

Lawyer's Guild Review Vol II, No 1
Jan-Feb 44

False Defamatory Anti-racial and Anti-religious Propaganda and the Use of the Mails

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The question of whether false and defamatory anti-racial and anti-religious propaganda should be barred from the mails is squarely presented by H.R. 2328, the bill introduced by Congressman Lynch, which provides:

"That in addition to the matter described as nonmailable pursuant to section 211 of the Criminal Code, as amended (U.S.C.; title 18, sec. 334), all papers, pamphlets, magazines, periodicals, books, pictures, and writings of any kind, containing any defamatory and false statements which tend 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 tend to cause such persons to be shunned or avoided, or to be injured in their business or occupation, are hereby declared nonmailable matter, and shall not be conveyed in the mails or delivered from any post office or by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe. Whoever shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of, or aid in the circulation or disposition of the same, if a principal, shall be imprisoned for not more than one year or fined not more than \$1,000, and if an accessory, shall be imprisoned for not more than six months or fined not more than \$500, or both such fine and imprisonment."

The enactment of this bill is imperative in order to control the great volume of false, vicious and defamatory propaganda against racial and religious groups which passes through the mails. The constant aim of this propaganda is to undermine our government, destroy our democratic way of life and stir up violent hatreds, antagonisms and racial and religious strife in every community. Its effect in hampering our war effort is incalculable.

The primary victim of this propaganda at the present time is the Jew, but the Jew is not the only scapegoat for peddlers of hate and vendors of venom. Every racial and religious minority in this country has at some time been subjected to vicious and defamatory attacks in literature that passes through the mails. The Ku Klux Klan, for example, directed a stream of libelous propaganda against the Irish and the Catholics during the 1920's.¹

Recent events have graphically illustrated the effectiveness of propaganda such as that cited above in promoting racial hatred, strife and violence. Jewish synagogues have been desecrated in many American cities. In Hartford and Bridgeport large numbers of Jewish

1. One of the outstanding documents of this propaganda, which was widely distributed through the mails, was a so-called oath alleged to have been taken by every member of the Fourth Degree of the Knights of Columbus. This false oath, which was the subject of a number of criminal prosecutions, reads in part as follows:

"I do now denounce and disown any allegiance as due to any heretical King, prince, or state, named Protestant or Liberals, or obedience to any of their laws, magistrates or officers.

"I do further declare that the doctrine of the Churches of England and Scotland, of the Calvinists, Huguenots and others of the name of Protestants or Masons to be damnable and they themselves to be damned who will not forsake the same * * *

"I do further promise and declare that I will have no opinion or will of my own or any mental reservation whatsoever, even as a corpse or cadaver * * * but will unhesitatingly obey each and every command that I may receive from my superiors in the militia of the Pope and of Jesus Christ * * *

"I do further promise and declare that I will * * * wage relentless war, secretly and openly, against all heretics, Protestants and Masons, as I am directed to do, to extirpate them from the face of the whole earth; and that I will spare neither age, sex, or condition, and that I will hang, burn, waste, boil, flay, strangle and bury alive these infamous heretics; rip up the stomachs and wombs of their women, and crush their infants' heads against the walls in order to annihilate their execrable race. That when the same cannot be done openly I will secretly use the poisonous cup, the strangulation cord, the steel of the poniard or the leaden bullet, regardless of the honor, rank, dignity or authority of the persons, whatever may be their conditions in life, either public or private, as I at any time may be directed so to do by any agents of the Pope or superior of the Brotherhood of the Holy Father of the Society of Jesus * * *

See the case of *People v. Gordon*, 63 Cal. App. 627, 219 Pac. 486 (Calif. 1923) at p. 488.

stores were defaced by hoodlums with swastikas on Halloween night. In Boston, Governor Saltonstall has had to appoint a Commission of Christians and Jews to investigate a large number of cases of anti-Jewish desecrations and violence which almost assumed the proportions of a reign of terror. This violence led Bishop G. Bromley Oxnam of the Methodist Church to state:

"The beating of Jewish boys must stop. The beaters must be apprehended and punished. The beating of any boys by gangs is bad enough at any time. The beating of boys of a particular race is worse. But the real menace lies in the apparent fact that these beatings are an expression of incipient fascism, that they follow a similar pattern, and that, in one case, at least, the beaters wore black shirts."²

Governor Saltonstall also ordered a statewide inquiry of anti-Semitic violence by the state police.

In Brooklyn, New York, there has been a widespread desecration of Jewish cemeteries. 139 incidents of anti-Semitic and anti-American violence and vandalism were investigated by Commissioner Herlands and the Department of Investigation of New York City. In Detroit racial riots resulted in the death of at least 23 persons and injury to hundreds of others. These disorders required the intervention of the army to restore order. In New York City the riots in Harlem resulted in property damage running into the millions.

These are but a few of the many examples throughout the country of violence, property damage and bitterness arising out of racial and religious strife. These instances are not merely sporadic manifestations of the ill-will which different groups in our population hold for each other. They are the planned results of a propaganda campaign which has been fostered by the Nazis and by native Fascist groups which follow the Nazi line. It is significant in this connection that Commissioner of Public Safety Stokes stated in his report of November 10, 1943, on anti-Semitic disturbances in Boston:

"Although anti-Semitic utterances were used in the course of these assaults the as-

saults and the utterances attending them could not be proven to be of organized anti-Semitic origin. *However, the widespread dissemination of anti-Semitic literature, I believe, is organized and should be dealt with immediately.*"

The mails are vital in the success of the Nazi-Fascist campaign to stir up racial and religious hatred, strife and intolerance, since it is the primary medium for the circulation of propaganda material. It is submitted that the LYNCH bill is a constructive step toward the control of such propaganda, and, if passed, will make a positive contribution to the preservation of our democracy and our way of life. In support of this conclusion we submit the following propositions:

I. Nazi Germany and enemies without use our mails to distribute false and defamatory propaganda against racial and religious groups in order to destroy American democracy.

II. Fascists and bigots in America, enemies within, following the Nazi propaganda line, use our mails to breed hatred and thereby cause disunity and undermine American democracy and the American way of life.

III. Present legal remedies for dealing with false and defamatory propaganda against racial and religious groups are ineffectual and need to be strengthened.

IV. The LYNCH bill does not set up an arbitrary censorship by the Post Office Department of printed matter passing through the mails.

V. The LYNCH bill does not violate constitutional guarantees of freedom of speech or of the press.

I

Nazi Germany and enemies without, misuse our mails.

A basic Nazi propaganda technique is the defamation and libel of racial and religious groups opposed to Nazism. It is part of a calculated strategy of psychological warfare against the enemies of Nazi Germany. In the Nazi pattern of conquest psychological warfare

2. *N. Y. Times*, November 3, 1943.

through propaganda precedes the employment of military measures.³

Propaganda is peactime preparation for war and the Nazis have perfected their propaganda techniques to a very high degree in order to make their task of military conquest easier. As one writer puts it:

“Exactly as a commander in the field shifts from the use of bombers to tanks, to infantry to solve various tactical problems, so does the Nazi High Command shift from armed force to propaganda, and vice versa, always aiming at the ultimate objective: destruction of the enemy.

“It is important to keep in mind this principle that destruction is the purpose of war; that destruction may be accomplished without physical annihilation, and that Nazi writing and propaganda are weapons for accomplishing this kind of destruction.”⁴

The purpose of Nazi propaganda is disruptive. Its object is to dissolve the united mass of the enemy people. It seeks “to extend the lines of cleavage within foreign states and so to widen them that the composite body splits up and disintegrates. Points of difference may be found to exist * * * between a government and its subjects, between minorities and majorities, between social classes. The function of Nazi propaganda is simply to emphasize these differences and widen them until complete disintegration is achieved. Then, as in Austria, Czechoslovakia and Albania, the aggressor’s army marches in to take over.”⁵

In selecting the Jews as the chief object of his propaganda activities, Hitler found a useful solvent, a universal means of weakening his enemies by stirring up racial and religious antagonisms among them and by discrediting all those who were opposed to him. Hermann Rauschning, his former associate, quotes him as saying:

“My Jews are a valuable hostage given to me by the democracies. Anti-Semitic prop-

aganda in all countries is an indispensable medium for the extension of our political campaign. You will see how little time we shall need in order to upset the ideas * * * of the whole world, simply and purely by attacking Judaism.”⁶

Once the Jew became hateful through the processes of libel, slander and forgery, the Nazis were able to discredit every person, every organization, every idea and every institution opposed to them through the simple process of labeling them as Jews.

This process was clearly summarized by the Institute of Propaganda Analysis:

“But the anti-Jewish propaganda had even greater value to Nazism than the mere creation of a scapegoat. Through the Jews Hitler was able to strike at anyone, Jew or non-Jew, opposed to Nazism, and to discredit any plan which aimed at the peaceful rehabilitation of Germany. Hitler’s objective was to create in the minds of Germans the ugly image of ‘Jew.’ The word ‘Jew’ was deliberately made synonymous with everything the Germans resented and hated or could be led to resent and hate. Once that was done, Nazi agitators revived or manufactured for circulation notorious forgeries, which branded all those persons as Jews who did or said anything not in accord with Nazi ideas. To attack the Dawes Plan, for example, it became necessary to label Dawes as a Jew and so, according to DER STUERMER, Dawes was portrayed to its readers as a full-blooded Jew, originally named Davidson. The banking house of J. P. Morgan, which acted as a house of issue for a German government loan opposed by Hitler, was promptly branded a Jewish banking house and the Morgan name given as an abridgment of the more Jewish-sounding Morganstern. Similarly the entire French nation, whom the Nazis consider to be Germany’s natural enemy, was described as a nation of Jews.”⁷

The same propaganda techniques against the Jews have been used by the Nazis to weaken other countries. Thus, false and defamatory anti-Semitic propaganda is not a minor aber-

3. Committee on Un-American Activities, 76th Congress, 3rd Session, Preliminary Report on Totalitarian Propaganda in the United States, Appendix, Part 3, p. 1385.

4. *Axis America*, Robert Strausz-Hupe, New York, Putnam, 1941, p. 40.

5. *The Attack from Within*, Elwyn Jones, Harmondsworth, Middlesex, Penguin Books, 1939, p. 136.

6. *They Got the Blame*, Kenneth M. Gould, New York, Association Press, 1942, p. 37.

7. *Propaganda Techniques of German Fascism*, Propaganda Analysis, Vol. I, No. 8, May 1938, p. 41.

ration, the product of crackpots, but a diabolical weapon used against all peoples whom the Nazis wish to conquer. It is one of the principal methods employed by the Nazis to undermine every Government opposed to their march of conquest.

The mails played a very important role in the Nazi effort to undermine this country through the propagation of racial and religious hatred.

Nazi propaganda agencies have understood that *one of the most effective techniques of modern advertising is direct mail and have, therefore, relied on it extensively to distribute their vicious propaganda against racial and religious groups in this country.* Before the war, hundreds of tons of propaganda mail from Nazi Germany was shipped into the United States.⁸

German propaganda was sent through the mails addressed to thousands of individuals, schools, colleges, institutions and business houses throughout the country.

The purpose of this propaganda is the inculcation of religious, racial and class hatred between groups of citizens in the United States.⁹

The Postmaster General was disturbed by this large quantity of propaganda mail coming into this country, principally "via Siberia." He therefore requested an opinion from the Attorney General as to whether he could exclude such matter from the mails if the mailers had not registered as foreign agents under the provisions of the Foreign Agent Registration Act of 1938. The Attorney General¹⁰ found that the Postmaster General was authorized to exclude such matter from the mails. This opinion enabled the Postmaster General to eliminate only part of the materials passing through the mails, intended by Nazi Germany to undermine American democracy. Such measures, however, could not deal with the flood of propaganda

material emanating from Nazi agencies established in this country. Before the war the Nazi government had set up in this country organizations which posed "as bona fide academic, cultural and commercial organizations, but which in effect (were) nothing more than outlets for the spreading of Nazi ideology."¹¹ Such organizations were the German Library of Information, the German Railroads Information Service, the American Fellowship Forum and the German-American Bund. The German Library of Information and the German Railroads Information Service had tremendous mailing lists of persons in the United States who were periodically sent Nazi publications. No effort was spared by any of the Nazi organizations in this country to spread systematically through the mails the false and defamatory attacks against racial and religious groups which originated in the twisted minds of German propagandists.

II

Enemies within, following the Nazi propaganda line, misuse our mails.

The Nazis are assisted in the propagation of their false and defamatory anti-racial and anti-religious propaganda by scores of native Fascist organizations which largely came into being with the advent of Adolf Hitler. The Committee on Un-American Activities was satisfied from the evidence that "all of these organizations receive their inspiration from the Nazi and Fascist forms of dictatorship, although they all profess to be strictly American and interested only in the institutions and problems of this country."¹² Fritz Kuhn, former leader of the German-American Bund, who is now in Sing Sing, testified before the Committee that the Bund worked sympathetically with other organizations throughout the United States and cooperated with them. Some of these groups are the Christian Front, the Christian Mobilizers, the Christian Crusaders, the Social Justice Society, the Silver Shirt Legion of America and the Knights of the White

8. Committee on Un-American Activities, 77th Congress, 1st Session, Report No. 1 (H.R.), Jan. 3, 1941, p. 18.

9. Committee on Un-American Activities, 76th Congress, 3rd Session, Preliminary Report on Totalitarian Propaganda in the United States, Appendix, Part 3, 1941, p. 1385. See also the testimony of L. M. C. Smith, Chief, Special Defense Unit, Department of Justice, in hearings before Special Committee No. 4, Committee on the Judiciary, House of Representatives, 77th Congress, 1st Session, on H.R. 6045, Nov. 28—Dec. 1, 1941, pp. 12, 13.

10. 39 Op. Att. Gen. 535, December 10, 1940.

11. Committee on Un-American Activities, Report No. 1, 77th Congress, 1st Session, Jan. 3, 1941, p. 5.

12. Committee on Un-American Activities, Report No. 1476, 76th Congress, 3rd Session, Jan. 3, 1940, p. 19.

Camellia. The Bund cooperated by exchanging literature and publications with these organizations and by publishing literature emanating from them in the official organ of the Bund. When Mr. Kuhn was asked, "What are the relations between Mr. Joe McWilliams and his Christian Mobilizers and the German-American Bund?" he answered, "They are very friendly to each other because the Christian Front, the Christian Mobilizers, really have ideas which we sponsor 100 per cent."¹³

In 1939 the Institute for Propaganda Analysis estimated that there were about "800 organizations that could be called pro-Fascist or pro-Nazi."¹⁴ Some flaunt the word 'Fascist' in their name, or use the swastika as their insignia. Others—the great majority—talk blithely of democracy or 'Constitutional Democracy,' but work hand in glove with the outspokenly fascist groups and distribute their literature.¹⁵

The war has not brought about any perceptible curtailment in the activities of the so-called "patriotic" organizations.¹⁶ Their literature still features documents and data obtained originally from Nazi propaganda sources. They still attempt to discredit all leaders, institutions and agencies opposed to the Nazis by labeling them as Jews. They still seek to create disunity among our people. They still have had no qualms about telling out and out lies, misquoting documents and even forging documents. Their literature which circulates freely through the mails still repeats all the odious lies and infamous inventions of a Goebbels, a Streicher and a Hitler. From this point of view they may be considered part of the Nazi propaganda apparatus, doing the work of the enemy as effectively as if they were fighting on his side. Their anti-Semitic propaganda has called forth the following forthright comments by Governor Saltanstill of Massachusetts:

13. Committee on Un-American Activities Report, 77th Congress, 1st Session, Appendix, Part 4, p. 1466.

14. The names of 121 organizations are listed in *Organized Anti-Semitism in America*, Donald S. Strong, American Council on Public Affairs, Washington, D. C., 1941, pp. 138, et seq.

15. Committee on Un-American Activities, 76th Congress, 3rd Session, Report No. 1476, pp. 19, 21, 22.

16. For an indication of the types of literature that these organizations have been sending through the mails since Pearl Harbor see the American Jewish Congress "Digest of the Anti-Semitic and Anti-Democratic Press in the United States."

"Anti-Semitism is a menace to American democracy. The attack upon the Jews is a prelude of the attack upon Catholicism, Protestantism and the whole democratic way of life. Since this is true, every anti-Semitic manifestation must be seriously treated and combatted by the responsible leaders of every community.

"It is particularly important to regard anti-Semitism as a danger signal of the anti-democratic and anti-American forces at work in our country during this great war, when the enemies abroad are constantly seeking to foment division and hatred between classes and creeds in the hope that after they have lost the war militarily, they yet may win the peace."¹⁷

It is ironical that a government engaged in deadly combat should lend its enemies the use of facilities for its own destruction. By denying the use of the mails to false and defamatory propaganda which libels racial and religious groups, the Nazis and those deluded Americans who follow the Nazi propaganda line will lose a potent weapon in their struggle against democracy.

III

Present legal remedies are ineffectual.

There can be little doubt of the serious harm which false and defamatory propaganda against racial and religious groups causes to each individual composing the group. In Germany the vicious propaganda against Jews eventually resulted in their ostracism from the community, their expropriation, enslavement and murder. In this country, violence, discrimination in employment and legal insecurity to the individual are the concomitants of false and defamatory propaganda against racial and religious groups.

Although serious harm may be done to an individual in a group which is libeled and defamed, there is little that he can do about it. A civil suit for libel is not available to him unless he is specifically mentioned or identified in the libel or defamation. Defamatory words must refer to some ascertained or ascertainable person. If only a small group is libeled or defamed

17. *Boston Herald*, Nov. 10, 1943.

and a particular individual is easily identifiable, he may bring a civil action for libel.¹⁸

However, in the typical libelous and defamatory propaganda against large groups such as "Irishmen", "Catholics", "Protestants", "Jews" or "Negroes" no particular individual is singled out for attack, but the entire racial or religious group to which the individual belongs is libeled and defamed. It is inevitable that the standing and reputation in the community of the individuals composing such group must necessarily suffer. Unfortunately, the courts have not permitted civil actions for libel by a member of a group which has been defamed unless, as we have noted, the individual bringing the action is specifically identifiable. Even if civil redress in the form of an action for libel were available to an individual member of a group which has been defamed, it is doubtful whether a mere civil responsibility in damages can act as a sufficient deterrent to the peddlers of racial and religious hatred and intolerance.

The law of criminal libel, as presently constituted, is also not a promising weapon for the control of false and defamatory propaganda against racial and religious groups. Libels were punishable criminally at common law and are now so punishable in the various states either by statute or under the common law. A typical criminal libel provision is Section 1340 of the New York Penal Law which defines criminal libel as follows:

"A malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person * * * in his * * * business or occupation * * *"

Prosecutions for the crime of criminal libel under provisions such as the above cited New York section have been rare.¹⁹ Thus criminal

18. *Ryckman v. Delavan*, 25 Wend. 186 (N. Y. 1840); *Dwyer v. The Fireman's Journal Co.*, 11 Daly 248 (N. Y. 1882); *Weston v. Commercial Advertiser Association*, 184 N. Y. 479, 77 N. E. 660 (1906).

19. See article by David Reisman, *Democracy and Defamation: Control of Group Libel*, in 42 *Columbia Law Review* 727, 1942, at pp. 749-750.

libel provisions have played only an inconsequential role in the control of false and defamatory propaganda against racial and religious groups. Moreover, the possibility of resort to criminal libel prosecutions to deal with such propaganda is further undermined by the conflict among the few authorities that exist as to whether an indictment for criminal libel can be maintained which is predicated upon writings assailing a class or group, unless directly or by implication some individual is also defamed. The authorities which permit criminal prosecution for group libel, even where no individual is specifically libeled or defamed, are predicated upon the theory that inflammatory and libelous publications aimed at a whole group or class tend to provoke breaches of the peace, and the public interest in preserving the peace requires their repression.

Illustrations of the use of criminal libel prosecutions as a means of combatting false and defamatory statements against groups may be seen in a number of cases arising out of the publication in different states and at different times of the alleged Knights of Columbus oath.²⁰

The oath, which was false, was published without mentioning a single individual. However, a number of publishers were indicted and the indictments were upheld by the courts. It was felt in these cases that all that was necessary to be proved was the false and defamatory attacks upon the group and that it was not necessary that the libelous matter "name the individuals * * * composing the class against whom the matter complained of is published, * * *"²¹

In *People v. Turner*,²² one of these cases, the court stated:

"It is undisputed that the publication was false, that the prosecuting witnesses were members of the society of the degree in question, and the inevitable conclusion to be drawn from the article is that every member of the order of the fourth degree

20. See Note 1, *supra*.

21. *People v. Gordan*, 219 Pac. 486 (p. 487).

22. 24 Cal. App. 766, 771, 154 Pac. 34 (1915).

had taken and subscribed to the published oath. The article asperses the character of such members, and ascribes to them base and dishonest motives, and as to them its publication constituted criminal libel * * *

“The law is elementary that the libel need not be on a particular person, but may be upon a family or a class of persons if the tendency of the publication is to stir up riot and disorder and incite to a breach of the peace. It is obvious that a libelous attack upon a body of men, though no individual may be pointed out, may tend as much or more to create a public disturbance as an attack on one individual, and a doubt has been suggested whether ‘the fact of numbers does not add to the enormity of the act’.”

Several other cases have upheld indictments arising out of the alleged Knights of Columbus oath.²³

Despite these and other authorities²⁴ which upheld prosecution for criminal libel when groups and not individuals are falsely libeled and defamed, the court in *Drozda v. State*,²⁵ reversed a conviction based on a libel of the Bohemian National Alliance. The court stated in its opinion:

“A government or other body politic, a corporation, religious system, race of people, or a political party, are not subject to criminal libel * * *

“A man who scurrilously attacks the Smiths, Johnsons, Joneses, or the Jews, Gentiles, or Syrians, Democrats, Republicans, Populists or office holders in general, could not be successfully haled into court and convicted of libel of any particular person, unless there be something in such article which by fair interpretation thereof tended to bring into disrepute some particular person or persons.”

23. *Crane v. State*, 14 Okla. Cr. 30, 166 Pac. 1110 (1917); *Alumbaugh v. State*, 39 Ga. App. 559, 147 S. E. 714 (1929).

24. See *People v. Spielman*, 318 Ill. 482, 149 N. E. 466 (1925); *People v. Eastman* (libel of members of American Legion), 188 N. Y. 478 (1907) (libel of Catholic Church and its priests); *Sumner v. Buel*, 12 Johns 475 (N. Y. 1815); Criminal libel; libeling a class, 86 Central Law Journal 334 (1918).

25. 86 Tex. Crim. Rep. 614 at pp. 617, 618; 218 S. W. 765 (1920).

In *People v. Edmondson*,²⁶ the defendant was indicted for criminal libel against “All persons of the Jewish Religion” because of his scurrilous and vicious attacks upon Jews. Judge Wallace dismissed this indictment, stating in the course of his opinion:

“I am of the opinion that the soundest rule that has been enunciated on the subject of group libel is this: That an indictment cannot be predicated upon defamatory writings assailing a class or group unless directly or by implication, some individual is libeled.”

After examining all the authorities in the field of group libel Riesman comes to the conclusion: “I do not believe that the law of criminal libel as it now stands is a very promising weapon for a campaign of prosecutions for group libels.”²⁷ The truth of the matter is that the libel provisions of the criminal law were not designed to deal with such matters as false and defamatory propaganda pursued by Nazi-Fascist organizations against racial and religious groups. The law of libel in both its civil and criminal aspects was intended primarily to deal with statements which defamed individual reputations rather than the defamation of broad groups in the population. To attempt to use criminal prosecutions against Nazi-Fascist peddlers of hate is to run the risk that indictments will be dismissed, as in the *Edmondson* case, on the ground that the defamatory matter does not relate to a specific individual. Such dismissals in turn would be deliberately distorted by Nazi-Fascist groups as vindication for the false and defamatory statements. The use of criminal libel prosecutions against Nazi-Fascist defamers may, therefore, be self-defeating.

Legislation such as the LYNCH bill is needed which clearly indicates that it is intended to cover “defamatory and false statements” against individuals “designated, identifiable or characterized * * * by race or religion.” This does not leave the loophole that the defamation must be of a specific individual before it can be considered criminal.

26. 168 Misc. 142, 4 N. Y. Supp. (2d) 257, 268 (Gen. Sess. 1938).

27. Op. cit., note 21, *supra*, at p. 750.

IV

The Lynch Bill does not set up an arbitrary censorship by the Post Office Department.

Much of the criticism directed against the Lynch bill is due to a fear that it will make the Postmaster General an arbitrary censor of printed matter passing through the mails. Some opponents of the bill have stated:

“Any additional powers put in the hands of the Postmaster General to determine what opinions should be barred from the mails add to the already intolerable bureaucratic censorship already exercised in the fields of ‘obscenity’ and ‘sedition.’”

A public official must decide what literature is false and defamatory within the terms of the statutory prohibitions. Being fallible, he may err and he may abuse his discretion. But in this, as in other fields, our law provides an adequate remedy for error and abuse of discretion, namely, an appeal to the courts. Any action of the Postmaster General in excluding printed matter from the mails is subject to review by the courts. Thus, the Postmaster General cannot set up “an intolerable bureaucratic censorship” since he is not the final judge of what material is objectionable. A bill in equity may be brought to enjoin the Postmaster General if he is in error in barring a particular publication from the mails. Ordinarily the head of an executive department is not subject to injunction in matters involving the exercise of his discretion. However, the federal courts will issue an injunction against a Postmaster General where he excludes a publication from the mails and such action is not authorized by the statutes under which he assumes to act. As the court stated in *Simmons v. Farley*:²⁸

“The authority of the Postmaster General is neither unbounded, arbitrary, nor discretionary. It is limited, and its exercise is governed by the acts of Congress which confer it and by the laws of the land, and his violation or disregard of either is remediable in the courts.”

28. 18 F. Supp. 758, 762 (D.C. Col. 1937). See also: *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902); *Pike v. Walker, Postmaster*, 121 F. (2d) 37 (App. D. C. 1941); *Lewis Pub. Co. v. Wyman*, 152 F. 787 (C.C. Mo., 1907).

Nor can it be argued that a court review of a Postmaster General's action in barring publications from the mails is only perfunctory in character. The courts have not hesitated to interfere with orders of the Postmaster General excluding matter from the mails where they have felt that such action was not warranted by the statutes.²⁹ The courts have been well aware of the fact that provisions of law such as those contained in the LYNCH bill are of a penal nature and should be strictly construed. Thus, they can be depended upon to require the Postmaster General to exclude only those publications from the mails whose language comes “fairly within the letter and spirit of the statute.”³⁰

The fear that power may be abused by the Postmaster General is in and of itself no sufficient reason why it should not be granted, unless we are content to have a governmental instrumentality continue to be used by our enemies for the purpose of promoting racial hatred and disunity. The remarks of the Court in *In re Rapier*,³¹ are pertinent on this point:

“The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. *That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.*” (Italics ours.)

V

The Lynch bill does not violate constitutional guarantees of freedom of speech or of the press.

The proposed bill does not prohibit publication or distribution of any writings or printed matter. It is not the exercise of a previous re-

29. See *American Civil Liberties Union v. Kiely*, 40 F. (2d) 451 (C.C.A. 2d, 1930); *Post Publishing Company v. Murray*, 230 F. 773 (C.C.A. 1st, 1916); *Simmons v. Farley, supra*; *Brooklyn Daily Eagle v. Voorhies*, 181 F. 579 (C.C.N.Y., 1910); *U. S. v. Demmett*, 39 F. (2d) 564 (C.C.A. 2d, 1930).

30. *McKnight v. U. S.*, 78 F. (2d) 931, 932 (C.C.A. 9th, 1935).

31. 143 U. S. 110, 36 L. Ed. 93, 102 (1892).

straint upon publication which would be void because it imposes a censorship. All that the LYNCH bill does is simply to deny to libelous publications directed against racial and religious groups the use of the mails.³²

Congress has the undoubted right under the Postal Clause of the Constitution to prescribe what may be carried in the mails. In *Ex Parte Jackson*,³³ for example, the Supreme Court held that the power vested in Congress to establish post-offices and post-roads embraces the regulation of the entire postal system of the country and that under it, Congress can designate what may be carried in the mails and what may be excluded. Acting under its constitutional authority Congress has already excluded from the mails such things as obscene matter,³⁴ material containing scurrilous libels or defamatory matter on the envelopes or outside wrappers,³⁵ lottery tickets,³⁶ material used to promote frauds³⁷ and matter containing liquor advertising intended for circulation in prohibition states.³⁸ These provisions of the Criminal Code have been consistently upheld by the courts. In *Ex Parte Jackson*,³⁹ for example, the court stated: "In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals." In *In re Rapier*,⁴⁰ which involved the exclusion from the mails of matter relating to lotteries, the court stated: "The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circula-

tion of printed matter which it regards as injurious to the people."⁴¹

While Congress has the undoubted power to exclude matter deemed "injurious to the people" or "injurious to the public morals" from the mails, it must be recognized that the use of the mails is an almost indispensable medium for the communication of ideas. Denial of the right to use the mails imposes a serious restriction upon freedom of expression. It is, therefore, vital that the use of the mails be not denied to publications which in the interest of freedom of expression should be circulated.

It is submitted that the LYNCH bill strikes at material which does not have any legitimate right to circulation. We have seen in the first place that most of the false and defamatory literature attacking racial and religious groups circulating through the mails is the product of traitorous and racketeering organizations of Nazi-Fascist inspiration. Secondly, there never has been any inherent right to circulate defamation and libel through the mails. Section 335 of the U. S. Criminal Code, which prohibits mailing material upon the envelope or outside wrapper of which, libelous, scurrilous or defamatory matter appears, has been upheld by the courts as not denying or abridging freedom of speech.

In the case of *Warren v. U. S.*,⁴² in which the constitutionality of Section 335 was questioned, the court stated:

"There is no substantial question of liberty or freedom of speech involved in this case. The unrestricted use of the mails is not one of the fundamental rights guaranteed by the Constitution * * * With this comprehensive control over the subject which Congress undoubtedly possesses, it is idle to say the liberty of the citizen and his freedom of speech in the proper sense of those terms are denied or abridged by a statute forbidding the deposit in the mails of anything upon the exposed surface of which appears language scurrilous, defamatory, or threatening or calculating and obviously intended to reflect injuriously upon the character or conduct of

32. A provision similar to the instant bill was considered by the Court in the case of *Masses Publishing Co. v. Patten*, 246 Fed. 24 (C.C.A. 2d, 1917). In that case the section of the Espionage Act making matter in violation of the Espionage Law non-mailable was upheld as constitutional by the court, which observed in the course of its opinion: "The Act of Congress now called in question does not undertake to say that certain matter shall not be published nor that it shall not be transmitted in interstate commerce. It simply declares that such matter shall not be carried in the United States mails" (at p. 27).

33. 96 U. S. 727, 24 L. Ed. 877 (1878).

34. 18 U. S. C. Section 334.

35. *Id.* Section 335.

36. *Id.* Section 336.

37. *Id.* Section 338.

38. *Id.* Section 341.

39. Note 35, *supra*.

40. Note 33, *supra*.

41. Compare *Masses Publishing Co. v. Patten*, *supra*, and *U. S. ex rel Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407 (1921).

42. 183 Fed. 718, 720-1 (C.C.A. 8th, 1910).

others. Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances, and certainly they do not mean that contrary to the will of Congress one may make of the post-office establishment of the United States an agency for the publication of his views of the character and conduct of others * * * The very idea of government implies some imposition of restraint in the interest of the general welfare, peace, and good order. The statute under consideration is a part of a body of legislation which is being gradually enlarged, and which is designed to exclude from the mails that which tends to debauch the morals of the people, or is contrived to despoil them of their property or is an apparent, visible attack upon their good names."

If Congress can prohibit the use of the mails to material containing libelous, defamatory and scurrilous statements appearing on the outside wrappers, then it can also prohibit the use of the mails to matter containing libel and defamation which is not apparent from an inspection of the envelope or the wrapper. Libel and defamation would in this respect be treated like obscene matter. In Section 335 of the Criminal Code Congress has prohibited the mailing of material on which lewd, lascivious or obscene epithets, statements or delineations appear on the outside wrappers. In Section 334 of the Code Congress has banned all lewd, lascivious or obscene matter from the mails.

It should be noted that the LYNCH bill is carefully drawn to strike at libelous matter only. Only false or defamatory matter which tends to expose persons designated, identified or characterized by race or religion 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, is made non-mailable by the LYNCH bill. It may be noted that the terms used in the bill to define the types of matter made non-mailable are almost exactly those which are used in the New York provision on criminal libel, and in many other libel statutes.

It is axiomatic that constitutional guarantees of freedom of speech and freedom of the press are limited by the law of libel. There is no freedom to make false and defamatory statements which injure a man's reputation. As ODGERS stated in the opening paragraph of his classic treatise on libel and slander: "No man may disparage or destroy the reputation of another. Every man has a right to have his good name maintained unimpaired. This right is a *jus in rem*, a right absolute and good against all the world."⁴³

The case of *Trinity Methodist Church, South v. Federal Radio Commission*,⁴⁴ presents issues which are very similar to those raised by the LYNCH bill. In that case the Trinity Church was the lessee and operator of a radio station in Los Angeles. The station was, in fact, owned by the Rev. Dr. Shuler, the minister in charge of the church, and was operated by him. Dr. Shuler had made many defamatory statements over the radio attacking judges, bar associations, the Board of Health, the Labor Temple, etc. In addition, he had alluded slightly to Jews and had made frequent and bitter attacks on the Roman Catholic religion and its relation to government. A renewal of the station's license was refused by the Commission. It was contended that the decision of the Commission refusing the license was unconstitutional in that it violated constitutional guarantees of freedom of speech. However, the action of the Commission was sustained and the Court stated in the course of its opinion:

"Appellant (Shuler) may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not * * * demand, of right, the continued use of an instrumentality of commerce for such purposes."⁴⁵ (Italics ours.)

43. *Digest of Libel and Slander*, W. Blake Odgers (6th Ed.), London, 1929.

44. 62 F. (2d) 850 (App. D. C., 1932).

45. 62 F. (2d) 850 at p. 853.

Finally, it may be noted the bill does not bar from the mails all writings which may be construed as attacks upon racial and religious groups, but only false and defamatory publications. A publication that is true, therefore, does not come under the prohibition of the LYNCH bill. The latter simply provides that the postal facilities of the federal government

cannot be used for the propagation of defamatory falsehoods against racial and religious groups. The federal government, if the bill is passed, will simply refuse to lend its postal facilities to organizations which use such propaganda as a means of undermining our democratic form of government and our democratic way of life.

NOTE ON A FOOTNOTE

“Were the parol evidence rule a rule of evidence, we could decide this question without reference to state court decisions.¹

¹As we did in the carefree days before the advent of *Erie R. Co. v. Tompkins*, 304 U. S. 64.”

—FRANK, Circuit Judge,
in *Zell v. American Seating Co.*, 138
F. 2d. 641.

How carefree the days of a federal judge
Ere Tompkins complained of the Erie!
Like that of a boy with a bagful of fudge,
His smile was immutably cheery.
He hummed a refrain as he strode his domain,
A frolicsome, nimble-of-gait judge,
Who knew the arcana of federal courts,
Maneuvered with ease in their mazy reports,
And, though his urbanity muffled his snorts,
Gave never a fig for a state judge!
Tranquillity filled
His delectable days
And, cozily skilled
In the federal ways,
He gave never a fig for a state judge!
But Tompkins, poor fellow, was tossed by a
freight
And Swift against Tyson fell with'm,
And the life of a federal jurist of late
Is reft its agreeable rhythm.
With lowering brow he perambulates now
In strange and unpleasant dominions;
For local decisions must govern his pen,
And if there are none, ah, beware of him then!
And, oh, his volcanic profanity when
He finds inconsistent opinions!
His peaceful routine
Is a thing of the past,
As witness the scene
And the violent blast
When he finds inconsistent opinions!

ARTHUR KRAMER.