98 Olden Lane
Princeton, New Jersey

25 March 1968

Mr. Frank R. Miller, President
San Francisco Homophile League, Inc.
1025 Bayshore Boulevard
San Francisco, California

Dear Mr. Miller:

Several weeks ago, Miss Shirley Miller, president of the Daughters of Bilitis, informed me that you wished information regarding the Model Penal Code, and she brought to my attention the preliminary draught of a "critique" of articles 213 and 251 of that code issued by your organisation. She also indicated that you would communicate with me. Very recently, Mr. Dick Leitsch, president of the Mattachine Society of New York, as chairman of the legal committee of which I serve, told me that you had telephoned him because of difficulty in obtaining the pertinent draughts of the Model Penal Code, and he suggested that I write to you directly. Hence this letter.

On the enclosed slip you will find the relevant sections of the various draughts of the Penal Code which are concerned in some measure with the subject of homosexuality. No doubt you already have these, since your critique quotes sections 213 and 251 in extenso. The actual draughts themselves, however, include the comments which accompanied their first appearance, and these are essential for an understanding of the rationale behind the particular provisions. I cannot understand why you should experience any difficulty in finding copies of the various draughts of the Penal Code. These should be available in the library of any self-respecting law school. Unfortunately, I do not know what law schools exist in San Francisco itself, but the Stanford University Law School, one of the great schools of the country, is certainly very near, and I am sure every bit of the material cited -- with one possible exception -- is available for reference there. The item which may be difficult or impossible to obtain is the "Proceedings" of the American Law Institute for 1955. For reasons which I have never been able to discover, the publication of the "Proceedings" was discontinued between the years 1945 and 1955, both inclusive, with the result that there is an eleven-year lacuna in this series in most law school libraries. In some instances -- as at Columbia -- this has been partially remedied by microfilms of the privately circulated copies of these eleven annual issues, but, in other cases, there is merely a gap. Without the "Proceedings" it is impossible to follow the floor discussion amongst the members of the Institute which followed upon the initial proposal to remove from the ambit of the criminal law consensual acts of homosexuality when performed by adults in private. This is a loss, but it is really not essential for any present consideration of the Model Penal Code's proposals, or of the comments thereto.

Included on the enclosed slip are the titles of four review articles, familiarity with the first three of which is essential for an understanding of the place of section 251.3 of the Penal Code in contemporary legal thought. These I shall advert to below in the course of certain comments which I am constrained to make regarding the critique prepared by your group. Candidly, it is difficult not to be struck by the evident willingness of the writer of your critique to venture judgments on dozens of subjects, the legal intracacies of any one of which would be more than sufficient to keep a score of legal scholars busy for months. No doubt there is a legitimate place for curbstone opinions by persons without even a rudimentary familiarity with legal principles, but, if the homophile movement is ever to exert any influence whatsoever upon those who are responsible for draughting our criminal laws in the field of homosexual conduct, then it must be prepared to counter its opponents' premises with reasoned and mature legal arguments, rather than empty rhetoric. I am aware, of course, that your critique is intended only for

internal distribution within the movement -- a report to those who are expected to attend the national conference in Chicago. While this justifies a document written with the layman in mind, it constitutes no warrant for the mass of errors and confusion which pervades the whole of your paper.

Permit me to begin with fundamentals. With the exception of the "conclusions and recommendations" appearing on the last two pages -- in the sense of which we would all concur -- there is nothing to be found anywhere in the document which can possibly justify its appearance. In the great majority of instances its statutory interpretation is entirely incorrect, and even on those rare occasions when a proper legal conclusion has been reached, the supporting reasoning is entirely without foundation. Why the author has seen fit to discuss almost every provision of the Penal Code dealing with matters sexual, both heterosexual and homosexual, with happy disregard as to whether they are in any way relevant to the legal problems confronting the homophile movement, is something I do not pretend to understand. One would have thought that the movement had work enough to do trying to cope with the direct legal problems confronting it, without wasting its precious energies and resources in a gratuitous commentary on the sex laws in general. In view of the fact that over 95% of all arrests in the United States for homosexual conduct falling short of outright public manifestations of homosexuality arise under some form of solicitation or loitering statute, the wisdom of confining discussion to a thorough analysis of section 251.3 of the code, together with any related provisions, should be apparent. The fact that several of the subsections of 213 pertain to homosexuality is of no moment, since they involve sanctions against acts of homosexuality committed with children, or under conditions analagous to rape or assault, and hence are irrelevant to the movement for homosexual law reform, which, by definition, has never proposed the legalisation of such conduct. The remaining provisions of 213 are either quite unconnected with the subject of homosexuality, or, at most, bear so remotely upon it as not to be worth consideration by the homophile movement.

Even a moment's reflection upon the continual threat to every practicing homosexual posed by the statutes on the order of 251.3 prevailing in fifty of the fifty-one American jurisdictions ought to make it doubly apparent that we have our hands more than full with that section alone. Yet the reader of your paper will look in vain for any meaningful analysis of 251.3. Instead, he will find the brevity of the discussion devoted to this section exceeded only by its bungling confusion. This -- the quintessential section of the entire Penal Code in terms of its baleful effects upon the lives of most practicing homosexuals -- is dismissed in your critique with the charitable observation, patently untrue, that its "major flaw . . . is not within the section as written, since it only prohibits loitering for the purpose of being solicited or soliciting deviate sexual relationships, rather than the actual solicitation . . . ." The absurdity of such reasoning should be apparent even without any legal training. Ask any practicing homosexual who has ever solicited how many solicitations he engaged in without some preliminary conduct sufficient to constitute legal "loitering", and the answer is likely to be "none". In truth, it is difficult to picture a solicitation without some preliminary manoeuvre, whether it be formal loitering at a street corner, or "constructive" loitering, like sitting at a bar, or cruising along a street in a car. Furthermore, the actual consummation of the intention to solicit by a completed act of solicitation often provides the necessary evidentiary base for proving that the preliminary conduct -- until then unexceptionable -- constitutes loitering for the purpose of solicitation. In short, conduct which, without any subsequent act of solicitation, would never come within the purview of section 251.3, nevertheless becomes criminal by virtue of a later act of solicitation. Hence an act of solicitation can be the determinant as to whether or not there will be a prosecution for loitering for the purpose of solicitation. And the practical effect is to punish solicitations under the rubric of loitering for the purpose of solicitation.

But this is not all, for there are obviously many convictions under this type of statute without any act of solicitation whatsoever. Loitering at certain places at certain times, or under certain conditions, is sufficient to constitute the offence. Thus, in terms of actual solicitations, the section proscribes conduct which is essentially inchoate and incomplete. This, however, only demonstrates that section 251.3 is much stronger and more repressive than if it merely outlawed only full-fledged acts of solicitation. In sum, there is nothing whatsoever to warrant your critique's conclusions regarding this section. Despite a technical reading of the language of 251.3, for one to suggest that it prohibits only loitering for the purpose of soliciting, and does not strike down acts of solicitation themselves, is to engage in legal sophistry, and to place a construction upon the section which no prosecutor or judge would accept. Statutory interpretation requires more than a mere linguistic comprehension of words. If the author of your publication proposes to engage in legal interpretation, he should demonstrate some familiarity with its principles.

I trust that what I have had to say will not be misinterpreted as carping criticism, nor that offence will be taken at my observation that distribution of your critique would only constitute a distinct disservice to the homophile movement. Defects of the kind already cited abound on every page of the document. At the risk of extending this letter, let me take up another example, since there is a relationship between it and 251.3. I refer to subsection 251.1 on open lewdness. Your critique does not quote the section itself, but the actual provision in the Model Penal Code reads as follows:

> "A person commits a petty misdemeanor if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed."

Your writer states that this section, as draughted, "fails to do several things which it should under any normal legal code do. First", he contends, "it fails to define its terms and thereby fails to really define the offense involved. . . . Secondly, it fails to determine if the offense can be committed either in public, private or both. Thirdly, this article fails to denote what degree of offense must be given to cause affront or alarm." It must come as a distinct surprise to anyone with even a passing acquaintance with legal principles to be told that a provision such as 251.1, redolent with the language of the common law, is defective because of indefiniteness. "Lewd" and "lewdness" are amongst the oldest of common-law terms, the meanings of which have been so honed by the courts for centuries that their meaning is sharply defined. "What is a lewd act?", enquires the writer of your critique. The answer is, "Read the cases and find out", in the same way that one finds out what constitutes murder, larceny, arson, and a host of other common-law crimes. No statute ordinarily defines common-law terms, unless some new statutory definition of them is being created. It is unfortunate that your writer gives no evidence of the slightest conception of Anglo-American legal methodology, otherwise he would not expect to find legal definitions in the statutes. It is the courts which have traditionally defined these terms, and it is to their decisions to which one must, under our system of jurisprudence, turn, if one will learn their meaning. For those who have neither the time nor inclination to read cases, a distillation of the decisions, as found in any good legal treatise, can serve as surrogate. There the questions your writer raises in blind subjection to the words his eyes sees, but which his mind does not understand, would be answered. There he would discover that the terms "lewd" and "lewdness" refer only to acts committed in public, never to acts in private, that it is no more necessary for a statute to speak of public lewdness than it is to speak of wet water, since the noun comprehends the adjective. Unfortunately your author has manifested throughout his critique the same regrettable ignorance of the legal meaning of statutory terms, which, as I have already indicated, are not to be interpreted like the words of some English theme.

In truth, the three supposed defects which your critique finds in section 251.1 exist only in the mind of its writer. As if this were not bad enough, however, he has compounded his errors by overlooking entirely that part of 251.1 which is of the utmost importance to the efforts for homosexual law reform. I am referring to that portion of the article which speaks of the commission of "any lewd act which he [the actor] knows is likely to be observed by others who would be affronted or alarmed." (Italics mine.) There are here two conditions which must be fulfilled before this section can become operative. (1) The lewd act must be performed under such conditions that it is likely to be observed by others who will be affronted or alarmed by it, and (2) the defendant must know that his lewd act is likely to be observed by others who will be affronted or alarmed if they see it. Unless both of these conditions obtain, a defendant under 251.1 must be acquitted. It is clear that the purpose of this section is not to prohibit lewd acts per se, but to protect the public against the kind of conduct which Professor Schwartz, in his "Morals Offenses and the Model Penal Code" has described as "psychic aggression", that is, a public "offending of our sensibilities in the area of sexual mores." (Columbia Law Review, Vol. 63, p. 672.) Since 251.1 is intended to proscribe heterosexual as well as homosexual conduct, a sense of prudence should dictate that the movement for homosexual law reform leave it undisturbed.

It follows that my purpose in discussing section 251.1 does not arise from any desire to amend its provisions; rather it stems from the applicability of the provision quoted in the last paragraph to section 251.3. If the underlying principle of that provision were inserted in section 251.3, the effect, for all practical purposes, would be to emasculate the latter section. And this could be done without raising the spectre of wide-spread outcries from the professional custodians of public morals, which any attempt at outright repeal of 251.3 would engender. That was the guiding principle under which the legal committee of New York Mattachine proceeded when it draughted an amended section 240.35(3) of the present New York criminal code, the language of which follows closely upon section 251.3 of the Model Penal Code, from which it is derived. Section 240.35(30 of the New York code reads as follows:

> "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."

After amendment by New York Mattachine, it appears as follows:

> "A person is guilty of loitering when he, while loitering in a public place for the purpose of engaging in, or soliciting another person to engage in, deviate sexual intercourse or other sexual behavior of a deviate nature, solicits another person in such an open and notorious manner as to constitute an outrage to public decency."

This language eliminates from all criminal sanctions mere loitering for the purpose of solicitation. The following three elements must all be present before a prosecution under the amended section can lie.

> (1) There must be a loitering for the purpose of engaging in or soliciting another person to engage in deviate sexual behavior.
>
> (2) This loitering must be accompanied or immediately followed by an actual act of solicitation.
>
> (3) The act of solicitation must be of such a character that it constitutes an outrage to public decency.

The absence of any one of these elements makes a successful prosecution impossible.

This language was first hammered out by New York Mattachine's legal committee. It was then submitted to the society's attorneys, who approved it without change. It then became the subject of intense discussion with the director of social action for the Episcopal Church in New Yorok, as a result of which the language was modified, and the wording assumedits ultimate form. Finall, the completed draught was introduced as a bill in the New York legislature, where it now rests. (There is no public knowledge of Mattschine's role in the draughting of this measure, since it was introduced by a legislator who handles legislative matters for the Episcopal Church, and it is thought to be a church-originated bill.)

I write all this because statutes on the order of New York's 240.35(3) -- all incorporating the basic concepts of section 251.3 of the Model Penal Code -- prevail in all American jurisdictions except Illinois. (The situation in the latter state is sui generis, and I shall not discuss it here.) Hence the principle behind the New York measure draughted by New York Mattschine is intended not merely as a local solution for adoption only in New York state, but as a national model for acceptance by every state in the country. Note my use of the word "principle", that is, the principle of emasculation by insertion of the requirement that there be a public outrage. The applicstion of this principle to the instant laws of the several states will naturally require somewhat different language in each case, depending upon the particular statute to be amended, but the principle should remain uniform. It is my hope to be able to discuss this subject formally at the Chicago meeting. That is why I ask that you spare the time of all of us who expect to attend that meeting, and refrain from taxing our patience by distributing this error-ridden "critique".

Before closing, it might be well for me to refer briefly to the review articles and their authors which I have cited on the accompanying slip. Professor Louis Schwartz of the University of Pennsylvania Law School was the reporter of that section of the American Law Institute which was responsible for most of the so-called "morals" provisions. I last year discussed with Professor Sheldon Glueck, my former law professor at Harvard, what might be the best way to approach Professor Schwartz with a view to the possible modification by the Institute of section 251.3 of the Model Penal Code. I shan't go into further details here, except to say that I am now in the process of gathering pertinent supporting material to present to Professor Schwartz at what I hope will be a personal conference with him. (Naturally, I will not go as a Mattschine emissary.) Two important items in this supporting material will be the article by Louis Henkin in the Columbia Law Review and the one in the U.C.L.A. Law Review, both listed on the slip. You will notice that the Schwartz article appeared one month prior to Henkin's, to which it was intended to be a companion. The U.C.L.A. article, however, which was published some three years later, is of an entirely different genre. It can, without exaggeration, be considered the "Wolfenden Report" of the loitering and solicitation statutes, for which the Model Penal Code provides no relief. Its footnotes alone constitute the most comprehensive bibliography in the field of homosexuality which has ever appeared, and they warrant the closest study by those working for legal reform. Without this pioneering study, the possibility of any change in the area of section 251.3 would be very dim indeed. (It is still not very great.) Those reading this article should note particularly the suggestions in that portion of the "conclusions and recommendations" appearing on pp. 793-794.

Once again permit me to venture the hope that my criticism will be accepted in the spirit in which it has been offered, that is, without any personal rancour, and with a desire to assist the homophile movement, in the success of which we are all deeply interested. Should there be any way in which I can be of assistance to you or to your organisation, please feel free to call upon me. I hope we shall have an opportunity to meet in Chicago.

Very sincerely yours,

[signed] Austin Wade