A. CYRUS WARNER
98 OLDEN LANE
PRINCETON, NEW JERSEY

6 July 1970

Spencer Coxe, Esquire, Executive Director
American Civil Liberties Union of Pennsylvania
260 South 15th Street
Philadelphia, Pennsylvania 19102

Dear Mr. Coxe:

I was recently sent -- for the purpose of comment -- a copy of the draft of the new Federal Criminal Code, drawn up by the National Commission on Reform of the Federal Criminal Laws. Upon examination I find that it contains, in the form of section 1853, a typical solicitation statute of the kind which we have both recognised as being extremely noxious. I am enclosing a copy of the provision, together with its appended comment.

Frankly, this comes to me as a great surprise in the light of what Professor Louis Schwartz, director of the draughting group, had told me. True, the provision is clothed in language ostensibly calculated to punish only "conduct . . . likely to cause offense or alarm to others", but, as we all know, these crimes are never reported by persons who have allegedly been offended, but are exclusively a product of vice-squad diligence, with all that that implies. Furthermore, the offense here does not involve any overt sexual act at all, nor even any actual solicitation by word or gesture. Mere loitering with the requisite intent is sufficient. Thus it is broader than the usual solicitation statute which ordinarily requires some form of overt solicitation. It is also broader than many such statutes in that, under the guise of even-handed treatment of homosexuality and heterosexuality, it is applicable to both forms of sexual approach.

The comment indicates that the inspiration for this provision came, amongst others, from the New York Penal Law, section 240.35. What it neglects to say, however, is that that section is applicable only to deviate sexual conduct. When this New York provision first emerged in 1964 from the hands of the Temporary State Commission on Revision of the [New York] Penal Law and Criminal Code, it was directed against both heterosexual as well as homosexual conduct, as here -- "loitering for the purpose of committing, attempting to commit, or soliciting another person to commit a lewd or sexual act." (Section 250.15(3).) As a result of public hearings, it was subsequently recognised that the proposed language would bring within its purview any youth loitering on a park bench who asked a girl to go to bed with him. The state commissioners therefore amended the provision so that, as finally enacted, it applied only to loitering "for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse . . . ."

In my view, the phraseology about giving "offense or alarm to others" is quite useless. To begin with, no actual offense or alarm is necessary, only the <u>likelihood</u> of such. <u>De facto</u> the courts will invariably infer such likelihood from the mere presence of a defendant loitering in a sexual recruting locale. I say this advisedly, because, until 1966, the old New York Penal Code, in section 722(8), ostensibly punished only one "who, <u>with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned</u>, . . . frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness." (Italics mine.) In fact, however, the New York courts consistently interpreted this statute as if the italicised words were not present. The same is likely to be the fate of the "offense or alarm to others" provision here. What we have is nothing but a typical solicitation statute, though broader and more encompassing than most. It is bad not only on policy grounds, but, like all such statutes, it is open to serious constitutional objection. Very nearly all sexual solicitations, whether homosexual or heterosexual, are for acts intended to be performed in <u>private</u>. Since sodomy between consenting adults in private will no

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longer be a crime under the proposed Federal Criminal Code, this means that almost all these solicitations will be for acts which will be perfectly licit. Thus the provision proscribes loitering with intent to solicit the commission of a legal act. This raises serious first and fourteenth amendment questions

My initial reaction was to bring this to the attention of Melvin Wulf, and to suggest that the national A.C.L.U. make representations to the national draughting group responsible for this provision. Further reflection, however, has led me to believe that you, Mr. Harvey, and I should meet with a view to our discussing the possibility of our jointly approaching Professor Schwartz at the University of Pennsylania Law School, who is the director of the whole undertaking. He, in turn, would immediately bring in Milton Stein, one of his former protégés, who is a senior staff counsel for the project. This would not only enable us to work entirely within Philadelphia, but would have the added advantage of saving time, since, despite the arrival of the study draft only a few days ago, the deadline for submitting suggestions is 1 August 1970. If you think it advisable we can, of course, bring Mr. Wulf into the picture, but I am inclined to think that the method outlined may have more force than more formal representations from the national A.C.L.U. office in New York.

I shall be glad to meet with you and Mr. Henry at any time you suggest -- hopefully very soon -- and I shall also be willing to do whatever work is necessary to draught any formal memorandum which you may think proper for submission to Professor Schwartz.

I look forward to your reply.

Very sincerely yours,

A. C. Warner

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FEDERAL CRIMINAL CODE (Study Draught)

Section 1853. Loitering to Solicit Sexual Activity

(1) Offense. A person is guilty of a Class B misdemeanor if, under circumstances in which, in fact, his conduct is likely to cause offense or alarm to others, he loiters in any public place with intent to solicit another or offer himself for the purpose of engaging in sexual activity.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 201. [Section 201 /(a)/ Federal jurisdiction to penalize an offense under this Code exists under circumstances which are set forth as the jurisdictional base or bases for the offense. . . . Bases commonly used in this Code as as follows: (a) the offense is committed within the special maritime and territorial jurisdiction of the United States.]

COMMENT

Sections 1852 [Indecent Exposure] and 1853 penalize sex-related behavior involving a substantial likelihood of alarming or giving serious offense to others. The drafts are derived from modern code revisions (N.Y. Pen. Law sections 245.00, 240.35; Mich. Rev. Crim. Code sections 2325, 5560(c); Calif. Pen. Code Revisions sections 1609, 1610; A.L.I. Model Penal Code sections 251.1, 251.3). In order to minimize constitutional vagueness problems, both sections prohibit overt conduct: Actual sexual exposure, and conduct manifesting an intent to solicit or offer sexual activity under circumstances in which it would be offensive or alarming. Note that section 1853 applies both to normal and deviate sexual solicitation. The concept of offense or alarm to "others" is an effort to define a kind of public nuisance; it would not reach, for example, an isolated private proposal of sexual relations although the addressee might find the proposal offensive. On the other hand, loitering for the purpose of making proposals indiscriminately to persons in or near a public facility involves so high a likelihood of offending others that restraint on such activity appears warranted. Conceivably, prosecution of offenses under section 1853 should be limited to cases where complaint is lodged by one, other than a law enforcement officer, who has been annoyed.