷⁵ Meigs, *THE VIOLENT MEN* (1950).

⁷⁶ *Pierce v. United States*, note 5, p. 273.

⁷⁷ *Whitney v. Colifornia*, note 6, p. 378—"The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State."

streets, or other immediate threat to public safety, peace, or order,"⁷⁸ the community best serves itself by punishing the threatening auditors—not for their innate resentments but for failing to modulate and control their oral expressions of them.⁷⁹ Thereby it retains for all its members "freedom to seek, receive and impart information and ideas through any media and regardless of frontiers,"⁸⁰ even when a considerable number of them are reacting to the tensions of the day with fear and resentment of all who threaten what remains of yesterday's status quo.

⁷⁸ *Cantwell v. Conn.*, note 65, p. 308.

⁷⁹ Black, J. dissenting in *Feiner v. New York*, note 1, p. 327, thought the police were under a duty to "protect Feiner's right to talk, even to the extent of arresting the man who threatened to interfere;" Frankfurter, J., concurring with the Court (*Niemotko v. Maryland*, note 12, p. 289), countered: "it is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker."

⁸⁰ UNITED NATIONS DECLARATION OF HUMAN RIGHTS, art. 19 (1949).