This brief was submitted to the National Commission on Reform of Federal Criminal laws. It resulted in the excision of section 1853 from the proposed Federal Criminal Code, and the substitution therefor of a new section, 1861, which was draughted in accordance with my suggestions. In this form the proposed federal criminal code was submitted to the Congress in 1970, eventually becoming known as S.1.

The following memorandum is submitted with respect to section 1853 of the new Federal Criminal Code which, in the view of its writers, is most objectionable. This provision is ostensibly framed to protect individuals from "conduct. . . . likely to cause [them] offense or alarm," yet the likelihood of a private citizen's making complaint under its provisions is remote indeed. It is well known that arrests for solicitation offenses are almost entirely police-instigated affairs, with all that that implies. Those who are familiar with "The Consenting Adult Homosexual and the Law," that seminal article which appeared in the U.C.L.A. Law Review for March 1966, will remember -- even if they themselves have no personal knowledge of the subject -- that the authors stated unequivocally that complaints from private persons "are rare." (p. 697, note 83). The only persons who are going to complain under section 1853 are vice-squad officers, whose tender sensibilities have been offended by the solicitations they directly encourage. Thus, ab initio, this section is based on a set of assumptions which are at variance with the empirical facts.

But this is only the beginning. The provision not only requires no overt sexual act of any kind; it does not even require an actual solicitation. The mere fact of loitering with the prerequisite intent is sufficient to bring criminal sanctions. This is truly shocking, and goes far beyond existing solicitation statutes, which usually require an actual solicitation before any crime is committed. True, section 240.35 of the New York Penal Law, from which the instant provision is derived, likewise requires no actual solicitation. But this New York law, like section 1853, is based on section 251.3 of the Model Penal Code, that lamentable provision against which the whole thrust of a lengthy memorandum by one of the present writers was directed two years ago.

The old New York solicitation statute, section 722(8) of the old penal code, which was replaced in 1966 by section 240.35 of the new code, had required an actual solicitation before any crime was committed; mere intention to solicit was insufficient. Thus the baleful effect of section 251.3 of the Model Penal Code in New York was to broaden the scope of the former solicitation statute. This is hardly the direction in which legislation in the area of sex should be moving at the present time. One has a right to expect something better than this retrograde provision of the Model Penal Code in the new Federal Code, which will probably serve as a model for the entire country for years to come. The fact that the state of Illinois has now gone for more than eight years without any solicitation statute of any kind, except for solicitations for prostitution, and has suffered no socially deleterious effects therefrom, should constitute proof positive that such statutes serve no demonstrable social purpose.

The term "retrograde" is used advisedly to describe both section 251.3 of the Model Penal Code and its progeny, section 1853 of the Federal Code. The latter corpus will, of course, be added to the body of state criminal statutes which are presently the only laws applicable in those areas to which federal jurisdiction will be extended. In the case of Illinois, this means the reintroduction, via section 1853, of the offense of soliciting, which it had been hopefully thought had disappeared forever in Illinois with the enactment by the Illinois legislature in 1961 -- effective in 1962 -- of a new criminal code which represented a milestone in penal reform. Admittedly, the number of occasions which will give rise to the exercise of federal jurisdiction in Illinois will be small, and the number of federal prosecutions under 1853 will be correspondingly very small. But this does not alter the fact that the door to an occasional prosecution for solicitation has been reopened in Illinois, and to characterize this as anything but retrograde would be an understatement.

The precedent here established is very bad. It could lead to the re-enactment by the state of Illinois of its old homosexual solicitation law or to the enactment of a new one, thus destroying the fruits of years of patient reform efforts. Alone among the states, Illinois repealed both its sodomy and homosexual solicitation laws in 1961, thus deliberately ignoring the Model Penal Code with its section 251.3. For this reason it has become the national model for reformers in the field of homosexual law reform. The very thought that the Federal Criminal Code in Illinois might work to modify in any small degree this progressive legislation is ample cause for alarm. It is a sad day indeed when the federal presence in any state, instead of constituting a progressive model for the state to emulate, will stand for the forces of regression.

It should be noted that section 1853 is much broader than New York's section 240.35(3) which inspired it. Under the guise of even-handed treatment of homosexual and heterosexual solicitation, 1853 is made applicable to both forms of sexual approach. The comment thereto neglects to point out that the New York provision on which it is modelled 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 and homosexual conduct -- "loitering for the purpose of committing, attempting to commit, or soliciting another person to commit a lewd or sexual act." (See State of New York, Senate-Assembly 1964, Senate printed Bill 4690, Assembly printed Bill 6187, section 250.15(3).) Subsequently, as a result of public hearings, it was recognized that the proposed wording would bring within its purview any youth loitering on a park bench who asked a girl to go to bed with him. The New York 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." (Present New York Penal Code, section 240.35(3).)

One may contend that all this is true, but that, unlike the New York law, section 1853 becomes operative only for conduct involving a likelihood of "offense or alarm to others." This is empty verbiage which can and will have absolutely no practical effect. In no sense does it mitigate the noxiousness of this statute. To begin with, no actual "offense or alarm to others" is necessary; only conduct "likely to cause offense" is required. This is so vague as to be meaningless. The courts will do with this language precisely what the New York courts did with the provision requiring a "breach of the peace" which was an integral part of the old New York solicitation law, section 722(8), before it was supplanted by section 240.35(3). The former section 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 writers'.) The New York courts consistently interpreted this statute as if the italicized words were not present. This is precisely the judicial fate in store for the language of section 1853 regarding "conduct . . . likely to cause offense or alarm to others." De facto the courts will infer a likelihood "to cause offense or alarm to others." from the mere presence of a defendant loitering in a sexual recruiting area without being able to give a good account of himself.

It should also be noted that the ostensible attempt of section 1853 to deal even-handedly with both heterosexual and homosexual solicitation is another pious mouthing without substance. The whole trend of modern law enforcement in the area of sex is to employ laws originally enacted with heterosexual conduct in mind almost exclusively against homosexuality. 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 against heterosexual conduct is concerned.

A case of homosexual solicitation occurring in Denver, which the national legal committee of the National Conference of Homophile Organizations recently entered as amicus curiae, involves just this kind of partisan misuse of laws originally enacted for the suppression of certain heterosexual conduct. In this instance, a Denver municipal ordinance is involved. Enacted to suppress "offenses relating to prostitution," it makes it unlawful "for any person to be in or near any place frequented by the public . . . for the purpose of inducing, enticing, or procuring another to commit a lewd act or an act of prostitution." The almost total absence of prosecutions anywhere for heterosexual sodomy, although the sodomy laws of almost all jurisdictions include such acts within their reach, is further proof of the discriminatory administration of such laws. Any realistic appraisal of section 1853 must conclude that it will be enforced almost exclusively against homosexuals and entirely by vice-squad officers. This being so, the observations made by the authors of the U.C.L.A. Law Review article are particularly pertinent. Homosexuals, the authors noted, either are "discreet as to whom they solicit or . . . /private/ citizens are not outraged by this type of behavior." They also stated that "interviews with enforcement agencies indicate that most homosexuals who are 'cruising' for partners do not brazenly solicit the first available male; rather, they will employ glances, gestures, dress and ambiguous conversation to elicit a promising response from the potential partner before an unequivocal solicitation for a lewd act is tendered." (pp. 698-699 and note 84.)

If there be any doubt as to the intended thrust of section 1853, it is provided by the comment which accompanies it. This speaks of the need to suppress "loitering for the purpose of making proposals indiscriminately to persons in or near a public facility." Since public facilities intended for the use of one sex are not customarily open to members of the other, it is clear that the only sexual proposals which this law is, de facto, calculated to punish are homosexual ones.

There are further serious objections to section 1853. The provision not only goes far beyond most solicitation laws in not requiring an actual solicitation, it is also likely to prove worse than other solicitation statutes in other respects as well. For example, it furnishes an added fillip to the activities of those petty blackmailers who batten under the protective penumbrae of all solicitation statutes. This is because the phrase "likely to cause offense or alarm to others" will provide an additional handle for blackmailing activities. Every young extortionist who has had experience "shaking down the queers" will know that, by claiming to have been "offended" by his victim's solicitation, and by threatening to report him to the authorities, his chances of a successful blackmail will be enhanced.

This is not to mention the continued opportunities for the rankest kind of police shakedowns which section 1853, like all solicitation laws, encourages. Whitman Knapp, chairman of the New York Commission presently investigating the New York City police department, has stated publicly that "our laws dealing with such problems as gambling, the Sabbath, and sex are . . . an important source of [police] corruption." (As quoted in the New York Times, 7 June 1970, page 65, column 1.) In addition to conducing to outright police corruption, section 1853, again like all solicitation laws, is open to capricious enforcement, thus allowing the police to use it for purposes of harassment, or as a means of filling their monthly arrest quotas when the need arises. This is not the kind of even-handed enforcement of penal legislation which the law presupposes.

The truth is that section 1853 assumes a condition of public sensitivity to sexual solicitation, whether homosexual or heterosexual, which is at variance with all known facts of contemporary life. The whole concept of sexual solicitors imposing themselves upon affronted and offended innocents is a construct of the Victorian age. Whether it was a valid assumption even then is debatable; certainly

it is not true today. Even if people were sufficiently offended by simple sexual solicitations as to warrant the intervention of the criminal law -- a proposition the validity of which has not been demonstrated -- the question remains whether an ordinary adult in full command of his mental faculties should not be expected to say "No" to an unwanted sexual proposal without the interference of the criminal law.

The situation is no different than the case of any other peddler who brandishes wares which are rejected by those who do not wish them. This analogy is not posed facetiously. It is significant that the English statute of 1898, which is generally recognized as being the archetype of all our present solicitation statutes, does not go nearly as far as section 1853. ("Every male person who in any public place persistently solicits or importunes for immoral purposes shall be deemed a rogue or vagabond within the meaning of the Vagrancy Act of 1824 and may be dealt with accordingly." 61 & 62 Vict., cap. 39.) This law, enacted in the heyday of Victorian prudery, offers no protection to persons supposedly "offended or alarmed." More important, it punishes only overt acts of solicitation, and then only if the conduct is "persistent." And the English courts are exceedingly careful to insist that a defendant be shown to have engaged in <u>persistent</u> importuning before he can be convicted. No doubt this comes from a recognition that only repeated soliciting is likely to cause any public nuisance. This is not to suggest that an English criminal statute passed three years after the conviction of Oscar Wilde should become the model for the forthcoming Federal Criminal Code. On the contrary, one has a right to expect something more enlightened than this Victorian specimen -- rather than something more retrograde -- from a Federal Code which promises to set the pattern for this nation's penal legislation during the coming decades.

The framing of general homosexual solicitation statutes applicable to sexual

proposals made in any public place, but based upon experience limited, for the most part, to public restrooms, makes as much sense as framing laws for regulating the conduct of women college students based only on experience with prostitutes. Yet to a marked degree, this is what section 1853 has done. All solicitation statutes, including section 1853, are based on the false assumption that almost all homosexual solicitations take place in public restrooms, that they are almost all essentially sordid in character, and that they constitute a public nuisance. The truth is that these solicitations are made in so many different public places that it is impossible to list them -- in men's locker rooms, in gymnasia, on beaches, in public parks, in bars, in bus and train terminals, in churches -- in all the variegated locales which are to be found in any modern industrial society. Homosexual solicitations occurring in areas unconnected with public restrooms rarely carry any of the offensive overtones commonly ascribed to this form of soliciting. Yet it is in public bars and parks frequented by homosexuals that vice-squad officers in mufti, whose professional efforts are devoted to the enticement of unsuspecting homosexual solicitors, make their greatest number of arrests. Enticement by plainclothesmen raises serious questions of police methods, regardless of whether or not their conduct goes as far as to constitute legal entrapment. This is over and above the central question as to whether the proposed Federal Code should perpetuate arrests for conduct so manifestly inoffensive and harmless.

A very close friend of one of the writers of this memorandum -- a young man, homosexual, who had graduated from Yale with high honours and had then subsequently graduated from the Harvard Law School -- but had not yet been admitted to the bar -- was arrested several years ago while sitting on a park bench in a Washington, D.C. park. He had been engaged in private conversation for almost half an hour with a vice-squad officer of whose identity he had been unaware. The conversation finally came around to matters sexual, and the victim invited the officer

to go to his hotel room for homosexual purposes. He was immediately seized and placed under arrest, a second officer emerging out of the nearby bushes to assist in this purpose. The defendant was charged with "making an indecent proposal," the District of Columbia's form of solicitation statute. Though he engaged a lawyer, he was persuaded to plead guilty and, although sentence was suspended because he had no previous criminal record, the defendant was never able to gain admission to his state bar because of this "morals" conviction.

The case is typical of hundreds, if not thousands, of similar ones which arise throughout the country every year. It demonstrates that the lightness of the penalties which are customarily imposed in no way reflects the lifetime suffering and the scarifying effects which these "morals" convictions inflict. Merely an arrest under one of these statutes, even though followed by an acquittal or by the dismissal of all charges without trial, frequently results in the loss of a man's job and permanent damage to his career. Are these the kind of prosecutions which the new Federal Criminal Code should encourage?

It is not only the "public nuisance" aspect of these statutes which constitutes a fiction in the great majority of cases. The claim that the solicitations which are involved are public acts represents another myth. All solicitation statutes require that the solicitation be made "in public" or "in a public place," for it is generally conceded that the same sexual proposal, if made in private, is not subject to the criminal law. (Since section 1853 requires no overt solicitation, the loitering with the requisite intent must occur in a public place.) Yet it is only faulty logic which considers private conversations to be public acts merely because they take place in a public location. A private conversation between two persons is no less private because it takes place in the midst of a public meeting rather than in a private bedroom. The locus of the solicitation should not determine whether it is public or private in character. These solicitations are, in

reality, 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. In the vast majority of cases, these private conversations offend no one.

This raises the most serious of all the objections to section 1853, and that is its questionable constitutionality. Almost all solicitations, whether homosexual or heterosexual, are for acts intended to be performed in private. Since the proposed Federal Criminal Code does not contemplate punishing sodomy or any other form of homosexuality when it takes place between consenting adults in private, and since, by definition, the heterosexual equivalents of such private homosexual acts are not crimes, it is clear that section 1853 punishes persons for loitering in public for the purpose of soliciting others to engage in perfectly licit conduct.

Since it is assumed that one has a constitutional right to communicate with others to persuade them to engage in legal conduct, one must enquire what constitutional warrant exists for criminal sanctions against solicitations for patently legal acts. To prohibit solicitations for sodomy intended to be performed in private between consenting adults after all criminal sanctions for such acts have been removed is an unconstitutional attempt to punish requests to engage in a perfectly legitimate activity. Once sodomy between consenting adults in private is lawful, the legislature is constitutionally prevented from punishing the use of legal means to consummate that conduct. In truth, section 1853 is in serious violation of both the first and fourteenth amendments. If it be argued that the threat of "offense or alarm to others" provides a sufficient constitutional base, the answer is clear. Ever since the Jehovah's Witnesses cases decided by the Supreme Court in the nineteen-thirties, no one can seriously contend that first amendment liberties may be proscribed simply because their exercise affronts others. Section 1853 is not only of very dubious constitutionality, but it is

contrary to the rationale which prompted the removal of criminal penalties against sodomy between consenting adults in private.

The authors of this memorandum yield to no one in their concern that the public be able to use public facilities free from offensive conduct, regardless of the purpose in the minds of those whose conduct causes offense. They are equally anxious to preserve the fundamental right of every citizen to go about in public places free from annoyance or alarm occasioned by others. Statutory suggestions to accomplish these objectives will be found below. But, before proposing any remedies, some attention must be directed to what it is that the law should seek to accomplish. The objection to all solicitation statutes is that, whilst claiming to protect the public from affront or alarm, they are also framed so as to punish some form of "immorality" or "lewdness" as well. That is, as vestiges of a Puritanic past, they attempt to ride two horses at once -- the suppression of public nuisances and the punishment of vice. In reality, they are "morals" statutes encapsulated within language purporting to "protect" the public from "offenses" which the public itself does not find sufficiently offensive to report to the authorities. As a consequence, the only persons who are "offended" are vice-squad officers.

Modern penal legislation must rid itself of this harmful Victorian legacy. It should frame statutes which punish conduct that in fact annoys or alarms others, whether this conduct be sexual or non-sexual in character. The law should direct its attention to the injury inflicted upon innocent persons and not concern itself with punishing "immorality." This means that the proper vehicle for such legislation is a harassment statute, not a solicitation statute or any other form of "morals" law.

The law must once and for all eschew the role of moral censor. Its duty is to protect whatever genuine societal interests are at stake; enforcing standards of

sexual rectitude upon its citizenry or prosecuting them for manifesting unconventional sexual desires is not its legitimate province. (The reference here is only to sexual proposals, not to overt sexual acts in public.) It is for this reason that section 1853 is so objectionable. If protection of the public against conduct "likely to cause offense or alarm" be its desideratum, of what relevance is the purpose for which the defendant loiters -- whether it be to solicit for sexual purposes, to play the role of voyeur, or to alarm a user of public facilities in some non-sexual manner?

There are countless forms of conduct which are likely to cause alarm or annoyance to others, only a distinct minority of which are sexual in character. Why, then, frame a statute with exclusively sexual motives in mind, one resting so heavily on experience in public restrooms, even though this may be an area where the law will be frequently invoked? If modern legislators are sincere in their professed desire to suppress public nuisances, they should confine their activities to this worthy social end, and stop trying to punish immoral people in the process. The latter has traditionally been the role of the Church, but today even many ecclesiastical authorities have given up the practice. Certainly it is a role alien to a modern state. That is why section 1853 should be expunged in its entirety, and why, in its place, there should be substituted an expanded section 1618 which, as it now appears, is totally inadequate. The provisions set forth below are intended as an amplification of section 1618. They are very similar to the present New York harassment law -- New York Penal Code, section 240.25 -- with some modifications. They proscribe all conduct which annoys or alarms; not merely sexual solicitations. The only substantial addition to the New York law is the introduction of a formal provision incorporating the sense of the precatory comments to 1853 regarding law enforcement officers. The proposed statute reads as follows:

"A person is guilty of harassment when, with intent to harass, annoy, or alarm another person:

(1) he strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact; or

(2) while loitering in a public place, he uses abusive or obscene language or makes an obscene gesture, which language or gesture alarms or seriously annoys such other person; or

(3) he persistently follows a person in or about a public place or places to the alarm or serious annoyance of such person; or

(4) he engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

"Subsections (2), (3), and (4) above may not be invoked where complaint is lodged by a law enforcement officer."

The above goes further than 1853 in protecting the public against annoyance or alarm, but it does so without branding people as "lewd" or "perverted," and without convicting them on "morals" charges. It deliberately refrains from using the words "offend" or "give offense" because of their frequent sexual implications. Instead, it follows the language of the New York law by using the words "annoy" and "annoyance," which are applicable to either sexual or non-sexual conduct. ("Annoy" is really broader than "offend," and includes everything encompassed by "offend" and considerably more.) It is not intended to proscribe all solicitations, but is directed against those where the solicitor refuses to take "no" for an answer and annoys the "solicitee" by his continued persistence. Such cases are as likely to arise from heterosexual as from homosexual solicitations, but the principle is the same. The statute is drawn so that the possibility of vice-squad enticement or of police shakedown is all but eliminated. It provides virtually no opportunity for blackmail. Finally, it is not open to any of the constitutional objections which plague section 1853, Essentially, it lays down three conditions which must be met before the criminal law can be invoked. These are:

(1) The defendant must intend to annoy or alarm someone.
(2) With that intent in mind, defendant must overtly do something.
(3) Defendant's conduct must, in fact, alarm or annoy someone.

At the risk of extending this memorandum unduly, one further observation is necessary. Much has been made of recent efforts to repeal the sodomy laws to the extent that they are applicable to the private acts of consenting adults. There is no doubt that the abolition of such laws is only simple justice to the millions of otherwise law-abiding homosexual Americans who are branded as criminals because of their private sexual acts. However, too many people overlook the fact that, even if all such laws were repealed tomorrow, the net effect on the number of arrests and convictions for homosexual offenses would be virtually nil, simply because prosecutions for private homosexual acts are almost unknown.

Repeal of the sodomy laws is necessary, not to eliminate prosecutions for this offense, but to establish the principle that the private sexual conduct of homosexuals 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 [illegible] apprehension which the sodomy laws engender.

Repeal of these laws would also eliminate many of the opportunities for blackmail which this form of homosexual conduct presently provides, although it would leave untouched other blackmail opportunities furnished by the solicitation statutes. It is these solicitation statutes -- whether framed as laws against "soliciting," "loitering," "importuning," or "making an indecent or lewd proposal" -- which account for the overwhelming majority of the convictions for homosexual conduct that does not involve any overt sexual act in public. The ostensible rationale for these statutes is to be found in the very comment to section 1853, namely, that the conduct involves "a kind of public nuisance" which must be proscribed. Merely to state this is to demonstrate that the framers of these laws are ignorant of the true patterns of homosexual solicitation, and have been guided by the common, though

erroneous, stereotype that homosexual solicitations occur principally in men's rest-rooms.

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 these laws be lunatics, minors, or persons suffering from some other form of physical, mental, or legal disability. There is no evidence that this course was followed with respect to section 1853 -- the central criminal statute affecting the lives of hundreds of thousands, if not millions, of homosexual citizens -- or that any effort was made to consult with responsible homosexuals or with the leaders of the numerous homophile organizations in this country, with a view to eliciting their opinions regarding the proposed law. Had this been done, there is reason to think that those responsible for proposing these criminal provisions would have been more sensitive to the immensity of the injustices for which statutes on the order of 1853 are responsible, and to the way in which they bring within their penal scope citizens who can in no sense be considered moral reprobates. With that in mind, and conscious of the fact that the federal Criminal Code is calculated to set the pattern for both federal and state governments during the coming decades, 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 Negro minority --will have been totally ignored by the framers of section 1853, which, from its position as the last substantive article in the whole voluminous Federal Code, seems to have been hastily added as an afterthought. This would be both tragic and shocking, and is but further reason for re-examining the premises on which section 1853 rests.

In conclusion, this memorandum reiterates that this provision is not justified by any legitimate social purpose, that it is inconsistent with the concept of re-

pealing all criminal sanctions against sodomy between consenting adults in private, that it is based on a set of postulates which are disproved by the empirical facts, that it constitutes an unreasonable intrusion into the private conduct of citizens, that it lends itself to capricious as well as to corrupt enforcement by the police, and that it encourages the activities of blackmailers -- all this in addition to its questionable constitutionality. Every one of its aims can be attained better by means of a harassment statute. Section 1853 should be replaced because it conduces to practices which are intolerable in a free and humane society.

Respectfully submitted,

Melvin L. Wulf, National Legal Director
American Civil Liberties Union

Spencer Coxe, Executive Director
American Civil Liberties Union of Pennsylvania

Arthur C. Warner, Chairman
National Committee for Homosexual Law Reform