A. Cyrus Warner
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Dear Dr. Humphreys,

Enclosed you will find a copy of the revised paper on the solicitation statutes, together with my covering letter of transmittal to Professor Krislov, editor of Law & Society Review. I trust you will not think me presumptuous for having mentioned you as the person who was kind enough to suggest that I submit this to the journal.

You will notice that I have eliminated the erroneous statement on page 3 of the original version to the effect that the homosexual solicitation statutes "account for well over 90% of all convictions for homosexual offences". This is a result of your having pointed out my error on this score. Instead, I have substituted what now appears at the bottom of page 3 and the beginning of page 4 of the revised version. Some other changes and revisions have also been made, but they are few, and most of them are of little consequence.

I see where your book has now been published. Recently I had the privilege of reading the most interesting précis of your publication which you wrote for last month's issue of Trans-action. This I found most helpful, since it provides a useful overview of your investigations and serves as a supplement to the volume itself. You are to be congratulated for a very great achievement. The Mattachine Society of New York has requested me to enquire whether you can arrange to have a review copy sent to its offices, 243 West End Avenue, New York, N. Y., 10023. To this I should like to add my own request for a copy for myself.

I was in Boston last month, where I attended a dinner held by the Boston group, now known as the Homophile Union of Boston (H.U.B.). The organisation has developed very well, and presently boasts more than 70 members, with its own rented offices staffed throughout the week, a regular attorney, and a permanent meeting place. The dinner was held at Father Upsom's church, and was attended by about 60 persons. This, and an earlier reception, gave me a welcome opportunity to meet Father Upsom, the Episcopal priest who has done so much to assist in the formation of the society, and whose kindness and help have been proverbial. He is a most remarkable person, and the Boston people are very much in his debt.

I am informed that you are thinking of seeking an academic position in the East. Whether this is actual fact or mere rumour, I do not know, nor do I know if I am violating any confidence by mentioning it, but I can say that the very thought of your establishing yourself in an area where we might be able to see more of each other is a source of delight to me.

I have taken the liberty of enclosing a copy of the unanimous decision of the three-judge federal district court in Dallas holding the Texas sodomy statute unconstitutional. This is the first concrete accomplishment of the N.A.C.H.O. legal committee which I have the privilege of heading. Mr. Henry McCluskey, Jr., a member of the committee, who planned the litigation and who saw it through to its successful conclusion, has a brilliantly inventive legal mind, and the final victory is a tribute to the unusual legal strategy which he devised. What he did was to use an ordinary, garden-variety case of sodomy arising in public as a means of challenging the constitutionality of the Texas sodomy law to the extent that it proscribes homosexual conduct in private. Until now we have been waiting and waiting -- and would probably have continued to wait until Kingdom come -- for a case where the authorities in some state actually prosecuted an act of sodomy between two consenting adults occurring in private. Only in this manner had we hoped to be able to challenge the constitutionality of state laws penalising such acts when per-

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formed in private. The trouble with this is there just are no such prosecutions. What McCluskey did was to devise a legal technique to test the constitutionality of such private acts of sodomy by using a case in which the acts themselves take place in public. The technique does not claim that the state does not have a constitutional right to proscribe acts of sodomy when they take place in public. What is does do is simply to make use of cases where the acts occur in public in order constitutionally to test state laws which punish acts of sodomy taking place either in private or public. Since this is true of the sodomy laws in every jurisdiction except in Illinois -- and in Connecticut after 1971 -- the result is nothing short of a tour de force and opens up every sodomy law in the country to constitutional attack.

When I visited Henry McCluskey in Dallas last summer to discuss the case, which had not yet gone to trial, the local Dallas chapter of the A.C.L.U. had declined to enter the litigation as amicus curiae. This gravely effected the chances for ultimate success. I therefore telephoned Mr. Melvin Wulf, national legal director of the A.C.L.U. in New York and also a member of my committee. As a result of this and several further conferences with Mr. Wulf, he ordered the Dallas chapter to intervene. This brought Professor George Schatzki of the University of Texas Law School into the case. He it was who wrote the brief on appeal. What probably clinched the case were the two parties who were permitted by the court to intervene -- a homosexual who admitted to acts of sodomy in private but not in public, and a heterosexual married couple who admitted to acts of heterosexual sodomy in private. The court, as you will notice, rested its decision on the claims of the latter couple, not on those of the homosexual intervenor. This constitutes a weakness in the decision from our point of view because, technically speaking, it means that the state of Texas -- which is presently without any sodomy law at all applicable to any form of sodomy until a constitutionally proper one is enacted by the legislature or until the state successfully challenges this decision in the U. S. Supreme Court, a rather unlikely possibility -- can enact a new sodomy law which will continue to punish homosexual acts of sodomy even when performed in private so long as it exempts from the law's purview acts of heterosexual sodomy between married couples. But the chances are small of this taking place. Any new law in Texas is likely to follow the Model Penal Code and exempt from all penal sanctions sodomy when performed by consenting adults in private, whether heterosexual or homosexual. In fact, this is just what has already happened in Dallas, where a new municipal ordinance, hastily passed in response to this decision, punishes deviate sexual acts only when performed in public. In the meantime, the state of Texas as a whole is without any sodomy law whatsoever.

I do hope that you continue firm in your intention to attend the national conference of N.A.C.H.O. in San Francisco next August. A national seminar on "Homosexuality and Social Policy: The Role of the Churches" will be held during the two days prior to the opening of the conference. This is being arranged by Professor Louis Crompton of the University of Nebraska, chairman of the religious committee of the N.A.C.H.O. I have reason to believe that he will be communicating with you about this -- if he has not already done so -- in the hope that you will make plans to attend and also to participate in it.

Again permit me to congratulate you on the well-deserved success of your book.

With all good wishes, I am

Very sincerely,

Arthur Warner

Arthur C. Warner

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