

Inside the ACLU: Activism and Anti-Communism in the Late 1960s

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I. INTRODUCTION

The American Civil Liberties Union is an organization that has never known peace. In its nearly eighty years of existence, the Union has drawn fire from all segments of the political spectrum. It has come into conflict on some occasion with virtually every part of American society—government, business, education, religion.

Some of the ACLU's fiercest battles have occurred within the organization itself. The Union has suffered two remarkable internal conflicts in its history, the first of which arose over the issue of communism. In 1940, the ACLU's board of directors yielded to rising anti-communist sentiment and adopted a resolution barring communists and other supporters of totalitarian doctrines from office in the Union.¹ All but one of the commu-

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1. Resolution Adopted by the Board of Directors and National Committee of ACLU at Annual Meeting of National Committee at Town Hall (Feb. 5, 1940), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 8 (Micro-filming Corp. of America) [hereinafter 1940 Resolution].

nists on the ACLU's Board resigned in protest, and the Board soon purged the lone holdout after a bitterly contested makeshift trial.² As the ACLU dealt with threats to civil liberties posed by anti-Communist hysteria in America over the next decades, the 1940 episode came to be viewed by many as the Union's most regrettable departure from its own principles.³ In the early 1960s, several of the ACLU's local affiliate organizations demanded reconsideration of what had become known as the "1940 Resolution." Some ACLU leaders, particularly those personally involved in the events of 1940, steadfastly defended the old policy. The issue, which ACLU Board Chairman Ernest Angell called the most "exhaustively discussed" in his quarter century of service,⁴ promised to create bitter conflict and division. After several years of debate, however, the Union's leaders came together in compromise, adopting a new policy statement satisfactory to all.

As the anti-communism issue finally wound to an end in the late 1960s, the ACLU was in the midst of a second major internal struggle. One contingent of the organization's leaders, known as "activists" or "militants," pushed to expand the Union's range of interests beyond their traditional limits.⁵ They sought to add to the Union's agenda previously neglected subjects such as abortion, capital punishment, homosexuality, marijuana, welfare, and proposals to amend the United States Constitution to lower voting age and to guarantee equal rights to women. While there was some disagreement between the activists and the ACLU's "moderate" or "traditionalist" leaders over where to draw lines on these issues, the conflict was not severe. The fierce storm of controversy centered around Vietnam.⁶ The activists saw critical civil liberties issues presented by American involvement in the war, while moderates feared transformation of the Union from a nonpolitical civil liberties group to a partisan anti-war organization. The activists ultimately prevailed, but the debate raged for several years until the Union's moderate faction finally disintegrated.⁷ When the

2. See CORLISS LAMONT, *THE TRIAL OF ELIZABETH GURLEY FLYNN BY THE AMERICAN CIVIL LIBERTIES UNION* (1968) [hereinafter TRIAL].

3. See *infra* notes 108-171 and accompanying text.

4. Statement by Ernest Angell, endorsed by Ralph Brown and Osmond K. Fraenkel, Re: 1940 Resolution: Mar. 19, 1967, Plenary Board Proposal To Amend Section 7(D) of the Union Constitution 29, in *Revision of ACLU Constitution* (1977) (undated item among materials distributed with ballot for 1967 referendum on proposed changes to ACLU Constitution), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America) [hereinafter Angell Statement].

5. See *infra* notes 91-107 and accompanying text.

6. See *infra* notes 172-284 and accompanying text.

7. See *infra* notes 285-321 and accompanying text.

Watergate scandal became a major issue in 1973, only a few dissenting voices remained to argue that seeking the impeachment of President Nixon was a political enterprise beyond the ACLU's proper sphere of concerns.⁸

The internal turmoil of the late 1960s had a troubling legacy for the organization. Within a few years, the ACLU came to the brink of collapse.⁹ Vietnam and Watergate triggered the fastest growth in the Union's history.¹⁰ While membership and income soared, much of the new support had more to do with political sentiment than commitment to abstract civil liberties principles. With the end of the war and Nixon's presidency, the ACLU's membership and income stagnated and then began to decline.¹¹ The slide accelerated after the ACLU defended the rights of American Nazis to march in Skokie, Illinois in 1977. The Union lost thousands of members and narrowly avoided bankruptcy.¹²

The financial crisis passed, but damage to the ACLU's reputation was more permanent. By alienating those of its leaders who resisted the activist expansion, the Union lost a vital moderating element. While conservatives had long accused the ACLU of supporting communism and atheism, a new and more sophisticated line of criticism emerged. The Union came to be perceived by many—even former friends—as a partisan special interest group with an agenda of liberal causes, rather than as a neutral defender of the Bill of Rights.¹³ The portrayal of the ACLU as a radical liberal lobby reached its climax in the 1988 presidential campaign when George Bush used ACLU membership as a black mark against his opponent Michael Dukakis.¹⁴ The perception had taken root that “[t]he ACLU of 1988 has about as much to do with civil liberties as the AT&T of 1988 has to do with telegraphs.”¹⁵

The late 1960s represented a critical moment for the ACLU, a period when one intense internal struggle finally ended and another began. The ACLU remains an organization with an unmatched impact on American law and liberties. Understanding the events that occurred inside the ACLU during the late 1960s is essential to understanding the ACLU's history and development. Only a few historical studies of the ACLU address the period of the late 1960s.¹⁶ None closely examines the Union's

8. See *infra* note 303 and accompanying text.

9. See *infra* notes 306-311 and accompanying text.

10. See *infra* notes 306-307 and accompanying text.

11. See *infra* notes 306-311 and accompanying text.

12. See *infra* note 306 and accompanying text.

13. See *infra* notes 309-310 and accompanying text.

14. Editorial, *Card-Carrying Smears*, N.Y. TIMES, Sept. 18, 1988, § 4, at 22.

15. Mark S. Campisano, *Card Games*, NEW REPUBLIC, Oct. 31, 1988, at 10, 12.

16. Two histories of the ACLU cover the late-1960s period. See WILLIAM A.

reconsideration of the 1940 Resolution,¹⁷ considers why the Union's leadership divided so bitterly over issues relating to Vietnam,¹⁸ or connects these two areas of tremendous controversy.

By examining together the two great conflicts of the ACLU's internal history, a broader lesson can be derived from the Union's experience. The debates over the 1940 Resolution and the Vietnam War proceeded in strikingly different manners. The ACLU's leaders turned a bitter fight over the 1940 Resolution, one that promised to alienate a substantial portion of the organization, into a respectful debate and a compromise satisfactory to all. The participants in the debate over the 1940 Resolution adopted an approach which can be described as "critical reflexivity," or a "mode of analysis that recognizes the existence of moral preferences in ourselves and others, and demands of us that we analyze the nature and construction of those preferences so that they contribute to rather than detract from our ability to achieve the purposeful understanding we seek."¹⁹ Recognizing that factors such as different personal experiences and fundamental understandings about communism influenced all participants in the debate, leaders on both sides moved away from dogmatically insisting that there was only one principled position. The ACLU's han-

DONOHUE, *THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION* (1985); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (1990). Each represents a diametrically opposite viewpoint. Donohue's study is a conservative critique designed to prove that the Union is a left-wing organization with a partisan agenda of "egalitarianism, rationalism, secularism, optimism, and antitraditionalism." DONOHUE, *supra*, at 5. Walker praises the Union as strongly as Donohue condemns it. A member of the ACLU's National Board of Directors and former president of its Nebraska affiliate, Walker portrays the Union as a heroic champion of liberty and dismisses Donohue's history as "a conservative diatribe based on little research and less understanding of the issues." WALKER, *supra*, at 449.

17. Donohue briefly discusses the demise of the 1940 Resolution, but his sole concern is whether the ACLU's new policy would allow a Communist to join the ACLU's Board. *See* DONOHUE, *supra* note 24, at 188-90. Walker mentions in one sentence that the ACLU abolished the 1940 Resolution, but otherwise ignores the issue, a Cold War era anachronism that does not fit into his depiction of the late-1960s as the era of "The Civil Rights Revolution." WALKER, *supra* note 24, at 133, 261. Walker vastly understates the persistence of anti-communism in the organization, claiming that by 1955 the ACLU's anti-Communist bloc was "decimated" and that the Union experienced no more "acrimonious disputes over cold war issues." *Id.* at 211.

18. Donohue briefly describes the ACLU's policy decisions concerning Vietnam, claiming that the ACLU "made an about-face and embarked on a frontal assault on government," but ignores entirely the internal conflict the issues generated. *See* DONOHUE, *supra* note 24, at 195. Walker mentions but does not analyze the organizational strife. *See* WALKER, *supra* note 24, at 282-85.

19. Raymond J. Michalowski & Ronald C. Kramer, *The Space Between Laws: The Problem of Corporate Crime in a Transnational Context*, 34 *SOC. PROBS.* 34, 46 (1987).

dling of that issue stands in sharp contrast to the debates and outcomes on matters relating to the Vietnam War. On those issues, both militants and moderates insisted that it was wrong to consider any factor—such as organizational history, personal experience, or concerns about public perception of the Union—other than abstract principles.²⁰ Each side treated opposing arguments as illegitimate affronts to self-evident civil liberties ideals.

The ACLU's internal war over Vietnam did not have to turn out as it did. A greater willingness to appreciate the subjective influences and motivations of all participants would have reduced the venom of the debate and made possible compromises avoiding the damaging fallout from the fight over the ensuing decades.

I. THE ACLU

A. *Anti-Communism*

Roger Baldwin founded the ACLU in 1920 and served as its Executive Director until 1950.²¹ A brilliant but autocratic organizer, Baldwin was a compelling presence inside the organization until his death in 1981. Arthur Garfield Hays, one of the Union's lawyers in its early years, said simply that "the American Civil Liberties Union *is* Roger Baldwin."²²

Baldwin's ideology comprised a unique mixture of radical ideas.²³ Though he never considered himself a Communist, his rhetoric often gave the opposite impression.²⁴ In his contribution to his thirtieth anniversary Harvard yearbook, Baldwin delighted in shocking his classmates with the declaration that "I seek social ownership of property, the abolition of the propertied class and sole control by those who produce wealth. Communism is the goal."²⁵

Although the ACLU disavowed political partisanship, its leadership in

20. See *infra* notes 172-284 and accompanying text.

21. WALKER, *supra* note 24, at 46-47, 205.

22. DONOHUE, *supra* note 24, at 45.

23. Baldwin was "a John Adams who imagined himself a Prince Kropotkin" in the words of one ACLU publicist of the 1920s. CLETUS E. DANIEL, *THE ACLU AND THE WAGNER ACT: AN INQUIRY INTO THE DEPRESSION-ERA CRISIS OF AMERICAN LIBERALISM* 79 (1980) (quoting JOSEPH FREEMAN, *AN AMERICAN TESTAMENT* 327-28 (1936)).

24. See Roger Baldwin, *Recollections of a Life in Civil Liberties—II: Russia, Communism, and United Fronts, 1920-1940*, CIV. LIBERTIES REV., Fall 1975, at 10 (describing his travels in Soviet Union, early attitudes toward communism, and participation in United Fronts with Communists).

25. *Id.* at 22; see also PEGGY LAMSON, *ROGER BALDWIN, FOUNDER OF THE AMERICAN CIVIL LIBERTIES UNION* 190-91 (1976).

its early years was heavily weighted to the left.²⁶ Anti-communism was not a significant issue within the organization until 1934, when a riot erupted at Madison Square Garden after Communists interrupted a Socialist rally against Austrian fascism.²⁷ A report by a special ACLU commission blamed the Communists for the riot, but also criticized the Socialists for escalating the mayhem. The report incensed Norman Thomas, who was an ACLU co-founder, Roger Baldwin's best friend, and six times the American Socialist Party's candidate for the United States Presidency.²⁸ Thomas called the riot the "public climax of Communist intolerance," expressed his shock at the ACLU's "equivocal attitude," and committed himself to removing Communists from the Union's leadership.²⁹ He found several allies among the ACLU's directors, including John Haynes Holmes, who considered Communists "a group of savages," and Morris Ernst, who advocated outlawing the Communist Party of the United States of America and other totalitarian groups.³⁰

The fracture over communism worsened when the ACLU became a target of Congressman Martin Dies and his Special Committee on Un-American Affairs. A McCarthy precursor, Dies oversaw sensational hearings at which charges of subversion and Communist infiltration were leveled at the ACLU, Shirley Temple, the Campfire Girls, the Boy Scouts, labor unions, and six hundred other organizations.³¹

Anxiety over communism peaked with the August 1939 announcement

26. For example, the ACLU's National Committee in 1935 consisted of twenty-eight socialists, twenty-two Democrats, four Communist sympathizers, and three Republicans. WALKER, *supra* note 24, at 69.

27. See CORLISS LAMONT, FREEDOM IS AS FREEDOM DOES: CIVIL LIBERTIES TODAY 265-66 (1956) [hereinafter FREEDOM].

28. See LAMSON, *supra* note 33, at 132; WALKER, *supra* note 24, at 68.

29. NORMAN THOMAS, TEST OF FREEDOM 19, 20 (1954); see also HARRY FLEISCHMAN, NORMAN THOMAS, A BIOGRAPHY 185-86 (1964); BERNARD K. JOHN POLL, PACIFIST'S PROGRESS: NORMAN THOMAS AND THE DECLINE OF AMERICAN SOCIALISM 174-77 (1970); MURRAY B. SEIDLER, NORMAN THOMAS: RESPECTABLE REBEL 127 (1967); W. A. SWANBERG, NORMAN THOMAS, THE LAST IDEALIST 200 (1976).

30. See WALKER, *supra* note 24, at 83; Jerold S. Auerbach, *The Depression Decade*, in THE PULSE OF FREEDOM—AMERICAN LIBERTIES: 1920-1970S 65, 95 n.72 (Alan Reitman ed., 1975).

31. See Jerold Simmons, *The American Civil Liberties Union and the Dies Committee 1938-1940*, 17 HARV. C.R.-C.L. L. REV. 183, 185 (1982); see also DONOHUE, *supra* note 24, at 141-44; Auerbach, *supra* note 38, at 86. Dies "cleared" the Union in October 1939 after a controversial meeting with ACLU counsel Morris Ernst. Some ACLU insiders alleged that Ernst bought Dies' blessing with a promise that the ACLU's Communist board members would soon be removed. See DONOHUE, *supra* note 24, at 141-42; FREEDOM, *supra* note 35, at 268-69; LAMSON, *supra* note 33, at 233; WALKER, *supra* note 24, at 129; Simmons, *supra*, at 196 (quoting letter from Ernst stating that he "saved the civil liberties union from a terrible rap, by seeing Dies").

of the Molotov-Ribbentrop Pact between Nazi Germany and the Soviet Union.³² Many previously wavering centrists, in both the ACLU and the nation generally, moved overnight into the anti-Communist camp. For Roger Baldwin, the announcement that the Communists “got into bed with Hitler” was a “bombshell,” the “biggest shock” of his life.³³ Despite his revulsion at the news, Baldwin did not immediately join those clamoring for expulsion of Communists from the ACLU’s ranks. In a December 1939 letter to John Dos Passos, an ACLU National Committee member who resigned because the Union tolerated Communist participation, Baldwin argued that “we can hardly apply in our board or membership the test of political or other values . . . without doing violence to our fundamental principles.”³⁴

Within a few months, Baldwin changed his mind and helped draft such a policy, having come to see it as the “only way to save the organization from complete disruption.”³⁵ The resolution imposed a “test of consistency in the defense of civil liberties in all aspects and all places” and it barred from Union offices and staff positions anyone who was a member of “any political organization which supports totalitarian dictatorship in any country” or whose “public declarations” indicated support for such groups.³⁶ It offered two examples of such organizations: the Communist Party and the German-American Bund.³⁷ The ACLU’s Board approved the resolution on February 5, 1940, after which most Communists within the Union’s leadership, including Board Chairman Harry Ward, soon resigned.³⁸

Only one Communist, Elizabeth Gurley Flynn, refused to resign from the ACLU’s Board.³⁹ Thinking it unchivalrous for a man to do so, Baldwin arranged for a female Board member to bring charges seeking Flynn’s expulsion.⁴⁰ On the night of May 7, 1940, the ACLU Board’s meeting turned into a grueling six-hour trial at which tensions and animosities simmering for half a decade were unleashed.⁴¹ The sole ground

32. Editorial, *A German Bomb*, N.Y. TIMES, Aug. 22, 1939, at 18.

33. LAMSON, *supra* note 33, at 201; Baldwin, *supra* note 32, at 34.

34. Auerbach, *supra* note 38, at 92.

35. LAMSON, *supra* note 33, at 234.

36. 1940 Resolution, *supra* note 6.

37. *Id.*

38. See WALKER, *supra* note 24, at 131-32.

39. See *id.* at 132.

40. See *id.* Baldwin spoke affectionately of Flynn’s “great personality, great charm.” LAMSON, *supra* note 33, at 235. Yale law professor and harsh ACLU critic Joseph Bishop called her “assuredly as honest and philanthropic a fool as ever scraped the caked blood from J. V. Stalin’s boots.” Joseph W. Bishop, Jr., *The Reverend Mr. Coffin, Dr. Spock, and the ACLU*, HARPER’S, May 1968, at 57, 67.

41. See TRIAL, *supra* note 7.

for expulsion was Flynn's admitted membership in the Communist Party, for no one could cite any instance when her actions or words conflicted with the ACLU's programs or principles.⁴² Flynn and her defenders pointed out the incongruity of imposing a test oath in an organization opposed to guilt by association.⁴³ When her interrogators, led by the Board's new chairman John Haynes Holmes, argued that communism and civil liberties were incompatible, Flynn countered that the unceasing demand for the ACLU's services in the United States could be taken to prove that civil liberties were incompatible with capitalism.⁴⁴ Flynn warned her accusers that they were "killing the ACLU," but when Board members split evenly, Holmes cast the deciding vote in favor of expulsion.⁴⁵

Although the public and press generally reacted favorably to the 1940 Resolution and ensuing purge, there was a strong backlash from many ACLU members and friends. Holmes defended the Board's actions, saying that the ACLU was not a free society but a "closed corporation," a "church with a dogma," and it had to exclude those who did not fully subscribe to its creed.⁴⁶ Always keenly defensive about ACLU policy and his own actions, Baldwin characteristically denied that anything significant had even occurred. He insisted, wrongly, that the ACLU had never elected any Communists, but merely tolerated several who joined the Communist Party after becoming ACLU officials.⁴⁷ He further claimed that no principles were changed because the 1940 Resolution "merely put into words what we had always done anyhow."⁴⁸ Baldwin flatly denied that considerations of expediency or organizational survival played any role in the decision.⁴⁹

After the Soviet Union became an ally and American Communists became fervent supporters of the war effort, worries about communism receded for a time—although anti-Communists continued to dominate the ACLU. When the Cold War heated up in the early 1950s, they reinforced the 1940 Resolution by incorporating it into the Union's constitution and

42. *See id.* at 100.

43. *See id.*

44. *See id.* at 19, 101-02.

45. *Id.* at 19. In a dramatic turnabout, Holmes was a victim of a later wave of anti-communism. In 1953, the ACLU came to his defense when former Communist Benjamin Gitlow, testifying before McCarthy's House Un-American Activities Committee, accused Holmes of collaborating with the Communist Party. *Un-American Committee Attack on Holmes Termed "Wholly Unfounded, Irresponsible,"* CIV. LIBERTIES, Oct. 1953, at 5.

46. Auerbach, *supra* note 38, at 99.

47. *See* TRIAL, *supra* note 7, at 100.

48. LAMSON, *supra* note 33, at 229; Auerbach, *supra* note 38, at 98.

49. Auerbach, *supra* note 38, at 97-99.

adding to the membership applications and cards a statement indicating that the organization did not welcome the support of Communists, fascists, or Klansmen.⁵⁰ The anti-Communist policy often put the Union in a difficult position. During congressional testimony in 1948, ACLU representatives admitted to Congressman Richard Nixon that the ACLU did not allow Communists among its officers and staff.⁵¹ Laughing, Nixon wondered aloud how the ACLU could argue that the government lacked the power to do the same.⁵²

While the ACLU opposed McCarthyism in significant respects, the Union's paranoia about communism diluted its response to the crisis.⁵³ The ACLU shied away from several important civil liberties cases involving communism, and in those it entered, the Union included a strong anti-Communist disclaimer in every brief.⁵⁴ Future Executive Director Aryeh Neier admitted that "[i]t was tough in the 50s to defend communists and we ran away."⁵⁵

50. See Memorandum from Jack Pemberton to the ACLU National Board, Affiliates and National Committee 2 (Nov. 4, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America) [hereinafter Pemberton Memorandum].

51. See WALKER, *supra* note 24, at 198.

52. See *id.*

53. Some claim the ACLU's equivocation contributed to the era's anti-Communist hysteria. See TRIAL, *supra* note 7, at 22; Simmons, *supra* note 39, at 206-07.

54. See Mary S. McAuliffe, *The Politics of Civil Liberties: The American Civil Liberties Union During the McCarthy Years*, in THE SPECTER: ORIGINAL ESSAYS ON THE COLD WAR AND THE ORIGINS OF MCCARTHYISM 152-70 (Robert Griffith & Athan Theoharis eds., 1974). The ACLU announced in 1952 that it would not oppose labor union rules prohibiting Communists from serving in leadership positions. American Civil Liberties Union Report on Civil Liberties: January 1951-June 1953, "WE HOLD THESE TRUTHS . . ." FREEDOM JUSTICE EQUALITY 11 (1953), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 87 (Microfilming Corp. of America) [hereinafter WE HOLD THESE TRUTHS]. The ACLU felt that a "union might reasonably determine that it was not worth risking the existence and effectiveness of the union." *Id.*

55. J. Anthony Lukas, *The ACLU Against Itself*, N.Y. TIMES, July 9, 1978, at 11 (Magazine). For example, the ACLU Board's anti-Communist faction, still led by Norman Thomas, proposed three controversial new policies regarding communism in 1953. The statements condemned the Communist Party suggested that Communists might be unfit to teach, approved the consideration of political associations in employers' hiring and firing decisions, and approved firing those who invoke the Fifth Amendment in response to questions about subversive associations. McAuliffe, *supra* note 62, at 161-62. After a referendum vote of local and national ACLU officials rejected the proposed statements, the ACLU's National Board adopted instead a muddled statement about the "dual nature" of the Communist Party, defining it as both a legitimate "political agitation movement and a part of the Soviet conspiracy." Minutes of the Board of Directors (Aug. 2, 1954), *microformed on* American Civil Liberties Union:

The most disconcerting element of the ACLU's Cold War record went undiscovered until the 1970s. It was never a secret that some ACLU leaders had a soft spot in their hearts for the FBI. Oddly, Roger Baldwin's heroes were Douglas MacArthur and J. Edgar Hoover.⁵⁶ Upon meeting the FBI director, Baldwin thanked him for his commitment to "observe with scrupulous care the civil rights of everybody."⁵⁷ In 1977, the ACLU obtained access to thousands of FBI documents in an attempt to learn more about the agency's past investigations of the Union.⁵⁸ The materials revealed that several ACLU officers in the 1950s confidentially provided information to the FBI about suspected Communist sympathizers within the ACLU's ranks.⁵⁹ ACLU General Counsel Morris Ernst maintained a particularly extensive correspondence with "my dear Edgar."⁶⁰ When the FBI documents became public, one ACLU official defended his decision to give confidential documents to the FBI on the ground that the 1940 Resolution established anti-communism as official ACLU policy.⁶¹ The discovery of the FBI connection prompted a nearly unanimous reaction of dismay throughout the ACLU, although Southern California affiliate president George Slaff went a bit further than most in comparing the betrayals to those of Benedict Arnold and Judas Iscariot.⁶²

B. Traditionalism

Tremendous changes occurred within the ACLU even as anti-communism persisted. In 1950, the Union still reflected Baldwin's vision of a small, elitist, and undemocratic organization. Baldwin's "promotion" in that year from executive director to honorary ambassador, engineered by those who no longer shared his vision, marked the beginning of the ACLU's transition to a mass membership organization with a federal structure.⁶³ The new Executive Director, Patrick Murphy Malin, began the first effort in the ACLU's history at rapid recruitment of new members.⁶⁴

Records and Publications 1917-1975, Reel 12 (Microfilming Corp. of America); *see also* CHARLES L. MARKMANN, *THE NOBLEST CRY: A HISTORY OF THE AMERICAN CIVIL LIBERTIES UNION 171-72* (1965).

56. *See* WALKER, *supra* note 24, at 161, 191, 200.

57. *Id.* at 161.

58. *See* Harrison E. Salisbury, *The Strange Correspondence of Morris Ernst and John Edgar Hoover 1939-1964*, 239 *NATION* 575, 575 (1984).

59. *Id.*

60. *Id.*

61. WALKER, *supra* note 24, at 193.

62. Letter from George Slaff to the Editor, *CIV. LIBERTIES REV.*, March/Apr. 1978, at 6.

63. *See* WALKER, *supra* note 24, at 203-08.

64. In 1953, the Union's annual report called for a "great host" of active members to

The effort succeeded, as membership and income shot upward.⁶⁵ The organization also underwent significant democratization and decentralization. Local affiliates increased in number, size, and independence, and obtained a more direct role in national policy making.⁶⁶ In 1954, the ACLU began holding biennial conferences—national mass meetings instituted to broaden participation, to suggest new policy directions to the National Board, and to explore undeveloped civil liberties issues.⁶⁷ The ACLU's leadership diversified somewhat to include more political conservatives and centrists, while the organization's public image became ever more respectable.⁶⁸

Despite the dramatic organizational changes, the ACLU's leaders maintained through the early 1960s a high level of consensus about the

keep civil liberties "alive and kicking all across the country." WE HOLD THESE TRUTHS, *supra* note 62, at 103.

65. Membership quadrupled to approximately 40,000 between 1949 and 1957. AMERICAN CIVIL LIBERTIES UNION, "NOR SPEAK WITH DOUBLE TONGUE" 8 (1957), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 87 (Microfilming Corp. of America). Not satisfied, Malin insisted that the ACLU "ought immediately, not gradually, to become four hundred thousand." *Id.* The Union's income rose by an average of more than twenty-five percent per year over the same period. *Compare* AMERICAN CIVIL LIBERTIES UNION, IN THE SHADOW OF FEAR 75 (1949), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 87 (Microfilming Corp. of America), *with* AMERICAN CIVIL LIBERTIES UNION, CLEARING THE MAIN CHANNELS 138 (1956), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 87 (Microfilming Corp. of America).

66. *See* Gertrude Samuels, *The Fight for Civil Liberties Never Stays Won*, N.Y. TIMES, June 19, 1966, § 6 (Magazine), at 14, 54 (describing affiliates as nearly self-governing).

67. *See* Dean M. Kelley, *Where Are Civil Liberties Headed?: A Report from the ACLU Biennial Conference*, CIV. LIBERTIES REV., Feb—Mar. 1977, at 11, 12. Other changes included de-emphasizing litigation in favor of legislative efforts, aided by the establishment in 1952 of a full-time Washington office. *Id.* at 11. The Union shifted toward implementing a positive agenda of goals, rather than being "like the fireman waiting for the whistle to blow so he could go put the fire out." Lesley Oelsner, *ACLU Recalls Its Humble Beginning as It Marks 50th Birthday and Hails Founder*, N.Y. TIMES, Jan. 22, 1970, at 40 (quoting ACLU executive director Jack Pemberton).

68. *See* Elliot Carlson, *Civil Liberties Guard: ACLU Goes Increasingly to Aid of Right-Wing Groups*, WALL ST. J., Mar. 29, 1965, at 14 (describing ACLU as "ardent defender of the civil rights of any group regardless of ideology"); Samuels, *supra* note 74, at 54 (cataloging ACLU's coverage of "political and social issues from extreme left to extreme right"); *Politics Is an Old Issue*, WASH. POST, Aug. 7, 1972, at C3 (quoting Dwight MacDonald's 1953 description of ACLU as "a worthy cause almost as sedate as the Children's Aid Society"); *cf.* Alan F. Westin, *On Closing the Review*, CIV. LIBERTIES REV., Jan.—Feb. 1979, at 5, 6 (discussing how media coverage of civil liberties improved in the 1950s, as "anti-labor, anti-radical, and anti-minority" bias dissipated).

Union's work. While there were always disagreements and debates, none was critically divisive or hostile. The Union devoted its attention to well-established civil liberties issues like obscenity, loyalty, and security concerns, criminal procedure, church/state separation, wiretapping, political association, and free speech in labor relations. For example, the discussions at the 1964 Biennial Conference, an event intended to foster exploration of "frontier" civil liberties issues, focused on traditional subjects like the Cold War, crime, organized religion, and equality.⁶⁹

Traditional attitudes toward civil liberties dominated the Union. At the end of 1963, Executive Director Jack Pemberton investigated views on potential expansion of the ACLU's activities. He distributed a letter mentioning possible new efforts such as opposing the peace-time draft, objecting to the growing military influence on civilian life, and recognizing the importance of peace movements in promoting civil liberties by opposing war.⁷⁰ Pemberton asked Roger Baldwin to review the responses and to consider "whether to embark on any of these areas or to stick to constitutional guarantees and immediately related concerns."⁷¹ After analyzing responses from ACLU officials and political science experts, Baldwin concluded that the Union should not dilute its responsibilities by taking on such new activities. Most of the respondents insisted that the Union stick to protecting the guarantees of the Bill of Rights, while some favored a more liberal interpretation of civil liberties going beyond the Constitution's precise guarantees, but none approved the sort of activism mentioned by Pemberton.⁷² One respondent commented that if the ACLU took the ridiculous step of supporting the peace movement, then it might as well take a position against poverty too.⁷³

The ACLU expanded its agenda and its definitions of civil liberties only slowly and with great reluctance. For example, in the mid-1960s, the ACLU's policy on homosexuality provided that laws criminalizing homosexual behavior do not violate the Constitution, and added that "[i]t is not within the province of the Union to evaluate the social validity of laws

69. See Memorandum from Alan Reitman and Leanne Golden to Board, National Committee, and Affiliates Re: 1964 Biennial Conference: Bulletin #2—Place, Time, Agenda 2-3 (Mar. 11, 1964), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 29 (Microfilming Corp. of America).

70. See Memorandum from Roger N. Baldwin to Board of Directors 1 (undated and attached as appendix to papers distributed in connection with ACLU's 1964 Biennial Conference), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 29 (Microfilming Corp. of America).

71. *Id.*

72. See *id.* at 1-2.

73. See *id.* at 4.

aimed at the suppression or elimination of homosexuals.”⁷⁴ The ACLU accepted homosexual conduct as a relevant factor in determining a person’s suitability for government employment because, as one Board member put it, “the public is entitled to protection against the risk of solicitation of young boys.”⁷⁵ Likewise, the ACLU’s Board did not vote to take a case opposing capital punishment until 1964, and even then some among the Union’s leaders considered it a radical move, arguing that the death penalty was an issue better left to partisan organizations like the New York Committee to Abolish Capital Punishment.⁷⁶

The ACLU was extraordinarily cautious about taking any position hinting of political partisanship. During the 1964 presidential campaign, Republican candidate Barry Goldwater attacked the Supreme Court for its expansive interpretations of the Constitution’s criminal safeguards. The ACLU Board discussed the matter, but did not take any action or offer any public comment, even though Goldwater’s tactics posed a novel challenge to the Union’s interests. The Board concurred with Executive Director Jack Pemberton’s view that “such able people as Mr. Kennedy, Senator Dodd, and Mr. Katzenbach have made responses, and it is more appropriate for these people to respond in the political context than for ACLU.”⁷⁷

The ACLU had tremendous success in advancing its agenda of traditional civil liberties concerns. The Supreme Court’s 1964 term ended with a string of decisions—*Escobedo v. Illinois*,⁷⁸ *Jacobellis v. Ohio*,⁷⁹ *Reynolds v. Sims*,⁸⁰ *New York Times v. Sullivan*⁸¹—marking the height of the

74. ACLU Position on Homosexuality (Sept. 29, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America).

75. Minutes of the Board of Directors of the ACLU 3 (Dec. 13, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 17 (Microfilming Corp. of America) (remarks of Will Maslow).

76. Minutes of the Board of Directors of the ACLU (Jan. 6, 1964), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 17 (Microfilming Corp. of America). The 1964 Civil Rights Bill, amended to prohibit employment discrimination based on gender as well as race, also put the ACLU in a quandary, because, “like the equal rights amendment which the Union opposes, it does not take into account the need for protective legislation for women.” Minutes of the Board of Directors of the ACLU 2 (Feb. 17, 1964), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 17 (Microfilming Corp. of America).

77. Minutes of the Board of Directors of the ACLU 4 (Sept. 28, 1964), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 17 (Microfilming Corp. of America).

78. 378 U.S. 478 (1964) (extending right of counsel to custodial interrogation).

79. 378 U.S. 184 (1964) (reversing obscenity conviction of movie theatre exhibitor).

80. 377 U.S. 533 (1964) (finding that the Equal Protection Clause requires substantially equal legislative representation for all citizens in a state).

81. 376 U.S. 254 (1964) (requiring proof of actual malice in defamation cases in-

ACLU's influence over American law and public policy.⁸²

C. Activism

A period of conflict and instability lay ahead for the ACLU. The tremendous organizational changes of the 1950s and early 1960s laid the foundation for the emergence of a new activism within its ranks. Greater size and wealth made possible an expansion of the Union's activities,⁸³ while the more decentralized structure enabled the most progressive local affiliates, now "about as amenable to order and discipline as so many jackrabbits," to lead the rest of the organization into new areas.⁸⁴

Broader social changes also encouraged expansion by creating "greater public comprehension of individual rights and a greater demand for those rights."⁸⁵ The civil rights movement played a particularly critical role in energizing the Union. Initially, the ACLU drew an informal distinction between civil liberties and civil rights, and left the latter to other organizations. Pressure built by the early 1960s for the ACLU to be more than "just cheerleaders for the NAACP."⁸⁶ After a six-month review to determine how the ACLU could further advance its work in the civil rights field, the ACLU established a Southern Regional office and hired Chuck Morgan as its director.⁸⁷ A loose cannon whose zealous efforts often cre-

volving statements about public official conduct).

82. WALKER, *supra* note 24, at 236; *see also* Alan Reitman, *Past, Present, and Future*, in PULSE OF FREEDOM, *supra* note 38, at 281, 285 (describing how courts "leaped forward in the late fifties and sixties with pace-making decisions in the criminal justice, political rights, and racial fields").

83. As an affiliate leader observed, "[t]he urge to enlarge our sphere of activity is a logical consequence of our increased effectiveness and prestige." Letter from Oscar Steiner to Odelia Robinson, *reprinted in* Memorandum from the National Office of the ACLU to the Board of Directors Re: National Committee and Affiliate Comment on "ACLU—Today and Tomorrow" 11 (May 7, 1964), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America).

84. Bishop, *supra* note 48, at 57; *see also* Martin Arnold, *ACLU Is Under Attack for New Activist Stands*, N.Y. TIMES, Feb. 13, 1972, at 51; Tamar Lewin, *ACLU Boasts Wide Portfolio of Cases, But Conservatives See Partisanship*, N.Y. TIMES, Oct. 2, 1988, at A24.

85. David Shaw, *New Direction for ACLU: How Far Will It Go?*, L.A. TIMES, Oct. 25, 1972, § 1, at 1, 13 (quoting ACLU Executive Director Aryeh Neier); Letter from Marvin Schacter, Ramona Ripston, and Melville B. Nimmer to Editor, L.A. TIMES, July 21, 1974, § 8, at 2 (suggesting ACLU's new activism was simply a response to "new pressure points" of an increasingly complex society).

86. Charles A. Radin, *ACLU*, BOSTON GLOBE, Oct. 2, 1988, at A21, A22 (quoting ACLU executive director Ira Glasser); *see* Lewin, *supra* note 92, at A24.

87. *Southern Regional Office Opened*, News Release No. 73 (Sept. 24, 1964), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975,

ated friction within the Union, Morgan was also a dynamic lawyer who quickly established a strong ACLU presence in the South.⁸⁸

Competition also prodded the Union. The Emergency Civil Liberties Committee (ECLC), formed in 1951 by ACLU officials dissatisfied with the ACLU's muddled response to anti-communism, acted as a small but radical challenge to its elder competitor through the 1960s.⁸⁹ The ECLC distinguished the two organizations on the ground that "the ACLU takes only clear cases of violations of civil liberties. We take cases that are not so clear."⁹⁰ When the ECLC began concentrating on cases involving the New Left, student groups, draft resisters, prisoners, the poor, and victims of police malpractice, the ACLU soon felt pressure to follow suit.

Accustomed to being a vanguard in the fight for liberty, the Union suddenly had to struggle in the 1960s to maintain its prominence and to fight its image as a group of old, white, upper-class men pursuing a "namby-pamby and legalistic approach."⁹¹ Reflecting the generational chasm facing American liberalism in general,⁹² New Left critics charged that the ACLU was "insensitive to the everyday struggle in the streets, overly reliant on the inevitably slow reform of the courtroom and naive in its expect-

Reel 17 (Microfilming Corp. of America); Report of the Southern Conference of the American Civil Liberties Union 5 (May 16, 1964), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America).

88. See Fred Powledge, *Profiles: Something for a Lawyer To Do*, NEW YORKER, Oct. 25, 1969, at 63, 99, 122.

89. The ECLC considered itself both a challenge and a goad to the ACLU, just as CORE had spurred the NAACP. By 1970, the ECLC could claim that, in its opinion, the ACLU had done "a fantastic job, a beautiful job They've become more militant." Oelsner, *supra* note 75, at 40 (quoting ECLC director Edith Tiger).

90. Michael Stern, *Civil-Liberties Units Expanding*, N.Y. TIMES, Dec. 22, 1968, at 52 (quoting Henry Di Suvero). Di Suvero and his wife Ramona Ripston resigned from the ACLU in 1968 as New Jersey Executive Director and National Public Relations Director respectively, due to the ACLU's reluctance to take sufficiently activist positions on the war and radical protests.

91. *Students in ACLU: Dynamite or Deadend?*, INSIDE ACLU, Nov. 4, 1968, at 1, 2, *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America) (quoting Ernie Mazy of ACLU's Michigan affiliate). The ACLU was a largely white (95 percent), college-educated (85 percent), male, upper-middle class, white-collar organization with very few young people, women, or minorities in its leadership. Shaw, *supra* note 93, at 13. Activism within the Union received a strong push from women and minority staff members recruited through affirmative action efforts of the 1960s. See Radin, *supra* note 94, at A21; cf. *Women: Neglected Resource?*, INSIDE ACLU, Nov. 17, 1969, at 3, *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America).

92. See Walter Goodman, *The Liberal Establishment Faces the Blacks, the Young, and the New Left*, N.Y. TIMES, Dec. 29, 1968, § 6 (Magazine), at 8.

tation that the powerful will yield any measure of their power to the powerless through traditional channels."⁹³ Conversely, the ACLU's most militant leaders viewed the New Left "with a very tolerant and even affectionate eye, like spoiled but favorite children."⁹⁴ They felt a pressing need to court the respect of the young. For example, Washington affiliate representative Leonard Schroeter insisted in 1967 that the ACLU, having "failed both generally and specifically to meet this incursion into the civil liberties of young people," should address itself to issues such as "non-verbal expression: dress, hair, the wearing of buttons, how free we are to congregate, the use of pot and LSD—i.e., problems generic to methods of expression adopted by young people who are trying to loosen some of society's bonds."⁹⁵

The ACLU's own success in promoting liberty contributed to its increasing activism. The Union had to find new objectives to fill the void left by fulfillment of its old aims.⁹⁶ ACLU leaders recognized that the organization "could not trail behind the courts and stay viable. We have to lead the courts or go out of business."⁹⁷ The ACLU's victories also encouraged activism by revealing that constitutional rights like freedom of expression and due process are not panaceas for all social ills. For many in the ACLU, the fight for the Bill of Rights had long rested on assumptions about the social and economic consequences that would follow from greater freedom. But, as Norman Podhertz explained, the enlargement of freedoms in the 1960s made clear that:

Liberty is not everything. Like everything else in the world, it is what it is and not something else. It is not, for example, equality. Nor is it distributive justice. Nor is it community The increase of freedom in America

93. Shaw, *supra* note 93, at 48.

94. Bishop, *supra* note 48, at 60; *see also* *Students, CLU Agree in Talks on 'Demands'*, *Inside ACLU*, Oct. 13, 1969, at 3-4, *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America) (describing demands made to ACLU of Southern California by student activists); *ACLU Meets Militants*, *INSIDE ACLU*, Oct. 6, 1969, at 2, *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America) (describing meeting between board of ACLU's Washington affiliate and young black militants).

95. Minutes of the Board of Directors 21 (Mar. 18-19, 1967), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 18 (Microfilming Corp. of America) [hereinafter Board Minutes of Mar. 18-19, 1967].

96. *See* Campisano, *supra* note 23, at 12 (comparing ACLU to March of Dimes taking up new causes after conquering polio). National Board member Alan Dershowitz argued that the Union ought to be like an accordion, expanding and contracting in response to the degree of repression in society, and "when that repression isn't there, we shouldn't try to fill the vacuum." Lukas, *supra* note 63, at 26.

97. Arnold, *supra* note 92, at 51 (quoting Aryeh Neier).

has brought with it . . . an increase of freedom. It has not made us more equal or more peaceable; it has only made us freer.⁹⁸

As a result, many in the ACLU began to redefine the meaning and scope of civil liberties. Concepts long considered beyond the ACLU's concern, such as structural economic inequality and rights to a guaranteed income and enjoyment of life, began to be seriously proposed as suitable for ACLU action.⁹⁹

II. RECONSIDERATION OF THE 1940 RESOLUTION

In the midst of transition from a traditional to a more activist approach, the ACLU dealt once more with the difficult issue of communism and anti-communism inside the organization. The controversy over the ACLU's anti-Communist legacy threatened to divide the Union again, and starkly exposed the lines between the old guard and the emerging militant faction in the ACLU of the late 1960s.

Several local affiliates began the push for reconsideration of the 1940 Resolution. The Iowa chapter attempted to have the topic put on the agenda for the 1964 Biennial Conference, but relented to discouragement from the National Board.¹⁰⁰ More determined opposition to the anti-Communist policy soon arose from Southern California, one of the strongest and most independent of the ACLU's affiliate branches.¹⁰¹ For a time, the Southern California affiliate's president Lloyd Smith squelched any action on this "tragically divisive issue."¹⁰² Smith foresaw that the atti-

98. Norman Podhertz, *Liberty & the Liberals*, COMMENTARY, Dec. 1971, at 4, 6.

99. See Shaw, *supra* note 93, at 13; George F. Will, *ACLU Swerve to the Left*, BOSTON GLOBE, Sept. 28, 1985, at 19 (describing "ACLU's results-oriented approach to constitutional rights"). Belittling the historical struggle for liberties as traditionally defined, one New York affiliate officer complained that "Hyde Park speeches or Tom Paine leaflets" meant little compared to the struggle for "social justice." Joseph W. Bishop, Jr., *Politics & ACLU*, COMMENTARY, Dec. 1971, at 50, 52.

100. See Minutes of the Board of Directors 3 (June 8, 1964), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 17 (Microfilming Corp. of America).

101. For thirty years, the ACLU's two California affiliate offices barely spoke to one another, as Northern California's staunchly traditionalist executive director Ernie Besig opposed the more radical positions frequently taken by his Southern California counterpart, Eason Monroe. The repeal of the 1940 Resolution was one of many issues into which the "avant-garde renegade" Southern California affiliate led the national organization. Shaw, *supra* note 93, at 13; see Vern L. Bullough, *The Image Polishers*, 226 NATION 134, 134 (1978) (describing how FBI regarded Southern California as "most troublesome of all ACLU affiliates"); Phil Kerby, *In the Center Ring, the ACLU . . .*, L.A. TIMES, Aug. 11, 1977, § II, at 1 (describing Southern California's uniquely aggressive stand against McCarthyism).

102. Memorandum from Lloyd M. Smith to Board of Directors of ACLU of Southern California Re: The Proposed Caughey Resolution Concerning the National ACLU

tudes of key ACLU leaders like Roger Baldwin and Norman Thomas toward the question would be “inescapably compelled by experience, regardless of what logical or ethical arguments may be urged for a different conclusion.”¹⁰³ Given the emotionally charged debate that would inevitably result, Smith questioned whether the anti-Communist rule was really harmful enough to “justify pumping quarts of adrenalin and disrupting our board.”¹⁰⁴ It seemed clear to him that raising the issue “will inevitably harm our organization regardless of what decision we might reach.”¹⁰⁵

A year later, the Southern California affiliate had a new president, George Slaff, and its board voted to seek reconsideration of the 1940 Resolution. The affiliate proposed a brief new policy providing that “[s]upport of civil liberties as guaranteed in the Constitution of the United States and particularly in the Bill of Rights is the one and fundamental qualification for membership or office in the American Civil Liberties Union.”¹⁰⁶ Presenting the issue to the ACLU’s National Board and the other affiliates, Southern California officials called the 1940 Resolution a double standard, a policy of guilt by association, a handicap to the Union’s progress, and a rule which if evenly applied would disqualify every Democrat and Republican from working for the Union because those parties upheld U.S. support for totalitarian dictatorships abroad.¹⁰⁷

The ACLU’s national leaders divided sharply over the Southern California proposal. Some took the matter as a personal affront. Norman Thomas defensively reminded everyone that his “credentials as a supporter of civil liberty . . . in America are, I think, as good as those of the

Resolutions in 1940 and 1954 1 (May 28, 1964), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America) [hereinafter Smith Memorandum]; *see also* LaRee Caughey & John Caughey, Criterion for ACLU Membership and Eligibility for Office (May 19, 1964), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America) (asking Southern California Board to seek reconsideration of 1940 Resolution, a disclaimer “as futile as it is ignoble”).

103. Smith Memorandum, *supra* note 110, at 2.

104. *Id.* at 7.

105. *Id.* at 8.

106. Memorandum from ACLU of Southern California to Members of the National Board and to Affiliates and Members of Their Boards 1 (Sept. 7, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America).

107. *See id.* at 3. The Southern California affiliate circulated its proposal and asked the other affiliates to advise the National Board of their views. *See* Minutes of the Board of Directors of the ACLU 12 (Apr. 3-4, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 17 (Microfilming Corp. of America).

Southern California branch of the ACLU.”¹⁰⁸ National executive director Jack Pemberton expressed hope that the issue would not spark a resurgence of the “recriminations and intense emotionalism” which surrounded the topic in 1940.¹⁰⁹ Since his “desk and all those in the national office continue to be burdened with an ever-increasing load of real and substantive problems calling for ACLU action,” Pemberton hoped that the work of the Union would not be handicapped by “these profound differences over one aspect of our own organic instrument.”¹¹⁰

In early debates about the Southern California challenge to the 1940 Resolution, ACLU leaders emphasized that the issue had to be resolved based purely on principles, and not considerations of public relations or organizational expediency. Radical lawyer William Kunstler argued emphatically that the 1940 Resolution was antithetical to ACLU principles, and attacked another board member for employing pragmatic arguments to support the old policy.¹¹¹ If pragmatism were a valid consideration, Kunstler reasoned, the ACLU should extend the ban to cover all unpopular groups.¹¹² George Slaff similarly declared that “[i]f we think first in terms of ‘public relations’ and second in terms of what is fundamentally right, we shall be true neither to ourselves nor to the great—yes, the noble—tradition of ACLU.”¹¹³ He insisted that everyone approach the question “as a matter of first impression” and decide which policy they would support based solely on principle.¹¹⁴ Jack Pemberton accurately described the situation as one in which “[b]oth sides contend for a principle which each genuinely deems important,” setting the stage for a bitter conflict.¹¹⁵

Although no longer a member of the ACLU’s Board, Roger Baldwin remained a distinguished figure within the organization and he firmly opposed repeal of the old resolution. As always, Baldwin emphasized policy consistency. He stated that “the ACLU has always excluded or removed from its governing councils those whose views or associations are incon-

108. Memorandum from Norman Thomas to Affiliates and Members of the National Board (Oct. 14, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America).

109. Pemberton Memorandum, *supra* note 58, at 3.

110. *Id.*

111. Memorandum from William Kunstler to Affiliates and Members of the National Board 2-3 (Oct. 29, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America).

112. *See id.* at 3.

113. Background Information and Summary of Position Papers on the 1940 Resolution and Other Constitutional Issues 12-13 (Dec. 8, 1966), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America) [hereinafter Background and Summary].

114. *Id.* at 13.

115. Pemberton Memorandum, *supra* note 58, at 3.

sistent with our purposes.”¹¹⁶ If the 1940 Resolution must go, Baldwin argued, the Union had “to avoid criticism that we have changed policy.”¹¹⁷ He proposed a new policy statement limiting the ACLU’s leadership to those who “unreservedly support the principles of civil, political and individual liberties, equally for all persons at home and abroad, without partisanship or favoritism.”¹¹⁸ The statement avoided mention of specific organizations but, according to Baldwin, the term “abroad” made clear that the ACLU still barred Communists.¹¹⁹ To emphasize the ACLU’s purported policy consistency, Baldwin added to his proposal a proviso stating that “[t]hese requirements are to be interpreted as not inconsistent with the long-standing policies of the Union concerning membership.”¹²⁰ He hoped that the change could “be made to appear not a repudiation of [the 1940 Resolution] but an enlargement.”¹²¹

At the National Board’s meeting in January 1966, George Slaff formally proposed to substitute the Southern California statement for the 1940 Resolution in the ACLU’s constitution.¹²² Participants in the debate were reminded that principles, rather than “considerations of expediency,” should control the decision.¹²³ It was clear, however, that personal experience strongly colored judgments about principle. Several of the board members remaining from 1940 recounted the atmosphere and events of that period.¹²⁴ Will Maslow commented that “the younger members of the Board are not so vividly aware of the problems we faced.”¹²⁵ Rather than choosing immediately between the 1940 Resolution and the Southern California proposal, the Board cautiously elected to refer the matter to a special committee to consider other alternatives along with the broader issue of the integrity, effectiveness, and viability of the ACLU.¹²⁶

116. Memorandum from Roger Baldwin to National Board 8-9 (June 7, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America).

117. Memorandum from Roger Baldwin Re: The 1940 Resolution 2 (Nov. 25, 1966), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America).

118. *Id.* at 1.

119. *See id.*

120. *Id.* at 2.

121. *Id.* at 1.

122. *See* Minutes of Board of Directors 9 (Jan. 29-30, 1966), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 17 (Microfilming Corp. of America) [hereinafter Board Minutes of Jan. 29-30, 1966].

123. *See id.* at 10 (remarks of David Carliner).

124. *See id.* at 10-11 (remarks of Osmond Fraenkel, Dorothy Kenyon, and Elmer Rice).

125. *See id.* at 11.

126. *See id.* at 11-12; *see also* Ernest Mazey, *Maintaining the Integrity, Effectiveness,*

The members of the Joint Committee on the 1940 Resolution divided sharply. The majority favored a proposal equivalent to the Southern California statement, providing only that all ACLU officers and staff members “shall be unequivocally committed to the objectives of this Union.”¹²⁷ The committee’s minority, led by attorneys George Soll and David Carliner, proposed an alternative statement relying on a subtle distinction: Their policy would not bar Communists per se, only those whose commitment to Communist or other totalitarian doctrines qualified their devotion to civil liberties.¹²⁸ In their view, the statement avoided the specter of guilt by association, but maintained the idea that “the ACLU judges communism, fascism, and racism each to have concepts in their doctrines which are antithetical to the beliefs which we have been organized to espouse.”¹²⁹

The committee anticipated that the issue would provoke a furious clash within the organization. For example, Milton Konvitz voted to leave intact the 1940 Resolution simply because:

All one needs to do to see what a hornet’s nest is being stirred up is to read the various memoranda and minutes that have been accumulating in one’s file. I am afraid that not much good can be expected from opening up the question Unanimity or a consensus is out of the question Judging from the contents and temper of the memoranda, I would say that the ACLU can expect only to get hurt, and not be helped or benefited, by a re-opening of the 1940 Resolution at this time.¹³⁰

Despite these fears, committee members continued to insist that principle alone should control the issue. Southern California’s George Slaff asked “why, if the 1940 Resolution is one we would not adopt in 1966 as an original proposition, we should continue to nurture such an obvious incubus?”¹³¹ The only reason he could see was an illegitimate concern with “that Madison Avenue invention, our ‘image’—the preservation of our ‘public relations.’”¹³²

But others on the Joint Committee began to move away from such a

and Viability of ACLU 4 (Nov. 9, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America) (recommending establishment of committee).

127. Report of the Special Committee on the 1940 Resolution and the Constitution Committee 3 (Dec. 8, 1966), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America) [hereinafter Special Committee Report].

128. *See id.* at 7.

129. Background and Summary, *supra* note 123, at 17 (position statement of David Carliner).

130. *Id.* at 21-22.

131. *Id.* at 18.

132. *Id.*

single-minded focus on abstract principles. George Soll recognized that, “[a]lthough almost all those present would have been opposed to the 1940 Resolution if it were up for decision for the first time in 1966,” personal and historical considerations made it unwise to resolve the issue based solely on abstract principles.¹³³ Others similarly acknowledged that motivations on both sides went beyond pure principles. Yale law professor Ralph Brown pointed out how “any statement aimed at our enemies in one generation is likely to look a little (or a lot) silly to the next generation. And a next generation is here.”¹³⁴ As another committee member put it, “[t]he fight over this paragraph looms larger to many of us who felt the effects of Communist pressure two decades ago than to the public at large. It will, unfortunately, be embarrassing to individual members.”¹³⁵

When the Joint Committee finally reported back to the ACLU’s Board, a majority of the committee members recommended replacing the 1940 Resolution with a simple rule requiring only commitment to the objectives of the Union.¹³⁶ Recognizing finally that the long debate over principles could never be settled, the Board shifted its focus to the practical effects of the various proposals, arguing about whether the Union’s “public ef-

133. *Id.* at 14.

134. *Id.* at 19 (emphasis in original).

135. Background and Summary, *supra* note 123, at 21 (position paper of Sheldon Karlins).

136. *See* Special Committee Report, *supra* note 136, at 3. The ACLU solicited comments on the committee’s proposal. *See* Memorandum from National Office to Board of Directors, National Committee, and Affiliates Re: Report of the Special Committee on the 1940 Resolution and the Constitution Committee (Dec. 20, 1966), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America). Most who wrote to express a view opposed the removal of the anti-Communist policy. *See* Memorandum of National Office to Board of Directors Re: Plenary Board Meeting—Report of the Joint Committee on the 1940 Resolution and the Constitution Committee—Comments and Recommendations from Individuals and Affiliates (Mar. 6, 1967), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America). Julian P. Noyd, for example, offered a historical argument: “In founding a university dedicated to the untrammelled pursuit of truth, Thomas Jefferson nevertheless thought it would be folly under the then existing circumstances to appoint a Federalist lawyer from Richmond to the chair of jurisprudence. He [saw] no inconsistency in this position and neither do I.” Memorandum from National Office to Board of Directors Re: Plenary Board Meeting—Addendum to Comments on the 1940 Resolution (Mar. 15, 1967), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America). Similarly, Baldwin and Thomas argued in a memorandum to the Board and affiliates that the 1940 Resolution should be retained because it had “always been the policy” and was “still relevant to the integrity” of the ACLU. Memorandum from Norman Thomas and Roger Baldwin to Board, National Committee, and Affiliates of the ACLU 1 (Jan. 31, 1967), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America).

fectiveness could be destroyed by public inconsistency on the part of its leadership.”¹³⁷ The Board approved the committee’s proposed statement, but only after amending it to bar all whose devotion to civil liberties is “qualified by advocacy of those communist, fascist, racist, or other doctrines which reject the concept of democratic government and of civil liberties” for all Americans.¹³⁸

As a proposed amendment to the ACLU’s constitution, the statement adopted by the Board had to be submitted to a referendum vote of an electorate composed of the National Board members, National Committee members, and local affiliate directors. Several of the largest affiliates mounted an aggressive campaign to defeat the proposal.¹³⁹ In an unusual step, ACLU board chairman Ernest Angell sent every voter a letter encouraging approval. He feared that if the referendum vote was negative, the National Board would be forced to “light the fires of controversy all over again.”¹⁴⁰ Despite Angell’s lobbying effort, only fifty-six percent of the electorate approved the change, less than the required two-thirds margin.¹⁴¹ The ACLU’s leaders were back at square one on the troublesome

137. Board Minutes of Mar. 18-19, 1967, *supra* note 103, at 11 (remarks of David Carliner).

138. *Id.* at 13.

139. See Memorandum from Jack Pemberton to Board of Directors (June 26, 1967), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America).

140. Angell Statement, *supra* note 11, at 29; see also Statement by Samuel Hendel Urging Adoption of New Section 7(D) in ACLU Constitution 34 (undated item among materials distributed with ballot for 1967 referendum on proposed changes to ACLU Constitution), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America) (encouraging adoption of proposal, claiming it rectified flaws of 1940 Resolution while still barring “those who by the use of Aesopian language, or rationalizations, or obfuscation justify the denial of civil liberties to any American”).

141. Memorandum from National Office to Members of the National Board and Affiliates Re: Board and Constitutional Amendment Balloting 1 (July 27, 1967), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America). The negative votes came primarily from the affiliates, especially the largest, most independent ones. For the following selected groups, the percentages voting in favor were:

National Committee	83%
National Board of Directors	70%
All affiliates	36%
Five largest affiliates (New York, Southern California, Illinois, Northern California, and Michigan)	26%

Id. at 15-16.

issue.

Three groups soon submitted new proposals. One set of affiliates supported the same provision previously proposed by the Southern California affiliate and endorsed by the majority of the Joint Committee.¹⁴² Another group of affiliates suggested that the ACLU simply delete, rather than rewrite, the section of the ACLU's constitution containing the 1940 Resolution.¹⁴³ Finally, Roger Baldwin drafted a new statement which emphasized policy consistency but contained no references to specific organizations or beliefs. It provided that "although the purposes of that [1940] policy remain unchanged, an even more comprehensive statement of the same policy is desirable to exclude all other conflicts of interest," and therefore "the policy so long in effect is restated."¹⁴⁴ The key passage of Baldwin's statement barred from office those who did not support "the principles of political democracy."¹⁴⁵

The day before the National Board meeting in December 1967, the Joint Committee met to consider the 1940 Resolution for the last time. By then, the Committee was "eager to propose some recommendation that would accommodate the different points of view within the Union on this subject."¹⁴⁶ The committee unanimously agreed on a proposal similar to Baldwin's statement. It provided that, "[w]hereas long-established policy has made clear that the leadership of the Union should be devoted unequivocally to the principles of civil liberties, . . . a current statement of that policy is desirable."¹⁴⁷ The proposal required support of "the freedoms associated with the forms and processes of political democracy."¹⁴⁸ The Joint Committee presented its proposal to the ACLU's Board of Directors and expressed hope that all board members would approach the matter "recognizing the need for compromise" and "with respect for each other's opinions and an awareness of their mutually-held civil libertarian

142. Memorandum from National Office to Board of Directors Re: The 1940 Resolution—Formal Requests for Constitutional Amendment 2 (Nov. 24 1967), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 25 (Microfilming Corp. of America).

143. *See id.* at 1.

144. *Id.* at 4. The crucial factor for Baldwin was that the ACLU "indicate that no change in policy is intended" and make clear that the sole purpose was not to repudiate the 1940 Resolution but to "bring it up to date and expand it." *Id.*

145. *Id.*

146. Minutes of the Board of Directors 25 (Dec. 2-3, 1967), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 18 (Microfilming Corp. of America) (remarks of David Carliner, ALCU Constitutional Committee Chairman).

147. *Id.* at 26.

148. *Id.*

goals.”¹⁴⁹

The ensuing discussion fulfilled that hope. One after another, Board members expressed their recognition of the personal and historical factors that divided them, their desire for a mutually satisfactory compromise, and their support for the Joint Committee’s effort. Delegates thanked the committee for considering the history of the issue and presenting a “consistent image for the public.”¹⁵⁰ One remarked that “[h]e who knows only his own generation remains always a child.”¹⁵¹ Osmond Fraenkel, a staunch opponent of the 1940 Resolution who served as counselor to Elizabeth Gurley Flynn at her expulsion trial, now thought the ACLU’s public image would be best served by avoiding “too radical a break with the Union’s tradition.”¹⁵² Affiliate leaders such as arch-activist Len Schroeter stepped forward to promise their affiliates’ support for the compromise and to laud the “statesmanship” of the Joint Committee.¹⁵³ Many who had arrived at the meeting intending to vote for another proposal now declared their support for the Joint Committee’s statement.¹⁵⁴ Previously opposed to anything short of full repudiation of the 1940 Resolution, but now caught up in the “spirit of compromise and mutual respect,” Franklyn Haiman supported the Joint Committee “out of respect for the deep feeling of the other members of this Board” who had different views on the issue.¹⁵⁵ Even Southern California’s George Slaff, the self-described “culprit responsible for the long years of debate on this issue,” threw his support behind the proposal and applauded the “one true statesman of ACLU: Roger Baldwin.”¹⁵⁶ The chorus of harmony and praise was interrupted only by lunch. Upon returning, Joint Committee spokesman David Carliner answered a final question about the proposed statement. He explained that it “supersede[d]” rather than “repeal[ed]” the 1940 Resolution, that it eliminated the specific references to communists without altering the Union’s substantive position, and that in the event of actual controversy the Board would determine whether an individual met the standard on a case-by-case basis.¹⁵⁷ Immediately after those remarks, the Board voted unanimously in favor of the Joint Committee’s proposal.¹⁵⁸ A few months later, the ACLU electorate overwhelmingly ratified the

149. *Id.* at 27 (remarks of David Carliner).

150. *Id.* at 30 (remarks of Charles Lambeth).

151. *Id.* (remarks of William Reynard).

152. Minutes of the Board of Directors (Dec. 2-3, 1967), *supra* note 155, at 29.

153. *Id.*

154. *See id.* at 30.

155. *Id.*

156. *Id.*

157. *Id.* at 30-31.

158. Minutes of the Board of Directors (Dec. 2-3, 1967), *supra* note 155, at 31.

Board's decision.¹⁵⁹

According to Roger Baldwin, nothing had changed. When asked about the "compromise" resolution, he remarked that "[i]t was no compromise. It's the same thing, but better expressed."¹⁶⁰ But contrary to Baldwin's insistence on consistency, anti-communism had finally faded within the ACLU.¹⁶¹ In 1976, again at the instigation of the Southern California affiliate, the ACLU's directors formally condemned the expulsion of Elizabeth Gurley Flynn and posthumously reinstated her to the board.¹⁶² The ACLU had finally exorcised the demons of 1940.

III. VIETNAM

The ACLU's reconsideration of the 1940 Resolution stands in stark contrast to its handling of another set of difficult problems during the latter part of the 1960s. The Vietnam War posed several issues—especially conscription, the legality of the war, and civil disobedience by war protesters—that lay on the border between civil liberties and politics and created a firestorm of controversy within the ACLU. On these issues, the Union's leaders never proceeded beyond intolerance and conflict to find understanding or compromise. The episode alienated many within the ACLU, and had a painful legacy for the organization in the years to come.

159. See Memorandum from Alan Reitman to the Board of Directors, National Committee, and Affiliates Re: Results of Balloting on Proposed Constitutional Amendments (May 17, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America). The ACLU's new policy drew criticism from both *Barron's* and *The Nation*, periodicals at opposite ends of the political spectrum. The conservative *Barron's* questioned whether the ACLU was still "anti-Red." Shirley Scheibla, *Defense to Offense: The ACLU Is Rapidly Expanding Its Sphere of Influence*, *BARRON'S*, Sept. 30, 1968, at 5, 5. The liberal *Nation* expressed fear that the Union had, "in a commendable effort to extricate itself from the ideological trap of the 1940 Resolution, now set the stage for further controversy." *The Test of Consistency*, 207 *NATION* 69, 70 (1968).

160. TRIAL, *supra* note 7, at 27. Years after the adoption of the new policy, Baldwin continued to argue that "[t]he 1940 Resolution is stronger today than it was in 1940." DONOHUE, *supra* note 24, at 189. In a 1974 interview, he defended the 1940 decision on the grounds that it was still ACLU policy, supplanted "in language, but not in principle." LAMSON, *supra* note 33, at 229.

161. In fact, ACLU Board member Alan Dershowitz claimed that the ACLU soon shifted to the other extreme, manifesting "an unwillingness to criticize communism." Will, *supra* note 107, at 19.

162. See Carey McWilliams, *Sanity Restored*, *NATION*, July 3-10, 1976, at 4. Osmond Fraenkel, Flynn's unofficial counselor in 1940, actually opposed this effort because he felt that "you can't change history." *Id.* On the other hand, Southern California's George Slaff offered the dramatic analogy that the Catholic Church reversed the conviction of Joan of Arc and canonized her. Daniel Seligman, *A Not-So-Hidden Agenda*, *FORTUNE*, Sept. 2, 1985, at 107, 108.

A. *Conscription*

As the United States escalated its military involvement in Vietnam, the ACLU began to consider adopting a policy statement on the draft. In January 1966, Norman Thomas asked the ACLU's National Board to declare the draft a violation of civil liberties and presumptively unconstitutional, to be maintained only upon a government showing of a greater evil abroad making it necessary.¹⁶³ At the other extreme, Roger Baldwin, George Soll, and the ACLU's Free Speech/Association Committee proposed statements denying that conscription raises constitutional or civil liberties concerns.¹⁶⁴ In their view, the Union bore the burden of proving that the draft was an unjustified invasion of civil liberties, but that "as a lay group, the ACLU lacks the specific factual information and expertise necessary to weigh the issues."¹⁶⁵ Consequently, they proposed to limit the Union's role to ancillary issues such as policing discriminatory draft procedures and protecting the right of conscientious objection.¹⁶⁶

A third statement, written by NYU law professor Norman Dorsen, navigated between these two poles. It recognized both the "severe deprivation of civil liberties" inherent in compulsory service and the nation's vital "impulse of self-preservation."¹⁶⁷ Dorsen proposed that "each occasion for required military service be examined on its own merits, to the best of the Union's ability, in order to determine whether the limitation on individual freedom is justified by world and national conditions."¹⁶⁸ By that approach, the ACLU could avoid arguing that conscription is unconstitutional per se or making a political judgment that the draft should be eliminated. Under Dorsen's proposal, the ACLU's legal staff would be authorized to assist individuals challenging the need for the draft.¹⁶⁹ At the same time, the Union would remain strictly nonpartisan, insisting only that "the military case for continuing a draft be open to full and free de-

163. Board Minutes of Jan. 29-30, 1966, *supra* note 131, at 2. Thomas first proposed such a policy statement to the National Board in 1965. See Norman Thomas, Statement Concerning Civil Liberties and Conscription (June 9, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 17 (Microfilming Corp. of America). The Board voted to send the issue to the ACLU's local affiliates for their consideration and comments. See Minutes of the Board of Directors 1-3 (June 7, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 17 (Microfilming Corp. of America).

164. Board Minutes of Jan. 29-30, 1966, *supra* note 131, at 2.

165. *See id.*

166. *Id.*

167. *Id.* at 6.

168. *Id.* at 7.

169. *See id.* at 6.

bate by citizens and the Congress.”¹⁷⁰

In the ensuing debate over these proposals, the Union got its first taste of the acrimony which would soon become routine. Moderate members accused the activists of being unable to set aside political views, saying of one that his “opposition to conscription, being based on his opposition to the Vietnam War, is more appropriate to peace organizations.”¹⁷¹ In return, militant board members claimed that the Union’s failure to take a position against the draft in the past was a “crime,” and proof that its leaders had been abdicating their responsibility as civil libertarians for years.¹⁷² In the end, the Board voted to approve Dorsen’s middle-ground statement.¹⁷³

The new conscription policy did not settle the issue for long. By the middle of 1966, new proposals began to emerge from both individual Board members and a special committee set up to consider the issue. In March 1967 leaders on both sides of the issue sought to alter the balance achieved under the Dorsen statement. Several Board members argued that the ACLU did not have sufficient expertise to judge the urgency of national security needs and that conscription was therefore “a political issue that must be decided in Congress.”¹⁷⁴ Meanwhile, members on the activist side of the Union proposed that ACLU spokesmen be authorized to testify before Congress that the Union “opposes continuation of the draft at this time; that we have examined the present occasion for conscription, and feel the government has not proven an overriding necessity for conscription.”¹⁷⁵ They attacked the traditionalists’ assertion that conscription was a political issue outside the sphere of ACLU concerns as an “argument of evasion”¹⁷⁶ and, revealing concern about the ACLU’s image among radicals, emphasized that it was critical to “encourage identification with the young people of this country—by our intellectual capacity . . . to identify

170. Board Minutes of Jan. 29-30, 1966, *supra* note 129, at 7.

171. *Id.* at 5 (remarks of David Carliner).

172. *See id.* at 4 (remarks of Leonard Schroeter).

173. *See id.* at 6-7. The Board touched upon conscription again in February of 1967, but only on the academic freedom aspects of draft procedures. *See* Minutes of the Board of Directors 3-4 (Feb. 27, 1967), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 18 (Microfilming Corp. of America). After a short, sedate debate, the Board decided that class rank, grades, and test scores should not be used as criteria for deferment, and that universities should decline to cooperate in making such information available to Selective Service officials. *See id.* No one on the Board had any objection to the ACLU’s involvement in such clearly non-political facets of the issue. *See id.*

174. Board Minutes of Mar. 18-19, 1967, *supra* note 103, at 1 (remarks of Bruce Clayton).

175. *Id.* at 3 (remarks of Franklyn Haiman).

176. *Id.* at 1 (remarks of Leonard Schroeter).

with their goals, fears, and ideals.”¹⁷⁷ Despite strong pulls in both directions, the Board rejected all attempts to modify the ACLU’s existing position on conscription. By a voice vote, the Board adopted resolutions clarifying and reiterating the policy, specifically authorizing ACLU officials to give factual testimony about the draft before congressional hearings, and approving the legal director’s decision to enter an Ohio case challenging induction on the theory that the government lacked sufficient justification for the draft.¹⁷⁸

Opposition to the draft eventually overwhelmed competing urges toward traditionalism or compromise. At the 1968 Biennial Conference, the delegates approved a recommendation that the ACLU declare the draft to be “a violation of civil liberties and constitutional guarantees” and that the ACLU “act to oppose the present draft law in the judicial, legislative, and public forums.”¹⁷⁹ Some at the conference went so far as to propose that the ACLU go on record as being opposed to conscription “under any circumstances and at any time.”¹⁸⁰

The National Board considered the Biennial Conference recommendation in February 1969. Moderates again accused activists of employing a “smoke-screen for having the Union take a political stand opposing the Vietnam War,”¹⁸¹ but the Board narrowly adopted the anti-conscription policy suggested by the Biennial Conference.¹⁸² In 1971, the activist wing took the Union a step further into arguably political territory, passing a resolution stating that draft violators deserved full and unconditional amnesty because of the unconstitutionality of the draft and the “growing recognition that American participation in the Vietnam War has long been a mistake.”¹⁸³

177. *Id.* at 2 (remarks of Leonard Schroeter).

178. *See id.* at 4.

179. Memorandum from Jack Pemberton to Members of the National Board, Affiliates, Members of the National Committee Re: Recommendations of the 1968 Biennial Conference 79 (Sept. 4, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 29 (Microfilming Corp. of America) [hereinafter “Recommendations of the 1968 Biennial Conference”].

180. Memorandum from Alan Reitman and Trudy Hayden to Board of Directors Re: Background on ACLU Policy on Conscription 3 (Nov. 20, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 26 (Microfilming Corp. of America).

181. Minutes of the Board of Directors 9 (Feb. 15-16, 1969), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America).

182. *Id.* at 11.

183. Minutes of the Board of Directors 12 (Dec. 5-6, 1971), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America).

B. The Legality of the Vietnam War

The ACLU experienced a similar rift between its moderate and activist factions over the legality of American participation in the war. In 1965, the ACLU's Ohio affiliate asked the national Board to consider the civil liberties implications of executive power being exercised to involve U.S. forces in Vietnam without a declaration of war. Among the ACLU's national staff, the initial discussion "produced an unanimous opinion that this issue is not one which should concern the Union," since it was a matter of politics and the constitutional doctrine of separation of powers, but not civil liberties.¹⁸⁴ When the issue came before the Board, the Union's associate director, Alan Reitman, expressed doubt that it was a proper subject of ACLU concern.¹⁸⁵ The Board voted to table the question without further debate, but it arose again at the next meeting. While Board members took the view that the lack of a congressional declaration of war was not unconstitutional and that "the ACLU is not in a position to argue the merits of the war itself,"¹⁸⁶ several members suggested that there was a need for someone to consider whether the legality of the war had some connection to civil liberties and, if so, "whether there is any concrete way for the Union to take action."¹⁸⁷ The Board unanimously agreed to refer the question to a Special Committee on the Constitutionality of the Undeclared War in Vietnam.

Several positions emerged within that small committee. Two members—New York attorney George Soll and historian Walter Millis—drafted a statement along traditionalist lines, finding no constitutional or civil liberties problems presented by the joint decision of Congress and the President to prosecute the war without an official declaration.¹⁸⁸ They

184. Memorandum from National Office to Board of Directors Re: Request of Ohio Civil Liberties Union for Guidance on Possible Civil Liberties Issue in Lack of Declaration of War by Congress in Viet Nam Situation 1 (Sept. 24, 1965), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 24 (Microfilming Corp. of America). The ACLU's staff also feared that a declared war would bring greater infringements of civil liberties than an undeclared one. *See id.*

185. Minutes of the Board of Directors 4 (Sept. 27, 1965), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 17 (Microfilming Corp. of America).

186. Minutes of the Board of Directors 2 (Oct. 11, 1965), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 17 (Microfilming Corp. of America) (remarks of Walter Millis and Algernon Black).

187. *Id.* (remarks of Julian Goldberg, Harriet Pilpel, and Osmond Fraenkel).

188. Memorandum from National Office to Board of Directors Re: Executive Pre-emption of Congress' Power to Declare War 5-6 (Dec. 7, 1965), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 24 (Microfilming Corp. of America).

pointed out that Congress participated fully in authorizing the war effort through budget appropriations and Selective Service legislation, and that public debate about the war had not been suppressed.¹⁸⁹ Soll and Millis concluded that the Union's only proper role would be to oppose the use of governmental powers which strictly require a declaration of war, such as prosecutions for treason.¹⁹⁰ At the other extreme, Algernon Black took the position that the war was unconstitutional and a violation of the civil liberties of the American people.¹⁹¹ Black reasoned that, while the President could act unilaterally in an emergency, there had been ample time to seek a declaration of war in this case.¹⁹²

The other committee members—Ed Ennis, Osmond Fraenkel and Robert Bierstedt—staked out a third position in the middle ground. They argued that the undeclared war raised a mixture of political and constitutional issues best considered by individual citizens and political organizations. They concluded that the ACLU should not take any position in the debate because “[t]he Union is not a political party but an organization limited to the defense of civil liberties,” and therefore “the Union should restrict itself to stating that it will raise the question of unconstitutionality in the context of an individual claim of a denial of constitutional rights.”¹⁹³

In the ACLU's December 1965 Board meeting, Black proposed that the Board adopt his statement and declare the Vietnam War an unconstitutional violation of civil liberties. No one would even second his motion.¹⁹⁴ The Board instead voted by a narrow margin to adopt the Soll and Millis position that the undeclared war did not present a liberties issue, unless the government attempted to use treason or espionage statutes expressly requiring a formal declaration.¹⁹⁵

One month later at its next meeting, a plenary session attended by affiliate representatives, the Board reconsidered its decision.¹⁹⁶ Supporters of the Ennis-Fraenkel-Bierstedt proposal reiterated their view that, although it was not the ACLU's job to decide whether the undeclared war violated constitutional principles requiring separation of powers, “when an individual feels that the constitutional question impinges on his civil liberties and calls on us to go to court with him, we will defend him and will

189. *Id.*

190. *Id.*

191. *See id.* at 6-7.

192. *See id.*

193. *Id.* at 5.

194. Minutes of the Board of Directors 4 (Dec. 13, 1965), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 17 (Microfilming Corp. of America).

195. *See id.* at 5.

196. *See* Board Minutes of Jan. 29-30, 1966, *supra* note 131, at 16-19.

be free to raise the constitutional question.”¹⁹⁷ That compromise proposal, designed to allow the ACLU to litigate cases challenging the war’s constitutionality without placing the organization on record against the war, was attacked from all sides. Activists such as Algernon Black, George Slaff, and Aryeh Neier insisted that the ACLU should declare the war to be unconstitutional.¹⁹⁸ Traditionalists, pointing to England’s parliamentary system as an example, wondered how civil liberties could require separation of powers between the executive and legislative branches.¹⁹⁹ One speaker lamented that the ACLU’s present course toward more aggressive policies on Vietnam issues made it “increasingly difficult for conservatives to unite under the civil liberties point of view.”²⁰⁰ Neither side would budge and the compromise position garnered only a handful of votes in its favor. The Board finally approved a statement, essentially identical to the policy already in place, providing that the war “does not, in and of itself, represent a civil liberties question.”²⁰¹

The issue did not come before the Board again until June 1970. In the wake of the invasion of Cambodia in April and the Kent State massacre in May, pressure to oppose the war became overwhelming. Most of the ACLU’s leaders fiercely opposed the war. The Union’s legal director Mel Wulf dramatically compared the ACLU’s situation to that of a German Civil Liberties Union in the 1930s.²⁰² A few isolated voices continued to argue that the ACLU could litigate constitutional claims on behalf of individuals without the organization itself reaching a political conclusion that the war had to be stopped. For the majority, however, the “climate of repression engendered by the war” had become the overriding concern.²⁰³ Despite resistance by a few moderate holdouts arguing “that ACLU should defend those whose civil liberties have been abridged but

197. *Id.* at 18 (remarks of Irving Achtenberg).

198. *See id.* at 17-18.

199. *See id.* at 18 (remarks of David Carliner).

200. *Id.* (remarks of John Losos).

201. *Id.* at 19.

202. Memorandum from Mel Wulf to Executive Committee 2 (May 26, 1970), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 26 (Microfilming Corp. of America); *see also* Memorandum from Due Process Committee to Board of Directors Re: The War in Indochina, Its Legality and Its Impact on Civil Liberties 1 (May 26, 1970), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 26 (Microfilming Corp. of America) (describing the committee’s “almost complete agreement that the Indochina war must be terminated as immediately as possible in order to restore the health of civil liberties in the United States”).

203. Minutes of the Board of Directors 6 (June 2, 4, 1970), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 19 (Microfilming Corp. of America).

that no statement about the war in Indochina itself should be made by an organization which is non-political,"²⁰⁴ the Board approved a statement declaring that the Vietnam War "had a highly detrimental effect on civil liberties."²⁰⁵ The statement contained a brief checklist of civil liberties deprivations attributable to the war, such as conscription, curtailed academic freedom, inhibition of dissent and free expression, the Kent State shootings, urban neglect, and military domination of public policy.²⁰⁶ The Board then voted to condemn the war as a violation of the Constitution, as well as civil liberties, based on the President's usurpation of the power to declare war.²⁰⁷ In a final vote, the Board committed the ACLU to "work for an immediate termination of the war and the immediate withdrawal of all U.S. troops from Southeast Asia" by litigating appropriate cases, lobbying Congress, and encouraging state legislatures to follow Massachusetts in statutorily prohibiting its citizens from being sent to Vietnam in the absence of a declaration of war.²⁰⁸ The ACLU's Executive Director Jack Pemberton acknowledged that the Board's decision to oppose the war marked a "major departure" from the organization's traditional role.²⁰⁹

The ACLU soon undertook efforts to bring an end to the war, litigating two cases in which draftees resisted induction on the ground that the war was illegal.²¹⁰ The courts in both cases ruled that Congress's repeated acts of support for the war demonstrated its assent. In August 1973, two ACLU representatives flew to Supreme Court Justice William O. Douglas' vacation cabin and obtained from him an order stopping the bombing of Cambodia. A few hours later, the full Court overruled the order.²¹¹ Aryeh Neier, Executive Director of the ACLU and a firm supporter of these efforts at the time, later observed that the litigation deserved to fail. He

204. *Id.* at 5.

205. *Id.* at 6.

206. *See id.*

207. *See id.* at 7.

208. *Id.* at 8.

209. Barbara Campbell, *A.C.L.U. Comes Out Against the War*, N.Y. TIMES, June 4, 1970, at 16.

210. *See* Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970), *aff'd sub nom.* Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); WALKER, *supra* note 24, at 286-87. In a less serious vein, ACLU Board member Monroe Freedman filed papers seeking to have Secretary of Defense Melvin Laird involuntarily committed to a state hospital on the ground he was "likely to be found to pose a substantial, serious, and imminent threat to other human beings." Lawrence Feinberg, *Active, Effective ACLU Facing Criticism Over Its Role*, WASH. POST, Aug. 7, 1972, at C1.

211. *See* Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973); WALKER, *supra* note 24, at 287.

conceded that, as moderate ACLU officials argued all along, the anti-war movement had unrestricted access to the political process in pursuit of its objectives. In retrospect, Neier recognized that “[c]ourts do not have the power to stop wars, and we were foolish to ask them to try.”²¹²

C. *Civil Disobedience and Dr. Spock*

The Vietnam War presented a third critical issue for the ACLU, the right to protest, and it became the most divisive question of all. Early protests against the war prompted the ACLU to review its policy on free speech and civil disobedience. In October 1965, the National Board considered whether the Union should involve itself in the case of David Miller, a war protester arrested for burning his draft card in front of a New York City induction center. Over the objection of a few who felt that the First Amendment did not protect the symbolic act of destroying a draft card, the Board voted to enter the case on free speech and due process grounds.²¹³ At the same time, the Board overwhelmingly approved a statement for public release which reiterated that, while the ACLU supported the right to protest, “[a]s a civil liberties organization, the ACLU offers no comment on the wisdom or merits of U.S. foreign policy, in Vietnam or elsewhere.”²¹⁴ The statement reflected a consensus among Board members that the Union should be involved in cases relating to Vietnam with a solid civil liberties connection, but that the Union had to draw “a clear line between defending the right of groups to protest and associating ourselves with the content of those groups’ advocacy.”²¹⁵ In addition, as one Board member noted, “emphasizing the Vietnam situation might boomerang, by trying to make money out of trouble.”²¹⁶ The Board asked its Free Speech and Association Committee to examine the war protest issue in more detail.²¹⁷

The committee prepared a policy statement which the Board unani-

212. Aryeh Neier, *An Activist's Wistful Question: "What Good Came of It at Last?"*, L.A. TIMES, June 11, 1978, § VI, at 1, 1 [hereinafter “*What Good Came of It?*”]; see also ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 152 (1982).

213. Minutes of the Board of Directors 4 (Oct. 25, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 17 (Microfilming Corp. of America) [hereinafter Board Minutes of Oct. 25, 1965].

214. Statement of the ACLU on Civil Liberties and Protests Against the War in Vietnam 1 (Oct. 27, 1965), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 24 (Microfilming Corp. of America).

215. Board Minutes of Oct. 25, 1965, *supra* note 222, at 2 (remarks of Ed Ennis).

216. *Id.* at 4 (remarks of Ed Ennis).

217. *See id.* at 3-4.

mously approved in February 1967.²¹⁸ The statement provided that the ACLU would not defend anyone who violated a valid law, regardless of that person's motivation for doing so.²¹⁹ The Board recognized that there is no constitutional right to violate a valid law for ideological or expressive reasons, and that engaging in civil disobedience requires a willingness to accept the law's punishment.²²⁰ At the same time, the policy statement applauded the dedication of protesters engaged in civil disobedience, called for due process for all persons arrested, and suggested that non-violent protesters be given leniency in sentencing.²²¹

Despite the Board's unanimous approval of the statement, the ACLU's national staff unilaterally decided not to release it to the public. Although even the most activist ACLU officials agreed with the policy in principle, they worried that it would make the Union seem out of touch with radical political movements. The staff initially planned to wait and to coincide the release of the policy with the next announcement of ACLU involvement in an important case involving the right to protest. Over the next few months, several of the most aggressive ACLU affiliates took cases that conflicted with the policy statement, and the national staff decided not to release the statement at all in order to avoid the appearance of inconsistency.²²² The staff's failure to release the statement angered moderate board members, who saw it as an improper attempt to stall until an "anemic, truncated version" of the statement could be adopted.²²³ It proved, in their view, "how far the ACLU has ceased to deserve the name 'Union.'"²²⁴

In the spring of 1967, the Union experienced its first major controversy over a war protest case. The director of the ACLU's Southern Re-

218. Minutes of the Board of Directors 5 (Feb. 27, 1967), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 18 (Microfilming Corp. of America) [hereinafter Board Minutes of Feb. 27, 1967].

219. The ACLU considered racially discriminatory laws invalid, and therefore acts in violation of them—such as civil rights protests—protected by the Constitution.

220. *See* Board Minutes of Feb. 27, 1967, *supra* note 227, at 5.

221. *See id.*

222. Memorandum from Jack Pemberton to Board of Directors Re: Policy Statement on Civil Disobedience (Jan. 19, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America).

223. Memorandum from George Soll to Board of Directors Re: The Issuance to the Public and ACLU Members of the ACLU Statement on Civil Disobedience 3 (Jan. 22, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America) [hereinafter Soll Memorandum].

224. Memorandum from Louis Lusky to Board of Directors Re: Organizational Problems 5 (Sept. 11, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America) [hereinafter Lusky Memorandum].

gional Office, Chuck Morgan, decided to defend Howard Levy, a U.S. Army Captain court-martialed for refusing to provide dermatology training to Special Forces medics. Levy contended that the instruction would in some small way contribute to the commission of war crimes against humanity.²²⁵ The case caused a stir within the ACLU because Levy relied not only on arguments about civil liberties principles, but on factual arguments about how the U.S. military conducted the war.²²⁶ Noting the “harm done to the Union by the widespread publicity given to the fact defenses, in which ACLU’s name was prominently mentioned,” the ACLU’s executive committee concluded that Morgan should not have taken the case.²²⁷ It asked Morgan to issue a public statement clarifying that Morgan argued Levy’s factual arguments only in his representative capacity as defense counsel, and that the ACLU itself endorsed only the civil liberties arguments. The ACLU’s Board approved the Executive Committee’s decision, with the Board’s moderate members complaining that the Union’s image and effectiveness had been impaired,²²⁸ and the activists commending Morgan for his “exemplary work” in the case.²²⁹

The Levy case was a minor squabble compared to what followed. The civil disobedience issue exploded after the January 1968 indictment of noted pediatrician and author Dr. Benjamin Spock, Yale chaplain William Sloane Coffin, Jr., and three other anti-war activists on charges of advocacy to violate and participation in violating the draft laws. The ACLU’s legal director Mel Wulf immediately announced that the Union would defend any of the “Boston Five” who desired assistance. That announcement outraged the Union’s moderates because Wulf did not have authority from the ACLU’s board to extend the offer. In their view, defending Spock and the other indictees would require the Union’s lawyers to argue a host of issues with no relation to traditional civil liberties, such as the legality of the war and draft, and the commission of war crimes by American troops. Moderate Board member Louis Hacker, a professor of economics at Columbia, warned of “our image being clouded, our traditional attitude of neutrality being jeopardized” with the consequence “when this war blows over, as it will—that our repute will have been seri-

225. Morgan was unable to draw much national attention to Levy’s case, in part because the Captain “had no more charisma than the average dermatologist.” Bishop, *supra* note 48, at 58.

226. WALKER, *supra* note 24, at 271.

227. Minutes of the Board of Directors 6 (June 1, 1967), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 18 (Microfilming Corp. of America).

228. *See id.* (remarks of Osmond Fraenkel, Louis Hacker, and Will Maslow).

229. *Id.* (remarks of Stuart Buchalter, Ed Ennis, and Lois Forer).

ously if not permanently damaged.”²³⁰ The moderates saw the case as a further step in the activists’ march toward putting the organization on record as opposing the Vietnam War with “a zeal more appropriate to a dissident leftist cabal.”²³¹

The dispute was not about whether the ACLU should have a role in the Spock case, but over what that role should be. Activists like Wulf wanted the Union to serve as defense counsel for the accused, while moderates favored the ACLU’s traditional approach of filing *amicus curiae* briefs on the relevant constitutional principles. The Spock case represented just one battle in a larger struggle over tactics. While the ACLU had long cherished the *amicus* brief as its most effective tool, the activists of the late 1960s saw it as an antiquated, formalistic, and impotent device. The new generation of ACLU leaders considered *amicus* to be a “relatively puny instrument” that very rarely makes an impression on a court²³² and instead merely “assuages liberal guilt.”²³³ The activists ultimately prevailed. While the ACLU participated by *amicus* brief in ninety percent of its cases in 1960, that figure fell to approximately ten percent by the end of the decade.²³⁴

When the Spock matter initially came before the ACLU’s Board, the traditionalists held their ground. Each side accused the other of being blinded by political motivations. Mel Wulf complained that it would be dangerous for the ACLU to forego direct representation in a high-profile case where the organization’s image among radicals was at stake. The moderates saw Wulf’s insistence on taking the case as a backhanded effort to push the union toward a political stance against the war, saying the ACLU’s “litigation tail is wagging the policy dog.”²³⁵ The Board’s more militant members countered that it was actually the traditionalists who risked letting politics “get in the way of the Union” and letting “political

230. Letter from Louis M. Hacker to John de J. Pemberton, Jr. (Jan. 10, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America).

231. Comments from ACLU Members on ACLU’s Participation in the Spock et al. Case 1 (Feb. 23, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America) (comments from Richard B. Cantor).

232. Memorandum from Aryeh Neier to Board Directors Re: Indictments of Spock, Coffin, et al. 3 (Feb. 15, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America).

233. *The ACLU: Destination Unknown*, L.A. TIMES, July 14, 1974, § VI, at 2 (quoting Chuck Morgan).

234. Arnold, *supra* note 92, at 51.

235. Minutes of the Board of Directors 6 (Jan. 12, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America) (remarks of Ralph Brown).

disagreements with the defendants dim its vision of the civil liberties violations."²³⁶ After debate, the Board voted down a motion to provide defense counsel to the Spock defendants, and instead approved the creation of a committee to prepare *amicus* briefs.²³⁷

Chaos followed. ACLU staff members immediately informed several of the important affiliates about the Board's decision.²³⁸ The ACLU's Massachusetts affiliate extended its own offer to represent the five indictees, two of whom accepted. Several other affiliates, including the powerful Southern California and New York branches, demanded that the national Board reverse its decision.²³⁹ Meanwhile, the moderate members of the national Board, hoping to solidify their victory on the Spock matter, began pushing for the release of the ACLU's long-delayed statement on civil disobedience. One lamented the inconsistent behavior of the activists, observing that:

When I have argued that some of the cases the ACLU was handling as direct counsel were giving us terrible publicity (and that they did not advance the cause of civil liberties) I was confronted with arguments about the sole importance of justice, truth, principle and purity—that even though the issue is an unpopular one, our commitment to civil liberties principle requires our intervention. Yet none of these values are mentioned with respect to the issuance of the civil disobedience statement. Now some of these same individuals have suddenly become hard headed realists with press treatment being the most important consideration.²⁴⁰

Other moderate Board members agreed that the ACLU should release the policy statement "even though some of the immature minds may accuse of finking out."²⁴¹ The activists fought back with harsh accusations that the statement was an attempt to embarrass the peace movement.

At the Board's next meeting, moderates formally moved for the release of the civil disobedience statement, saying "expansionists in the Union should not invariably be appeased" and that, since no member of the Board seemed to have a problem with the merits of the statement, it

236. *Id.* at 4 (remarks of Algernon Black).

237. *See id.* at 6.

238. *See* Lusky Memorandum, *supra* note 233, at 6.

239. Memorandum from Executive Committee to Board of Directors, Affiliates, and National Committee Re: The Federal Indictment of Dr. Spock, Reverend Coffin, and Messrs. Ferber, Goodman and Raskin for Counseling Evasion of the Draft 1-2 (Jan. 22, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America).

240. Soll Memorandum, *supra* note 232, at 5.

241. Memorandum from National Office to Board of Directors Re: Comments on Question of Release of Statement on Civil Disobedience 1 (Jan. 24, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 25 (Microfilming Corp. of America) (statement of Paul A. Phillips).

was wrong to hide it from the Union's members and the press.²⁴² Those who opposed release acknowledged that the problem was not the statement itself, but that it would be misconstrued and prompt headlines like "The ACLU says that protesters go too far."²⁴³ The Board voted to release the statement in its original form.²⁴⁴ The activists' prediction about press reaction to the statement came true, as newspapers tied the civil disobedience statement to the Board's earlier decision not to defend the Spock indictees.²⁴⁵ The *New York Times* reported the "considerable embarrassment and even bitterness" created by the ACLU's internal "split" over the issue.²⁴⁶ The *Village Voice* called it the ACLU's "latest cop-out" and quoted the president of the Union's New Jersey affiliate claiming that "supporters of the war in Vietnam have carried the day in the national ACLU."²⁴⁷ The article went on to describe the confidence of the ACLU's "militant young lawyers" that "the diehards of the national board are living on borrowed time."²⁴⁸

Those young militants were not content to let the issue rest, and they set the stage for a confrontation at the board's meeting in March 1968. Before the meeting, a number of affiliates, including New York and Southern California, petitioned for the Board to reverse itself and to offer counsel in the Spock case.²⁴⁹ The Free Speech and Association Committee, split evenly on what the ACLU's role in the Spock case should be, presented two reports.²⁵⁰ The traditionalists argued that the Union should file *amicus* briefs as the civil liberties issues and evidence became clear,

242. Minutes of the Board of Directors 5 (Jan. 25, 1968), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 19 (Microfilming Corp. of America) (remarks of Dean M. Kelley); *see also id.* at 6 (remarks of George Soll and Osmond Fraenkel).

243. *Id.* at 7 (remarks of Marvin Karpatkin and Walter Millis).

244. *See id.* at 8.

245. According to the ACLU's Executive Director, the *New York Times*, *Washington Post* and other newspapers linked and confused the civil disobedience statement and the ACLU's decision on the Spock case. *See* Memorandum from Jack Pemberton to Board of Directors and Affiliates Re: Publicity on ACLU Civil Disobedience Statement 1 (Feb. 2, 1968), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 25 (Microfilming Corp. of America).

246. John Leo, *ACLU Bars Help to Draft Resisters*, N.Y. TIMES, Feb. 2, 1968, at 1, 3.

247. John Leo, *Defining Civil Liberties: The ACLU & the War*, VILLAGE VOICE, Feb. 15, 1968, at 8, 8-9 (quoting Emil Oxfeld).

248. *Id.* at 9.

249. Affiliate Comments and Resolutions on ACLU Participation in the Spock, et al. Case (Feb. 23, 1968), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 25 (Microfilming Corp. of America).

250. Minutes of the Board of Directors 3-6 (Mar. 2, 1968), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 19 (Microfilming Corp. of America) [hereinafter Affiliate Comments of Feb. 23, 1968].

while the activists believed the indictment was clearly invalid on its face and should be opposed immediately.²⁵¹ The debate became heated and personal, with arguments going to the basic nature of the organization. Louis Lusky, a Columbia law professor, argued that it would harm the ACLU to raise “frivolous” issues such as a possible “Nuremberg defense” based on the Spock defendants’ good-faith perception of a pattern of American war crimes and the waging of an aggressive war in Vietnam.²⁵² Radical lawyer William Kunstler characterized Lusky’s thinking as ‘living with old decisions,’ an approach that would have preserved *Plessy v. Ferguson* and racial segregation.²⁵³ The militants complained that the ACLU’s reluctance to enter the Spock case “reflects a crisis in the union, created by a split between older and younger people, the at-large Board and the affiliates, the older leadership and the membership, the old Board and the national staff.”²⁵⁴ Marvin Karpatkin, a former NAACP lawyer, warned that the question was “a critical indicator of the future course of ACLU,” for merely filing *amicus* briefs in the case would mean “a severe curtailment of ACLU’s potential” and a “return to the days of a cautious, limited, New York-centered organization.”²⁵⁵ Ralph Brown bluntly suggested that the militants’ need for “ego enhancement” made them feel the ACLU had to be in charge of every case important to the political left.²⁵⁶ If they could retain a “touch of humility,” he argued, they could see that an *amicus* approach would be most effective.²⁵⁷ In response to intimations that the ACLU’s more conservative leaders were supporters of the war, one pointed out that he would be glad to challenge the war in any political forum, but did not want to betray the peace movement by defiling the ACLU’s neutrality.²⁵⁸

Amid the bitter recriminations, ACLU vice chairman David Isbell implored everyone in the ACLU family to “return to previous rules of conduct and try to retain as much respect for the view of others within the organization as they aim to have for those outside.”²⁵⁹ A few board members heeded that advice and suggested means of compromise for cases in which civil liberties and political issues tangled. Franklyn Haiman pointed out that, while the ACLU had not (yet) taken the position that the war or the draft was unconstitutional, “this position is at least arguable”

251. *Id.*

252. *Id.* at 7.

253. *Id.* at 9.

254. *Id.* at 11 (remarks of Leonard Schroeter).

255. *Id.* at 10.

256. Affiliate Comments of Feb. 23, 1968, *supra* note 258, at 12.

257. *Id.*

258. *Id.* at 11 (remarks of David Carliner).

259. *Id.* at 12.

and therefore “the Union should defend those who say this.”²⁶⁰ Samuel Hendel similarly agreed that “what must be decided is whether the positions of the *Spock* defendants are *arguable* in a civil liberties context, not whether they are fully meritorious in the Union’s view.”²⁶¹ The isolated attempts at compromise were ignored. Moderates acted as though representing the Spock defendants would mean enshrining defense arguments as official ACLU policies; militants assumed that declining the representation meant endorsing the war. When the smoke cleared, the Board voted by a narrow margin to offer to defend any of the Spock defendants and to support fully the Massachusetts affiliate’s representation already in progress.

The reverberations of the showdown continued for months.²⁶² Moderate board member Louis Lusky decried the state of the Union. He felt the Spock controversy “raises a serious question as to whether the national Board is any longer in control of the Union, and reflects a deep sickness in the organization.”²⁶³ He considered the March 2 meeting in particular “the most destructive debate he had witnessed in any organization,” as “revered members of the ACLU Board had been berated because of their age and other irrelevancies.”²⁶⁴ In a long memorandum chronicling the conflict and ill feelings generated by it, Lusky accused the militants of making inaccurate and unauthorized disclosures of information to local affiliates and the press in order to create the false impression that a “warlike and reactionary purpose” motivated the Board’s initial decision not to represent the Spock defendants.²⁶⁵ He complained that the militants were “ready to deny not only the good sense but the courage of their opponents—to deny not only the fact of their personal opposition to the war but also their loyalty to civil liberties principle.”²⁶⁶ Lusky accused them of preferring to “wreck the organization” rather than let the Board’s initial decision stand.²⁶⁷

260. *Id.* at 8-9.

261. *Id.*

262. Some board members suggested that a special committee should investigate the disaster, but most felt that it would do more harm than good, and the proposal received little support. See Minutes of the Board of Directors 6-7 (May 9, 1968), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 19 (Microfilming Corp. of America).

263. *Id.* at 6.

264. *Id.*

265. Lusky Memorandum, *supra* note 233, at 10.

266. *Id.* at 9.

267. *Id.* A year later, the friction had still not disappeared. After Lusky questioned “the emphasis given certain kinds of cases” and “the distinctions made between entering cases amicus or by direct representation,” he was “verbally accosted” at two board meetings by legal director Mel Wulf. Minutes of the Board of Directors 15-16 (April

The ACLU's Executive Director Jack Pemberton also weighed in on the turmoil. He submitted that:

[T]he accusations of ulterior motives and disloyalty to the Union which have flowed from the Spock-Coffin issue are dangerous and unnecessary. The accusations in effect imply that the opposition, and only the opposition, is unable to act objectively. The question of objectivity is one that affects both sides in any question as politically potent as the Vietnam War. Instead of accusation, each person must consider for himself how best to retain and exercise his own objective capacities.²⁶⁸

Pemberton regretted that the entire conflict turned out to be moot, for all five of the Spock defendants secured other counsel and rejected the ACLU's offer of representation.²⁶⁹

Civil disobedience and the Spock case remained volatile subjects when local and national ACLU officials gathered for the Biennial Conference in June 1968. From the moderate perspective, the conference "was not quite an Armageddon, [but it] did make even clearer the sickness of the Union."²⁷⁰ Moderates sought an official expression of disapproval of national staff members' efforts to mobilize voters to "purge" four incumbent directors who voted against defending Spock.²⁷¹ The votes of staff members serving as delegates at the conference were enough to defeat the censure motion.²⁷²

The voters at the Biennial Conference instead recommended that the National Board rescind its civil disobedience policy statement in favor of a position allowing that "there may be circumstances in which ACLU may be ready to defend civil disobedience."²⁷³ When the Board met to consider that and several other proposals, the statement that received the most support was similar to the policy already in effect. It reiterated that the ACLU would not defend a person who violated a valid law, even as a form of protest, although the Union had great respect for the noble intentions often motivating civil disobedience.²⁷⁴ The Board's ability to reach a

19-20, 1969), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America). After Wulf apologized for having "lost his temper," Lusky dropped his demand for an investigation. *Id.* at 16.

268. Minutes of the Board of Directors 4 (June 13, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America).

269. See WALKER, *supra* note 24, at 284.

270. Lusky Memorandum, *supra* note 233, at 15.

271. *Id.*

272. See *id.*

273. Recommendations of the 1968 Biennial Conference, *supra* note 188, at 43 (Resolution Nos. 15-16).

274. Minutes of the Board of Directors 12-14 (Oct. 5-6, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Micro-

consensus on that policy illustrated how much the Spock conflict—considered “the major internal controversy in the ACLU in the past 30 years”²⁷⁵—arose because of different attitudes toward the Vietnam War and the organization’s image, rather than disagreements about the underlying civil liberties principles.

IV. CONFLICT AND COMPROMISE

The ACLU’s leaders recognized in the late 1960s that the organization was in the midst of one of the most difficult periods in its history. When the ACLU was smaller, it could “tolerate fairly unresolved differences as to what the role and objectives of the union itself were,” but such disagreement now threatened its “functional integrity.”²⁷⁶ Outspoken national board member Louis Lusky described the Union as caught in an “accelerating drift toward faction, mediocrity, parochialism, intellectual arrogance, divorce of power from responsibility, preoccupation with substantive issues at the cost of civil liberties principle—in short, toward deadly decay.”²⁷⁷ As observed in another memorandum addressing the persistence of “strife and hard feelings” within the Union, “[t]he injection of *ideological* conflicts into the foci of such ordinary organizational frictions can be as damaging as a handful of steel shavings thrown into a machine bearing.”²⁷⁸

The ACLU’s turn toward activism and politically-oriented endeavors by the end of the late 1960s alienated many of its long-time supporters.²⁷⁹ Quitting after more than ten years as a Board member and as chairman of the Academic Freedom Committee, Louis Hacker explained that he wit-

filming Corp. of America).

275. Arnold, *supra* note 92, at 51.

276. John de J. Pemberton, Jr., ACLU at a Crossroads 5 (undated address to 1968 Biennial Conference) *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 29 (Microfilming Corp. of America) [hereinafter Pemberton Address].

277. Lusky Memorandum, *supra* note 233, at 2.

278. Memorandum from Gordon K. Haskell Re: Structure, Function, and Mythology 3 (Sept. 19, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 26 (Microfilming Corp. of America) [hereinafter Haskell Memorandum]; *see also* Minutes of the Board of Directors 5 (Sept. 21, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America) (quoting Leonard Schroeter’s observation of “the lack of confidence in the national Board and in the affiliates for one another”); Minutes of the Board of Directors 10 (Dec. 14-15, 1968), *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America) (quoting Philip Hirschkop’s claim that “Board members had lost touch with the affiliates and the membership of the Union”).

279. *See* Arnold, *supra* note 92, at 51.

nessed “too many things taking place in the ACLU and more particularly in the [New York affiliate] beyond my comprehension; and what I do understand I cannot accept.”²⁸⁰ Believing that the ACLU had become enmeshed in too many war-related issues and other political matters, New York attorney Herbert Prashker left the Board “not over a particular issue, but because I thought it was losing its focus.”²⁸¹ Walter Metzger, a member of the Academic Freedom Committee, resigned not because of the substance of the disagreements, but because of the bitter way in which the ACLU carried out its debates. He resented the “caustic judgments” of Board members certain that anti-war sentiment motivated some of the committee’s reports and resolutions, and the resulting insinuation that some “are less firm in their commitment to the neutral principle than are the members of the Board.”²⁸² Metzger expected more humility and comity among those who purported to be sharing ideas in a common cause.²⁸³ Some even speculated that the internal conflicts prompted Jack Pemberton’s resignation from the office of Executive Director in 1970.²⁸⁴

From within its own ranks, the ACLU began to hear allegations that it had crossed the threshold into political action.²⁸⁵ Harvard law professor and ACLU board member Alan Dershowitz complained through the 1970s about the Union’s “many leftist political positions,” and how it had joined the movements whose rights it once merely defended.²⁸⁶ Aryeh Neier, the ACLU’s Executive Director during the 1970s, also later condemned the swing toward political endeavors, concluding that the ACLU was “mis-

280. Letter from Louis M. Hacker to Board of Directors (Jan. 5, 1969), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 19 (Microfilming Corp. of America).

281. Arnold, *supra* note 92, at 51.

282. Letter from Walter P. Metzger to Samuel Hendel 1, 2 (Nov. 5, 1969), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 26 (Microfilming Corp. of America).

283. *See id.* at 2.

284. *See* Martin Arnold, *Pemberton Quits as A.C.L.U.’s Head*, N.Y. TIMES, Apr. 11, 1970, at 1, 41 (reporting Pemberton’s denial that internal conflict motivated his resignation).

285. *See* Letter from Carl B. Pearlston, Jr., to Editor, L.A. TIMES, July 21, 1974, § 8, at 2 (describing “polarization and factionalism” within Southern California affiliate “over the attempt by activists to make a pseudo-civil liberties issue out of every social, economic and political problem besetting the nation”).

286. Lukas, *supra* note 63, at 26; *see also* *Libertarian Lobby*, TIME, Feb. 17, 1975, at 79. Some critics observed that “many of the blacks and women who came into leadership roles in the ACLU as a result of recruiting efforts in the late 1960s have voted the positions of the groups they see themselves representing, rather than the more individualist civil libertarian positions of the white males they replaced.” Radin, *supra* note 94, at A21-A22.

taken in some of the fights we took on.”²⁸⁷

These leaders worried that the ACLU’s commitment to defending traditional civil liberties declined when the traditionalist or moderate point of view evaporated within the Union. Neier felt that the Union’s expanded reach prevented it from making good on its primary commitments.²⁸⁸ After the ACLU formed special projects for gay rights, black rights, women’s rights, prisoner’s rights, and children’s rights, Der-showitz suggested the ACLU needed one more—a civil liberties project. Traditional freedoms, the lodestar of the Union for decades, were “in danger of getting lost in the shuffle.”²⁸⁹

The ACLU’s “political agenda” also became the principal target of attacks by liberal and conservative critics outside the Union. Yale law professor Joseph Bishop fired the first stinging shot. In a December, 1971 essay in the liberal journal *Commentary*, Bishop described the Spock episode as a turning point after which the ACLU “embarked on a series of political crusades.”²⁹⁰ Bishop’s analysis received considerable attention in other magazines and newspapers. “William F. Buckley, Jr. teeheed; the *Wall Street Journal* editorially heehawed” at seeing the ACLU slapped by its liberal friends.²⁹¹ Several major newspapers ran articles based on Bishop’s claims, fueling the spreading perception that the ACLU had gone “berserk” and abandoned its basic character in order to pursue political objectives.²⁹² The ACLU’s decision in 1973 to take out full page newspaper ads demanding Nixon’s impeachment rekindled the criticism,²⁹³ with observers charging that the Union had sunk even further into the “morass of politics” and was “as out of touch with reality as a poor soul gone on an

287. Neier, “*What Good Came of It?*”, *supra* note 221, at 3.

288. See Tom Goldstein, *The A.C.L.U. Finds Another Issue: Itself*, N.Y. TIMES, Apr. 23, 1978, § 4, at 4 (“I don’t think the A.C.L.U. should further extend its reach It must make good on some of the commitments already made.”).

289. Jeffrey T. Leeds, *The A.C.L.U.: Impeccable Judgments or Tainted Policies?*, N.Y. TIMES, Sept. 10, 1989, § 6 (Magazine), at 71, 76. National board member Rolland O’Hare worried that the ACLU’s alienation of much of the political spectrum made it “difficult to defend the things we care most about.” Lukas, *supra* note 63, at 26; see also Jim Mann, *Hard Times for the ACLU*, NEW REPUBLIC, Apr. 15, 1978, at 12, 15 (“If the ACLU becomes too busy to stick up for the First Amendment, then who will?”).

290. Bishop, *supra* note 48, at 51-58 (discussing ACLU’s involvement in “political” issues such as the Vietnam War, the draft, Capt. Levy’s case, the Spock case, the Black Panthers’ conflicts with police, school decentralization, nerve gas shipments, and underground nuclear testing).

291. Nicholas von Hoffman, *The Liberals Get a Whumping*, WASH. POST, Jan. 26, 1972, at B1; *A Mysterious Affliction*, WALL ST. J., Dec. 27, 1971, at 6; William F. Buckley, Jr., *The Decline of the ACLU*, 24 NAT’L REVIEW 118 (1972).

292. Nick Thimmesch, *The ACLU Veers to the Left, and Loses Some Credibility*, L.A. TIMES, Jan. 28, 1972, § II, at 7; see also Arnold, *supra* note 92, at 1.

293.

LSD trip.”²⁹⁴ The accusations soon became a standard refrain in articles about the Union. Journalists who closely covered the ACLU’s activities, like Nick Thimmesch and Nat Hentoff, constantly accused the Union of privileging leftist politics over civil liberties.²⁹⁵

By the late 1970s, the ACLU suffered a virtual financial collapse as an indirect result of the conflict and activist shift of the late 1960s.²⁹⁶ Tens of thousands of new members temporarily swelled the ACLU’s membership rolls, but lost interest after U.S. troops left Vietnam and Richard Nixon left the White House. When scores abandoned the ACLU in 1977 for defending the right of Nazis to march in Skokie, it became clear that the Union had attracted many who did not readily accept the ACLU’s most basic principle of defending speech without regard to its content.²⁹⁷ Although the membership rolls and bank accounts eventually recovered, the damage to the Union’s reputation was not as easy to repair.²⁹⁸ The idea had taken firm hold that the ACLU was no longer the

294. Nick Thimmesch, *Headline Grabbing by ACLU*, CHI. TRIB., Oct. 11, 1973, § 1, at 22; see also Nick Thimmesch, *The Clamor To Drive Nixon Out*, CHI. TRIB., Feb. 7, 1974, § 1, at 22; *Destination Unknown*, *supra* note 242, at 2.

295. For examples of Thimmesch’s coverage of the Union, see *supra* notes 302 and 303. Hentoff, who served as a member of the ACLU’s national and New York affiliate boards, wrote about the ACLU and civil liberties issues for the *Village Voice* and *Washington Post*, finally resigning from the Union in 1995 over disagreement with its policies, especially those relating to abortion. See NAT HENTOFF, *SPEAKING FREELY* 193 (1997).

296. See WALKER, *supra* note 24, at 327-28 (describing how ACLU shrank from 275,000 to 200,000 members from 1974 to 1978, and incurred \$500,000 debt); A.C.L.U., *After Defections over Nazi Case, Is Threatened by Deficit*, N.Y. TIMES, Oct. 14, 1979, at 59. In hindsight, some ACLU officials felt that Skokie had a positive purging effect since “many of those who walked away in disgust over our stand in Skokie had joined the organization because they agreed with its opposition to the war and Richard Nixon.” Neier, “*What Good Came of It?*,” *supra* note 221, at 3; see also *The ACLU on the Rebound*, NAT’L L.J., Sept. 5, 1983, at 1, 8 (quoting ACLU board chairman Norman Dorsen referring to Skokie as “a short-term problem” that became “a long-term benefit”).

297. See WALKER, *supra* note 24, at 328; see also Irving L. Horowitz & Victoria C. Bramson, *Skokie, the ACLU and the Endurance of Democratic Theory*, 43 LAW & CONTEMP. PROBS. 328, 344 (1979) (linking Skokie episode to ACLU’s internal history and claiming ACLU leaders did not want to make “same mistakes” as with Communists in 1950s by tempering their defense of Nazis).

298. See Bishop, *supra* note 48, at 58 (claiming that ACLU risked “change in its base of support—from a large number of people, having very different political views, but sharing a common belief in the virtues of the Bill of Rights, to a rather smaller and politically homogeneous group”); cf. Lusk Memorandum, *supra* note 233, at 10, 11 (arguing that ACLU in late 1960s threatened to become “an ingrown assembly of like-minded people capable of communicating only with each other” rather than organization that “speaks to the whole American community”).

champion of great causes, but rather a “misguided ideologue”²⁹⁹ whose ambit of concerns consisted of the “universe of the political left.”³⁰⁰ That image has not been easy for the ACLU to escape. In early 1998, the ACLU launched the first sustained advertising campaign in its history, taking out monthly newspaper ads on various civil liberties issues in an effort finally to put to rest the public perception that it was a partisan, “liberal left” organization.³⁰¹

The internal conflicts over the Vietnam War, and the resulting harm to the organization, were not inevitable. Even as the controversies raged, the leaders of the Union dealt with an equally vexing problem—reconsideration of the 1940 Resolution—in a strikingly different manner. The 1940 Resolution was as emotional, vital, and divisive as any issue that came before the ACLU in the late 1960s. It aroused pressing concerns about the organization’s integrity from both its supporters and opponents. The initial lines in the battle over the old policy seemed immutable as a portion of the Union was determined to retain the explicit prohibition of Communists, and the rest determined to remove it. But what seemed to be an unavoidable conflict was avoided. In the end, the Board unanimously adopted a compromise statement which earned overwhelming approval from the organization’s electorate. The final debate on the resolution was an oasis of good feelings and cooperation in a period of discord and strife over other issues.

The fundamental factor which defused hostility in the handling of the anti-communism issue was mutual recognition of the subjective motivations involved. In the early debates about the 1940 Resolution, the ACLU’s leaders framed their arguments only in terms of abstract civil liberties principles. Speakers in the initial discussions repeatedly insisted that only considerations of principle were valid, condemning arguments based on organizational history, personal experience, public relations, or any other factor. At that point, it appeared the issue would bring painful, destructive debates, leading to a result that would alienate a substantial minority of the Union’s leadership. After significant conflict over the issue, the nature of the debate changed. Recognizing that factors such as personal experience and different understandings of communism made it impossible to persuade opponents by arguing about principles, the partici-

299. Basile Uddo, *The ACLU: One Step Too Far, Too Often*, AMERICA, May 19, 1979, at 413.

300. Mann, *supra* note 299, at 12-15; *see also* Seligman, *supra* note 171, at 107 (“One familiar criticism is that sometime around the late Sixties this organization abandoned its pristine approach to the Bill of Rights and began pushing its own left-liberal agenda.”).

301. *See* Sally G. Beatty, *ACLU Launches Effort To Burnish Image*, WALL. ST. J., Feb. 6, 1998, at B6 (quoting ACLU executive director Ira Glasser).

pants moved away from a dogmatic insistence that there was only one objective, justifiable position on the issue. This “critically reflexive” approach³⁰² changed the tone of the debate as well as the policy outcome. When the accusations and recriminations stopped, a compromise appeared that all sides found acceptable.

By contrast, participants on both sides of the Vietnam debates constantly questioned the motivations of their opponents. They considered their own arguments to be nothing but sincere, principled beliefs about civil liberties, while claiming that subjective political and personal biases hopelessly colored their adversaries’ views.³⁰³ In his address to the 1968 Biennial Conference, Executive Director Jack Pemberton spoke about the accusations of subjectivity and ulterior motivation that pervaded debates between the “traditionalists” and “militants” within the Union.³⁰⁴ He described how “the polarization of opinion, with its intolerance of opposition, that has taken place in the larger society has its parallel within the ACLU.”³⁰⁵ The moderates accused the activists of allowing opposition to the Vietnam War to infect their judgment and of attempting to convert the ACLU to the service of political objectives; the activists responded by charging that the moderates sought to hamstring the Union.³⁰⁶ Pemberton considered both sides’ attacks “equal mixtures of truth and nonsense,” pointing out that neither could properly claim sole possession of the “peculiarly precious commodity” of objectivity.³⁰⁷ While the traditionalists who opposed representing the Spock defendants were not motivated by pro-war sentiments, they did “sometimes appear overly concerned that the bad public odor of our clients may unduly tarnish our image.”³⁰⁸ While the activists firmly defended right-wing expression, they “occasionally exhibit an unseemly fear that we may appear insufficiently identified” with liberal causes.³⁰⁹ Pemberton concluded that the “mutual distrust” impairing the quality of ACLU debate was “pretentious, because it assumes that the merits of the other side’s arguments are so well understood

302. *See supra* note 27 and accompanying text.

303. Roger Baldwin sensed this tendency in 1967, before the most frenzied conflict, noting that the “unifying principle in any Board debate” should be a common understanding that freedom was everyone’s top priority and that he “missed that spirit” in much of the current discussion. Letter from Roger Baldwin to John de J. Pemberton, Jr. (June 2, 1967), *microformed on American Civil Liberties Union: Records and Publications 1917-1975*, Reel 25 (Microfilming Corp. of America).

304. Pemberton Address, *supra* note 285, at 3-4, 12, 14-15.

305. *Id.* at 3.

306. *Id.* at 4, 14-15.

307. *Id.* at 4.

308. *Id.* at 12, 15.

309. *Id.*

by the accuser that he can know that the disagreement is not meritorious,” when “[i]n fact, there has been real merit on more than one side of the arguments that have most intensely divided the Union.”³¹⁰ Others within the ACLU echoed Pemberton’s sentiments, calling for “less dogmatism, labeling, [and] name-calling” in ACLU debates.³¹¹

Despite Pemberton’s pleas, the ACLU’s debates about Vietnam never progressed beyond accusations of bias and departure from principle. There was never a mutual recognition of the subjective political and individual factors that influenced both sides. Militants and moderates alike maintained a doctrinaire persistence in treating opposing views as illegitimate affronts to civil libertarian principle. The ACLU’s leaders eschewed compromise positions temporarily in place regarding the draft and the legality of the war, and never considered whether compromise was possible on the Spock case. Both the militants and the moderates failed to see that the Union could have been effective and dynamic while remaining within the boundaries of its traditional nonpartisan role. The ACLU could have recognized the serious civil liberties implications of the draft and the war, and done a full array of work in these areas by defending the rights of others to challenge the government’s actions, without the organization itself making a political declaration condemning the draft or the war. The Union could have selected the most effective method of defending the rights of war protesters in the courts, whether as defense counsel or *amicus curiae*, without endorsing as organizational policy the defendants’ arguments going beyond civil liberties issues. The ACLU’s bitter internal conflict during the Vietnam era was not inevitable.

V. CONCLUSION

The late 1960s represents a critical and dramatic period in the organ-

310. Pemberton Address, *supra* note 285, at 14, 15. Pemberton also attacked the rampant excess concern with the Union’s public relations, noting that “image is not an end in itself.” *Id.* at 12.

311. *The Union’s Unity: Two Comments*, INSIDE ACLU, Nov. 18, 1968, at 1, *microformed on* American Civil Liberties Union: Records and Publications 1917-1975, Reel 19 (Microfilming Corp. of America) (quoting Arizona affiliate’s executive director Ted Mote, who also described how “[i]nstead of attempting to see how much of a consensus can be reached on a policy question we usually prepare opposing position papers, sponsor a debate, and generally choose up sides”); *see also* Haskell Memorandum, *supra* note 287, at 3, 4 (complaining that accusations of “parochial and generational prejudices” were “muddying the waters of our vital ideological debate [and creating] needless obstacles to improving our organizational effectiveness”); Lusky Memorandum, *supra* note 233, at 10 (“The True Believers simply did not accept the possibility that any well-motivated person could, in good faith, disagree with them.”).

izational history of the ACLU. After years of controversy, the union finally managed to put to rest the issue of anti-communism within its own house by adopting a compromise policy that satisfied even the most militant and most traditional among the Union's leaders. At the same time, the Vietnam War presented new policy questions that bitterly divided the ACLU's leadership. Neither side in these debates could accept their adversaries' views as arising from legitimate disagreement over civil liberties principles, and instead accused opponents of attempting to convert ACLU policy to the service of political agendas. The episode significantly affected the ACLU's short-term fortunes, leading to a period of dramatic growth followed by near collapse. The conflict had longer lasting consequences as well, with the alienation of the ACLU's moderate element and a new public and media perception of the ACLU as a partisan lobby for liberal causes rather than a non-political defender of the rights of all.

The intense internal conflict over the Vietnam War during the late 1960s could have been avoided or reduced had the ACLU's leaders drawn on the organization's contemporaneous experience in resolving another difficult issue, the reconsideration of the 1940 Resolution. As with the anti-communism issue, the policy choices presented to the ACLU's leaders by the Vietnam War inevitably involved subjective and instrumental considerations as well as purely principled ones. A willingness by leaders on both sides to acknowledge this could have avoided the venomous character of the conflict and made compromise possible.