Memorandum To Members Of The President's
Committee On Civil Rights

on

GROUP DEFAMATION AND CIVIL RIGHTS

from

ROBERT K. CARR, Executive Secretary

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With the assistance of Nancy Wechsler and Rachel Sady

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MEMORANDUM June 5, 1947

TO: Members of the President's Committee on Civil Rights

FROM: Robert K. Carr, Executive Secretary

SUBJECT: "Group Defamation and Civil Rights" Memorandum by Milton D. Stewart, Director of Research (with the assistance of Nancy Wechsler and Rachel Sady)

This memorandum is somewhat different in character and intent from the others which the Staff has prepared. The first part of it is an analysis of proposals presented to the Committee in favor of group libel laws; the second section deals with an original proposal by the Staff for an alternative way of dealing with group defamation. I think it is of sufficient merit to warrant the consideration of the Committee (especially those members who are on Subcommittee No. 3). I am also sending it to six or seven specialists in the field for their comments.

I would like to emphasize the tentative nature of the proposal, and to urge members of the Committee to suggest any modifications which seem to them to be desirable.

Group Defamation and Civil Rights

Introduction

The literature on group defamation which the Staff has examined is murky, confused and inadequate. There is no classic statement in the field which does justice to all of the sociolegal aspects of the problem. Whether minority group spokesmen are for or against group libel statutes depends on whether they believe the right to sue or prosecute those who "libel" their groups will help them in their quest for tolerance. Traditional civil libertarians bewail the evil of spreading race and religious hatred, but fear the risk of limiting freedom of speech with any inhibition of hate propaganda. Many sociologists are impatient with this position which they claim reflects failure to recognize an impending disaster to a free society — the intensifications of social cleavages and hostilities to a point where group tensions often erupt into violence.

This memorandum is an attempt to reformulate the problem, review the present situation, marshal the arguments for and against group libel laws, and to propose an alternative way of handling group defamation. This last is based on an application of a broad principle, eloquently elaborated by Harold D. Lasswell, Professor of Law at Yale University.* The specific proposal made here is the responsibility of the present writer.

A. The Crux of the Problem

Essentially, the proposal for laws enabling groups to sue those who "libel" them reflects a clash of three civil rights ("rights" are used here in the non-technical sense). The first is the freedom of public expression which has traditionally been held to cover criticism of the motives, goals and activities of all the groups in the community -- without fear of retribution of any kind. A second civil right involved here is the freedom of

* (cf. his contribution to Ickes, H.L., Freedom of the Press Today.

individuals who comprise the audience in the communications process to form intelligent, enlightened judgments on the basis of as many facts and opinions as can reasonably be made available. (This civil right is one which represents the ultimate justification for freedom of speech). Finally, a variety of groups in a community argue that they have a civil right to be free from defamation. The key question is which of these civil rights is to take priority over the others, when they conflict. Protagonists of group libel laws hold that defense of the right to defame as part of freedom of speech and press is an unwarrantable infringement of the right of groups not to be defamed.

The role of the second civil right -- the right of the citizen to be well informed and to make enlightened judgments -- is what is most often left unclear by those who comment on these proposals. Yet it is this right which may well take precedence over the other two. The unqualified right to freedom of speech is supposed to result <u>in the long run</u>, and on the basis of a clash of many interpretations and points of view, in the emergence of truth. This assumption also takes care of the requirements of groups that they be fairly presented and judged. If truth emerges in the long run, then the facts and opinions about them which are broadcast will be truthful, valid ones. Thus, the long-standing view of democratic theorists has been that the scrupulous maintenance of the freedom of the communicator to criticize will ultimately safeguard the other two civil rights.

B. <u>The Argument for Anti-Defamation Laws</u>

Those who argue for anti-defamation laws say, in effect, that "The American society cannot run the risk of widespread group defamation. We are told that in time, history, relying on a free market place of opinion, will vindicate the reputations of defamed minority groups. Such vindication will be bitter indeed

if it comes after the groups -- and the fabric of democracy -- have been destroyed by their defamers." In support of this point of view several factual arguments may be adduced. Group tensions in our time, for a variety of reasons, are probably more serious and widespread than ever before. Racial and religious minority groups whose forebears had low status as immigrants or slaves have reached the point where they are demanding full social equality for themselves and their children. The general level of psychological tension in America, as elsewhere in the world, is high as a result of deep socio-economic crises, that hate propaganda has a greater chance of success than before. We have ever present in our minds the successful manipulation of group hatreds by the Nazis to achieve the death of German democracy and their own rise to absolute power. This is important because it has raised serious doubts in the minds of those who were persuaded that mass irrationality was no longer a serious social problem in the Western world. Civil rights, those who urge action argue, cannot flourish when sowers of hatred are free to plant seeds of prejudice.

Then there are the obvious imperfections in American communications process. Giant media of communication cover the land. The concentration of control of the great networks of newspapers, radio stations and movie theaters is on the increase. There is an apparent inequality of access to the forming of public opinion, which has resulted in the loss of faith in the possibility of a free and legitimate competition of ideas. The clash of conflicting opinions is a frustrating chimera when one of the opinions is shouted in newspapers which reach ten million readers, while the others must whisper to tens of hundreds through leaflets. Finally, the wide dispersion of printing presses has made it possible for hate mongers to operate <u>anonymously</u> in the crevices of the opinion-forming mechanism. This is important because the democratic theory of decision-making postulates the right of the citizen to make up his mind with full information about the competence and self interest of those who try to persuade him.

These are the factors to which proponents of group libel point. In effect they argue that we can no longer rely on imperfect competition of ideas to control the malicious falsehoods of hate mongers. A new technique of control is necessary. This control, an explicitly legal one, they propose to create on the basis of the analagous laws which protect the individual from libel.

C. The Analogy of Individual Libel

The scope of the existing law of defamation of individuals and of well identified groups (such as corporations) has been briefly summarized as follows: (Professor Jerome Michael, Report to the General Jewish Council)

> "A civil action of libel is maintainable for the publication of any statement that tends to expose a person to hatred, contempt, ridicule or obloquy. The plaintiff need prove merely the publication of the statement by the defendant, and the fact that it refers to him. The malice which is said to be a necessary element of the action is inferred from the fact that the published statement does so expose the plaintiff. The plaintiff need not prove the statement is false, but the defendant may prove its truth, and in almost all jurisdictions, truth is a complete defense.
>
> "In addition to the defense of truth, the courts have from an early date allowed the defendant a certain freedom in making statements that constitute comments upon matters of public concern, i.e. in literary criticism and the discussion of the public acts of government officials and candidates for public office. In most states, this 'privilege of fair comment' is narrowly restricted. It is simply a freedom to comment on and draw conclusions from facts set forth in the same publication, if those facts are true. In a few states, the privilege is broader, and is, in effect, a privilege to make false statements of fact on public matters if reasonably believed to be true. In all states,

however, this privilege obtains only if the publication is made without 'actual malice', i.e. if it was motivated by a genuine concern about public affairs rather than by ill-will against the plaintiff.

"Besides giving rise to civil responsibility, libels were punishable criminally at common law, and are now so punishable by the states. In most states, the crime is now defined by statute, but in a few jurisdictions the common law offense still exists. In all, the definition and incidents of the crime are based very largely on common law conceptions. The original justification of criminal prosecution for libel was the tendency of defamatory publications to create a breach of the peace by arousing the person who was defamed and the members of his family to acts of vengeance. An actual breach of the peace was never a necessary element of the crime, however, and at the present time, in all but a few states, the publication need not even tend to create such a breach.

"In both its civil and criminal aspects, the law of libel has been concerned with statements damaging to individual reputations. However, there has been a partial adaptation of the law to make it apply to statements about groups of people. When the group defamed is a recognized legal entity, such as a corporation or an unincorporated association, the statements may give rise to both civil and criminal liability. The same is true of a statement about a group of individuals which is of such a nature as to leave no doubt that the plaintiff or complainant was included in the attack. If the group defamed consists of an indefinite number of individuals, and the statements cannot be shown to refer to any particular member of the group, no one of them may maintain a civil action. In such a case, there is some authority for the maintenance of a criminal prosecution. The cases are too few, however, to justify a prediction of what the courts would do in more than a few jurisdictions. The difficulty is enhanced by the fact that in most of the cases that might be cited in support of such prosecutions, the defendant was charged with a libel upon named individuals as well as upon all members of the group."

Group libel usually refers to defamation of peoples belonging to racial, religious and nationality groups. Such statements as the following are usually considered to be libelous of groups:

> "The Irish are to blame for political corruption in our large cities."
>
> "There is proof that the New Deal from its inception has been naught but the political penetration of predominately megalomaniacal Israelites."
>
> "The priests got as many people as possible killed during the war to multiply the number of masses."
>
> "Above all, the objective of the Negro is to rule the white, especially white women."
>
> "There never has been such a thing as a Catholic democrat. The whole history of the church proves it to be anti-democratic."

Four group libel statutes have been adopted by states or provinces on the North American continent. There is a law in the province of Manitoba which provides that:

> "...the publication of a libel against a race or religious creed likely to expose persons belonging to the race or professing the religious creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, shall entitle a person belonging to the race or professing the religious creed to sue for an injunction to prevent the...circulation of the libel...."

Action can be brought by only one representative of the libeled group, and can be against the owner of the publication and the circulator of the libel, as well as the author.

In the United States, Illinois for a considerable time has had, but rarely used, a group libel law against the exhibition of any lithograph, photoplay or drama which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, or any race, color,

creed or religion" exposing such citizens to "contempt, derision, or obloquy," or contributing to breach of the peace or riots. Massachusetts, in 1942 amended its criminal libel law to cover speeches inciting religious and racial hatred. According to the American Civil Liberties Union, this statute has been completely unworkable.

In 1935 New Jersey adopted legislation making guilty of misdemeanor:

> "any person who shall in the presence of two or more persons, in any language, make or utter any speech, statement or declaration, which in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or groups of persons residing in this state by reason of race, color, religion, or manner of worship...."

Owners and managers of buildings where these speeches were given were held liable, as well as the actual speakers. This statute was aimed at the German American Bund and its anti-Semitic propaganda, but a case against the Bund did not get to court until 1939 (although earlier it was used unsuccessfully against Jehovah's Witnesses for anti-Catholic statements). The Bundists were convicted but appealed, with the assistance of the American Civil Liberties Union, and the Supreme Court of New Jersey ruled the law unconstitutional. The Court felt that it should not be left to a jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said.

The Rhode Island legislature passed a similar bill in 1944, but the governor vetoed it and the veto was sustained. Several bills have been introduced in the New York legislature extending criminal libel to groups, but they have not been reported out of committee. The Dickstein bill introduced in Congress was designed to give the

Postmaster General power to bar from the mails any matter intended "to cause racial or religious hatred, bigotry or intolerance." Recent efforts have also been made to get group libel covered by city ordinances, and a few cities have done so although there is no record of successful prosecution.

D. Existing Laws

Thus, experience with these experimental group libel laws hardly warrants any enthusiasm for such statutes. On the other hand, there is at present very little legal basis for prosecuting those who spread hate propaganda. Individual libel laws may be, in some cases, applicable. But the problem is so complex, and varies so from state to state, that successful prosecutions, either civil or criminal, are extremely dubious. In private actions the truth of the statements is an issue in most cases. Moreover, a prosecutor or a plaintiff needs to establish malice or ill will on the part of the defendant. If the result is to be sizeable damages award or any reasonable punishment, this is an absolute necessity. The difficulty of establishing malice in libel cases and overcoming the defenses of truth and free and fair comment on public matters make the individual libel laws almost certainly useless for prosecutions of those who libel groups.

In opposing any group libel laws the American Civil Liberties Union argues that in extreme cases it is possible to prosecute those who libel groups under existing "public safety" statutes. They point to common state and local ordinances against incitement to riot as examples. Such prosecutions might conceivably be used in some cases.

The Union says:

> "Where speech and publications incite to violence or present a 'clear and present danger' of so doing, they can be attacked under existing laws controlling disorderly conduct, breaches of the peace, incitements to violence and the like."

It must be recognized that this is an extremely limited mechanism and proponents of group libel laws argue that it is in effect bringing a fire extinguisher into play after the house has burned down. In his appearance before the President's Committee, Mr. Will Maslow, of the American Jewish Congress argued:

> "We are concerned with organized efforts to spread anti-Semitism and other group hatreds, not merely because such defamation endangers the security of a particular minority group, but because democracy itself is imperilled by such attacks upon it. We learned from bitter experience in Germany that Fascist groups begin their assault upon democracy by exploiting latent prejudices against the Jews and other minorities. Democrats in Europe wrung their hands while political extremists made a mockery of free speech.
>
> "We can no longer solve these problems by a hackneyed repetition of the clear and present danger rule. When the danger becomes so clear and present that the courts see it, it will be too late for governmental measures. Precisely because organized defamation is for the moment quiescent we can afford to take time to rethink the problem of how to allow complete unfettered discussion of public issues and at the same time prevent the wilful spread of group libels. Now in its incipient stage, the germ can be killed by a strong antiseptic. Later on amputation may be necessary."

E. Group Libel: Civil Suits

It is clear that no existing statutes can be relied upon to mediate among, and adequately protect all three of the civil rights cited above -- the right to free expression, the right to form enlightened judgments based on the truth, and the right of groups to be free from defamation. Those who would go further with some kinds of laws against group defamation are seldom clear about their goals. One series of proposals follows the analogy of individual libel very scrupulously. The purpose seems to be to protect the individual members of a defamed group, by enabling them to sue for damages.

Few competent students seriously propose laws permitting private suits. The objections are:

1. The purposive emphasis is wrong; the goal should be to protect the public against dangerous lies, and only secondarily, the members of the defamed groups.

2. Private suitors are often irresponsible; they may imagine damage where there is none; the threat of unjustified, expensive suits would probably result in a serious if indirect interference with the right of free comment.

3. If every member of the defamed group be permitted to bring a suit, there would be an impossible flood of expensive court battles.

4. It would be extremely difficult, if not impossible to measure damages, either to the individual plaintiff, or to the members of the group. There would be no way to assess actual loss because of the defamatory comment.

5. It is impossible, at least, that such laws would not back-fire since it is impossible to see how racketeering members of minority groups could be kept from trying to cash in on such actions.

6. Still other arguments, applicable to civil suits to recover damages because of group defamation are also applicable to criminal prosecutions. These will be considered below.

F. Group Libel: Criminal Prosecutions

A somewhat more impressive case can be made for putting prosecutions for group defamation in the hands of state or federal attorneys. Here too, however, obviously impossible proposals are advanced. There is now pending before the House of Representatives, a bill introduced by Mr. Buckley of New York (H.R. 2848): "To suppress the evil of anti-Semitism and the hatred of members of any race because of race, creed or color." It is almost certainly impossible that Congress will ever adopt this proposal. If it should, the Supreme Court would almost certainly strike it down as a clear violation of the First Amendment. The bill's first section points to the evil of spreading bigotry, and establishes the policy of preventing it. As constitutional authority it cites Congress' "powers to regulate commerce among the several States and with foreign nations."

The succeeding sections would make it unlawful to distribute hate propaganda. It defines the illegal material as "any book, pamphlet, picture, paper, letter, writing, print or other publication which exposes the Jews, or any other group as a nation, people or any substantial portion of them to hatred, contempt, ridicule, or obloquy, or which causes or tends to cause them to be shunned or avoided, or which has a tendency to injure them in their occupations, employment, or other economic activities," etc...

It would be illegal to mail such material, import it from abroad, or ship it by common carrier. It would be illegal to

receive such material "with intent to sell, distribute, circulate or exhibit the same to others..." Punishment is provided for any persons violating these provisions, or conspiring or acting in concert with others to violate them. For each offense, a fine up to $5,000 or a prison term up to five years is provided.

This is, of course, an extreme proposal. It is not actually a projection from the pattern of individual libel law. It is an explicit limitation of freedom of expression. What it does, is to put the propaganda of bigots in the same non-mailable class with obscene materials, gambling and lottery offers, and mailed communications intended to defraud. There is this to be said for it: the difficulties of definition which attach to more limited proposals, as well as complications of determining truth or intent or damage "fall away." They fall away because of the breadth of the language. That same scope makes it almost certainly a perilous-jack-in-the-box, full of possible extensions.

A proposal more closely modelled along the lines of individual libel laws is the following (by Professor Michael):

"No person shall knowingly deposit or cause to be deposited in the mails, or shall knowingly take from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, any malicious publication by writing, printing, picture, effigy or other representation, which tends to expose persons designated, identified or characterized therein by race or religion, any of whom reside in the United States, to hatred, contempt, ridicule or obloquy, or tends to cause such persons to be shunned or avoided or to be injured in their business or occupation. Any publication having any such tendency shall

be deemed to be malicious if it was animated by ill-will against the racial or religious group referred to therein. No person shall be convicted under this section (1) if the publication, although malicious, was true, or (2) if the publication, although false and made without reasonable grounds for believing it to be true, was honestly believed by him to be true, and was not malicious. The burden of coming forward with evidence upon the issues of truth, belief, reasonableness of belief, and malice shall be upon the defendant, but the entire case shall be upon the prosecution. Any person convicted of violating this section shall be fined not more than one thousand dollars ($1,000) or imprisoned not more than one (1) year, or both."

This bill is obviously drawn with a keen desire to guarantee the widest possible latitude for information and comment on controversial matters relating to religious and racial groups. It may well be that no broader statute could be upheld under the Constitution. Yet the limited applicability of this proposal, and the difficulties of well-considered, effective enforcement bring out sharply the slipperiness of the legal ground which any group libel law must traverse. The following troublesome problems confound this and any other group libel statute, to greater or lesser degree:

1. Fact or opinion?

One ticklish decision in this area is whether particular statements report facts or state opinions. It is important since the succeeding questions of "truth" and "intent" can be applied only when this determination has been made. Are these statements, for example, factual, opinionated, or both: "The Protestant Churches are creating chaos in Latin America by their proselytizing:" "The

Catholic Church supports Franco, a Fascist." "The difference between the white and black races is proved by the higher crime rate among Negroes." "Jehovah's Witnesses are trying to stir up religious hatred, and are therefore un-American." "The New Deal is the creature of the big-city Catholics and Jews who now run it."

2. Truth and a reasonable belief in truth

If it were held that the foregoing statements were factual assertions, then their truth or falsity would become an issue. If they are false, the problem shifts to whether a man who makes them is "reasonably" convinced of their truth. If they are true of some members of the groups discussed, but not others are they still defamatory? Are unfavorable statements which may be true of groups historically, but are untrue now, still defamatory?

3. Actual defamation?

Are the foregoing statements actually defamatory of the groups mentioned? Some might be, some might not. It would be extremely difficult to set up clear and consistently usable standards of what "tends to expose to contempt, hatred, ridicule, etc." Suppose a man publishes an accurate list of Jews convicted of swindling, Irishmen convicted of draft-dodging, Mexicans convicted of vagrancy, and Negroes convicted of rape. Are the groups libelled, (as well as the individuals?) What of statements like: "Hillman, Rosenman, Morgenthau, Baruch and Lillienthal have been running the country for years and they and their ilk must be run out of the government."

4. Danger of self-defeating laws

Many opponents of such laws take the view that the evil they are designed to deal with will be aggravated by the establishment of court proceedings to litigate the truth or falsity of statements about racial or religious groups. Thus the American Jewish Committee argued before this Committee:

> "If truth or reasonable belief in truth are permitted as defenses, and they should be, a group libel law would give every bigot and agitator a public forum from which he could propagate this bigotry. A prosecution for group libel would inevitably give far wider circulation to the libel than its original utterance."

Professor Chafee suggests that such laws may make religious issue in a community where none existed before. Thus the New Jersey law which led to the prosecution of Jehovah's Witnesses made Catholicism an issue where it had not been one before. A more general charge of irrelevance is laid against group libel proposals by the American Civil Liberties Union:

> "The way to combat prejudice against races and religions is in the open where intolerance and bigotry can be attacked, exposed and destroyed by the common sense of the overwhelming majority of the people. The causes of prejudice lie in social and economic conditions which demand reforms. Legal penalties on mere expressions of racial and religious prejudice are bound to fail in the long run, just as have all restraints on freedom of racial propaganda. Penalties on acts of discrimination are entirely justified."

5. The Danger of Extension

In addition to the general fear of extension of group libel laws to other groups than those for whose protection they are designed, a more specified one has been expressed. It is argued that even if the legislation is narrowly drawn, members of minority

groups will seek to have it enforced beyond its proper, intended scope. In other words, they will try to choke off discussion of their political policies and activities, which are fair game for public comment. Thus some Protestants and Catholics might try to ban or punish criticism of their recruiting activities in one or another part of the world. Or they might charge that attacks on their birth control or parochial school policies represent bigotry. Some Jews might try to still criticism of various Zionist groups.

It is further argued that group libel laws will then create more hatred for the minority groups because of their ability to stifle legitimate public scrutiny of themselves. There might ensue a dangerous timidity in participants in the open forum, a reluctance to risk discussing subjects which they ought to be free to evaluate.

G. An Alternative

To sum up, the constitutionality of a broad group libel or group defamation law is dubious; the utility of a narrow group libel law is questionable. And above all, it is a needlessly dangerous, probably roundabout self-defeating way of getting at the real dilemma: the conflict of the three civil rights suggested at the outset. That dilemma may be considered from another standpoint. What is the real goal of efforts to control propagandistic attacks on religious, racial or national minorities? Why is it that there is sentiment for some kind of restraining action to expressions on these matters as against others? The answer is that there is an implicit fear that in a time of crisis, the citizens will not wait for the balancing process of debate to work itself out; instead they will be led to dangerous belief and destructive anti-democratic action because of the broad diffusion of bigotry.

The "argument for anti-defamation laws" offered above may be compelling but the record of restrictive punitive action presents little basis for confidence in its success, aside from questions of its moral appropriateness.

In terms of the goal of action, the trouble with group libel bans is that they try to punish where they ought to protect; they constrain where they ought to expand. The hierachy of civil rights on which they are based places the defamed group first. It leaves the enlightened public opinion only indirectly and inadequately strengthened. It places a possibly unconstitutional, and certainly unappealing limitation on freedom of expression.

An alternative structure might place the freedom of the citizen to be exposed to a clash of facts and interpretations at the top of the list. This means not limiting, by the threat of suit or the threat of

censorship the freedom to criticize -- even the freedom to defame. And here the danger becomes clear: the danger is that in our imperfectly competitive forum of opinion, the citizen may be exposed to a constant stream of evil misinformation and malicious libel without the benefit of contrary facts or opinions.

It is not enough to say that the contrary facts are available somewhere and at some time. Subscribers to the Cross and the Flag almost certainly do not read the Nation; those who get the Protocols of Zion in the mail will not read the Report of the American Historical Association, exposing it as a fraud. Because of well known facts about the self-selection and social stratification of audiences, it is foolhardy to rely on any automatic opinion clash.

Why not guarantee contrary facts and opinions of those exposed to bigotry?

A statement of this problem in the international sphere by Assistant Secretary of State William Benton is helpful:

> "But do you newsmen agree that if such countries, working behind information walls of their own creation, fill their citizens with consistently one-sided and consistently hostile interpretations about other countries, while at the same time consistently withholding facts and interpretations that might work for mutual friendliness and understanding--do you agree that such a policy raises for the international community serious questions? And are not the answers to those questions those which lead directly away from that understanding and mutual trust which alone can provide a stable foundation for peace?
>
> "In the domestic area, such a policy is bad enough. But when it is exported in propaganda to other countries, its potential mischief is compounded. It becomes international libel.
>
> "...
>
> "We in the United States would of course have no complaint if facts about us were reported in proportion to their true relation to the American scene. Tell the worst; we can take it. We ourselves send the worst all over the world, via our news agencies, along with whatever else is regarded as news. But when foreign

governments in control of information, day after day, year after year, concentrate on the abnormal and the malignant aspects of America, while excluding the normal and the benign then I think those countries construct a barrier to stability and peace that can conceivably prove insurmontable."

("The American Position on International News and International Libel," March 19, 1947)

Concern about hate propaganda involves an additional fear; that because of the anonymous nature of much bigotry-spawning material, the recipient cannot properly evaluate it. Thus the infamous forged Benjamin Franklin letter about Jews (exposed by Carl Van Doren) was mailed as a single page of beautiful engraving on heavy bond paper to thousands of people. There was not a word as to who the sender was. The democrat has enough faith in the competence of the people to come to sound judgment that he may not wish to consider punishing the sender, or denying him access to the public. But the sender must come openly, saying who he is. Then the public is free to determine his competence to discuss these matters, as well as what self-interests may color his views. Because the whole matter of disclosure is being considered in detail by Subcommittee No. 3, which will shortly report on it, it will not be dwelt on here.

What I am here proposing is that the civil rights involved be clarified and redefined by statute as they affect mailed material expressing hostility or ridiculing racial, religious or national groups in America.

1. The bigot has full freedom to express his bigotry, subject to:

   a) Disclosure of his identity and the source of the funds with which he publishes the mailed material;

   b) Provision of an opportunity for <u>reply</u> to the minority group which he maligns or ridicules.

2. The various groups in the community are free to defend themselves generally against defamation (as now), and are specifically entitled by law to reply directly to attacks upon them in published material sent through the mails.

3. The citizen with ultimate responsibility for making good judgments, will suffer no limitation in the source of information, even falsehoods, where minority groups are attacked through the mails. He shall have the right to know who attacks him or his neighbors, and what his spokesmen or his neighbors have to say in reply.

The principle expressed here is, I believe, a sound, even a conventional one. If recognized in law it would represent a "half-way house" between the theoretically absolute freedom under the first amendment, and the point at which the states (and Congress) may directly use the police power to limit free expression. One argument for this proposal might be that it could conceivably forestall the day when rampant race hatred presented a clear and present danger. Supreme Court Justice Roberts has stated the application of the latter doctrine to the distribution of controversial religious literature:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under guise of conserving desirable conditions."

This particular quotation was chosen because the final sentence raises the implicit constitutional question about a compulsory reply statute. Would it "unduly suppress free communication"? The Court might or might not think so.

One of the most serious difficulties in dealing with hate propaganda is the absence of a "social hatred gauge." If there were such a device, at a given point in the incidence of social hatreds, the right of reply would be instituted. At a still later point, suppression would be

called into play in line with the Court's rule of "clear and present danger." But we have no such gauge. We do not even have an accurate measure of how much hate propaganda now goes through the mail. As one indicator, I have appended a list of pamphlets and periodicals which the Anti-Defamation League considered anti-Semitic or "doubtful with respect to minority groups" in 1946. It must be stressed that this is far from exhaustive; it does not include many small publications, nor does it apparently include those defamatory of other minority groups. The question is whether at the present time, when the minority defense groups say hate propaganda has reached a new low, the volume of such material would justify instituting a reply-to-bigotry procedure.

H. How It Would Work

A statute to guarantee minorities the right to reply to attacks upon them would have to steer a difficult course between "effectiveness" and "constitutionality." To maximize the chances for court approval, there should be as little interference with the normal process of free expression as possible. To serve any real purpose the law should have enough teeth to make it more than a statement of good intentions. These notes are intended only to serve as provocative leads for further discussion.

1. What should be covered?

Any material tending to expose a racial, religious or national minority group to contempt or ridicule (parallel to the individual libel laws) sent through the United States mail or shipped in interstate commerce by common carrier, would be subject to this statute. The test would be the described character of the material, regardless of truth or falsity, fact or opinion. Leaflets, newspapers and periodicals would be covered. Bona fide works of

art would be excluded. Other books might be excluded in view of the possibly disproportionate burden on publishers relative to the likelihood of injury from this source. (This presents difficulties of definition.) Thus, occasional instances of injurious statements in standard media would be covered as well as systematically scurrilous publications of professional bigots.

2. When should the anti-minority propaganda be noted?

The publisher or distributor of material injurious to a minority group could voluntarily submit it for preparation of a reply before he tried to mail it. If he did not do so, any person receiving the material, or any postmaster through whose hands it passed, or any minority group to whose attention it came, could submit it with a request that it be answered.

3. When shall the reply be made?

Ideally, a reply to injurious statements about a minority group should be made at the same instant, and within the same wrapper as the offending content. This would, however, introduce considerable difficulty. In the first place, it might well represent an unduly harsh interference prior to publication and distribution. It would certainly represent such a burden for newspapers and periodicals which might have to interrupt their schedule of regular issues. And it would require publishers to take the risk of determining whether borderline material was subject to reply and thus tend to create a prior restraint which would probably be considered unduly burdensome by the courts. A compromise to handle the first difficulty might be to require instant replies to all defamation which occur in non-periodical publications -- such as pamphlets, books, and leaflets. For publications on a regular time schedule, the requirement would be for the reply to be carried in the first issue after the offending items were carried.

However, in view of the prior restraint problem it would probably be safer to make the proposal depend upon reply at the earliest possible moment after the offending matter were mailed and after the responsible administrative agency had ordered a reply.

4. Who shall decide whether a reply is to be required?

An advisory committee composed of one representative of each minority group and several representatives of the general public shall decide, in the name of the Attorney General, whether a particular minority group has the right to reply to a particular piece of offensive literature. If it so decides, it should then designate a responsible group in the community to prepare an appropriate reply. The advisory committee might be free to decide against a reply because one is not warranted, desirable or sought.

5. What limitations shall there be on the nature of the reply?

The sole limitations on the nature of the reply should be that it should contain no defamatory material and that it should be no longer than the initial statement which it answers.

6. Who shall bear the expense of printing and distributing the reply?

The reply might be paid for by the person or group which distributes the initial attack, by the Government or by the group chosen to reply. It would probably be politically unwise for the Government to pay for the reply. To ask the authors of the reply to pay for the printing and circulation of it seems unfair. The objection to having the originator of the libelous material pay for the reply is that the courts might hold this to be an unjustified burden which would unduly inhibit freedom of expression. Nevertheless, this last seems like the most equitable arrangement.

Upon receipt of the designated reply from the advisory committee the responsibilities of the publisher would vary with the kind of publication which he originally produced. A newspaper would be expected to carry the reply in its columns giving the same prominence to it as the original attack had. If he had turned out a separate publication the publisher would be required to publish the reply in pamphlet form provided that it did not exceed the length of the original matter. In either case, the defamer would have the responsibility for circulating copies of the reply to exactly the same list to which he had sent the original piece. Each reply should carry the notation that it is required and authorized by Congress, which is committed to the principle that the public is entitled to prompt replies to attacks on minority groups.

7. What punishments for non-compliance?

If the publisher failed to comply with the order of the advisory committee he would be subject to prosecution. In defense he could attack the validity of the order. Penalties would be first a fine on the basis of the number of copies of the original material which he mailed out, in more aggravated cases denial of the second class mailing privilege, in extreme cases being barred from the mails.

The advisory committee would not conduct hearings preliminary to its decisions, but any defendant could attack its orders in court on his own initiative.

I. Does the Alternative Meet the Tests?

Although a compulsory reply statute has many difficulties of its own, it would not be subject to some of the limitations of the conventional group libel proposals. The problem of truth or falsity of assertions about minority groups would fall away; a minority group would be entitled to a reply regardless of whether it felt defamed because of the misuse of true statements or the dissemination of false ones. Whether the injurious remarks represented facts or opinions would likewise be irrelevant in the considerations of the Advisory Committee. No question of "intent" would have to be raised as a basis for granting or refusing to grant the right of reply -- whether the injurious materials were maliciously inspired or not would not influence the deliberations of the Advisory Committee. The chances of responsible consideration would probably be greater if it were made by such an Advisory Committee, rather than private persons who might bring civil suits, or local prosecutors who might bring criminal actions.

One problem which would still remain under a reply statute would be the danger of extension. Minority groups might try to use their reply power to discourage legitimate public criticism of their political activities, e.g., Protestants on missionary activity in Latin-America; Catholics on parochial school buses; and the Jews on Zionist questions. This danger is admittedly a real one. It is less serious than it would be under a group libel law. First, because the Advisory Committee, composed of responsible public-minded citizens, would presumably guard against such extensions. Second, the Congress and the courts would always have the right to check the policies of the Advisory Committee.

The wisdom of "right of minorities to reply" statute is subject to two basic questions. First, whether it would have the desired results, and second, whether the courts would uphold it. Whether it would actually do what it sets out to do is a problem in politics and in social psychology. Politically, the question is whether giving this much official attention to hate groups would increase their status and their responsibility. In addition, it may be far from desirable to make anti-Negroism, anti-Semitism, "anti-Niseism," etc. "issues" on which there are two sides. There is a certain amount of danger that a reply statute would help to create a public opinion in which one had to be "for" or "against" each minority group. The professional bigots would certainly raise the cry that they are being persecuted, and would try to use the reply scheme to make martyrs of themselves.

Partial answers to these objections are that bigots claim to be persecuted martyrs now and that since replies would go only to people whom they now reach, there would be no enhancement of their status or expansion of the "issues" of race and religion. It must be noted that these are only partial answers. The most serious question of all is whether giving both sides on an issue like this will lead the reader to form a rational judgment. The answer can be provided only by a series of research projects by communications specialists. No precisely applicable studies have been done. There is, however, a project now in progress at the Commission on Community Inter-Relations which offers some suggestive data. The Commission was interested in learning the answers to these questions:

(1) Do anti-Semitic remarks made in public places create anti-Semitism?

The answer according to a staged experiment was "Yes." --

14% of those who overheard an unanswered anti-Semitic remark

picked up some of the prejudice. (In a few cases, however, the anti-Semitic remark actually had a boomerang effect and made people feel more favorably toward the Jews)

(2) Should people who overhear such remarks reply to them? (On the basis of acted out playlets before audiences of ordinary people taken off the street, the answer is "Yes." People who heard replies to the remarks, as well as the remarks themselves, were less likely to pick up anti-Semitic attitudes and more likely to be shifted from passive sympathy to active defense of the minority. People exposed to the experiment felt, by and large, that such remarks made in public places should be answered. More people felt this way than did not, regardless of whether they were hostile, friendly or indifferent to Jews).

(3) What kind of replies should be made to such remarks? (The CCI tested the alternative impacts of calm, rational replies as against excited, militant ones. They also tested the relative effectiveness of using arguments about traditional American fair play as against arguments about individual differences in all groups. The indications were that a calm manner and an appeal to American principles of fair play were most effective with strangers in a public group. In general, the objective was to neutralize or counter the effect the remarks might have on the bystanders rather than persuade the person who made the remark).

The tentativeness of these conclusions cannot be too greatly stressed. There is a large question about whether research on verbal communication can

be applied meaningful to printed matter, which would be involved in the first instance in the "right of reply" proposal. It would not be too difficult to undertake research to answer the psychological questions about the effect of having anti-minority group material immediately answered. Here, however, it is proper for the minority groups themselves to take the responsibility for learning the most effective ways of answering attacks upon them. All that the government would be asked to do on this problem would be to provide them with an opportunity. From then on they would be on their own; if they could not successfully defend themselves, then they would deserve whatever consequences ensued. This is the basis of the democratic theory of public opinion.

The question of the constitutionality of a federal reply statute would rest in the first instance on whether the courts considered the burden of forcing persons publishing material tending to injure minority groups to pay for replies an unwarranted burden which would unduly restrain their freedom of expression.

Providing for punishment for failure to publish reply only after an order of the Advisory Committee has been issued tends to minimize this burden. It seems unlikely that the courts would consider the burden too great in cases of wilful defamation (which, it would be argued, might be made subject to much more severe penalties, along the line of group defamation statutes discussed above). The danger zone is the area of injurious statements not shown to be false or which are undoubtedly subject to a new burden. The ultimate question would be whether this burden is justified by the larger purpose. A bill drafted to accomplish this purpose would have to be tightly

worded and all possible exceptions for materials not susceptible of this treatment (such as legitimate aesthetic criticism) should be made.

A reply statute could almost certainly not reach all of the defamatory material now being placed in the mail. Some of it takes extremely fantastic forms. For example, there are several astrologists who are anti-Semitic, anti-Catholic and anti-Negro -- they derive their hostility to these minority groups, they claim, from the position of the stars.

The arguments in favor of reply can be summed up as follows: It is an appropriate mechansim for a democracy; it is not subject to many of the difficulties of conventional group libel proposals; its chances of success are at least as good, and probably better than, a group libel proposal. The arguments against it are: a qualified fear of extension; the possibility that in some or many cases it might boomerang by improving the public opinion position of bigots; and that its constitutionality is questionable.

It seems to the writer that the proposal has at least enough merit to warrant consideration by the Committee and analysis by experts.*

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*It is important to repeat that disclosure is an essential part of this proposal. The very least which would be necessary would be requiring the sender's name and address on every piece of mail which is relevant. Mr. Ernst has already, independently, requested the Staff to look into the feasibility of this idea.

Appendix

INDICATORS OR EXTENT OF BIGOTRY MATERIAL IN MAILS

From, A Survey of the Anti-Semitic Scene in 1946
THE FACTS, Anti-Defamation League of B'nai B'rith, April 1947.
pp. 34ff.

1. Pamphlets and books:

"The Roosevelt Death Mystery," by "Mr. X"
"At The Root of It All -- Anti-Gentilism," by Lyrl Clark van Hyning
"The Semitic Race," by William L. Blessing
"Ravishing The Women of Conquered Europe," by Austin J. App
"Slave-Laboring German Prisoners-of-War," by Austin J. App
"Judaic-Communism vs. Christian-Americanism," by Marilyn R. Allen
"My Country Right or Wrong My Country," by Marilyn R. Allen
"Palestine or Birobidjan," by G. Allison Phelps
"The Case of Tyler Kent," by John Howland Snow
"Government by Treason," by John Howland Snow
"Carpetbaggers in Operation Dixie," by Joseph P. Kamp
"HOW - To Be An American," by Joseph P. Kamp

2. Periodicals:

Publication	Location	Circulation	
		Claimed	Known
AMERICA IN DANGER	Omaha, Neb.	1,100	- - -
AMERICA SPEAKS	Atascadero, Cal.	- - -	- - -
BEACON LIGHT HERALD	" "	- - -	- - -
BIBLE NEWS FLASHES	Faribault, Minn.	3,000	3,000
BOISE VALLEY HERALD	Middleton, Idaho	400	- - -
BROOM	San Diego, Calif.	2,000	- - -
CHRISTIAN VETERANS POLITICAL COUNSEL	Chicago, Ill.	- - -	- - -
CLOSER-UPS	Hollywood, Calif.	7,000	- - -
COMMONWEALTH	Bradentown, Fla.	5,000	1,300
CONSTITUTIONALIST	Seattle, Wash.	2,200	- - -

Publication	Location	Circulation	
		Claimed	Known
CROSS AND THE FLAG	Detroit, Mich.	12,000	- - -
DAYTON INDEPENDENT	Dayton, Ohio	15,000	5,000
DEFENDER	Wichita, Kans.	70-100,000	- - -
DESTINY	Haverhill, Mass.	18,000	- - -
ECONOMIC COUNCIL LETTER	New York City	8,000	- - -
ELEVENTH HOUR	Detroit, Mich.	2,000	- - -
FOORT NEWS LETTER	Vancouver, B.C. Canada	- - -	- - -
FREEDOM NEWS	San Antonio, Tex.	- - -	- - -
GENTILE NEWS	Oak Park, Ill.	- - -	12,500
GREEN MOUNTAINEER	New York City	- - -	- - -
GUILDSMAN	Germantown, Ill.	- - -	- - -
IMP'S BULLETIN	Aberdeen, Wash.	2,000	- - -
INDIVIDUALIST	Danville, Va.	527	- - -
INDIVIDUALIST	Lincoln, Nebr.	- - -	- - -
MALIST	Meriden, Conn.	- - -	300
MIDNIGHT CRY	Cincinnati, Ohio	- - -	- - -
MONEY	New York City	6,000	- - -
NATIONAL CHRISTIAN JOURNAL	Oakland, Calif.	- - -	- - -
NATIONAL DEFENSE	Arcadia, Calif.	3,150	- - -
NATIONAL PROGRESS	Philadelphia, Pa.	350-500	- - -
NORTHWESTERN PILOT	Minneapolis, Minn.	2-4,000	3,000
PATRIOTIC RESEARCH BUREAU	Chicago, Ill.	- - -	700
PHILADELPHIA NATIONALIST	Philadelphia, Pa.	350-500	- - -

Publication	Location	Circulation	
		Claimed	Known
PILGRIM TORCH	Englewood, Calif.	2,500	- - -
PRAYER CIRCLE LETTER	Wichita, Kans.	25,000	- - -
RUBICON	New York City	- - -	- - -
SHOWERS OF BLESSING	Denver, Colo.	- - -	- - -
SMITH LETTER (WEEKLY-NATIONALIST NEWS SERVICE)	Washington, D. C.	- - -	- - -
SMITH LETTER (MONTHLY)	Detroit, Mich.	- - -	- - -
SOUTHERN OUTLOOK	Clanton, Alabama	20,000	- - -
STUDIO NEWS	Friend, Nebr.	1,000	- - -
TALK OF THE TIMES	San Diego, Calif.	- - -	- - -
THINK WEEKLY	Newark, N. J.	10,000	- - -
WESTERN VOICE	Englewood, Colo.	- - -	- - -
WHITE HORSE	Atlanta, Ga.	3,500	- - -
WOMEN'S VOICE	Chicago, Ill.	- - -	- - -
X-RAY	Muncie, Ind.	1,000	- - -

The following publications have carried articles which give rise to concern regarding their attitude toward minorities in the United States:

Publication	Location	Circulation	
		Claimed	Known
AMERICAN GLASS REVIEW	Pittsburgh, Pa.	- - -	- - -
ANN SU CARDWELL LETTER	New York City	- - -	- - -
APPEAL TO REASON	Becket, Mass.	less than 200	- - -

Publication	Location	Circulation	
		Claimed	Known
ARAB NEWS BULLETIN	Washington, D. C.	- - -	- - -
CAROLINA WATCHMAN	Greenville, S. C.	2,000	- - -
CHRISTIAN BEACON	Collingswood, N. J.	- - -	- - -
COLUMBUS TRIBUNE	Columbus, Ga.	5,100	- - -
COVENANT VOICE	Chicago, Ill.	5,000	- - -
FUNDAMENTALIST	Ft. Worth, Texas	- - -	- - -
GAELIC AMERICAN	New York City	65,000	- - -
GEORGIA FARMERS MARKET BULLETIN	Covington, Ga.	200,000	- - -
INDEPENDENT WRITER	Somerville, N. J.	- - -	- - -
MILITANT TRUTH	Chattanooga, Tenn.	45,000	- - -
NATIONAL FORECAST	Washington, D. C.	- - -	- - -
NATIONAL REPUBLIC	Washington, D. C.	28,000	- - -
PATRIOT (MASS.)	Melrose, Mass.	- - -	- - -
PROGRESSIVE LABOR	Knoxville, Tenn.	- - -	- - -
STATESMAN	Hapeville, Ga.	- - -	- - -
TABLET	Brooklyn, N. Y.	99,004	- - -
TALK OF THE TIMES	San Diego, Calif.	- - -	- - -
TODAY'S WORLD	St. Louis, Mo.	60,000	20,000
VOICE OF THE PEOPLE	Sioux City, Iowa	500	- - -

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