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,

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