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11 December 1964

The Hon. Richard J. Bartlett, Chairman
New York State Commission on Revision of the Penal Law & Criminal Code
155 Leonard Street
New York 13, New York

Dear Mr. Bartlett:

I am taking the liberty of writing you regarding two rather small sections of the proposed penal law for New York, recently draughted by the temporary commission of which you are chairman.

I graduated before the war from the Harvard Law School, where I worked in criminology under Professor Sheldon Glueck. After my legal training, I went on to my doctorate in British history, which I have been teaching for the past several years. My attention has been drawn to the proposed penal law as a result of a paper which I have been writing on civil liberties in this country and in England.

Permit me to say at the outset that I feel yourcommission should be congratulated for the forward-looking changes which it has incorporated in the proposed law. I commend the liberalization which you recommend in the area of sexual conduct and the law.

My purpose in writing is respectfully to call your attention to two small sections which appear to be rather inconsistent with the principal changes that have been made, and which may have been something of an oversight on the part of the commission. I refer first to section 250.15(3). As presently worded, this would bring within its ambit the case of a young man who loiters on a park bench for the purpose of picking up a girl and taking her to his apartment for sexual relations. It is difficult to believe that the commission intended to penalize conduct of this sort. Section 250.15(3) is apparently derived from section 722(8) of the present New York code, in which loitering for deviant sexual purposes is penalized. For this reason, some lawyers have suggested to me that, in all probability, section 250.15(3) of the proposed law would not be used to punish ordinary heterosexual solicitations where prostitution is not involved. Yet the fact remains there is nothing in the present wording which would preclude such prosecutions, and, in my opinion, it is poorly draughted. Furthermore, this section would not be cured by reverting to the language of section 722(8) of the present New York code, so as to penalize only deviant sexual conduct, since this would run counter to the whole rationale of the changes which your commission has proposed with regard to sodomy.

It would seem reasonable to think that, when the commission decided to remove criminal sanctions from deviant sexual conduct in private between consenting adults, it had in mind the extent to which the present state of the law conduces to blackmail and bribery. Yet section 250.15(3), as proposed, is likely to provide the same opportunity for blackmail as now exists. This is particularly true since the great majority of deviant sexual cases in the courts involve, not the sodomy laws, but section 722(8);

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and the number of occasions where the arresting officer in such cases is a party to a shakedown or bribery is scandalous.

On the other hand, there is, without doubt, a public interest involved, and that is the right of users of public facilities not to be affronted by acts of public solicitation which are clearly offensive. This is particularly important where large numbers of persons congregate for this purpose. There is a way, I would suggest, in which this situation can be remedied without opening the door to the objections inherent in section 250.15(3), and that is to follow the procedure adopted by the Illinois penal code of 1961. As part of the general reform of its adultery and sodomy laws, Illinois, in 1961, entirely removed solicitation for sexual purposes as an offence except when it involves solicitation for hire (male or female prostitution). The situation where large numbers of undesirables congregate is satisfactorily handled in Illinois by park regulations and by strict enforcement by the police of other statutes which do not have any sexual provisions. (Sections 250.15(6) and 250.15(8) of the proposed law -- possibly with slight modifications -- might well serve this purpose.) I have had occasion to discuss this matter with several members of the New York bar, and it is their view that the Illinois approach is the one which best protects the public interest without simultaneously trenching upon the rights of the individual.

The second matter that I wish to discuss is another instance where the Illinois approach appears to be preferrable. This concerns the meaning of a "public place" as presently defined in section 250.00(2) of the law proposed by your commission. I respectfully submit that the definition there employed has the objection that it militates against the poor man who cannot afford hotel or motel rooms for his sexual indiscretions. The youth who is unexpectedly caught with a girl at 2:00 o'clock in the morning on some deserted country road will run afoul of the law under section 250.05(4) of the proposed penal law. Here again is a situation constituting an open invitation to police shakedowns or bribery. I suggest that the test as to whether or not a place is a public place should turn, not on whether the public has access to it (as now set forth in section 250.00(2), but whether or not the place, considering the time and circumstances, is such that the conduct is likely "to be viewed by others". This is the criterion of the Illinois law, which reads: "Public Place for purposes of this Section means any place where the conduct may reasonably be expected to be viewed by others." (Illinois Penal Code, Section 38/11-9(b).

In sum, it is my earnest suggestion that your commission adopt the Illinois approach toward the two sections discussed, namely, that section 250.15(3) be eliminated, as in Illinois, and that the Illinois definition of "public place" be adopted in lieu of the definition presently found in section 250.00(2) of the proposed New York law.

Let me add that this matter has been discussed with several attorneys and officials of the New York Civil Liberties Union, who are interested in the subject, and who plan to take this up for official consideration by the Union next week.

Very sincerely yours,

[signed] A. Cyrus Warner