

AMERICAN CIVIL LIBERTIES UNION
156 FIFTH AVENUE
NEW YORK, NEW YORK 10010

MINUTES

BOARD OF DIRECTORS MEETING

TUESDAY, FEBRUARY 14, 1967 - 5:30-8:00 P.M.

ACLU OFFICES

Present: Mr. Angell, presiding; Messrs Black, Brown, Buchalter, Carliner, Ennis, Evans, Fraenkel, Goldberg, Hacker, Kelley, Maslow, Miller, Soll, Whelan; Judge Kenyon, Mesdames Bittenwieser, Jacobs, Pilpel.

Office: Messrs Pemberton, Forbes, Haskell, Karparkin, Speiser; Mesdames Floyd, Koch, Norton; Misses Cooper, Goldstein, Strickland.

Announcements:

The Chairman introduced Mr. Kenneth Forbes, recently appointed as Field Development Officer in the national office. Mr. Angell then welcomed two guests at today's meeting: Mr. Sumner Rosen, and Prof. Robert Christen--both members of the Academic Freedom Committee who attended in order to present the committee's recommendations scheduled for discussion.

1. Minutes of the January 9, 1967 Board Meeting. The Chairman read a letter from Mr. Soll in which he requested that the following changes be made in the minutes of the last meeting:

(1) At the top of page 6, strike the words "we are willing" and (following the words on the previous page "the 'should' implies that") add: "race data will necessarily show the presence or absence of discrimination in all cases, which, of course, it will not. He said that he thinks we should [say that America owes the Negroes something special beyond equality]."

(2) In the first full paragraph on page 8, following the words "He sees no great harm in making C.O.'s serve the country in other ways...", strike the words "such as the medical corps" and substitute the phrase: "provided by alternate service as civilians in medical hospitals or for service organizations like the Red Cross;" and in the next clause, change "alternative service" to read "alternate service."

The minutes of the previous meeting were then approved as so corrected.

2. Resolution on the Death of Grenville Clark. The Board noted with sorrow the death of National Committeeman Grenville Clark on January 13, and as an expression of appreciation for his great contribution to the cause of individual freedom, unanimously adopted the resolution prepared by Alan Reitman and circulated for this meeting.

3. Request of Michael Harrington for a 6-month Leave of Absence. Mr. Pemberton explained that an illness had kept Mr. Harrington away from the board meetings for a year immediately following his election to the Board, and that Mr. Harrington now requested an additional 6-month leave of absence, after which he hopes to be able to participate regularly in the meetings. The Board then approved this request.

4. Board meeting Times and Dates. Mr. Goldberg summarized for the Board the results of his recent poll of the Board membership on their preferences for board meeting dates and times, pointing out that the poll was conducted in accordance with the Biennial Conference Planary Session mandate seeking to promote attendance by out-of-town members. Only 21 out of 71 members responded to the poll; but analysis of the returns in conjunction with considerable discussion at this meeting of the preferences and concerns of those present and of the intent of the mandate resulted in adoption of the following motions regarding future board meetings: (1) A motion was made and carried selecting a Thursday luncheon meeting for the hours 12:30 to 2:30 p.m. (2) A motion was then made and carried, with 10 affirmative votes, that the above meeting time should be alternated with a dinner meeting on Thursday evening for the hours of 5:30 to 8:00 p.m. (3) A third motion establishing a schedule of two meetings per month, alternating the Thursday noon and Thursday evening meetings provided for in the first two motions, carried by a vote of 7-5.

It was understood that the office is empowered to call additional meetings if necessary, or to cancel a meeting if there is an insufficient agenda to warrant it.

5. Recommendation of the Executive Director that the \$34,862.91 obligation of LCDC be assigned to the Greta Brown Fund.

Mr. Pemberton reviewed the action of the Board last fall, authorizing loans totaling \$30,000 to LCDC, and, thereafter, a grant from the Greta Brown Fund in the amount of \$40,000, conditioned on the merging of LCDC with the Roger Baldwin Foundation. LCDC has not yet accepted or rejected the conditions of that grant. He also noted that acceptance would cancel the debt.

Mr. Pemberton then proposed that the LCDC debt to ACLU, of \$34,862.91 (\$4,862.91 of which represents an open account for office and other services routinely rendered to LCDC) be assigned to the Greta Brown Fund as of December 31, 1966, since, if the debt becomes unrecoverable, it would in effect become a grant from that fund, whose terms are such as to make it the appropriate source for such a grant. A motion adopting this recommendation was then duly made and carried.

6. Appointment of Howard Samuel to the Board of Directors. On behalf of the 1966 Nominating Committee,

Mr. Pemberton conveyed to the Board their recommendation that Mr. Howard Samuel be appointed to fill a vacant term expiring at the end of 1967. He then presented biographical data on Mr. Samuel, and noted that his long years of service in the labor movement would give the Board needed representation in that area. A motion was then duly made and carried appointing Mr. Samuel to the Board of Directors for the vacant one-year term.

7. Executive Committee recommendation on the Executive Director's salary.

The Executive Director was asked to leave the room temporarily during discussion of this recommendation. Mr. Angell then presented the Executive Committee's recommendation that Mr. Pemberton's salary as Executive Director, be increased as of January 1, 1967 from the present \$20,000 per year to a figure of \$25,000 per year. A motion authorizing this increase was then duly made and carried.

8. Resolution on the Fiduciary Trust Co. / RMB/ACLU Escrow Agreement. Mr. Pemberton reminded the

Board that Roger N. Baldwin is the beneficiary of an escrow agreement by which securities were deposited with the Fiduciary Trust Company which undertook to pay ACLU \$3,600 per year to pay Roger Baldwin a salary as international work advisor. The fund has grown from about \$30,000 to about \$70,000, and Roger Baldwin has done increasingly more international work. Mr. Pemberton requested that the Board authorize an amendment of the escrow agreement to direct the payment of an additional \$1,000 annually as an expense allowance for Mr. Baldwin with which to continue his work. A motion was then made and carried authorizing the requested amendment.

9. Due Process Committee Recommendation on State Abortion Laws. Mr. Ennis reviewed the Due Process

Committee's considerations on the question of abortion as presented in the Feb. 8, 1967 office memorandum to the Board. He asked that the Board consider separately two questions: (1) What are the civil liberties issues upon which ACLU policy in this area should be based, and what should that policy be? (In this connection he pointed out that Judge Kenyon felt a woman should have an unrestricted right to seek an abortion, and that since the child has no independent life until birth, the state has no legitimate interest in deciding the fate of the unborn child.) On this question he drew attention to the Committee's recommendation on page 4 of the memorandum. (2) On what issue of purely constitutional law, if any, can ACLU base its policy? Mr. Ennis said that the Committee was not prepared to say that, as a matter of constitutional law, the state has insufficient interest in protecting the unborn child, but that there may be a constitutional defense in some circumstances (e.g., rape or incest) for persons charged under the penal laws on abortion.

I. The civil liberties question involved in abortion laws.

Mr. Ennis then moved that the Board adopt the Due Process Committee position (stated at the bottom of page 4 of the memorandum) that the present abortion laws should be changed to allow a woman unfettered discretion to have an abortion up to the first 20 weeks of pregnancy with the consent of the husband, if any, if he is available.

Mrs. Pilpel commented with approval on the efforts of the Committee, but suggested that in several respects they had not taken a sufficiently strong stand in support of civil liberties, and urged that the present law in New York which permits abortion only "to preserve the life of the woman ..." raises real questions of civil liberties on five different grounds: (1) it is unconstitutionally vague--no one can know for sure what it means, with the result that different hospitals and different doctors have different rules for identical situations; (2) it denies to women in lower economic groups the equal protection of the laws guaranteed by the 14th Amendment; (3) it infringes the constitutional right to decide whether and when to have a child, as well as the marital right of privacy (including the relationship with her physician), declared by the U.S. Supreme Court to be older than the Bill of Rights; (4) it impairs the constitutional rights of physicians to

practice in accordance with their professional obligations in that it requires them to refrain from a medical procedure, failure to perform which would, except for the law, in many cases be malpractice; and (5) it deprives women of their lives and liberty (to decide how their bodies are to be used) without due process of law.

Mrs. Pilpel continued by urging that the Board keep in mind that there are at present in various state legislatures pending bills to reform state abortion laws. She said that she would prefer a motion which stated support for the NYCLU position (page 2 of the memo) that present state laws are unconstitutional, giving the five reasons outlined above; authorized support of the three pending cases in litigation she now knows of; and eliminated the requirement of the consent of the husband included in the Committee's recommendation, conditioned lawfulness of inducing an abortion in another on the actor's being a licensed physician, and provided that in certain stipulated cases an abortion would be lawful even after the 20th week of pregnancy. Rather than move a substitute motion, Mrs. Pilpel stated her intention to move a number of amendments to the Ennis motion. She then moved an amendment to the main motion striking out the reference to the husband's approval.

Mr. Soll questioned whether there is any civil liberties issue involved in the main motion's distinction between the 20th and the 21st week and whether a physician performs the operation or not. Mrs. Pilpel answered that perhaps the division of the problem inherent in the main motion makes it difficult to show the civil liberties relevance, but that since after the 26th week the abortion procedure becomes hazardous, the state's interest in preserving the life of the mother may justify restricting her theretofore unfettered discretion. Mr. Carliner suggested that perhaps Mr. Soll's point goes to the question of the husband's consent as well. Mr. Evans commented that we cannot neglect the father's right to have a child. Mrs. Pilpel urged that that point could apply as well to decisions about the use of contraceptives, but to do so would cause us to take a backward step in the recognition of individual liberty. Mr. Speiser asked whether it was the intent of the amendment to express a view about the consent of the husband, or simply to leave it out of consideration; i.e., would we thereby oppose legislation which insists on the consent of the husband? Mrs. Pilpel said we should oppose it; we should not approve of compelling a woman to have a child she doesn't want because her husband forces her to do so by withholding his consent. The motion to amend by deleting the reference to the husband then carried by a vote of 11-3.

Mrs. Pilpel then introduced a second motion to amend the main motion by stating that an abortion should be done on another only by a licensed physician; Mr. Ennis seconded the motion. Mrs. Pilpel then explained that while the Union's primary concern is with the civil liberties issue, we could not ignore the social and public relations aspect of the fight to win a change in the abortion laws, and she felt it would be unsound as a matter of policy to approve of abortion without including this stipulation, and to that extent recognizing the state's interest in protecting the life and health of the mother.

Mr. Carliner opposed the motion to amend, saying that we could assume that those in favor of granting women this right would insist upon this provision, but that for the Union to make such a stipulation would be to dilute unnecessarily our civil liberties stance; there is no need for the Union to attempt to draft an abortion law. Mr. Maslow responded that the Union cannot afford to weigh or debate a policy with such far reaching, complex implications on purely civil liberties grounds. He said that, while in general we should stick to civil liberties issues, we should not prevent ourselves from making a perfectly logical statement in recognition of this

complexity. Mr. Fraenkel supported Mr. Maslow's point, analogizing it to the decisions of a federal court on non-federal questions in any case in which it has assumed federal jurisdiction. Mr. Goldberg then moved a substitute motion that the Union take the position that we regard it entirely within the province of the state legislature to require that abortions be done by a licensed physician. The chair ruled that there should be a vote on the Pilpel motion first. Her second amendment, stipulating that abortions should be done on another only by a licensed physician, carried by a vote of 10-4.

Mrs. Pilpel then introduced a third amendment to the main motion: that the Union will support bills which would amend the law by permitting termination of a pregnancy after the 20th week (1) when continued pregnancy would endanger the life of the mother, (2) when continued pregnancy creates a substantial risk to the woman's physical or mental health, (3) when there is substantial chance of the child being born mentally or physically defective, (4) when the pregnancy results from rape or incest, or (5) when the woman is unmarried and 15 years of age or under, or mentally ill or a mental defective. She proposed that the first 3 conditions be found only upon a medical judgment.

Judge Kenyon opposed the motion, saying that she does not concede that the state has any legitimate interest in protecting the life of an unborn child, even after 20 weeks of pregnancy, that is superior to the interest of the mother in protecting her own life and health.* Thus, she said she is unwilling to impose any time limits, on the mother's unfettered discretion to abort herself, which assumes such interest on the part of the state. Mrs. Pilpel insisted that her provision is premised not upon any assumption of the state's interest in the unborn child, but upon the medical conclusion that the abortion procedure performed after the 26th week involves serious risk to the life of the woman. Judge Kenyon conceded that there may be a question as to the woman's wisdom in exposing herself to a hazardous operation, but asked why the state should be permitted to assert an interest in this situation any more than it does in the case of any other operation. Mr. Carliner added that this would imply that a woman has no right to commit suicide if she so chooses, or no right to refuse medical treatment; and he asked whether the Union had any policy on such issues. Mr. Pemberton replied that we did not. Mr. Ennis urged that the amendment's provision for a medical judgment recognizes that the state may have a legitimate interest in the primary life--that of the mother--and that after the 20th week of pregnancy it may well legitimately assume an interest in the second life as well. Mr. Brown asked whether the present proposal does not suffer the same defect of unconstitutional vagueness that Mrs. Pilpel asserted in existing abortion laws. Mrs. Pilpel replied that hers was merely a proposal, not the draft of a bill.

Mr. Goldberg then urged that the Board adopt a substitute motion asserting that a civil liberties issues does not exist if a state legislature asserts that an abortion cannot be performed after the 20th week of pregnancy unless certain conditions [those 5 conditions listed by Mrs. Pilpel] exist. Mrs. Pilpel objected that the Union should never take the stance of saying that a civil liberties issue does not exist. Mr. Maslow said that we may be confusing the issue by using the period of 20 weeks which is based on the assumption that after that time the child might be able to survive independent of the mother; and he suggested that if our interest is only in the rights of the woman and the state's interest in her well-being, we should instead use the period of 3 months, based on the medical opinion (he cited Dr. Alan Guttmacher) that abortion after that time may be hazardous. Mr. Ennis asserted that the state does have a legitimate interest in the life of the child after 20 weeks, and Mr. Maslow supplemented this contention by pointing out that the law does recognize an unborn child as a legal entity in such issues as the

* or that is superior to her sense of responsibility—as mother—to make the agonizing decision as to the morality of imposing upon the family situation, or upon the loveless product of rape, an inevitable unfortunate existence.

inheritance of property and the maintenance of tort actions, and that there could be a conflict of interest between mother and child. Mr. Evans pointed out that it is equally inconsistent if we recognize the state's interest in protecting the child after the 20th week, to make such exceptions as are proposed by Mrs. Pilpel's last two conditions (rape and incest, 15-year old mothers).

Mr. Goldberg then withdrew his substitute motion, saying that the question of whether the unborn child has rights is a subtle and complicated issue not dependant upon the distinctions of the 20th or 26th week of pregnancy. He then introduced an alternative substitute motion: that the state has a right to fix a time beyond which it is unlawful to perform an abortion because of a grave danger to the mother unless the abortion is medically advisable because of substantial risk to the physical or mental health of the woman, or substantial risk that the child will be defective mentally or physically.

Mr. Fraenkel then moved to refer the whole matter back to committee, and to let the motions already adopted rest in suspense until the Committee reports back to the Board. However, he withdrew his motion to refer so that the Board could take a vote on the Ennis main motion as amended, responding to Mrs. Pilpel's plea that referral back to committee at this juncture would mean that the ACLU would have no role of guidance with respect to the legislative bills now pending in several states. She urged that the two motions already passed overwhelmingly should stand.

Mr. Carliner, acknowledging Mr. Goldberg's effort clearly to restrict the Union position at this point to the question of the rights of the mother and the interest of the state in her health, suggested that the point could be more easily handled by relying on the medical opinion that abortion after 3 months could be hazardous to the life of the mother. He therefore moved to amend the main motion by striking the phrase "20 weeks" and substituting the phrase "3 months." Mr. Fraenkel seconded the motion.

Mr. Brown raised strong objections to what he considered "amateur gynecology" in the discussion of this issue, and moved that the entire matter be referred back to committee for the solicitation of further medical opinion. Mr. Black objected that civil libertarians are supposed to have faith in the ability of people to handle freedom, that we should recognize that the right of individuals to make decisions in the conduct of their lives is a crucial civil liberty; and he urged that referral back to committee now would be to go back on this faith, as the Union would then have no influence on the outcome of this crucial civil liberties question. Mr. Goldberg urged that a clear civil liberties issue is presented by the position that women have a right to control their bodies but that we at the same time recognize the interest of the state in protecting the health of the mother. He urged that we could decide that much at this meeting, but that beyond that we may be over our heads. Mrs. Pilpel added her strong recommendation that the Union can at this point take a position at least on the question of whether a woman is entitled to demand an abortion up to the 20th week of pregnancy without being unlawful. The Brown motion to recommit then lost by a vote of 6-10.

Discussion then continued on the Carliner amendment. Mr. Ennis said that the amendment would put us on the wrong track because it misses the point of the present abortion laws which are set up to protect the unborn child. But Mrs. Pilpel answered that we want to be on that track, because we are not interested in anything but the rights of the mother up to that point. The Carliner amendment to substitute the phrase "three months" then carried, 8-5.

A vote was called on the Ennis main motion as amended which then carried, 9-2.

Mr. Fraenkel then moved that all questions concerning policy on abortion after the first three months of pregnancy be recommitted for further clarification by the Committee. This motion carried 9-2.

II. The question of constitutionality of present abortion laws.

Mrs. Pilpel noted that there are three abortion cases now pending (in California, New Jersey, and New York), and urged that the Union take a policy stand on the 5 questions she raised concerning constitutionality of the abortion laws. Mr. Fraenkel felt the Board was insufficiently informed regarding the 5 points to make a decision at this time, but that we need not vote it down. He preferred no vote. Mrs. Pilpel moved that the Board at least declare that the present abortion laws, both on their face and in their application, raise serious constitutional questions. Mr. Carliner suggested that the Board ask the legal director to inquire as to cases now pending and report to the Board what constitutional questions they raise for our consideration. Mr. Fraenkel then moved to refer the matter to the office for such a report. Mr. Maslow asked that consideration also be given to the constitutional issues involved in the activity of one religious body seeking civil sanctions for its religious dogma. The Fraenkel motion then carried, 13-0.

The meeting then adjourned.