To the Reader:

The background to the enclosed material is as follows. In 1969 the New Jersey "Criminal Law Revision Commission" was established "to study and review the New Jersey Statutory Law pertaining to crimes . . . and to prepare a revision . . . thereof for enactment by the Legislature." The Commission was composed of nine members, with Prof. Robert E. Knowlton, sometime dean of the Rutgers University Law School as chairman.

After I had received a copy of the Commission's interim report in 1970, I insinuated myself into Professor Knowlton's good graces. I complimented him on the Commission's fine work, particularly for its having removed private consensual sexual conduct between adults from the criminal sanction. But I went on to recommend that section 20:34-1 of the proposed code, the pan-sexual solicitation provision, be excised when the Commission draughted its final report. Professor Knowlton agreed with my recommendation, and he undertook to persuade the other Commissioners in this sense. For this purpose I submitted to him a copy of the memorandum which I had previously written for distribution to all the members of the New York State legislature regarding that state's homosexual solicitation statute. (The New York and the New Jersey provision were both open to the same objections.) Many months later Professor Knowlton informed me that he had been able to persuade only two other members of the Commission to agree to the solicitation recommendations. He attributed his lack of success to the "large number of former law-enforcement officers and prosecutors on the Commission." (I suspect one of the worst of these was Alvin E. Granite, former Gloucester County prosecutor, later partner in the law firm of Granite & Granite.) As a consequence, the Commission's proposed code, as presented to the Legislature in its final report in 1971, retained section 20:34-1.

My anger at this development was reflected in the pages of the memorandum I wrote and sent to the Commission in June, 1972, under the signature of Walter Barnett as well as my own. This is marked in the enclosures as item no. 1 and should be read first. Soon thereafter the Judiciary Committee of the state Assembly, under the chairmanship of Assemblyman William Dickey, who had been one of the Commissioners, held a single day of public hearings on the proposed penal code. However, trough the hearings themselves were open to the public, the opportunity to testify was by invitation only.

As is clear from the Index to item no. 2, only nine persons were invited, the list having been headed by Professor Knowlton, as spokesman for the Commission. By means which need not be discussed here, I managed to obtain invitations to testify for myself and for Michael Valente. Equally important was the fact that Professor Knowlton gave me a personal commitment that he would not testify against the recommendations regarding solicitation which I intended to make in my testimony. (As Chairman of the Commission which had refused to delete the solicitation provision, it would not have been inappropriate for him to have opposed me regardless of his own personal views on the matter.) Michael's and my testimony constitute item no. 2, which should be read next.

In the event, our testimony produced no results, and, as a consequence of state elections over the succeeding years, the composition of the Assembly Judiciary Committee changed. By 1974 the chairman was Assemblyman Eldridge Hawkins, a black attorney from East Orange. Since Dickey's committee had done nothing to promote any part of the code, I visited Hawkins. My ostensible reason was to discuss a letter I had sent to his immediate predecessor -- not Dickey, but one of his several successors as chairman -- who had not moved on my communication. Soon after my interview with Hawkins began, the subject of the letter was put aside, and, before the afternoon was over, he had asked me to become a member of his own political action committee. So began my attendance at the monthly meetings of this political group. At the time I became a member, I was one of about four white persons on the committee, the remaining ten or so being black. But as time went by, the other white members lost interest, so that I eventually became the only white person who continued to attend the committee's meetings throughout its existence. I suspect this was something Hawkins never forgot. (My motives at the time were not quite as altruistic as might appear, since I had hoped to meet through those meetings some fitting black stud as an ancillary dividend -- a hope which never materialized.) After serving on the political action committee for several months, Hawkins invited me to sit as an observer at the meetings of his Judiciary Committee. There were about ten or twelve members of the Committee, of which about eight were usually in attendance. I found myself one of six persons attending who was not a Committee member. These were the Governor's own counsel, a deputy attorney-general representing the Attorney-General, a deputy repre-

sending the Public Defender — in New Jersey he is a cabinet member like the Attorney-General — the aide to the Committee, and, finally, a representative of the Legislative Research Office, who sits with all legislative committees that propose legislation, since the function of his office is to provide legislators with an appraisal of the consequences of the laws they propose.

I commenced my three years on the Judiciary Committee — which met weekly during session time — with the firmest resolve to keep my eyes and ears open and my big mouth tightly shut. But after several months of attendance and with a growing acquaintance with the members — fostered sometimes by having lunch with some of them in the State House cafeteria — I found I could communicate with other members without being considered officious. With the passage of time I realized that there was little distinction between observers and Committee members so far as participation in the discussions of the Committee was concerned, except when it came to voting. For example, when there was a serious division on the Committee between those strongly favoring law and order and those who emphasized individual rights, Hawkins would frequently turn the entire disputed matter over to the deputy attorney-general and the deputy public defender, with instructions to come back at a later meeting with some kind of a compromise. Invariably the solution which those two non-members recommended would be adopted by the Committee, usually unanimously. This was but one example of the thin line between members of the Committee and non-members. Eventually my original intention not to speak at all was abandoned. My initial tactic was to make friends with the other non-members, particularly the deputy public defender. The latter eventually became a good friend, and he remains to this day an important personal contact in the executive branch of the state government. My continuing objective, of course, was to have the sexual solicitation provision removed from the proposed code. With this end in mind, I tried to identify those who might support me. One day I discussed informally the idea of dropping the sexual solicitation provision with the director of the legislative research office, who personally represented his department on the Committee. I was taken aback when he informed me that it was very necessary to retain this provision in the code in order to "protect the public from the queers in places like Washington Park in Newark." (As a Washington Park solicitor of more than thirty-years standing, I feigned

appreciation for this most valuable intelligence and departed his presence. From then on I kept my distance from this worthy, but, to my delight, he died within a year of this encounter. His successor on the Committee enjoyed none of his predecessor's influence, nor was he as regular in attendance as the latter had been.

When I first started on the Judiciary Committee the group was still in the early stages of going over the proposed penal code section by section. In this it was acting not only for the Assembly, but as surrogate for the Senate Judiciary Committee, which had earlier relinguished most of its role with respect to the code to its counterpart in the other House. Because the clauses in the code with which I was concerned were toward its end, they were not reached until the second year's legislative session. By that time I had had ample time to consider how to proceed. I approached Hawkins alone, and told him that I felt section 2C:34-1 should be dropped. He agreed. (If he had had his way, the code would also not have punished prostitution.) He asked me for a memorandum which he could distribute to the members of the Committee on the day when the sections involved came up for discussion. The result was my three-and-one-half page memorandum for the Judiciary Committee -- probably the briefest thing I ever wrote -- which constitutes item no. 3 of these enclosures. This contained two recommendations, the first having to do with solicitation, the second with open-lewdness. Both recommendations were unanimously agreed to by the Judiciary Committee and, in that form, became part of the proposed penal code as voted out by the Committee and as subsequently passed by the Assembly. The first of these was part of the code later passed by the Senate and is today the law in New Jersey. The second proposal, however, was later emasculated due to the clumsy intervention of an ignorant young lawyer representing the National Organization of Women. At the last stage of the legislative process, not many weeks before the Senate as a body was due to vote on the whole code as it had been passed months before by the Assembly, she appeared before the Senate Judiciary Committee, which was now perfunctorily reviewing the code as it had been received from the Assembly. She claimed that nothing in the code protected women against "flashers", that is, men who publicly display their genitals, usually as a form of aggression against or intimidation of women. In truth the open-lewdness provision <u>did</u> cover the "flasher" situation, but she was too stupid to see this and the

Senate Judiciary Committee accepted her proposals. At this stage there was no opportunity nor time for anyone to appear before the Senate Committee in opposition to her proposals. The best I could do was to speak to Senator Greenberg, the chairman of the Committee, after the damage had already been done. He promised to try to remedy the matter, but it was now too late in the session. The Senate passed the code with a new provision against "flashers"

By itself, this event would not have been disastrous. However, the passage by the Senate of a code containing a provision not to be found in, or differing in any way from, the version already passed by the Assembly necessitated sending the entire code back to the Assembly so that the latter body could either accept or reject the Senate changes. (The New Jersey legislature does not have any system of conference committees by means of which the Federal Congress and the legislatures of some other states resolve differences in the enactments of its two houses.) Thus the Senate version of the code now found its way back to the Assembly Judiciary Committee preparatory to its consideration by the full Assembly. But the composition of the Assembly Judiciary Committee had now changed, and its chairman was no longer Eldridge Hawkins, who was no longer a member of the legislature. I did not have the influence in the new Assembly Judiciary Committee which I had once enjoyed under Hawkins, and many of its members were strangers. The new chairman, Assemblyman Herman, was interested in only one thing -- getting a penal code enacted, any code, no matter what the specific language. There was now time for only one Judiciary Committee meeting on the code, which Herman decided to throw open to the public, since all the women's groups, the right to lifers, the moral majoritarians and others were getting into the act. At an emotionally-charged public meeting in a large public hearing room filled to capacity with scores of people, the Assembly Judiciary Committee voted to include the Senate-passed "flasher" provision within the open-lewdness section. Again, this would not have been disastrous had the Committee not, as part of the "flasher" change -- simultaneously voted to make the entire section applicable to lewdness wherever it occurs, rather than limiting it to lewdness occurring in public, as had been the case until then. Thus in one dark instant the carefully crafted New Jersey open-lewdness provision, which had been steered around so many legislative shoals, foundered, to be replaced by what is now the present law, namely a statute which punishes lewdness anywhere. My several

attempts to speak against the new proposal in the crowded hearing room were unsuccessful. The Committee and then the Assembly repassed the code with the new language, as did the Senate when it met for one day later that Summer. With the Governor's signature, the new penal code became law.

Princeton, New Jersey
27 August 1983

Arthur C. Warner

This memorandum is submitted to the New Jersey Criminal Law Revision Commission by the National Committee for Sexual Civil Liberties with a deep sense of dismay at the inclusion of a sexual solicitation provision -- 20:34-3 -- in the proposed penal code for the State of New Jersey. (Text of this provision will be found infra, at the end of this memorandum.) Last year the undersigners, acting on behalf of the above Committee, of which they are the national co-chairmen, requested an opportunity to appear personally before your Commission in order to discuss certain aspects of the criminal law and sex with which their Committee is deeply concerned. This request was denied, and the undersigners were persuaded instead to submit a memorandum on the subject. Accordingly, they submitted copies of a memorandum which had originally been prepared for the members of the New York State legislature in Albany, involving that state's solicitation statute. Since the ostensible raison d'etre of the New York statute and that of the proposed New Jersey provision were identical, there was no need to draft a new memorandum for this purpose. The undersigners were grateful for the fact that Professor Robert Knowlton, your Commission's chairman, arranged for consideration of this memorandum by your body even though a preliminary draft of your proposals had already been sent to the printer. We were grateful, too, to learn that Professor Knowlton appeared sympathetic to the general propositions put forward in that memorandum. However, the subsequent appearance of section 2C:34-3 in your Commission's Final Report containing the proposed Penal Code for this state has raised grave doubts as to how seriously the representations made by our Committee were considered by your Commission as a body -- doubts which serve to confirm the necessity for an opportunity to appear personally on the issues which we have raised and which your Commission has seemingly failed to take into consideration.

The burden of the memorandum which we submitted was that sexual solicitation statutes were thoroughly unjust, that they did not protect the public from anything, and that their mere presence on the statute book serves as a device for victimizing homosexuals -- and only homosexuals -- whether or not such statutes are framed so as to include neterosexual solicitations as well as homosexual ones. To support this position, we pointed out that the then newly-proposed Federal Criminal Code, submitted to

the President and the Congress in January, 1971 by the National Commission on Reform of Federal Criminal Laws, had specifically repudiated its initial recommendation -- sec. 1853 in its original study draft -- on which sec. 2C:34-3 of the proposed New Jersey Penal Code is based. In its final draft, this same National Commission replaced sec. 1853 with an entirely new section, 1861, which treats the subject in an entirely different manner. Our memorandum to your Commission specifically quoted sec. 1861 in its entirety, even going so far as to suggest two minor modifications in language, involving no substantive changes, in order to clarify the intentions of the federal provisions. Our same memorandum went to great pains to point out that it is now sec. 1861 of the proposed Federal Criminal Code, and not sec. 251.3 of the Model Penal Code, which stands as the model in this area for the entire country. Sec. 251.3 of the Model Penal Code and sec. 1861 of the proposed Federal Criminal Code were drafted under the aegis of the same authority, Professor Louis Schwartz of the University of Pennsylvania Law School. The former provision reflected his thinking some ten or fifteen years ago, the latter his current view that statutes on the order of 251.3 are inherently discriminatory and unjust, and that they serve no useful social purpose.

In the light of the above, one can only imagine our Committee's astonishment to discover that your Commission ignored the final version of the proposed Federal Criminal Code, with its new sec. 1861, together with everything in our memorandum in support of it, and recommended a sexual solicitation statute for the State of New Jersey which is almost a carbon copy of the now-repudiated -- and discredited -- sec. 1853. To add insult to injury, your Commission then justified its action by a commentary which is almost a verbatin replica of the comment accompanying the same rejected federal provision, sec. 1853. Nowhere in your Commission's report is there any mention of the fact that the two provisions which are cited as its "source of reference" -- Model Penal Code sec. 251.3 and proposed Federal Criminal Code sec. 1853 -- no longer enjoy the support of those who drafted them, and that the latter section has been specifically replaced by a provision based on an entirely different theory of jurisprudence. Certainly the Legislature and the public are entitled to know what reasons motivated your body to reject what is generally considered a more enlightened alternative.

This raises the whole question of the authoritativness of any of the citations which your Commission has used as "sources and references" to bolster sec. 2C:34-3. Those who have examined the comment which accompanied the old sec. 1853 of the original draft of the proposed Federal Criminal Code know that it was "derived from" what its authors described as "modern code revisions", of which sec. 240.35(3) of the present New York Penal Law is cited as the first example. (The National Commision on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code, Washington, D.C., 1970, p. 266) But the latter provision turns out to be nothing but a repetition of sec. 251.3 of the Model Penal Code, the retrograde character of which is now generally recognized. Sec. 251.3 introduced a new element into the jurisprudence of solicitation by punishing loitering for the "purpose of soliciting." Prior to the Model Penal Code's 251.3, most jurisdictions where such statutes obtained had, at the very least, required an overt solicitation before the criminal law could be invoked. By enacting sec. 240.35(3), New York -- to the knowledge of the undersigned -- became the first state to incorporate into its jurisprudence the noxious concept derived from sec. 251.3 of the Model Penal Code that loitering with a mere intention to solicit was sufficient to invoke criminal sanctions. (The previous New York solicitation provision, which 240.35(3) supplanted, had required a "breach of the peace" plus an intention to solicit. (See pp. 5-6 infra.)This was followed by sec. 1853 of the proposed Federal Criminal Code, since repudiated, and now by your Commission's proposed sec. 2C:34-3. This is a perfect example of the way in which the statutory offspring of an illegitimate statute are subsequently used to "prove" their progenitor's legitimacy. For unless one subscribes to the view that one of the functions of the criminal law is to punish "impure" thoughts, no justifiable societal interest can be adduced for punishing a mere intention to solicit. The entire rationale for sexual solicitation statutes is supposed to be protection of the public from offense or alarm. Sec. 2C:34-3 uses these very words. If, then, protection of the public from offense or alarm be the law's desideratum, and if there be no actual solicitation, of what relevance is the fact that the defendant loitered for a sexual rather than some other purpose? Why proscribe loitering only for sexual purposes? In its proposed sec. 2C:33-4(6) -- a harassment section -- your Commission has recommended punishing any "course of alarming

conduct or of repeatedly committed acts which alarm or seriously annoy" others. Your Commission has already stated, in its commentary to sec. 2C:34-3, that that section "require[s] public alarm because . . . it is only when that element exists that the criminal law has any interest in the area." If this be true, then why does not sec. 2C:33-4(c) suffice for all forms of alarming or offensive conduct, whether sexual or non-sexual? Why is a special sexual provision necessary? Why insist on tarring offenders with a peculiarly sexual crime -- with all the scarifying consequences of a conviction for a "morals" offense -- when it is claimed that the gravamen of the offense is not its sexual character but its offensiveness? It is this form of legal sophistry which sec. 1861 of the final draft of the proposed Federal Criminal Code attempted to avoid, and why it was derived from sec. 240.25 of the New York Penal Code, which is a general harassment statute that proscribes all conduct that annoys or alarms, not merely sexual solicitations. As it stands, sec. 2C:34-3 forces one to the ineluctable conclusion that your Commission, whilst giving lip-service to the principle of invoking the criminal law only to protect the public from annoyance or alarm, has framed a Victorian-type statute to punish people for manifesting sexual desires.

Nowhere in your Commission's report is there any evidence that the Commissioners were aware that Illinois repealed its sexual solicitation law more than a decade ago -- at the same time it legalized consensual homosexual conduct between adults in private -- that Connecticut did the same three years ago, that Hawaii followed suit this year, and that New Mexico has never had a solicitation statute at all. Here are the true models for the country. Herein lies the most persuasive evidence that statutes on the order of 2C:34-3 are not necessary, for there is not a scintilla of evidence to suggest that the standards of public decency in the jurisdictions just named have been debased for want of solicitation laws.

As we stated in our original memorandum, if the Commission be sincere in its professed desire to suppress public nuisances, then it should confine its legislative proposals to that worthy social end, and not try to punish "immoral" people in the process. The latter has traditionally been the role of the Church, though, today, even most ecclesiastical authorities have abandoned the practice. Certainly it is not the role

of the modern state. It can be argued, of course, that the present New Jersey solicitation law is ingrequently invoked and that convictions under it are rare. This may be true, in view of the fact that this state has no cities large enough to maintain vice squads which engage in full-time enforcement of the solicitation law. (Where enforcement of solicitation laws becomes a full-time activity of vice squads, the latter have a vested interest against their repeal.) But the absence of prosecutions constitutes the strongest reason for the repeal of such laws, not their retention. To maintain laws on the statute book which are not intended to be enforced or which are incapable of enforcement violates every rational principle of jurisprudence. It not only brings the law itself into general disrepute, fostering contempt for the law generally, but it stands as an open invitation to black-mail, extortion, and other corruption. Laws are supposed to be enforced even though no criminal statute ever succeeds in reaching all of its violators. As long as there is some reasonable connexion between the number of offenses and the number of prosecutions, the equitable sense of the community is not outraged and public respect for the law is not corroded. But where, as had frequently been pointed out in the case of the existing sodomy laws, there are at least half a million offenses for every prosecution, the law itself becomes a mockery and is frequently employed as an instrument for private vengeance. The occasional prosecution which does take place can serve no social purpose because laws which are unenforceable can have no legitimate social purpose. To suggest that, even though unenforceable, the law should remain on the statute book for purposes of moral suasion is to subscribe to the myth that morality can be inculcated by unenforceable sanctions.

It is, of course, true that, unlike New York's sec. 240.35(3), both the initial federal proposal, sec. 1853, and its progeny, New Jersey's proposed 2C:34-3, require "offense or alarm to others". This is empty verbiage, which will have absolutely no practical effect. Though it may read well as a law student's exercise, it does nothing to mitigate the baleful character of statutes of this kind. The New Jersey courts will do with this language precisely what the New York courts did when confronted with the requirement that there be a "breach of the peace" before the old New York solicitation statute could be invoked. This was section 722(8) of the old New York Penal

Code, which was in effect until supplanted in 1965 by sec. 240.35(3) of the present New York Penal Code. Sec. 722(8) punished

> "any person 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." (Italics the undersigners'.)

During the life of this provision, the above language was consistently interpreted by the New York courts as not requiring any actual intention to provoke a breach of the peace nor any actual threat to the peace. Obviously this broadened the statute far beyond the original legislative intention, and destroyed the illusion that the conduct being proscribed did in fact constitute an affront to the public. So with proposed New Jersey sec. 2C:34-3, the courts will de facto infer that a defendant's conduct caused "offense or alarm to others" if he is found loitering in a sexual recruiting area without being able to give a good account of himself.

Equally empty is the fact that sec. 2C:34-3 professes to treat heterosexual and homosexual solicitations even-handedly. The entire trend of modern law enforcement in the area of sex is to employ laws originally enacted with heterosexual conduct in mind against homosexuals almost 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. The almost total absence of prosecutions anywhere for heterosexual sodomy, although the sodomy laws of almost every jurisdiction include such acts within their reach, is one of the many instances of the discriminatory administration of such laws. Clearly, the prosecution of an occasional heterosexual offender under sec. 2C:34-3 in no way lessens the noxiousness of this provision.

Proof of the retrograde character of 2C:34-3 is attested to by the fact that it goes beyond the thrust of the present New Jersey solicitation provision, sec. 2A:170-5. While the latter requires an overt invitation or solicitation "by word, act, sign, or any device" before criminal sanctions attach, sec. 2C:34-3 is calculated to punish mere intentions to solicit. One has a right to expect something better in a penal code which professes to incorporate the latest in enlightened jurisprudence. The notion

that sexual solicitations, whether heterosexual or homosexual, which do not involve prostitution, offend or alarm the public, is one of the oldest of myths, and it is about time that the law was made to rest on facts rather than on fiction. This is not to deny that some solicitations, whether sexual or non-sexual in character, are offensive to those to whom they are made. Like all myths, this one contains an element of truth. What needs to be examined is (1) the extent to which solicitation laws actually protect the class of persons they are designed to shield, and (2) whether this protection is desirable in view of the greater evils which these statutes produce. Actually, it is not necessary to weigh the comparative advantages and disadvantages of (1) and (2) above, because even the most cursory survey of these statutes reveals that prosecutions under them are almost invariably police-initiated affairs. Complaints by private citizens under solicitation laws are virtually unknown. Our committee has been unable to discover a single such case anywhere in the more than three years of its existence. This merely confirms what was found by the U.C.L.A. investigators, from whose comprehensive report we quoted in our earlier memorandum to your Commission "that communications from [private] citizens complaining about solicitations by homosexuals are rare." (See U.C.L.A. Report, cited in our earlier memorandum, p. 698, note 83.) This means that the only element of affront involved in these cases is to the tender sensibilities of the plainclothesmen whose professional careers as vice-squad officers are daily dedicated to uncovering as many such solicitations as possible.

Surely the Commission must know that -- the facts of law enforcement being what they are -- a statute drawn along the lines of sec. 2C:34-3 stands as an open invitation for an arresting officer to claim he was offended by a defendant's solicitation whether this was true or not. The U.C.L.A. investigators stated categorically in this connexion that "when prosecutions are limited to credibility contests between defendants and arresting officers the likelihood of miscarriages of justice is evident." (U.C.L.A. Report, pp. 694-695.) How much more so when criminality is made to rest on the unverifiable subjective feelings of an arresting officer! Whitman Knapp, erstwhile chairman of the New York City Commission which investigated the city police department, stated publicly that "our laws dealing with such problems as gambling, the Sabbath, and sex are

. . . . an important source of /police/ corruption." (As reported in the New York Times, 7 June 1970, p. 65, column 1.) Solicitation statutes are a standing temptation to blackmailers, extortionists, and corrupt policemen, who use them to prey on persons denominated "criminal" only by a distorted concept of what the law should proscribe. In addition to conducing to outright corruption, statutes on the order of sec. 2C:34-3 are open to capricious and discriminatory enforcement, permitting police to use them for purposes of harassment, to satisfy personal grudges, or to fill their monthly arrest quotas when the need arises. This is not the kind of even-handed enforcement of penal statutes which the law presupposes. Conceded that corruption in the administration of a law does not necessarily prove that the law should be repealed. But here we have laws which clearly do not protect those they were designed to protect. Even if one interprets the absence of private complaints to mean that private persons who are offended are too embarrassed to complain to the authorities, the unalterable fact that there are virtually no private complainants means either that the law is failing in its intended purpose or that it is unnecessary. To suggest that the mere existence of such statutes on the books contributes to the moral fibre of the community is to subscribe to a grotesque view of what constitutes "morality". In the face of these facts, the question arises as to why these statutes should be continued as a source of official and private corruption.

This brings us back to our original memorandum to your Commission, in which we stated that "the situation is no different with respect to solicitations than with any other peddlar who brandishes wares which are rejected by those who do not wish them." (p. 9) Some persons may find these solicitations officious and offensive, but the ultimate question remains as to why an ordinary adult, in full command of his mental faculties, should not be expected to say "No" to an unwanted proposal -- whether sexual or non-sexual -- without the intervention of the criminal law. As already indicated, four states -- Illinois, New Mexico, Hawaii, and Connecticut -- have repealed their solicitation laws. (New Mexico never had one.) We submit that the precedent of Connecticut is particularly relevant for this state and should be followed, since New Jersey is very similar to Connecticut in its vicinity to New York, the ethnic composition of its population, and the division of that population into industrial, urban, and suburban areas.

Because our Committee did not anticipate a recommendation on the order of sec. 2C:34-3, it did not venture any observations as to its constitutionality in our original memorandum. The truth is that all statutes along these lines are of dubious constitutionality. The only reason they remain on the statute book is because defendants involved in so-called "morals" cases are too embarrassed or terrified to challenge them. By pleading guilty in the expectation of a small fine they avoid additional publicity and humiliation. (Jail sentences are rarely imposed in such cases.) To our knowledge, only one such statute has been challenged on constitutional grounds anywhere in this country, and it is significant that that law was thrown out as unconstitutional on its face as soon as the case came to trial. Sections 823.5-1 and 823.5-3 of the revised municipal code of the city of Denver were ostensibly enacted to suppress "offenses against prostitution." These made it unlawful "for any person to be in or near any place frequented by the public, or any public place, for the purpose of inducing, enticing, or procuring another to commit a lewd act or an act of prostitution." Like other such statutes, this ordinance was employed exclusively against homosexual solicitors except where prostitution was involved. In a case decided only this past April, a three-judge county court in Denver unanimously held this solicitation provision unconstitutional on its face. The court declared:

> "The ordinance, upon examination, contains two elements, to-wit: (1) Being in a public place, and (2) Possessing a certain state of mind.
>
> "No overt act is required in furtherance of the purpose for which the accused is present at such public place.
>
> "Thus, the thrust of the ordinance is aimed at immoral thoughts.
> . . . . . .
>
> "First Amendment rights are applied to the states through the Fourteenth Amendment, as shown by Winters v. New York, 333 U.S. 507. In short, the ordinance in question goes even beyond the strong rights secured to the people under freedom of speech.
>
> "We hold, therefor, that freedom of thought cannot be limited nor prohibited by law, and find clearly, beyond all reasonable doubt, that the ordinance, section 823.5-3 is unconstitutional on its face, as violative of the Fourteenth Amendment." (The City and County of Denver v. Salvadore E. Albi, decided 17 April 1972.)

The above could properly have been written regarding sec. 2C:34-3. The latter contains the same two elements -- loitering plus intention to solicit.

The fact that defendant's conduct under sec. 2C:34-3 must cause "offense or alarm to others" does not cure its unconstitutionality. Since when may thoughts be punished on the ground that, if expressed, they would be offensive to others? Not since the series of Jehovah's Witnesses cases decided by the U.S. Supreme Court during the 1930's can one seriously contend that first amendment liberties may be proscribed because their exercise offends or alarms others. But the constitutional objections to sec. 2C:34-3 are even stronger than those made to the Denver ordinance. Though Colorado has now repealed its sodomy law to the extent that it was once applicable to consensual acts between adults in private, the Denver case arose before that repeal. By contrast, the proposed penal code for New Jersey, of which sec. 2C:34-3 forms a part, removes sodomy between consenting adults in private from the criminal category. It also removes the heterosexual equivalents -- fornication and adultery. Thus, to the extent that sec. 2C:34-3 will punish intentions to solicit for sexual acts to be performed by consenting adults in private -- the vast majority of solicitations -- it will punish intentions to engage in perfectly licit activities. Since one must assume that there is a constitutional right to ask another person to engage in perfectly legal conduct, a fortiori one has a constitutional right to intend to ask someone to engage in legal conduct. Nor would the unconstitutionality of sec. 2C:34-3 be cured by requiring an actual solicitation -- even though this might render it slightly less open to abuse -- because, once conduct has been legalized by the State, the State would appear to be constitutionally precluded from punishing the use of legal means -- such as private conversations -- to consummate that legal conduct. Finally, there is the requirement of loitering. Since loitering, per se, is not illegal, the intention to solicit, if otherwise licit, does not become illegal when combined with another legal act -- loitering.

Sec. 2C:34-3, like sec. 1853 of the original draft of the Federal Criminal Code, would appear to be an unconstitutional attempt to punish private intentions to engage in legal activity, thus violating both the fourteenth and first amendments. (There is reason to believe that constitutional considerations were a factor in causing sec. 1853 to be jettisoned.) Sec. 2C:34-3 is also inconsistent with the principle of removing all criminal penalties from private sexual conduct between consenting

adults. As to the private character of these solicitations, our initial memorandum to your Commission made it clear that

> "location per se does not 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." (p. 4)

Nothing we have said is intended to overlook our Committee's satisfaction that your Commission has recommended repeal of all laws to the extent that they punish private sexual conduct between consenting adults. In the case of the sodomy laws, such repeal is necessary, not merely to eliminate the occasional prosecutions for this offense which still take place, but to establish the principle that the private sexual conduct of both homosexuals and heterosexuals is their own business, to make it easier to prohibit by law discrimination against homosexuals in employment, and to free homosexuals from the crushing burden of fear and apprehension which the existing sodomy laws engender. Repeal of these laws would also eliminate many of the opportunities for blackmail which the present sodomy laws provide. But this is only half the picture, for such repeal will leave untouched the large area for blackmail which is provided by the solicitation statutes. It is these statutes which account for the overwhelming majority of convictions in this country for homosexual conduct that does not involve any overt sexual act. As we pointed out in our original memorandum, the U.C.L.A. investigators found "that approximately 90-95% of all homosexual arrests /in California/ are for violations of "that state's solicitation law. (U.C.L.A. Report, p. 691, note 30.) Though the percentage is probably lower in New Jersey, it is the solicitation law and not the sodomy law which is likely to make criminals of most homosexuals. The ostensible rationale for these statutes is to be found in the very commentary of your Commission to 2C:34-3, where it states that the conduct involves "a kind of public nuisance" which must be proscribed. (New Jersey Criminal Law Revision Commission, Final Report, Vol. II, "Commentary", p.306.) This statement, lifted verbatim from the comment of the National Commission on Reform of Federal Criminal Laws with respect to sec. 1853 -- before it had been replaced by sec. 1861 -- demonstrates that the framers of these laws have been woefully ignorant of the

true pattern of homosexual solicitation, and that they have been guided by the common, though erroneous, stereotype that homosexual solicitations are open and flagrant, and that they constitute a public nuisance. (National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code, p. 266.) Had the Commissioners digested the burden of our earlier memorandum, they should have been satisfied by the extensive authoritative evidence to the contrary which we adduced. That evidence was best summed up with the statement from the U.C.L.A. Report "that homosexuals are discreet as to whom they solicit" and "that citizens are not outraged by this type of behavior." (p. 699)

At this point in history, it should not be necessary to point out that, where government claims to rest on the consent of the governed, those charged with framing legislation should engage in some form of discussion with those whom the contemplated laws are intended to affect, unless the objects of the legislation by lunatics, minors, or persons suffering from some other form of physical, mental, or legal disability. There is no evidence that this course was ever followed by the Commission with respect to its laws involving homosexuality, or that any effort was made to consult with responsible homosexuals or with representatives of the several homophile organizations in this state, with a view to eliciting their opinions regarding the proposed laws. Had this been done, there is reason to think that those responsible for drafting these criminal provisions would have been more sensitive to the immensity of the injustices for which statutes on the order of sec. 2C:34-3 are responsible, and to the extent to which they bring within their penal scope citizens who can in no legitimate sense be considered moral reprobates -- unless they be so denominated because of their sexual orientation. With that in mind, and conscious of the fact that the proposed penal code for New Jersey is calculated to become the legal framework for this jurisdiction for decades to come, it is hoped that this obvious wrong will yet be redressed. To do less would mean that the long-standing grievances of the nation's second largest minority -- second only to its black minority -- will have been ignored by the framers of sec. 2C:34-3. This would be tragic, and is but further reason for reexamining the premises on which sec. 2C:34-3 rests.

It has frequently been suggested that, as "liberal" as the commissioners might wish to be, they have precluded from incorporating in the proposed penal code their own true views in the area of homosexuality for fear that the entire penal code -- of which they are justly proud -- would be jeopardized in the Legislature. This is political expediency at its worst. The public has a right to expect that Commissioners appointed to draft a penal code for this state will recommend what they, in good conscience, deem the law should be. The place for compromise on the grounds of political expediency is in the halls of the Legislature, not in the recommendations of the Commissioners. Even if some compromise were in order, the undersigned must ask why it is the homosexual minority which must make such a sacrifice in the interest of the code as a whole. There are heterosexual reforms in the proposed code on the passage of which hang the destinies of far fewer people than those encompassed by the solicitation laws. If political compromise in the area of sexual conduct is to be in the order of the day, then equity demands that those compromises be sought in areas which affect the smallest number of citizens. In truth, however, the apprehensions voiced regarding the legislature fate of the code if sec. 2C:34-3 were moitted are misplaced. No proposed penal code has ever been lost in any state because of its suggested sexual reforms. In New York, in 1965, when the Legislature refused to go along with the proposal of the Temporary State Commission on Revision of the Penal Law and Criminal Code that sodomy between consenting adults in private be legalized, the code with the sodomy reform proposal was nevertheless enacted unchanged, and a new sodomy law was passed by separate bill. In Colorado, where a similar provision for sodomy reform was removed by one house of the Legislature, the original reform provisions as recommended by the Colorado Penal Law Revision Commission were what finally emerged from the conference committee of the two houses and what were ultimately enacted. In sum, there is no evidence anywhere that, where revision commissioners have acted in accordance with their own consciences in the area of sex, their entire penal code has been jeopardized.

The undersigners earnestly hope that this memorandum will be given the consideration which its earlier one to your Commission evidently failed to receive, and that it will lead to an opportunity for personal consultation with at least

some of the Commissioners.

Respectfully submitted,

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Co-chairmen National Committee
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Section 2C:34-3 --- LOITERING TO SOLICIT SEXUAL ACTIVITY

"A person is guilty of a petty disorderly persons offense if, under circumstances in which his conduct causes offense or alarm to others, he loiters in any public place with purpose of soliciting another or offering himself for the purpose of engaging in sexual activity."

14 June 1972

MEMORANDUM FOR THE JUDICIARY COMMITTEE
NEW JERSEY ASSEMBLY

This memorandum deals with Sections 2C:34-1 and 2C:34-3 of the proposed New Jersey penal code draughted by the Criminal Law Revision Commission.

First, with respect to Section 2C:34-3, involving "loitering to solicit sexual activity." This provision should be excised from the proposed code in its entirety. This is because it flies in the face of modern legal thought, is inconsistent with the rest of the penal code, and is of doubtful constitutionality. On many occasions it has been pointed out that, if someone who is solicited is not interested in the proposal, such person need only say "No" to the solicitor. The proposed code specifically decriminalizes all forms of sexual activity so long as the conduct involves only consenting adults in private. This means that solicitations to engage in such conduct -- when the acts are to take place between consenting adults in private -- are merely requests to engage in perfectly licit activity, proscription of which violates rights protected by the First Amendment.

The Criminal Law Revision Commission evinced considerable concern lest, in punishing solicitations to commit crimes, freedom of speech might be infringed. It quoted from the draughters of the Modern Penal Code, who had stated that it was a matter for the legislature to decide "whether the punishment of solicitations should be curtailed in order to protect free speech." (Model Penal Code, as quoted in Final Report of the New Jersey Criminal Law Revision Commission, Vol. II, Commentary, p. 121.) Regrettably, the Commission did not appear to have manifested the same solicitude for freedom of speech when the solicitation, as here, is for the purpose of engaging in legal conduct, as it manifested in those cases

where the solicitation was for the purpose of committing a crime.

There are other inconsistencies. In the proposed code the Commission has deliberately omitted solicitations of a crime as a separate offense. Instead, if "a solicitation to commit a crime" constitutes "a substantial step in a course of conduct planned to culminate in" the "commission of the crime", the solicitation is treated as a criminal attempt and is punished accordingly. (Final Report, op. cit., Vol. II, Commentary, p. 120 and Vol. I, Penal Code, Section 2C:5-1a(3).) But the code limits the "definition of crimes of attempt to those situations where the offense attempted is a crime." (Ibid., Vol. II, Commentary, p. 113.) The Commission stated:

> "An attempt to commit a disorderly persons offense is, in our view, not sufficiently serious to be made the object of the penal law. Many disorderly persons offenses are too innocuous or themselves too far removed from the feared result to support an attempt offense." (Ibid., Vol. II, Commentary, pp. 113-114.)

Section 2C:34-3 violates these principles in two ways. (1) It creates a separate offense of solicitation, which was supposed to have been eliminated from the code, and (2) it applies it, mirabile dictu, to activities which are perfectly legal! (The code also punishes solicitations to commit prostitution, but prostitution, by definition, is an offense, while private sexual activity between consenting adults is no offense at all.) Under Section 2C:34-3, any young man loitering on a park bench who asks a girl to go to bed with him can be sent to prison. This section is defective for precisely the same reasons that a similar section in the new Colorado code was held to be defective and was therefore struck down by the Supreme Court of Colorado. (See People v. Gibson, 521 Pacific 2nd 774, 15 April 1974.)

A number of states have eliminated provisions on the order of 2C:34-3 in the course of adopting their new criminal codes. Among these are Illinois, Connecticut, Hawaii, and North Dakota. New Mexico has managed to live quite comfortably without ever having had a sexual solicitation law on its statute book. These changes are the result of a growing

recognition that such laws are nothing but relics of a Puritanic past and serve merely to make criminals of otherwise law-abiding people without carrying out any useful social purpose.

Second, regarding Section 2C:34-1, involving "open lewdness." There is no basic objection to this provision except in so far as its language fails to make clear that the conduct to be punished is public conduct, not private conduct. This appears to have been the intention of the framers of the section, for they entitled it "open lewdness." Nevertheless, the omission of clear language limiting the scope of this provision to public conduct is disturbing. To cure the defect, it is proposed that the section read as follows:

> "A person commits a disorderly persons offense if, in a place exposed to public view, he does any flagrantly lewd and offensive act which he knows is likely to be observed by members of the public who would be affronted or alarmed."

The new language is indicated by underlining, and does not alter the meaning of the section in any way.

The whole common-law history of statutes of this kind is against criminalizing lewd conduct when it occurs in private. The common law punished conduct such as indecent exposure, not because of its sexual character, but because it threatened a breach of the peace. This is reflected in many of the older state penal laws, such as the one in New York, which was repealed in 1965 by the present New York penal code. Section 722(8) of the old New York law punished such conduct only when it took place "with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned." The same concept is involved in Section 2C:34-1, which penalizes the conduct only when other persons are affronted or alarmed. Where people are affronted or alarmed, there is a clear risk of a breach of the peace. This fortifies the conclusion that the draughtsmen of this provision had in mind only conduct exposed to public view, since, by definition, a breach of the peace is something which affects the public. To punish con-

duct which is not exposed to public view, such as that occurring within the home or family, even if it be observed by others within the home or family, would extend the criminal law into areas where it has generally not intruded and would go against the entire thrust of modern statutes which protect sexual privacy.

Respectfully submitted,

Arthur C. Warner

Arthur C. Warner

Princeton, New Jersey
3 February 1975