This was originally distributed to every member of the New York State legislature in Albany. Subsequently it became the first of the two memoranda submitted to the New Jersey Criminal Law Revision Commission. It was also submitted to the Nebraska Penal Law Revision Commission, where it resulted in the excision of a proposed homosexual solicitation provision, which had appeared in the code as originally draughted. As a consequence, the Nebraska penal code as ultimately enacted contained no such provision.

This memorandum is submitted with respect to section 240.35(3), the homosexual solicitation provision of the New York Penal Code. It rests on the premise that, if all criminal sanctions against private homosexual conduct between consenting adults are removed, then consistency requires a similar repeal of this section also. However, this memorandum is also intended to demonstrate that section 240.35(3) is thoroughly unjust, and that it serves no legitimate social purpose even were private sodomy between consenting adults to continue to be a crime.

The archetype for all state solicitation statutes is the English act of 1898, which, for the first time, brought within the purview of the criminal law any "male person who in any public place persistently solicits or importunes for immoral purposes."[1] This language did not specifically refer to homosexual conduct, and was actually drafted with pimps and procurers in mind. However, it soon became the recognized legal vehicle in England against all forms of homosexual solicitation. In this country state homosexual solicitation statutes are subsumed under a variety of different heads, such as "loitering", "disorderly conduct", "vagrancy", or "making a lewd or indecent proposal", not all of which employ the actual term "solicit", but they are all substantially identical in purpose and effect. Like the English statute, many of them were enacted with only heterosexual conduct in mind, although they are all capable of being employed against homosexuality also. Moreover, the whole trend of modern law enforcement in the area of sex is to use statutes originally enacted for heterosexual purposes against homosexuality exclusively. This is a consequence of changed sexual standards, which have greatly attenuated public hostility toward most manifestations of heterosexuality, and have left many statutes dead letters so far

as their application to heterosexual conduct is concerned.

However, this is not the case with New York's section 240.35(3), which states that

> "a person is guilty of loitering when he loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature."

This provision is quite recent, forming part of the penal code enacted in 1965. It replaced section 722(8) of the old New York penal code, which had declared anyone guilty of disorderly conduct

> "who, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, ... frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness."[2]

722(8) had consistently been interpreted by the New York courts as requiring no actual intention to provoke a breach of the peace or no actual threat to the peace in order to be invoked. Obviously this had broadened the statute far beyond the original legislative intention and destroyed any illusion that the conduct being proscribed did in fact constitute an affront to the public. The same intention to punish the deviant character of the conduct involved, regardless whether or not it was actually offensive to the public, was manifested by the Temporary New York State Commission which drafted the present penal code, of which section 240.35(3) forms a part. As originally drafted by this commission, the section was directed against both homosexual and heterosexual solicitation, punishing anyone who "loiters or remains in a public place for the purpose of committing, attempting to commit, or soliciting another person to commit, a lewd or sexual act."[3] At the public hearings which the Commission subsequently held on its entire proposed draft code, it was pointed out that this provision, as then worded, would bring within its purview any young man loitering on a park bench who

asked a girl to go to bed with him. The New York commissioners thereupon altered the provision so that, as finally enacted, it took the form of the present section 240.35(3), that is, they restricted it exclusively to homosexual solicitations. By excluding all heterosexual conduct from these criminal sanctions, the Commissioners seemed to be more concerned with punishing deviant sexual conduct than with preventing offences to public decency.

It is precisely here that one must enquire as to whether the conduct which the homosexual solicitation statutes profess to punish does, in fact, constitute an affront to the public, for all of these laws rest on the premise that they protect society from public outrage by punishing acts of public indecency. This memorandum does not question the propriety of laws proscribing conduct which does in fact offend public decency. The question arises, however, whether the acts against which the old section 722(8) and the present 240.35(3) operate do actually offend the public. In 1966 a definitive study of the homosexual solicitation laws was completed under the auspices of the University of California at Los Angeles. This was a joint research project of six specialists in the field, the results of which, almost 200 pages in length, appeared in the U.C.L.A. Law Review as "The Consenting Adult Homosexual and the Law". Every aspect of the laws against homosexual solicitation was examined by these researchers, beginning with the philosophical rationale for and against morals legislation first appearing in the writings of certain eighteenth and nineteenth century political writers and going on from there to a penetrating investigation of present-day administration and enforcement of these laws. In a very real sense this project constitutes the "Wolfenden Report" of the solicitation statutes. The authors of the U.C.L.A. Report stated:

> "This project, taking the position that the deviant nature of sexual conduct, alone, does not warrant the imposition of criminal sanctions, concludes that only public displays of consensual homosexuality should be the legitimate concern of the criminal law. Even then, prohibition of public homosexuality is justified, not because it involves deviant sexual behavior, but because it involves an element of public outrage." [4]

It is because section 240.35(3) is a clear attempt to punish the deviant character of the conduct involved regardless of whether or not it constitutes a public outrage that this memorandum is submitted.

In one fundamental respect, section 240.35(3) is no different from all other solicitation laws, that is, it limits its ambit to activity occurring in a "public place". It thus gives lip-service to the idea of protecting the public from outrage. But a moment's reflection makes it evident that location per se does not necessarily convert an act otherwise private into a public one. It is illogical to make the locus of the solicitation the sole determinant of its private or public character. A private conversation between two persons, for example, is no less private simply because it takes place in the midst of a public meeting. These solicitations are, in fact, private acts which the law has arbitrarily denominated "public" simply because they are made in public places. Like all private conversations, they are heard only by the persons to whom they are addressed. And, in the vast majority of cases, these conversations offend no one.

This point is central to the whole question, because 240.35(3) does not punish sexual acts, but solicitations, that is, private conversations. The overwhelming majority of convictions rests on what the defendant said, not on what he did. The soliciting words need be communicated only to the arresting officer -- always in plainclothes -- in a place loosely denominated as "public", in order to constitute grounds for criminal prosecution. Hence the only

possible "public outrage" is to the tender sensibilities of the policeman whose professional career is dedicated to uncovering as many such solicitations as possible. The U.C.L.A. Report stated:

> "Since the /police/ decoy operates to apprehend solicitors, it is difficult to argue that he is a victim or that he is outraged by the proscribed conduct, particularly when he engages in responsive conversation or gestures with the suspect." [5]

Prosecutions under the solicitation statutes in all jurisdictions are invariably police-initiated affairs. Through "interviews with police departments", the U.C.L.A. investigators found "that communications from /private/ citizens complaining about solicitations by homosexuals are rare."[6] Through "interviews with enforcement agencies" the same investigators found

> "that most homosexuals who are 'cruising' for partners do not brazenly solicit the first available male; rather, they will employ glances, gestures, dress and ambiguous conversation to elicit a promising response from the potential partner before an unequivocal solicitation for a lewd act is tendered."[7]

Since this information was elicited from vice-squad officers, it can be regarded as unimpeachable testimony from specialists in the field. Their testimony is confirmed by other investigators. Michael Schofield notes that "the great majority /of homosexual solicitors/ are merely trying to find out if the other man is homosexual by the use of words or an enquiring look which would go unnoticed by the man who is heterosexual." He continues:

> "If the other man does not respond, the homosexual will go away and seek a sexual partner elsewhere. A homosexual would be stupid to importune persistently and pressingly as he is well aware that the vast majority of men look upon homosexual activities with repugnance."[8]

The U.C.L.A. Report concluded either "that homosexuals are discreet as to whom they solicit or that citizens are not outraged by this type of behavior."[9] Actually both propositions are true. Homosexual solicitors are known to be extremely circumspect and cautious; their

conduct is so subtle in its use of indirection, innuendo, and subterfuge, that only the cognoscenti are aware of what is going on. There are exceptions, to be sure, but they remain distinct exceptions.

All doubts as to the private and inoffensive character of the conduct involved are removed when consideration is given to the manner in which these "crimes" are apprehended. "This particular offense necessarily calls for the employment of plain-clothes police if it is to be successfully detected," wrote the Wolfenden Committee in its discussion of importuning.[10] If this be so, these are certainly not the methods customarily employed in the apprehension of persons whose conduct constitutes an open affront to public decency. In truth, it is only through the persistent and diligent use of police decoys and plainclothesmen that arrests under the homosexual solicitation laws are at all possible. By its very nature the offence is a clandestine one, and is almost invariably witnessed by only one person -- the arresting officer -- upon whose honesty and integrity extraordinary reliance must perforce be placed. What the U.C.L.A. Report found with respect to the California disorderly conduct statute -- that state's homosexual solicitation law -- applies equally in New York. It states:

> "Most convictions ... are based exclusively on the arresting officer's allegation that the defendant has made an oral solicitation for a lewd act. Prosecutions based on the police decoy's testimony are not often dismissed for lack of evidence....
>
> "Yet it is questionable whether convictions should be based exclusively on the oral testimony of the arresting officer. No crime is easier to charge or harder to disprove than the sex offence. In addition to lack of corroboration, the solicitation may be equivocal or unindicative of a firm intent to consummate the solicited act. When prosecutions are limited to credibility contests between defendants and arresting officers the likelihood of miscarriages of justice is evident ..." [11]

Small wonder that administration of the homosexual solicitation

statutes is characterized by police entrapment and extortion. What has frequently been said about the sodomy statutes and professional blackmailers applies with equal force to the solicitation laws and the police, whose "shakedown" of homosexual solicitors is all too frequent. Whitman Knapp, chairman of the New York City Commission presently investigating the New York City police department, has stated publicly that "our laws dealing with such problems as gambling, the Sabbath, and sex are ... an important source of /police/ corruption."[12] In addition to conducing to outright police corruption, statutes on the order of 240.35(3) are open to capricious enforcement, permitting the police to use them for purposes of harassment, satisfying personal grudges, or as a means of filling their monthly arrest quotas when the need arises. This is not the kind of even-handed enforcement of penal statutes which the law presupposes.

No reference to the solicitation laws would be complete without reference to the robberies and "muggings" which they encourage on the part of the criminal population. Robbery and its kindred offence, blackmail, have always been the two crimes most associated with homosexuality. The homosexual is one of the most tempting preys of those who specialize in these crimes, since the latter know that, in the vast majority of cases, their homosexual victims will never report these offences to the police. This is because the homosexual fears that, if he were to go to the authorities, he would find himself faced with homosexual charges. The same is true in the case of "mugging". These unprovoked assaults on homosexuals are usually committed by young roughs, often working in gangs, who consider as fair game anyone suspected of being homosexual, without the necessity for any actual manifestation of homosexuality on the part of the victim. The merest suggestion of a homosexual proposal, real or fancied, will suffice, and the proposal itself will invariably have

been induced by the would-be mugger himself. As a consequence, there are numerous occasions when the victims of these muggings are not in fact homosexual. For the reason already indicated, the great majority of muggings of homosexuals go unreported by their victims and the mugger knows that he can commit his crime with virtual impunity. A study made almost three years ago of one hundred muggings in New York City, the results of which appeared in the New York Times, indicated that "at least 20 per cent of the attacks studied were against chronic drunks or men seeking the company of prostitutes or homosexuals, victims who by their habits are unusually vulnerable to being mugged." [13] Since this investigation was confined to court cases, it was, by definition, limited to what had come to the attention of the authorities. Hence it involved only the visible fraction of the iceberg which constitutes homosexual mugging, for it is no exaggeration to state that, for every mugging of a homosexual which is brought to the attention of the police, at least four go unreported and undetected.[14]

A high percentage of assaults on homosexuals involve no actual robbery or attempted robbery at all. Even where a robbery does take place, the assailants frequently decide to rob their victim as an afterthought after the assault, which was their real purpose. In these instances the muggings are a form of sadism pure and simple. Reference has been made elsewhere to the analogy between the treatment of homosexuals in our contemporary society and the treatment of religious heretics of old. Just as the Church absolved of all sin the perpetrators of any crime committed against a heretic or homosexual -- and the two were considered synonymous -- so many people today, encouraged by the law, applaud those who assault and murder homosexuals. Like religion, the solicitation statutes stand as an

important social pillar giving direct support to this kind of savagery. Amongst certain social classes in our urban areas "rolling the queers for kicks" is an established form of Saturday night entertainment. No social stigma whatsoever attaches to this activity; on the contrary, it is looked upon by those who engage in it as the surest way of demonstrating their professed heterosexuality to associates within their own peer group. Robbery is rarely a motive in these cases even though a few dollars may sometimes be taken from the victim. The following case is not at all atypical.

> "One spring evening in April, 1961, a young man stood waiting for a trolley near his home in San Francisco. His name was William Hall. He was a teacher by profession.... as he stood alone waiting for the streetcar that was to take him to a dinner engagement with a friend, he /was/ ... surprised to see a car carrying four young men come to a precipitous halt beside him. Three of the young stalwarts descended from the car and approached him directly .... nothing about the teacher is reported to have been particularly distinctive, let alone eccentric ... one of the approaching gang called out bluntly to him, 'Are you a queer?'
>
> "... the teacher's reply was more educative than anger-provoking.
>
> " 'What if I asked you that question?'
>
> "Those were among the very last words spoken by William Hall. The three young hoodlums stormed the defenseless man and proceeded to beat him into a state of unconsciousness ... the police later reported ... that Hall had been struck in the head by some weapon resembling a blackjack..."[15]

Before leaving "Hall's unconscious body" to die, the youths removed $2.85 from his wallet, but it would be sheer phantasy to suggest that this was the reason for their brutal assault. After leaving Hall, the youths"continued their prowl of the city in search of other 'queers'." [16] The police inspector in charge of the case stated that "they said they considered Hall's death justifiable homicide. They seem to regard beating-up of whomever they consider sex deviates as a civic duty." [17]

The observations of the eminent psychoanalyst, from whose study of homosexuality this account was taken, deserve notice. He wrote:

> "... The number of youths led to such criminality under the guise of decency is far from negligible. These young men admitted that the beating they gave Hall was not the first they had ever administered to a person whom they deemed to be /homosexual/ ... There had been many other such nights for this advanced guard of the puritan terror. When they left their friends that fateful evening they felt quite free to announce their intention of seeking prospective victims without the slightest fear of losing face. They said they knew of at least fifty other youths within the brief confines of their own neighborhood who participated in similar attacks upon 'queers' .... /They/ affirmed ... that they 'keep watch on establishments patronized by homosexuals, then track down the patrons as potential victims for attack.' The crusade of these youthful enemies of sexual deviation, like all such crusades, is an inspired one. They are armed and made brave by the most intoxicating of all human delusions: the feeling of self-righteousness.
>
> . . . . . .
>
> "A youth goes out to hunt down a 'queer' and, having found one and attacked him, then robs him of a couple of bucks. How different is this from the activities of a police force that, with the aid of cunning techniques, often entraps the 'deviate' and then turns him over to a lawyer who makes a not unhandsome fee 'defending' the culprit in a case of 'sodomy' or 'solicitation'?"[18]

The same psychoanalyst states that "a growing number of young hoodlums in America make a practice of 'queer-baiting,' comfortable in the knowledge that so-called homosexuals will almost never call upon the police for protection and that they really cannot do so.... <u>These youths take their cue from the laws and from the intolerant spirit that brings about and perpetuates such laws</u>." [19]

Is it demanding too much to ask that the solicitation laws be repealed in the name of common humanity? The entire concept of sexual solicitors imposing themselves upon "offended" and "affronted" innocents is a construct of the Victorian age. Whether it was a valid assumption even then is debatable; certainly it is not true today. Even if people are offended by a simple sexual solicitation -- a proposition the validity of which has never been demonstrated -- the question still remains why an ordinary adult in full command of his mental faculties should not be expected to say "No" to an un-

wanted sexual proposal without the intervention of the criminal law.

The situation is no different than the case of any other peddler who brandishes wares which are rejected by those who do not wish them. The analogy is not posed facetiously. It is significant that the English statute of 1898, referred to above, does not go nearly as far as section 240.35(3). This law, enacted in the heyday of Victorian prudery, offers no protection to persons supposedly offended. It punishes only "persistent soliciting or importuning", thus recognizing that only repeated solicitation by those who refuse to take "No" for an answer is likely to cause any public nuisance. This is not to suggest that an English criminal statute passed three years after the conviction of Oscar Wilde should become the model for New York state in 1971. It is offered only to show how repressive and unjust the present New York law is.

All solicitation statutes suffer from a common objection. While claiming to protect the public from affront or offence, they are framed so as to punish some form of "immorality" or "lewdness" as well. That is, as vestiges of a Puritanic past, they attempt to ride two horses at once -- the suppression of public nuisances and the punishment of vice. In reality, they are "morals" statutes encapsulated within language purporting to protect the public from "offences" which the public itself does not consider sufficiently offensive to report to the authorities. As a consequence, the only persons "offended" are vice-squad officers.

The Legislature should rid itself of this harmful Victorian legacy. It should frame a statute which punishes only conduct that in fact annoys or offends others, whether that conduct be sexual or non-sexual in character. The law should direct its attention to the injury inflicted upon innocent persons and not concern itself with

punishing "immorality". This is why the proper vehicle for such legislation is a harassment statute on the order of section 240.25 of the present New York penal code. In this way the law would abandon its present role of moral censor and limit itself to the protection of whatever genuine societal interests are at stake. Certainly enforcing standards of sexual rectitude upon its citizenry or prosecuting them for manifesting unconventional sexual desires is not its legitimate province. (The reference here is only to sexual proposals, not to overt sexual acts in public.) It is for this reason that section 240.35(3) is so objectionable. If protection of the public against offensive conduct be its desideratum, of what relevance is the purpose for which the defendant loiters -- whether it be to solicit for sexual purposes or to affront the public in some non-sexual manner?

If the Legislature be sincere in its professed desire to suppress public nuisances, it should confine legislation to this worthy social end, and stop trying to punish "immoral" people in the process. The latter has traditionally been the role of the Church, but today even most ecclesiastical authorities have abandoned the practice. Certainly it is a role alien to a modern state. The situation is made worse by the fact that the New York solicitation law not only shares all the objectionable features common to this type of statute generally, but has other noxious features of its own which make it virtually sui generis. To the knowledge of the undersigned, it is the only solicitation statute in the country which requires no actual solicitation at all. The mere fact of loitering with intent to solicit is sufficient to bring criminal sanctions. This is truly shocking, and goes far beyond the solicitation laws of other states, which require an overt solicitation before any crime is committed. An actual solicitation was also required by the old New York solicitation

statute mentioned above, section 722(8) of the old New York penal code which 240.35(3) replaced. True, the latter is based on section 251.3 of the Model Penal Code, which likewise punishes loitering "in or near any public place for the purpose of soliciting." But that lamentable provision is today recognized as being inconsistent with the recommendation in that same Model Penal Code that all criminal sanctions against homosexual conduct in private between consenting adults be removed. Section 251.3 of the Model Penal Code was drawn up under the auspices of Professor Louis Schwartz of the University of Pennsylvania Law School, who was rapporteur for the committee of the American Law Institute which drafted all the so-called "morals" provisions of that code. More recently Professor Schwartz served as staff director for the National Commission on Reform of Federal Criminal Laws, which drafted the whole new Federal Criminal Code that was presented this January to the President for submission to the Congress for adoption. It is this proposed new Federal Criminal Code and not the Model Penal Code -- which has never been published -- that now stands as the model for the country. Section 1861 of this new Federal Code reads as follows:

> "(1) Offense. A person is guilty of an offense if, with intent to harass, annoy or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed or alarmed by his behavior, he
>
> (a) engages in fighting, or in violent, tumultuous or threatening behavior;
>
> (b) makes unreasonable noise;
>
> (c) in a public place, uses abusive or obscene language, or makes an obscene gesture;
>
> (d) obstructs vehicular or pedestrian traffic, or the use of a public facility;
>
> (e) persistently follows a person in or about a public place or places;
>
> (f) while loitering in a public place for the purpose of soliciting sexual contact, he solicits such contact;
>
> . . . . . .

"(4) Complaint by Member of the Public Required. Prosecution under paragraphs (c), (e) and (f) of subsection (1) shall be instituted only upon complaint to a law enforcement officer by someone other than a law enforcement officer." [20]

In recommending the above, the National Commission appended the following comment:

> "This statute defines what constitutes disorderly conduct in federal enclaves. It is largely derived from N.Y.Pen.L. par.240.20, but includes, as well, offensive sexual solicitation and persistent following of a person. The thrust of the statute is prevention of harassment or annoyance of others. Because the conduct described in paragraphs (c), (e) and (f) of subsection (1) may not be offensive to the person to whom it is directed and because protection of the sensibilities of a law enforcement officer are not the purpose of the section, it is provided that a private person must initiate the complaint." [21]

Should the Legislature insist on the need for some solicitation law, we ask that it adopt this form of statute with the addition of a clarifying phrase to both subsection (1) (f) and section (4) above merely to make the meaning more precise. With the suggested phrases, which involve no substantive change at all, subsection (1) (f) and section (4) would read as follows:

"(1) (f) while loitering in a public place for the purpose of soliciting sexual contact, he solicits such contact with someone other than a law enforcement officer;

"(4) Complaint by Member of the Public Required. Prosecution under paragraphs (c), (e) and (f) of subsection (1) shall be instituted only upon complaint to a law enforcement officer by a complaining witness in the case who is not himself a law enforcement officer.

This language pins down the purpose of the whole statute as explained in the comment of the National Commission, quoted above. Otherwise it might be possible to evade its clear intent. The U.C.L.A. investigators found that, although "complaints to the police are infrequent," an examination of a substantial number of police arrest reports for homosexual solicitation disclosed that they contained statements indicating they had "result/ed/ from complaints made to the police." However, further investigation disclosed "that such

statements made on arrest reports" were "a matter of form. The 'complaint', specifying merely that homosexual activity is prevalent in the area, may have been communicated to the police many months previous to the arrests. It is rare for an arrest to result immmediately from a specific complaint regarding an observation of lewd conduct or a lewd solicitation." [22] It is to foreclose the possibility of any arrests on "complaints" of the kind just instanced that the clarifying language should be inserted.

Should the Legislature accept our recommendation that New York's law follow the proposed federal statute, we respectfully request that the offence be denominated "harassment", not "disorderly conduct" or "loitering", and that it be added as one of the subsections under section 240.25 of the present New York penal code which is a harassment section. This is particularly appropriate since it will be noted that the proposed federal statute already contains several provisions taken directly from New York's sections 240.20 and 240.25, both of which the National Commission used as models in drafting its statute. This will have the effect of labelling the offence for what it is -- harassment -- and avoiding the odious sexual overtones of a "loitering" or "disorderly conduct" prosecution. This would be in accord with the principle of punishing homosexual solicitations not because they are deviate or even sexual in character, but only when they involve annoyance or alarm to others. The point is important, because the lightness of the penalties imposed by section 240.35(3) in no way reflects the lifetime of suffering and the scarifying effects which any "morals" conviction entails. Loss of employment frequently follows a mere arrest under the present statute, even though it is followed by an acquittal or by dismissal of all charges without trial. When consideration is given to the

fact that solicitation charges are the basis for almost all homosexual arrests except for those involving actual sexual acts committed in public, the need at least to ameliorate these unjust laws if there is to be any meaningful homosexual law reform should be evident. [23] Through "interviews with 15 enforcement agencies", the U.C.L.A. investigators found "that approximately 90-95% of all homosexual arrests /in California/ are for violations of" the California solicitation law." [24] These figures are no different from those in other states with large urban areas. Because criminal prosecutions for private acts of sodomy between consenting adults are rare, and public homosexual conduct short of sodomy comes under the purview of the public lewdness statutes, the solicitation statutes are the weapon almost always employed and they account for the vast majority of homosexual arrests. Yet, as we have seen, these "crimes" involve no overt sexual acts at all. To brand solicitors as moral reprobates for life is to impose a punishment totally out of proportion to the offence committed even where the conduct does offend others. We cannot urge too strongly that offensive sexual solicitations should be treated no differently than any other offensive non-sexual conduct, and that the law should reflect this by denominating the offence as a form of harassment.

Similar considerations warrant enacting provisions allowing for the release of homosexual offenders on their own recognizance prior to trial. The U.C.L.A. Report noted that trial judges are reluctant to sentence homosexual offenders to prison because of the "widely accepted contention that incarceration only breeds further homosexuality; that homosexuals in jail enjoy a 'Roman Holiday.' " The Report holds that the same principle should apply to pretrial confinement, since "the publicity produced by confinement for such an offense may

irreparably damage the defendant's social, family, and employment status." [25] The Report continued:

> "The basic purpose of the bail system is to guarantee the defendant's presence at trial. A robber, perhaps, might risk the publicity and loss of job and family relations to avoid the heavy penalties for his crime. But for the homosexual offender, the considerations are just the opposite. The main desire of these defendants is to avoid publicity and to maintain their standing in the community. The penalties they face at trial are quite minor in comparison. The result is that few of these offenders attempt to escape the jurisdiction before trial. The records examined, in fact, failed to reveal any such attempts. Thus the basic purpose of the bail system would appear to be inapplicable for these offenders.
>
> . . . . . .
>
> "In the absence of practical benefits derived from pretrial confinement and because of its detrimental features, the system should permit the discharge of these offenders on their own recognizance.... Such provision should be applicable only to those homosexual defendants arrested for consenting or nuisance-type activities. In those cases in which homosexuals are arrested for acts involving force or participation with a juvenile, such release should not be available." [26]

Finally, we ask that the proposed harassment statute contain a specific clause stating that the Legislature, in enacting it, has preempted the field, thus insuring that no local ordinance inconsistent with its provisions can be enacted. This is essential in a statute of this type, since the subject matter lends itself to regulation by local ordinance.

We wish to stress that, though we recommend a solicitation law on the order of the proposed federal provisions with the minor additions just discussed, we would be less than candid were we to fail to reiterate our opposition to the entire theory of a solicitation law, and to point out that our recommendations are made only so that our request that section 240.35(3) be repealed in its entirety will not jeopardize the enactment of a substitute along the lines indicated in order to provide some measure of justice to homosexuals who are caught in the toils of the law.

We wish also to caution against any thought of leaving section 240.35(3) unchanged except for extending its range so as to include heterosexual as well as homosexual solicitations. Homosexuals would gain nothing whatsoever by having heterosexual solicitors as companions in misery even if such a modification were to result in the actual prosecution of heterosexual offenders. But, as indicated at the beginning of this memorandum, where such statutes are drawn so as to include heterosexual as well as homosexual solicitations, they are enforced only against homosexuals. Thus any such change would be no change at all, and it is real change which we ask, not verbal sleight of hand.

The fact that the state of Illinois has now gone for nine years without a solicitation statute, that New Mexico has never had one, and that Connecticut's law is due to expire this coming October would appear to confute those who contend that solicitation statutes are necessary to protect public decency. Our position is identical with that reached by the U.C.L.A. Report, which concluded with this observation:

> "The development of effective morals legislation traditionally has been impeded by anachronistic concepts of acceptable sexual behavior which focus on the morality of the conduct rather than on the resulting social harm. Revisions of such legislation have always lagged behind changing notions of permissible conduct... The judiciary, confined by an outdated statutory system, can only achieve a partial reconciliation between the law and contemporary values. The responsibility for a total reconciliation lies with the legislature." [27]

Simple justice requires that the Legislature of the State of New York effect such a reconciliation on behalf of its homosexual citizens, who, by the most conservative of estimates, constitute its second largest minority.

Respectfully submitted,

Walter E. Barnett
Arthur C. Warner

Co-chairmen National Committee
for Sexual Civil Liberties

4 February 1971

NOTES

[1] 61 & 62 Vict., cap. 39, sec. 1(1)(b).

[2] Italics the undersigners'.

[3] See State of New York, Senate-Assembly, March 23, 1964, Senate printed Bill 4690, Assembly printed Bill 6187, section 250.15(3).

[4] Jon J. Gallo, Stefan M. Mason, Louis M. Meisinger, Kenneth D. Robin, Gary D. Stabile, and Robert J. Wynne, "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County," U.C.L.A. Law Review, Vol. 13, No. 3 (March, 1966), p. 793. Italics the undersigners'. Hereafter cited as U.C.L.A. Report with all page references to this issue of the U.C.L.A. Law Review. The rather parochial title of this study does not reflect its wide scope and depth, nor the general applicability of its conclusions to the entire country and not merely to California or Los Angeles County.

[5] Ibid., p. 698.

[6] Ibid., p. 698, note 83.

[7] Ibid., p. 699, note 84.

[8] Michael Schofield, The Sociological Aspects of Homosexuality (London, 1965), p. 200.

[9] U.C.L.A. Report, p. 699.

[10] Committee on Homosexual Offences and Prostitution, Report, command paper 247 (Home Office, London, 1957), p. 43.

[11] U.C.L.A. Report, pp. 694-695.

[12] As quoted in the New York Times, 7 June 1970, p.65, column 1.

[13] New York Times, 20 May 1968, p. 52, columns 1-2.

[14] Not one of the eight representatives of organizations working in the field of homosexuality who were interrogated by one of the undersigned gave an estimate of more than 10% as the proportion of robberies of homosexuals which are reported to the police.

[15] As reported by Wainwright Churchill in Homosexual Behavior Among Males: A Cross-Cultural and Cross-Species Investigation (New York, 1967), pp. 194-195.

[16] Ibid., p. 195.

[17] As quoted in Ibid., p. 196.

[18] Ibid., pp. 196-197.

[19] Ibid., pp. 226-227. Italics the undersigners'. The youths involved

in these assaults are always prepared to fabricate false sexual charges against their victim in the unlikely event that he should complain to the police. Consequently, in any contest of credibility between themselves and their victim, the latter's denials would hardly stand a chance of being accepted against the unanimous allegations of his several assailants.

[20] The National Commission on Reform of Federal Criminal Laws, Final Report to the President and Congress (U.S. Government Printing Office, Washington, 1971), p. 269. The undersigners made use of an advance copy privately obtained prior to publication, which, as of this writing, has not taken place.

[21] Ibid., pp. 269-270.

[22] U.C.L.A. Report, p. 688, note 17.

[23] Actual homosexual acts committed in public fall under the present sodomy laws if they involve actual sodomy; if they involve conduct short of sodomy, they constitute offences under the public lewdness statutes of the various states on the order of section 245.00 of the New York penal code.

[24] U.C.L.A. Report, p. 691, note 30.

[25] Ibid., p. 744.

[26] Ibid., pp. 744-745. It is clear from the above that the principle of discharging homosexual offenders on their own recognizance is equally applicable to those arrested for actual sexual acts in public as well as mere solicitations where the parties to those acts are consenting adults.

[27] Ibid., p. 797.