This memorandum takes as its starting point the proposition put forward eleven years ago in the Report of the Committee on Homosexual Offenses and Prostitution in answer to the query, "What acts ought to be punished by the State?" That committee, under the chairmanship of Sir John Wolfenden, concluded that "the function of the criminal law" in matters of sexual conduct "is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."[1] The removal by the American Law Institute of all criminal sanctions against sodomy when performed by consenting adults in private -- as reflected in its now completed Model Penal Code -- appears to have been a recognition of this principle. In so doing, however, the Institute retained in its Penal Code -- in the form of section 251.3 -- criminal penalties against loitering for the purpose of soliciting for deviate sexual purposes. This memorandum is intended to demonstrate that the continuing presence of section 251.3 in the Model Penal Code is not only contrary to the rationale which prompted the removal of the criminal penalties against adult consensual homosexuality in private, but that statutes of this kind, presently in effect in every American jurisdiction except Illinois, are unjust, and serve no demonstrable social purpose. This memorandum also intends to show that the homosexual solicitation laws conduce to serious corruption on the part of the police, and that they encourage crimes of violence by criminal and other elements of the population. It should be noted here that the discussion that follows in no way questions the necessity for legal repression of all manifestations of sexual behavior -- homosexual or heterosexual -- which constitute an outrage to public decency.

During the six years which have passed since the final draft of the Model Penal Code was adopted by the American Law Institute, state solicitation statutes on the order of section 251.3 have come under increasingly close examination and scrutiny. At the University of California at Los Angeles, a definitive study of the California solicitation statute -- section 647 of the California Penal Code -- was completed in 1966. This was a joint project of several authorities, 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: An Empirical Study of Enforcement and Administration in Los Angeles County." The wide scope, as well as the depth, of this study are not reflected in its rather parochial title, which would lead one to suppose that it dealt only with California in general and Los Angeles County in particular. In fact, the project considered every aspect of the laws against homosexual solicitation, beginning with the philosophical rationale for and against morals legislation appearing in the writings of certain eighteenth and nineteenth-century political philosophers, and going on from there to a penetrating analysis of present-day administration and enforcement of these laws in California. Throughout the study, however, its authors are mindful of the problem of sexual deviation in our contemporary society as a whole. This amplitude, plus its perceptive analysis, have caused its judgments to be recognized as valid nationally. In a very real sense, the project constitutes the "Wolfenden Report" of the solicitation statutes.[2]

Of particular relevance here is the following statement by the authors of this study in a section entitled "Conclusions and Recommendations."

> "Legislative prohibition of specific forms of sexual behavior is designed to protect three objective societal interests: 1) the right of the individual to be free from sexual coercion; 2) the right of the child to be protected from sexual exploitation; and 3) the right of society generally to be insulated from offensive public displays of sexual behavior. A fourth interest, perhaps the driving force behind morals legislation, is the suppression of sexual behavior, which by deviating from the societal norm, is deemed to be destructive per se of the moral fibre of society.
>
> "Adult consensual homosexuality does not infringe all of these interests. Whether consummated publicly or privately, it involves

> neither sexual coercion of adults nor sexual exploitation of children.. ..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."[3]

It is by the standards here set forth that this memorandum wishes to assess section 251.3 of the Model Penal Code.

First, a few words about the homosexual solicitation statutes, of which section 251.3 stands as a model. The offence at which they are aimed was unknown to the common law, but came into the public law of the English-speaking world as a belated consequence of the "moralising" influences of the Evangelical revival on both sides of the Atlantic.[4] In England this was first instanced by Henry Labouchere's successful amendment to the Criminal Law Amendment Act of 1885, which created the offence of "gross indecency" between males.[5] More in point was the amendment, in 1898, of the Vagrancy Act of 1824, 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."[6] In the United States, the homosexual solicitation statutes were enacted, in the main, by the post-Civil-War generations, whose apprehensions had been stirred by the sexual alarums sounded by Anthony Comstock.

As already indicated, statutes on the order of 251.3 exist at present in every American state plus the District of Columbia, except in Illinois. Whilst to the lawmakers these enactments generally appear as merely one of the numerous petty misdemeanors which garnish the statute book, the penalties for which are invariably minor, the fact that statistically they account for well over 90% of all convictions for homosexual offences is ordinarily overlooked. This means that, even if the example of the Model Penal Code in eliminating the laws against adult consensual homosexuality in private were to be followed by every American state, the net effect would be to reduce the number of homosexual convictions in the country by

less than 10%. When, in our society, the legal and social consequences of a so-called "morals" conviction is taken into consideration, the scarifying effects upon those who have run afoul of laws on the order of 251.3 -- no matter how minor the penalties imposed -- should be obvious.

Nowhere is the disparity between theory and actuality more apparent than in the homosexual solicitation statutes. The ostensible rationale for all such laws is the protection of society from public outrage. No one would question this as a legitimate social purpose. The question which must be asked, however, is whether the acts against which these statutes operate do, in fact, offend public decency. A reading of the solicitation statutes, as well as section 251.3, immediately reveals that the acts which they strike down are not, in reality, public acts at all, but private ones. It is indeed true that, in order to be punishable, the proscribed conduct must occur "in public" or "in a public place", but this fact, by itself, does not necessarily convert a private act into a public one. It is illogical to make locus the sole determinant of an act's private or public character. A private conversation between two persons, for instance, is no less private simply because it takes place in the midst of a public meeting. The example is particularly apt, inasmuch as statutes of the type of 251.3 include within their ambit private conversations as well as private acts. The vast 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 duties are daily -- or rather nightly -- 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."7

Prosecutions under the solicitation statutes in all American jurisdictions

are invariably police-initiated affairs. This is because complaints from private persons to the police regarding homosexual solicitations "are rare",[8] and prosecutions resulting therefrom are virtually unknown. After the New York City police were forbidden in 1966, by executive order of the Mayor, to make any more arrests under the New York State solicitation statute[9] without a signed complaint from a private citizen, weekly arrests for this offence in New York City plummeted "from over 100 . . . to almost none."[10] It was with knowledge of facts such as these that the authors of the U.C.L.A. Report "inferred that homosexuals are discreet as to whom they solicit or that [private] citizens are not outraged by this type of behavior." They also stated that "interviews with enforcement agencies indicate 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 unequivical solicitation for a lewd art (sic) is tendered."[11] Since this testimony was elicited by the authors of the California Report from vice-squad officers, it can be regarded as unimpeachable evidence from specialists in the field.

Further evidence of the private and inoffensive character of the conduct involved is provided by the tactics of the police who are employed in its discovery. "This particular offence necessarily calls for the employment of plain-clothes police if it is to be successfully detected," wrote the members of the Wolfenden Committee in their discussion of importuning.[12] 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. The U.C.L.A. Report states:

"Most convictions for disorderly conduct 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 sufficient 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 . . ."[13]

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 statutes and police "shakedowns." Admittedly much of the evidence of police corruption is hearsay, yet it requires no vivid imagination to recognize that these laws are an open invitation to extortion by the police. From his years as a consultant with the American Civil Liberties Union in morals cases, the present writer has become convinced that the practice of "shaking down" victims is an all-too-frequent aspect of police enforcement of the homosexual solicitation laws.[14] It is not suggested that, because the use of agents provocateurs by the police is sometimes abused, their employment should be entirely prohibited. What is contended is merely that -- in a free society -- there is no warrant for these kinds of police methods where no recognizable public interest is at stake. Yet it is well to remember that these objectionable practices are less a result of intentional misbehavior on the part of the police, than a direct consequence of the solicitation statutes themselves, which virtually require the use of odious enforcement procedures if they are not to remain a dead letter. For this reason reform can be looked for, not through any change in the manner of enforcement, but in total repeal of the laws themselves.[15]

The Chicago police provide a particularly illuminating example of police practice in this field. Since Illinois no longer has any criminal sanctions against either adult consensual sodomy in private or solicitations for homosexual purposes

occurring in a public place, it must strike the reader as odd that this jurisdiction should be singled out for purposes of illustration.[16] One would suppose that police shakedowns in Chicago involving these quondam offences had disappeared. Professional blackmailing has, in fact, disappeared in cases which would formerly have constituted the crime of sodomy, but police shakedowns still take place -- although far less frequently than before -- in connection with conduct which would have amounted to solicitation under the old solicitation statute. This is not to imply that abolition of the Illinois solicitation law has not worked a remarkable improvement in reducing police corruption in this area. The reason for its persistence on a much reduced scale is related to the somewhat unusual manner in which homosexual law reform was carried out in Illinois. These measures were enacted with little, if any, publicity, since they were introduced in the legislature as part of a much larger measure comprising a revision of the entire Illinois criminal code. Not until some time after the new criminal code had been adopted did the general public slowly awaken to what had been enacted. As a consequence, there are still persons in Illinois who are ignorant of these legal changes. They are fair game to the Chicago police, who conduct themselves as if no change whatsoever had been made in the law. If the police suspect such persons of having solicited for homosexual purposes, they threaten them with arrest, the result of which is very often a "pay off" from the victim in return for his immediate release, since he is unaware that he has not committed an offence. Where no bribe is forthcoming, the police frequently <u>do</u> make arrests. This can readily be done by alleging that the defendant's solicitation was accompanied by a request for money, a sufficient allegation on which to base a charge of prostitution.[17] In most instances, however, the defendant will be taken into custody without any formal charges being preferred, only to be quietly released the following morning.[18] Illegal arrests of this kind, followed by over night incarceration, are not limited to homosexual cases. Rather they are a standard method of police harassment of all minority groups in Chicago, including homosexuals. What is important for this discussion is the fact that the Chicago police have been able

to continue these lawless tactics against homosexuals by pretending that the Illinois homosexual solicitation statute is still on the books. That they should do this, however, is not very surprising, since the repeal of the statute has confronted them, not only with the loss of what was once a lucrative source of illicit perquisites, but an easy means of quick arrests for any police officer who finds himself short of his arrest quota at the end of the month. It is logical to assume that repeal of similar solicitation statutes in other jurisdictions in the country may be met by similar methods of accommodation on the part of the larger metropolitan police forces.

No study of the solicitation laws can be complete without some reference to the robberies which they encourage on the part of the criminal population. Robbery and its kindred offence, blackmail, have always been the two crimes, par excellence, associated with homosexuality. The homosexual is one of the most tempting preys to those who specialize in these crimes, since they know that the vast majority of these offences will never be reported to the police if committed against homosexuals. This is because the homosexual victim fears that, if he were to go to the authorities, he would find himself faced with a homosexual charge. Of the two crimes, robbery and blackmail, the former is the more serious, being a felony at common law, while blackmail is only a common-law misdemeanor. This is not the place to attempt a distinction between the two, except to note that robbery involves the taking of property against the will of the lawful possessor under threat of force or violence, or as a consequence of actual violence, while in blackmail the possessor's consent to the taking is obtained, albeit by means of a threat. Thus the taking of another's property under a threat to accuse him of a crime, while insufficient to support a prosecution for robbery, is enough to sustain a charge of blackmail. An exception has always been made where property has been obtained from a person by a threat to accuse him of the crime of sodomy. In this case the law demonstrates the enormity with which it has traditionally regarded sodomitical practices by denominating the crime as robbery rather than as blackmail. However, for purposes of clarity and

consistency in the discussion which follows, such cases will be considered for what they really are, i.e., blackmail, rather than robbery.

Since almost all cases of blackmail of homosexuals -- as distinct from police extortion -- occur as a consequence of the consummation of some homosexual act indoors in private, this crime is of little or no moment in any consideration of the laws against homosexual solicitation, which, by definition, occurs out-of-doors. Furthermore, removal from the criminal statute book of all private acts of adult consensual homosexuality has the virtual effect of eliminating blackmail from the homosexual scene.[19] Robbery, on the other hand, is frequently to be found as an accoutrement of all manifestations of homosexuality, whether occurring in public or in private, and whether consisting of completed acts or mere solicitations. Here a distinction has to be made between the form which the robbery of homosexuals takes when it accompanies private acts of homosexuality indoors, and the form which it assumes in outdoor situations involving homosexual solicitations or claimed solicitations. Where robbery of a homosexual or alleged homosexual occurs under circumstances which are also congenial to the existence of blackmail -- that is, as a sequel to private acts of homosexuality indoors -- it generally involves no more than a mere threat of force, without any actual physical violence. One reason for this is that robbery with violence is less likely to be employed inside private dwellings or apartments because of the risk of alerting neighbors.[20] By contrast, an extraordinarily high percentage of the robberies which occur as a consequence of homosexual propositioning, real or imagined, out-of-doors employs actual violence, which means that they are popularly known as "muggings." Thus the robbery of homosexuals as a result of private homosexual acts indoors partakes more of the character of blackmail in that it involves only a threat of force rather than actual force. On the other hand, robberies of homosexuals or alleged homosexuals in outdoor situations, where a homosexual solicitation or an actual homosexual act is claimed, are almost invariably accompanied by violence.

"Muggings" of homosexuals are usually committed outside by young roughs, often working in gangs, and are directed against 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, or fancied proposal -- which is invariably induced by the would-be "mugger" himself -- will suffice. As a consequence, there are numerous occasions when the victims of these muggings are not, in fact, homosexual. As in the case of robberies of homosexuals indoors, the great majority of muggings of homosexuals out-of-doors go unreported by their victims for fear of prosecution on a charge of homosexual solicitation. Because of the homosexual solicitation laws, the mugger of a homosexual knows that he can commit his crime with virtual impunity. A recent study of one hundred cases of mugging 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."[21] Since this investigation was confined to court cases, it was, by definition, limited to what had come to the attention of the authorities. Thus it involved only the visible portion of the iceberg which constitutes homosexual muggings, for it is no exaggeration to state that, for every mugging of a homosexual which is brought to the attention of the police, four go unreported and undetected.[22]

The evidence today is very strong that repeal of the homosexual solicitation statutes would greatly reduce this form of crime, even though much of it comes from a single jurisdiction, Illinois, which has now had more than six years' experience without any penal sanctions against homosexual solicitation as well as without laws against adult consensual sodomy when performed in private.[23] This writer has had several interviews with muggers recently released from Illinois prisons, who were in their late twenties and early thirties -- that is, old enough to have remembered "the good old days", before repeal of the Illinois laws against homosexuality.[24] Their testimony was unanimous that, prior to the change in the law, they

had found homosexuals "easy pickings" for their mugging activities. They rued the fact that it was no longer possible for "a young fellow to make an extra buck from the "queers" because of the legal changes. Since the modus operandi of these crimps had never included visits to homosexuals in their homes, but only to homosexual meeting places out-of-doors, the legal transformation which had put such a damper on their operations was the abolition of the Illinois solicitation statute, not repeal of the sodomy law. Muggings of homosexuals in Illinois as a consequence of an alleged solicitation can no longer be committed with impunity, since the victim is likely to inform the police.

There is another aspect to homosexual muggings which should be noted, one which is peculiar to cases involving homosexuality. This is the fact that, in many of these "robberies", the economic motive is very small or entirely absent. While in the ordinary mugging the violence is merely the means for accomplishing the felonious taking of the victim's property, in many of the muggings of homosexuals, the violence is itself the raison d'etre, and any robbery which takes place is only an incidental or adventitious sequel to the violence. Assaults and other forms of violence against homosexuals and suspected homosexuals are nothing new in our society. In recent years, however, with the great spread of public sophistication in the ways and doings of homosexuals, this violence has become a socially accepted pattern of conduct within many social groups, whose counterparts, a generation ago, had never even heard the term "homosexual". Today, for many high school students and their "drop-out" friends, "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 as an important means of demonstrating one's heterosexual virility to one's associates within the same peer group. A gang of youths will descend upon the local area where homosexuals or suspected homosexuals are believed to gather. One of the group will separate from the others in order to act as a lure. The others will lie in wait in their car. After ostentatiously parading

past a likely victim, the lure will feign sexual interest, and finally accept the victim's offer of an automobile ride. The other members of the gang will follow the pair at a discreet distance in their car. When the first car reaches its destination the second car will come up quickly from the rear. The youths will jump out, and then inflict a vicious beating upon the alleged homosexual. Sometimes he will be robbed, but not always. When robbery does occur, it is always subsidiary to the violence.

The reason why such muggings go unreported to the police has already been discussed. Here it is pertinent to note that, in addition to permitting such crimes to be committed with virtual impunity, the solicitation statutes stand as an important social pillar giving direct support to this form of sadism. Like religion, law is one of the most important educative forces within the social structure, and it must assume a large share of the responsibility for public attitudes which result in the treatment of the homosexual as a pariah of the most loathsome kind. The analogy with the religious heretic of old is particularly relevant. Any crime committed against a heretic, even murder or related forms of violence, was deemed a meritorious act, and the Church absolved the perpetrator of all sin. During most of Western history, the homosexual has been treated as a sexual heretic.[25] Our contemporary society retains much of this feeling, which is buttressed by existing laws, and is demonstrated by the fact that those who commit crimes against homosexuals frequently view themselves as public benefactors. The following case, not at all atypical, is worthy of note:

> "On spring evening in April, 1961, a young man stood waiting for a trolley near his home in San Francisco. His name was William P. 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. Apparently their fists could not inflict sufficient injury upon the victim to gratify their lustful hatred, for the police later reported that investigation revealed that Hall had been struck in the head by some weapon resembling a blackjack. Their debt to the community having been paid through the attack on this man who they assumed to be a 'queer', the boys removed from Hall's unconscious body a wallet containing $2.85 and left their victim lying senseless.

. . . . . .

". . . After having attacked . . . the teacher, they continued their prowl of the city in search of other 'queers'; but finding no more people to assault and murder that night, they went home . . .

"In reporting the details of this atrocity, the News Call Bulletin thought it proper and meaningful to add that, 'The officers made clear Hall certainly was not in that unfortunate category' -- that of a'sex deviate'."[26]

The observations of the prominent psychoanalyst, from whose definitive study of homosexuality the above account was taken, deserve serious consideration.

"The need felt on the part of the police and press to clarify that William Hall was not a 'sex deviate' is one of those subtle things people are prone to overlook without sufficient appraisal of its implicit meaning. This statement would appear to imply that the murder of Hall was all the more tragic and, perhaps, all the more criminal because the victim was not a 'homosexual'. Had Hall in fact been homosexual, would it be correct to interpret the action of these youths as in any way less criminal?

"A great many people . . . might answer this question in the affirmative. The young murderers certainly believed that their action was innocuous, if not virtuous . . . Inspector Robert McLellan commented to the press, 'They said they considered Hall's death justifiable homicide.' He added, 'They seem to regard the beating-up of whomever they consider sex deviates as a civic duty.' . . . . . .

". . . 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 in the 'unfortunate category.' 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 at least fifty other youths within the brief confines of their own neighborhood who participated in similar attacks upon 'queers'. Hadley Roff of the News Call Bulletin reported that it had been affirmed by the young vigilantes 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.

"The young, we know, are highly impressionable and become very easily conditioned by the unverbalized attitudes that impinge upon them from the environment. It is not without meaning that these youths, like so many others, have gained the impression that assault and battery and even murder are justifiable if the object of one's hostility is homosexual. . . In a society that condones legal oppression of the sexual nonconformist, and in which almost all morality has become equated with sexual morality, it is not surprising that the young should come to believe that any . . . form of brutality is . . . justified in the suppression and extermination of 'the deviate'. . . . . .

"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'? . . .

"There is profit for all in 'queer hunting.' Each takes his share, and each feels the nobler for having done so."[27]

In short, "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 . . .[28] <u>These youths take their cue from the laws and from the intolerant spirit that brings about and perpetuates such laws</u>."[29] It should not be necessary to observe that, in any decent society, the law should not abet such sadism. Repeal of the homosexual solicitation statutes would -- as in the case of ordinary robberies of homosexuals -- vastly reduce this special form of violence, and would assure a reasonable chance of punishment in those few cases where it persisted.[30]

Violence by professional criminals and by the self-appointed protectors of public morals, together with corruption on the part of the police, is often matched by capricious or overzealous enforcement of the homosexual solicitation statutes, going far beyond anything reasonably contemplated by the legislatures which enacted them. It is well known that "those responsible for law enforcement have the habit of 'cracking down' sporadically while leaving the law unenforced at

other times, so that there are waves of arrests followed by relative inactivity."[31] What the American Law Institute has stated with respect to prosecutions for the crime of sodomy, applies with equal force to arrests under the homosexual solicitation statutes: "Capricious selection of a few cases for prosecution among millions of infractions is unfair and chiefly benefits the seekers of private vengeance."[32] The manner in which these statutes are enforced suggests more often a morbid interest on the part of the police in homosexual salacity than any genuine concern for protecting the public from moral outrage. The psychoanalyst quoted above writes:

> "In one city . . . all of the benches in a particular park where 'homosexuals' were known to meet were wired for sound. The police spent hours each day listening to the conversations of the people sitting on these benches. Anytime the conversation became 'suggestive', or if one person propositioned the other, the police moved in to make an arrest."[33]

Other types of surveillance and undercover tactics are employed to meet varying situations. In many cities the traditional pattern of homosexual solicitation has been altered by the increasing use of the automobile. The rendezvous is still the same -- the typically small, central-city park -- but the soliciting, instead of being done by pedestrians in the park, is done by men who "cruise" around the park in their cars in search of possible sexual partners from amongst others similarly "cruising" by car. This is solicitation of the most covert and unobtrusive kind, but the police have risen to the occasion. The driver of one car will give another driver the eye, very often when both cars stop, side by side, for a traffic light. The second car will then follow the first, they will proceed for a few blocks, stop, park, and the driver of one of the cars will enter the car of the other. The two will then proceed together in the one car, either to some secluded spot in the country several miles away, or, if one of them has an apartment, they will both go there. Every so often this pattern is interrupted by an unmarked police car, driven by two officers in mufti, which will follow the two cars after they have been observed circulating in the vicinity of the park. At the place where the one

driver enters the car of the other -- but before they have had a chance to converse with each other and learn each other's identity -- they will be stopped by the police. The usual tactic is for one officer to take one of the drivers, and for the other officer to take the other, but out of earshot of the first. Each officer will then question the man he is holding, but the questions he will put to his prisoner will be about the identity of the other man being held. This quickly elicits the fact that the two men are strangers to each other. With this information, plus the fact that they were observed "cruising" in the vicinity of the park, the two are arrested for loitering for the purpose of homosexual solicitation.

Ignoring the legal question whether one can loiter by car, and, if so, whether cruising about a given area in a car can constitute the offence -- many lawyers would be amazed at such a contention, since loitering, by definition, involves conduct which is essentially stationary rather than mobile in character -- it is very doubtful that such a strained interpretation of the solicitation statutes was ever contemplated by their framers. The very notion that conduct so overwhelmingly private can be the object of police investigation and arrest is repugnant to our concepts of a free society. Unless one accepts the intellectual rationale for all morality legislation -- namely, that it is the duty of the state, operating through its laws, to impose certain moral standards upon every member of society for his own alleged good -- one must reject the legitimacy of laws which allow police interference with activities so manifestly personal without showing some overriding public interest. It is well to remember that when the members of the Wolfenden Committee and of the American Law Institute voted to recommend the abolition of the crime of sodomy when performed by consenting adults in private, they explicitly denied the admissibility of attempts on the part of the state to arrogate to itself the role of religion by imposing moral standards upon its citizens. The Wolfenden Report specifically stated: "Unless a deliberate attempt is to be made by society, acting through the agency of law, to equate the sphere of crime with that of sin,

there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[34]

Weighed by this test, the solicitation statutes, one and all, must be found wanting. There is a measure of supreme inconsistency in recommending repeal of the sodomy laws and not of the solicitation statutes also. Admittedly, as long as criminal sanctions against sodomy were deemed proper, no legitimate case could be made for repeal of the solicitation statutes, since they both rest on the same intellectual foundations, viz., the desirability of state proscription of all homosexual conduct, whether in private or public. But a decision having been made to remove private acts of adult consensual homosexuality from the criminal statute book, consistency requires a like removal of the homosexual solicitation provisions, which also proscribe acts which are inherently private. This is a most important point, since many persons fail to perceive that the rationale behind both statutes is identical; they still labor under the illusion that the solicitation statutes protect the public from some form of public outrage. Even a cursory reading of section 251.3 should serve to dispel this notion. "A person is guilty of a petty misdemeanor if he loiters in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual relations."[35] Since the only overt act required is the loitering, which is certainly morally neutral, there is no requirement that the defendant need have committed any lewd act in order to come within the purview of this provision, to say nothing of any requirement that anyone was affronted or likely to be affronted by his conduct. In truth, except for the loitering, the defendant need not have committed any act at all, since the gravamen of the offence lies entirely in the state of the defendant's mind. This, it is submitted, is the distinct hallmark of the morality statute, which punishes not offensive conduct, but filthy minds.

In short, the conclusion is ineluctible that, despite the use of such terms as "in public" and "in a public place", the solicitation statutes do not pre-

scribe conduct which offends public decency or which creates a public scandal; rather they are intended to, and do in fact, punish what is sexually deviant. Thus they are in direct contravention of the principles enunciated by the Wolfenden Committee and the authors of the U.C.L.A. Report, as quoted in the opening pages of this memorandum.

Aside from the inconsistency inherent in retaining section 251.3 once it is proposed to eliminate the sodomy laws to the extent that they penalize adult consensual homosexuality in private, there is another anomaly. So long as sodomy remained a crime, it followed logically that any solicitation to commit this crime should be legally proscribed. In fact, a failure to punish such solicitations could have been viewed as a serious lacuna in the law. However, once acts of sodomy are removed as a crime when performed between consenting adults in private, the homosexual solicitation statutes penalize requests to commit legal acts.[36] Short of situations involving a common-law conspiracy -- the definition of which is broad enough to include agreements by two or more persons to commit acts which would be lawful if done by only one person -- this writer is unaware of any precedents in Anglo-American jurisprudence where a proposal to perform an act which is, by definition legal, is made the object of criminal sanctions.[37] Unless the proposal violates some legitimate societal interest, or threatens injury to another, it should be a legal maxim that no punishment can attach to an invitation to engage in legal conduct.

This brings us to the nub of the entire matter, which is the fact that the real safeguard against offences to public decency is provided by the open lewdness statutes on the order of section 251.1 of the Model Penal Code, and not by the solicitation statutes patterned after section 251.3. Section 251.1 punishes "any lewd act which" the actor "knows is likely to be observed by others who would be affronted or alarmed." This is what gives society its shield against acts constituting a public outrage. Statutes like section 251.1 are to be found in every American jurisdiction, and provide the public with needed security against affront or outrage occasioned by indecent or scandalous conduct. Wherever the circumstances of a homo-

sexual solicitation do in fact involve conduct offensive to public decency, such conduct can be proscribed far more appropriately under an open-lewdness statute than under a solicitation statute. This would have the merit of punishing the conduct because it outraged public mores, and not because it was deviant in character. In short, on those infrequent occasions when enforcement of the homosexual solicitation statutes comprehends acts which actually offend public decency, these statutes are superfluous, since the offensive conduct would be better punished under an open-lewdness type statute. To the extent that the homosexual solicitation statutes punish conduct which is private, or which does not outrage public mores -- which is the situation in the vast majority of cases -- these laws offend the principles affirmed by both the Wolfenden Committee and the authors of the U.C.L.A. Report, as well as the rationale behind the American Law Institute's own recommendation that the laws against private consensual acts of sodomy between adults be repealed.

The years which have elapsed since 1962, when the American Law Institute adopted the final draft of its Model Penal Code, have provided increasing evidence to fortify the view that section 251.3 should be removed from the code. Whereas, in 1962, statements as to what might be the results of repeal of the homosexual solicitation statutes were essentially conjectural, this is no longer the case. The repeal of the Illinois solicitation statute in 1961 -- effective at the beginning of 1962 -- has already been instanced. The evidence from Illinois has since been buttressed by that from New York City, the executive order of whose mayor in April 1966, and the results which this produced, have also been noted.[38] Less well known is the administrative action taken within the police department in Washington, D.C.[39] No formal order has ever been publicly issued in Washington, but a change in the manner of police enforcement of the District of Columbia solicitation statute was initiated a few years ago in response to strong demands by the local chapter of the American Civil Liberties Union and allied groups for an end to the scandalous police entrapment which had hitherto characterized the administration of this law in the

nation's capital. This followed on the heels of several important judicial decisions in the District of Columbia which severely restricted the statute's ambit, one significant result of which was to put an end to the efforts by the metropolitan police to apply the law to private dwellings through the operation of a sophisticated system of vice-squad espionage.[40] As a consequence, police practices in Washington were entirely overhauled, and the situation which has resulted is, de facto, similar to, even though not quite as far-reaching as that which prevails in New York City.[41]

In these three jurisdictions, Illinois, New York City, and the District of Columbia, embracing the two largest cities in the country -- there is no evidence whatsoever that indiscriminate homosexual solicitation has increased. More important, there has been no suggestion of an increase in acts which offend public decency.[42] When such acts do occur, the existence of statutes on the order of section 251.1 of the Model Penal Code insures that they will be swiftly repressed and prosecuted.

In conclusion, what the evidence does demonstrate is that the homosexual solicitation statutes constitute an unreasonable intrusion into the private lives of citizens, that they do not protect any public interest, that they lend themselves to capricious as well as corrupt enforcement by the police, and that they encourage crimes of sadistic violence against innocent victims. In short, they conduce to practices which are intolerable in a free and humane society. Furthermore, their perdurance is inconsonant with the American Law Institute's declared policy of proposing the repeal of all criminal sanctions against homosexual acts when performed by consenting adults in private. Accordingly, this memorandum respectfully urges that their archetype, section 251.3, be expunged from the Model Penal Code.

NOTES

[1] Committee on Homosexual Offences and Prostitution, Report, command paper 247 (Home Office, London, 1957), pp. 9-10. Hereafter cited as Wolfenden Report.

[2] Its footnotes alone contain the most comprehensive bibliography on the legal aspects of homosexuality that has ever appeared.

[3] "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County", 13 U.C.L.A. Law Review 793 (March, 1966). Italics this writer's. Hereafter cited as U.C.L.A. Report.

[4] Prior to the solicitation statutes, the vagrancy statutes had traditionally been used to suppress all forms of public indecency.

[5] 48 & 49 Vict., cap. 69, sec. 11.

[6] 61 & 62 Vict., cap. 39, sec. 1(1)(b). This language does not specifically refer to homosexual conduct, and was actually drafted with pimps and procurers in mind. However, it soon became the recognized legal weapon in England against all forms of homosexual solicitation.

[7] p. 698.

[8] U.C.L.A. Report, p. 698, note 83.

[9] New York Criminal Code, section 240.35(3).

[10] Dick Leitsch, "A New Frontier for Freedom", Social Action, (New York, 1967), Vol. XXXIV, No. 4 (Dec, 1967), p. 25. Section 240.35(3) of the New York State Criminal Code is almost identical with section 251.3 of the Model Penal Code, from which it is derived. Mr. Leitsch has since informed this writer that there have actually been no arrests whatsoever by the New York City police in the two years since the inception of the new policy, so that the statement above should have read "none", rather than "almost none".

[11] U.C.L.A. Report, pp. 698-699 and note 84.

[12] Wolfenden Report, p. 43.

[13] pp. 694-695.

[14] "Shakedowns" occur under either of two sets of circumstances: 1) Where the arresting officer has clear evidence of the violation of the solicitation law, he may attempt to extort money from his prisoner in return for overlooking the offence and permitting him to go free. However, there is a limit to how frequently a corrupt officer can do this, since, if he carries the practice too far, it will be reflected by a significant reduction in his arrest total, which may expose him to criticism from, and even investigation by his superiors. Consequently, a shakedown is much more likely to take place 2) where the arresting officer has insufficient evidence to make an arrest or to bring charges, and knows that the evidence is insufficient. Under these circumstances, the officer's arrest record will remain unaffected, since no arrest was ever contemplated in the first place.

The shakedown itself can take a variety of forms, all of them calculated to impress the victim with the officer's kindness and leniency. The transaction is not

infrequently handled with such consummate skill that the victim himself does not realize that what he is being asked to pay is a bribe. One common technique is to apprize the victim of the fact that, after he has been taken to the police station and booked on the charges, he will have to raise bail if he does not wish to stay in jail until trial. He is then told what the cost of the bail bond is likely to be, and informed that, if he is willing to pay the cost of the bond here and now to the arresting officer, the latter can arrange to have the judge handle the case without the need to bring the prisoner to the police station, and without his subsequent appearance in court. Needless to say, to a large number of persons, unversed in the law, and overwhelmed with fear, such a proposal sounds downright magnanimous, and some of them are sufficiently naive to believe that the money which they pay under these circumstances constitutes an official out-of-court settlement.

15 Professional blackmail is not normally associated with homosexual soliciting out-of-doors; rather, it is almost always connected with private acts of homosexuality indoors. However, there is one form of blackmail which does occasionally occur in connection with outdoor homosexual solicitations as well as in the usual indoor sodomy situation. This is blackmail involving the impersonation of detectives by private blackmailers, and the extortion of money under the threat of arrest for homosexual solicitation. It is the only form of private blackmail associated with homosexual solicitation out-of-doors, and the fact that it takes the form of a fictitious police shakedown is further evidence that professional blackmail of the usual kind is hardly ever a product of outdoor solicitations.

16 Aside from the fact that the writer has greater first-hand knowledge of the situation in Chicago, the state of Illinois is the one jurisdiction where a comparison is possible between the position after repeal of the laws and that prevailing before.

17 In Illinois, the crime of prostitution encompasses anyone who "offers or agrees to perform . . . for money . . . any act of deviate sexual conduct." (Illinois Statutes, chap. 38, sec. 11-14(a)(2). Arrests -- although not convictions -- for mail prostitution in Chicago have risen significantly since repeal of the Illinois solicitation law.

18 The practice of arresting without formal charges, and then releasing the following morning, is an old tactic of the Chicago police, which has prevailed for decades. It is employed against anyone who may have incurred the displeasure of the police, and is not restricted to cases of alleged homosexual solicitation. The device has traditionally been used to harry lesser breeds beyond the law whom the police held in contempt -- alcoholics, Negroes, homosexuals, prostitutes, vagrants, and those who are merely poor. Since the events leading to these arrests almost invariably occur at night, when there are few, if any, witnesses, and since the victims are released the next morning, it is easier for the police to escape responsibility for their illegal action than if the arrests took place in daytime. If any charges are made in connection with these arrests, they are made only pro forma, solely for the record, with full knowledge that there is no case against the defendant, and that he will never be brought to court. A cooperative magistrate from amongst those members of the inferior judiciary who connive at this illegality will dismiss the charges by the time the defendant has been released the following morning. A high officer of the Chicago police department confided to this writer a few years ago that it was the unwritten policy of the department for the police to arrest anyone they wished, regardless of whether the person had committed any offense, and without regard for the legality of the arrest. "If need be", he stated, "we will charge him with moon-gazing." This unexpected candor was the result of the informant's forthcoming retirement from the police department the following month.

[19] Blackmail is still possible in the case of homosexual acts involving children, or force, but the perpetrators of such offences should expect to run the same risk of blackmail as the violators of other laws whose identity is known.

As for the point that adult homosexuals engaging in private consensual acts which are no longer legally proscribed are still open to blackmail by the threat of disclosure to their families, friends, or employers, the answer is that this risk is actually quite small. The virtual disappearance of homosexual blackmail in the wake of the repeal of the Illinois statutes can be adduced in confirmation. The important consideration is that whatever risk of blackmail does remain is not the consequence of unjust laws. Furthermore, with adult consensual homosexuality no longer a crime when occurring in private, blackmail involving a threat to divulge the facts to families, friends, or employers can always be promptly reported to the authorities by the homosexual victim without fear of his being charged with some homosexual offence.

[20] There are, however, numerous exceptions to this generalization.

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

[22] The Times cited "a survey by the National Opinion Research Corporation" which "indicated that about 50 per cent of all robberies are never reported to the police" -- Times, op. cit., p. 52, columns 2-3 -- but this figure has little relevance to the proportion of robberies of homosexuals which go unreported. Not one of the five representatives of organizations working in the field of homosexuality who were interrogated by this writer gave an estimate of more than 10% as the proportion of robberies of homosexuals which are reported to the authorities.

[23] This evidence was not available at the time section 251.3 of the Model Penal Code was adopted.

Administrative actions taken in New York City, instanced above, and similar action in the District of Columbia to eliminate police arrests for solicitation without a complaint from a private citizen do not, of course, remove the laws from the statute book. Hence, even in these two cities, these statutes continue to have the same inhibitory effect upon the reporting of muggings of homosexuals to the police.

[24] Few of these men had actually been sent to prison for mugging, and none of them for having mugged a homosexual. But they all had engaged in muggings of homosexuals before the change in the Illinois law, even though they had been imprisoned for other crimes.

[25] The two most heinous crimes in mediaeval times were heresy and homosexuality; hence it was no accident that the appellation "bugger" was indiscriminately applied to both heretics and homosexuals. Anyone thought guilty of one of these crimes was believed capable of the other. The . term is a corruption of "Bulgar", since the Cathari, one of the most important of mediaeval heretical sects, originated in Bulgaria. See Sir Frederick Pollock & Frederic W. Maitland, The History of English Law (Cambridge, 1923), Vol. II, p. 556 and Henry Charles Lea, A History of the Inquisition of the Middle Ages (New York, 1955), Vol. I, note on p. 115.

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

[27] Ibid., pp. 196-197. Italics this writer's.

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

[29] Wainwright Churchill, op. cit., pp. 226-227. For another one of the rare references to "queer-baiting", see Webster Schott, "A Four-Million Minority Asks for Equal Rights", New York Times Magazine, 12 November 1967, p. 44, columns 1-2. An attempt to identify the sociological roots of this phenomenon, at least amongst lower-class males, will be found in Walter B. Miller, "Lower Class Culture as a Generating Milieu of Gang Delinquency", Journal of Social Issues, Vol. XIV, No. 3 (1958), pp. 5-19, at p. 9. However, the problem is probed there only briefly, in connection with a discussion of other subjects, and the views expressed are not consonant with wide-spread empirical data pointing to quite different conclusions.

[30] It is significant that sadistic violence against homosexuals qua homosexuals, is virtually unknown amongst Negroes. Since no one has ever suggested that the robbery rate among Negroes is lower than among whites, this would seem to confirm the fact that these "robberies" of homosexuals involving violence are usually not robberies in the true sense of the term.

To be a crusading anti-homosexual one must have within his own psyche the stuff of which persecutors are made, i.e., personality ingredients of a kind which are far less likely to be found within a racial group that was once slave, and which, even since its legal emancipation from servitude, has been kept in a second-class position. Furthermore, the American Negro has absorbed far less of the sexually-repressive elements of Christianity than other aspects of the Christian ethic, with the result that religion has left much less of a "moralistic" impress upon him than upon Christians of European stock. Finally, the Negro's deep endemic poverty, reflected by the extremely small number of Negro families which have enjoyed middle-class economic status for even as long as a generation, has prevented the growth of middle-class sexual morality.

[31] Wainwright Churchill, op. cit., p. 225.

[32] As quoted in Ibid., p. 226

[33] Ibid., p. 228

[34] Wolfenden Report, op. cit., p. 24.

[35] Italics this writer's.

[36] Admittedly, even after the legalization of adult consensual homosexuality in private, a proposal to engage in homosexual acts in public would continue to constitute a solicitation to commit an illegal act, but inasmuch as the overwhelming majority of homosexual solicitations involve requests to commit acts in private, not in public, the point is rather academic.

[37] However, even with sodomy a crime, and even if a homosexual solicitation followed by an assent thereto on the part of the person solicited were considered an agreement to commit sodomy, such an agreement would not constitute a conspiracy. A pact of this kind would be on the same footing as an agreement between two persons to commit adultery. Neither can serve as the basis for a conspiracy indictment by