

P U B L I C H E A R I N G

before

ASSEMBLY JUDICIARY COMMITTEE

on

PROPOSED PENAL CODE
(Assembly Resolution No. 13)

Held:
June 20, 1972
Assembly Chamber
State House
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman William K. Dickey (Chairman)
Assemblywoman Ann Klein
Assemblyman Walter C. Keogh-Dwyer
Assemblyman Herbert C. Klein
Assemblyman David A. Wallace

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ASSEMBLY RESOLUTION No. 13

STATE OF NEW JERSEY

INTRODUCED MARCH 13, 1972

By Assemblymen DICKHY and OWENS

(Without Reference)

AN ASSEMBLY RESOLUTION directing the Judiciary Committee of the General Assembly to review the proposed Penal Code prepared by the Criminal Law Revision Commission and to report thereon on or before October 1, 1972.

1 WHEREAS, The Criminal Law Revision Commission has submitted
2 a comprehensive report and a proposed New Jersey Penal Code
3 which the Legislature should consider for enactment at the
4 earliest practicable time; and

5 WHEREAS, The proposed Penal Code has been widely distributed
6 and is the subject of in depth study by law enforcement officers
7 at State, county and municipal levels, the judiciary and members
8 of the bar and their recommendations with respect to its pro-
9 visions should be solicited and considered; and

10 WHEREAS, Enactment of the proposed Penal Code will necessitate
11 revision, compilation or other appropriate legislative disposition
12 of a number of statutory provisions not included in the draft of
13 the code as prepared by the commission; now, therefore

1 BE IT RESOLVED *by the General Assembly of the State of New*
2 *Jersey:*

1 1. The Judiciary Committee of the General Assembly is requested
2 and directed to review the proposed Penal Code as submitted to the
3 Governor and the Legislature by the Criminal Law Revision Com-
4 mission, confer with the commission, the Supreme Court, the
5 Attorney General, county prosecutors and other law enforcement
6 officers and agencies, hold public hearings on the proposed Code
7 and report to the General Assembly on or before October 1, 1972
8 with a proposed Penal Code in appropriate form for consideration
9 and enactment into law.

1 2. The Judiciary Committee shall be entitled to avail itself of the
2 assistance of such legislative, executive and judicial agencies as
3 may reasonably be made available to it and shall invite the mem-
4 bers of the Judiciary Committee of the Senate to sit with it in the
5 public hearings it is hereby requested to conduct.

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ASSEMBLYMAN WILLIAM K. DICKEY (Chairman): Ladies and gentlemen, this is a public hearing of the Assembly Judiciary Committee, pursuant to Assembly Resolution Number 13, authorizing this Committee to hold public hearings concerning the proposed Penal Code. The Penal Code was prepared by the Criminal Law Revision Commission which has submitted its report, dated October, 1971.

The members of the Committee present today are Mrs. Ann Klein of Morris County, Mr. David Wallace of Hudson County. My name is William Dickey. I am Chairman of the Committee and am from Camden County. There may be other members of our Committee attending. I will introduce them when they arrive.

I should like to call as our first witness the Chairman of the Criminal Law Revision Commission, Professor Robert E. Knowlton of Rutgers Law School. Professor Knowlton, will you step up to the desk which has my name on it.

Professor Knowlton, we are very pleased to have you with us today.

I see one additional member of our Committee is now present, Assemblyman Walter Keogh-Dwyer of Sussex County.

Professor Knowlton, thank you very much. You may proceed.

R O B E R T E. K N O W L T O N: Thank you, Chairman Dickey.

At the outset, as Chairman of the Commission, I would like to thank the Legislature through this Committee for establishing the Commission and for funding it so that we could do our work.

Secondly, I would like to thank the Legislative Reference Agency for its assistance in the drafting of the proposal that we have made.

I expect to speak very shortly and in general terms now, but I do want to impress upon the Committee, for

myself and I believe for all of the members of the Commission and of the Commission's staff, that we want to do everything possible that we can to assist you in your work. So I would hope that you will feel free to avail yourselves of our services whenever the opportunity or the need arises.

The statute which created the Commission imposed upon us the obligation of creating a modern Criminal Code for New Jersey. I think our proposal meets those standards. It is a Code which is an attempt to rationalize out the Criminal Law, in the light of Professor Wechler's statement, on a rational Penal Code. The Criminal Law has not grown consistently or rationally. We tried to give it a rational content.

We do other things, I think, that are important in a modern Criminal Code. For example, we tried to formulate in the statute for legislative determination the general principles of Criminal Law, those things that relate to the area of self-defense, justification, culpability, all of the things that we do not have today in New Jersey.

Secondly, we tried to rearrange the sentencing structure. The sentencing structure in New Jersey I think is archaic. It is haphazard. Each crime has its own individual punishment. There is very little rhyme or reason sometimes between the relationship of punishment for rather closely-related crimes.

We have tried to improve the sentencing situation in a number of basic ways. In the first place, we put all the crimes in categories. We have 4 categories of crimes. I believe, and I think it was the Commission's point of view, that the Legislature operating before the fact on general statements cannot make the fine distinctions that the present Code attempts to make.

We have improved sentencing in other ways. We have limited to some extent the discretion of the trial judge in an attempt to avoid what people claim are

aberrational sentences or unduly harsh sentences for different offenders. We have given the Parole Board more power so that the actual operations of the sentencing structure will be more related to the individual involved by the Parole Board's determinations over a longer period of time.

Another thing we have attempted to do is we have attempted throughout the Code to bring the culpability of the offender, what his actual culpability, what his mental state and blameworthiness are, more closely in line with the criminal conduct and the sanction. During the development of the Criminal Law in the past, a number of variations of these mens rea or culpability requirements have been introduced into the law. We attempt to define carefully what they are and to make the offender liable for only that for which he is culpable.

Another thing that we do, and probably the last thing that I want to mention, is that we attempt to avoid the over-extension of the Criminal Law. In the historical development of the Criminal Law, there has been a tendency to make anything you don't like criminal, whether or not it serves any useful purpose to make it criminal.

We have attempted to eliminate some of the crimes that are presently existing. We have attempted to abolish common law crimes, that old catchall for when you didn't like it, you would prosecute him under the common law. And we have attempted to bring it more in line with what current views as to the usefulness of criminal law demonstrates is desirable.

Those basic principles are what we operate on. You will see them throughout the Code. I think that they will improve the Code. I think it will make it a modern Code in New Jersey. And I think all of us agree on one thing at least and that is that in the study of the Criminal Law in New Jersey it is perfectly clear that something has to be done. The present New Jersey Criminal Law is

very chaotic, haphazard and subject to a great number of abuses.

We agree that there has to be a Code. We think we have given you one that you can at least start to operate from in developing a modern Code that will help to solve the problems of Criminal Law.

Finally I want to point out that a new Penal Code won't solve the problems of crime in our society. But we all agree, I think, that it is a necessary first step toward the solution of those problems. I do not think that other remedies and other moves in the area of crime are going to be very successful unless and until we have a new Penal Code. Thank you, Mr. Chairman.

ASSEMBLYMAN DICKEY: Thank you, Professor Knowlton.

I would ask any member of our Committee that would like to ask any questions of Professor Knowlton. Mrs. Klein, any questions?

ASSEMBLYWOMAN KLEIN: No.

ASSEMBLYMAN DICKEY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKEY: Professor Knowlton, would you care for the purpose of informing the Committee to tell us what offenses in the present Criminal Law are either not re-enacted in the Code or are left open for consideration by the Legislature?

MR. KNOWLTON: There are certain areas that we did not deal with and I will tell you why we did not. We did not deal with the drug problem because the Legislature had at that particular time just passed a comprehensive bill. There was no experience under the new law. We had no guidelines to go on in relation to the new law.

We did not deal with abortion because there was a Special Commission on Abortion.

We did not deal with the problem of capital punishment because we were informed that there was going to be a Special Commission on Capital Punishment.

We did very little with the Arms Control Act which had been recently passed at that particular juncture.

Now crimes we left out - one is the provision 2A:85-1 in the present Code. It says that anything that was indictable at common law would be a misdemeanor today. We abolished common law crimes. We say that if it isn't in the statute, it isn't a crime. That has an effect of narrowing the criminal law because I think that common law crimes were originally used very frequently to extend the statutory law. They would say, "Well, it doesn't coincide quite with the statute," but at common law it was indictable.

Another area where we have operated, I think, in this regard is in the disorderly persons violation. I am sorry I can't give you a list of one by one disorderly persons that we have eliminated. But we have eliminated a number of them. Some of them were very antiquated ones. If I recall correctly, there was one about a ten-year-old child going to a theater or some such thing.

We also have taken the criminal law out of the area of consensual sex offenses. We would not make consensual activity, consensual between adults in private, a crime. Today it is. It can be, of course, either fornication, sodomy or some other crime. We have eliminated that. There are others, I would suppose, but I can't offhand give you any more than that, Mr. Chairman.

ASSEMBLYMAN DICKEY: Professor Knowlton, with reference to common law crimes which are now eliminated or will be eliminated if the Code is enacted, under 2A:85-1, can you give the Committee an example of what might be a common law crime that is encompassed within that present statute?

MR. KNOWLTON: Well, I can think of one case offhand where the indictment was for conspiracy. Now we have a

criminal conspiracy statute. But some of the elements of the criminal conspiracy that the Legislature determined should be a part of the crime weren't present. They upheld the indictment under the old Common Law. An example of that might be, under the Common Law, conspiracy to commit a crime is, of course, criminal, but a conspiracy can be criminal whether the means or the end, neither one of which, is criminal. In other words, if you can do something unlawful in combination with somebody else, but not criminal, it will be a crime of conspiracy.

We have, for example, taken goals or means of conspiracy and required that they be criminal. So we have limited the crime of conspiracy in that respect, I think quite rightly, because of the fact that it gives too great a leeway in the Criminal Law to say that anything you find to be illegal would be a crime of conspiracy. That is an example of the type of crime we have taken out.

What I said before is that it was used to enlarge statutory crime frequently by finding the indictment was invalid under the statute but all right at common law.

There are other types of cases - nonfeasance in office is one of those types of cases - the common law crime of nonfeasance. We cover many of those by definitions in our Code. But we believe that the conduct should not be criminal unless the Legislature has determined that it should be criminal and enacted a statute in relation to it.

ASSEMBLYMAN DICKY: I assume the classic crime of common scold is going to be out if the Code is adopted.

MR. KNOWLTON: I assume so. I don't recall anything in the Code that even comes close to that.

ASSEMBLYMAN DICKY: Now with reference to the deletion of the consensual sex crimes, what was the rationale of the Commission in omitting those from the Code?

MR. KNOWLTON: Of course, in all of these matters, the Commission may have debated them. I am not quite sure what their rationale was. I can tell you what my rationale

is on it. When you are talking about consenting adults, it is not conduct that has an effect on any third person. It is in a sense a victimless crime. You have seen in the newspaper recently talk about victimless crimes. It is also conduct which is so infrequently enforced that any enforcement of these laws frequently is arbitrary. It just happens that you happen to find out about somebody. It goes on very widely in today's society. Society does not really think of it as criminal. It is only enforced under very unusual, perhaps haphazard or arbitrary circumstances. And there is no justification in my view of imposing criminal sanctions on a person for this type of conduct. It certainly has been unsuccessful; that is, criminal sanctions in the past have been unsuccessful in deterring the conduct. It goes on, as everybody knows, very frequently. And I think the combination of those factors, that there was no social utility in the criminal law in this area, that there was no victim to this crime, that it was not a crime which affected anybody other than the two people involved, is the rationale for this.

ASSEMBLYMAN DICKEY: Professor, you have mentioned that the Criminal Law with reference to drug problems has not been dealt with because the Controlled Dangerous Substances Law would cover that situation. Is that correct?

MR. KNOWLTON: That is correct. It is a fairly recent statute and we didn't feel that we had any experience to evaluate the operation of that statute at all.

ASSEMBLYMAN DICKEY: You mentioned some antiquated laws that were left out. You mentioned one pertaining to a child going to the movies or theater, I guess. Do you recall any other antiquated laws that you think are being left out in this Code that we now have in our present law?

MR. KNOWLTON: Mr. Graham is writing a few down here for me. We have omitted dueling. That wouldn't be criminal under our revision. It might be an assault and

battery, but it would not be criminal.

We have eliminated mayhem, did you say, John? We have incorporated it. We have consolidated on some of these things. Mayhem is a crime that traditionally goes back to the idea that you gouged or dismembered a person. Now that is within our assault and battery. It is no longer a separate crime.

ASSEMBLYMAN DICKEY: That would be under aggravated assault then?

MR. KNOWLTON: That's right. I don't recall any more of these crimes.

ASSEMBLYMAN DICKEY: All right. Now with reference to the category of crimes, you have indicated that the Code sets up four categories of crime and also capital offenses, as I recall, which would make five. Is that right?

MR. KNOWLTON: That is correct. We did not take a position on capital punishment, but the possibility of a capital crime exists under our classification.

ASSEMBLYMAN DICKEY: Then I seem to recall that there are disorderly persons offenses and petty disorderly persons offenses. Is that right?

MR. KNOWLTON: That is correct.

ASSEMBLYMAN DICKEY: For the information of the Committee, can you tell me the range of recommended penalties in each one of those categories?

MR. KNOWLTON: For a crime of the first degree, which we do not have too many of, it is from 10 years to 20 years; a crime of the second degree is 5 to 10 years; a crime of the third degree is 3 to 5 years; and a crime of the fourth degree is a term not to exceed 18 months. The disorderly conduct is 6 months, the same as it is today; and the petty disorderly is 30 days.

ASSEMBLYMAN DICKEY: Do any of these carry with them fines or is that left open to the court in any way?

MR. KNOWLTON: Fines are left open to the court in most instances. There is a statute on fines. Fines for

first degree would be \$10,000 - well, \$10,000 would be first or second - \$5,000 for second and third - and \$1,000 when the conviction is a disorderly person.

ASSEMBLYMAN DICKEY: What was the possible fine under the third category?

MR. KNOWLTON: \$10,000, first or second; \$5,000, third or fourth; \$1,000 for disorderly person; \$500 for a petty disorderly person.

We have particular provisions about fines incidentally in the criteria for when they should be imposed or should be utilized, and in certain circumstances we allow the fine to relate to the amount of value obtained by the criminal conduct. So we have those special provisions as well.

ASSEMBLYMAN DICKEY: Do I recall correctly that the United States Supreme Court held that disorderly persons offenses should not carry a penalty of greater than six months imprisonment and \$500 fine if it is going to be tried without jury?

MR. KNOWLTON: It certainly is no greater than six months in jail. I didn't realize there was a \$500 limitation on the fine, but I will certainly check that. I didn't realize that.

ASSEMBLYMAN DICKEY: If you would, Professor, we would appreciate your advice on that. I seem to recall that we amended our disorderly persons offenses a couple of years ago to change that penalty to comply with the United States Supreme Court decision.

MR. KNOWLTON: I recall when it was amended. You did do it shortly after Duncan against Illinois. Certainly Duncan holds it cannot be more than six months. But I did not realize there was a fine limitation. We will check that.

ASSEMBLYMAN DICKEY: Now would you care to discuss the category of in tort crimes, Professor?

MR. KNOWLTON: Well, we have in the category the traditional in tort crimes: attempt, conspiracy. The problem there, of course, is to draw sufficient safeguards

so that the conduct which did not give rise to the harm would come within the criminal law and would not be so far removed as to create an ambiguity.

We do redefine both conspiracy and attempts. In the conspiracy section we define the crime - we enlarge the crime in one sense. We require that the conspiracy operates off the mens rea of one party to avoid the problem that if A and B appear to agree to commit a crime, but A was kidding, that B would be liable. So we have changed it in that respect. We have limited the impact in terms of liability to substantive offenses to some extent. In most other respects, it is very similar.

One of the things we did do - we defined conspiracy. We limited the definition in terms of conspiracy to do what. We have certain listed things that the goal of a conspiracy must be, so that we don't get into the problem I mentioned a few moments ago.

In the law of attempt, we have, I think, broadened the impact of the statute. We require that there be a purposeful act, which is the old specific intent requirement of the law of attempt. We have, in fact, then said that conduct which substantially corroborates the intent is sufficient to be the overt act. So we have tried to draw that line in terms of making sure that this is the man that is about to commit the crime, but still expanding it beyond what the present definitions in many jurisdictions require as an overt act.

ASSEMBLYMAN DICKEY: Thank you, Professor. I think some of the other members of the Committee may want to ask some questions. Mrs. Klein?

ASSEMBLYWOMAN KLEIN: Professor, do you have a copy of this in front of you?

MR. KNOWLTON: Yes, I do.

ASSEMBLYWOMAN KLEIN: Because I would like to make some specific references.

On page 24, the discussion of entrapment.

MR. KNOWLTON: Page 24, in ---

ASSEMBLYWOMAN KLEIN: -- in Volume I. On number (b) there, why is it that you recommend that entrapment be tried by the court in the absence of a jury?

MR. KNOWLTON: There are a number of reasons for that. One is, I think, a practical reason and that is that the defense attorney, since entrapment normally is an admission that you have committed a crime -- the defense attorney may very well find it difficult and inconsistent to raise it at the trial. Secondly, is that some of the evidence which may come in on the entrapment issue may be very prejudicial either to the State or the defendant, depending on the evidence, if the issue of entrapment is raised on substantive trial. Finally, I don't myself believe that this type of question is within the traditional ambit of a jury trial. I think a jury trial is helpful and desirable. I think it should be a jury of twelve, as I indicated in my opinion on the other question. I think it is helpful to give an unbiased, brand-new view of the facts, I think it is helpful sometimes to evaluate that conduct in the light of the community mores and maybe ameliorate the criminal law by an acquittal.

But I don't think in this particular case, the issue of entrapment, which is essentially the question of "is this police conduct desirable?" -- that type of question, I believe can be handled better by a court. They are more informed on what is actually involved in the social policies on the issue. They are more informed on what the courts have held to be entrapment. For those reasons, I was in favor of its being tried by the judge rather than the jury.

ASSEMBLYWOMAN KLEIN: On page 59 -- I think this is something new and it occurs also on page 75 -- under 2C:13-5, number 5, the question of criminal coercion, the threat to "bring about or continue a strike, boycott or other collective action, except that such a threat shall not be

deemed coercive when the restriction compelled is for the benefit of the group in whose interest the actor acts." Do you find that kind of a vague wording? Can you tell me what the real intention of that is?

MR. KNOWLTON: I think it is designed to prevent anybody arguing that in a normal strike situation, the threat of a strike would be criminal coercion. That is why it says it is for the benefit of the group in whose interest the actor acts.

You have, I think, a difficult problem, drawing the line between conduct which is socially desirable, is acceptable, to a striking over the working conditions, labor and all the other values that are involved in negotiations of collective bargaining. You also have a strike where obviously a person can be utilizing it for his own personal gain and utilizing his position to bring about the strike for his own personal gain. We thought that was undesirable.

I think that is why we word it the way we do. I don't have any pride in authorship. It is perhaps not the clearest that can be done, but that was our basic conception, at least.

ASSEMBLYWOMAN KLEIN: I don't understand what kind of a situation it would apply to.

MR. KNOWLTON: Mr. Graham said we should go back and look at the purpose, "unlawfully to restrict another's freedom of action to engage or refrain from engaging in conduct."

I think these are devices that could be utilized by people in position to bring about this conduct for purposes that we wouldn't recognize as valid. Clearly, if the member of a group said, "I will bring about this action unless you send me on a trip" - unless you do something that he is not required to do - it strikes me that should be criminal. It is coercion. It is a form of extortion, although here it's not for value in that sense, but it is a form of extortion. It is a form of exerting an

illegal will over a person. But we don't want that to be involved when it is being done for the benefit of the group that that person represents.

ASSEMBLYWOMAN KLEIN: I believe, Mr. Chairman, that that wording is a little vague. I would like to see some attention paid to maybe strengthening the intent of that.

On page 61, I was wondering why the "deviate sexual intercourse" definition was put in there because it doesn't seem to be relevant to anything else. Since we are eliminating these as crimes, it seems rather strange. It is right in the middle of the page.

MR. KNOWLTON: The definition refers to the aggravated sodomy. What we have done is eliminated only sex offenses between consenting adults in private. Now we have been trying to create a parallel structure between heterosexual and deviate conduct. So if there is force or compulsion used, it is going to be equally a crime whether it is force or compulsion to engage in heterosexual activity or to engage in deviate activity.

Therefore, I think my reaction is that the definition is necessary in relation to these other crimes.

ASSEMBLYWOMAN KLEIN: I suggest that the definition doesn't go along with what you said since it only exempts between husband and wife but not any other two human beings. So you are eliminating the consenting adults.

MR. KNOWLTON: That, I think, is correct. Where the consent comes in is that in the definition of aggravated sodomy or in the definition of the other, sodomy itself, it says "he compels." - obviously if it is consent, he can't compel - or "he has substantially impaired the other person's power to appraise or control his conduct," which would vitiate any consent. Down in "sodomy," it is once again "he compels ... he knows that the other person suffers from a mental disease or defect," which would negative the consent, or "he knows that the other person submits

because he is unaware that a sexual act is being committed." In each of those instances, it would not be consent. Those are the only things that are declared to be criminal. Therefore, between consenting adults, they would not be criminal.

ASSEMBLYWOMAN KLEIN: I will turn to something less sexy.

On page 88, it seemed to me there might be something put in here in terms of harassing the debtor. There doesn't seem to be any thought about prohibiting constant telephone calls at work or calling in the middle of the night or things like that.

MR. KNOWLTON: We have a provision, I believe, that deals with harassing calls, which that type of conduct would come under. Is that right, John?

As I say, I think it would come within this general statute we have on harassing calls. I think it might be a very good place to put something in particular designed ---

ASSEMBLYWOMAN KLEIN: There is something in the Federal statutes about it.

MR. KNOWLTON: Our harassment statute is incidentally on page 112. It reads, "makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm."

ASSEMBLYWOMAN KLEIN: You think it would be redundant to put it in there?

MR. KNOWLTON: I am not sure that it would. It might be desirable to make it specifically apply. But at least I think it would probably come under our general provision in any event.

ASSEMBLYWOMAN KLEIN: I see. There were a couple of new things - well, one new thing. Is jostling something new in this Code?

MR. KNOWLTON: I think it is something new.

ASSEMBLYWOMAN KLEIN: We took out dueling but we put in jostling.

MR. KNOWLTON: I think it is something new in the Code. I think a number of municipalities have crimes like that. It is a crime that they have in New York. I think it is primarily designed to deal with situations where two people are engaged in the joint operation of pickpocketing or purse-snatching. As I understand, in getting on buses and that sort of thing, this is a fairly widespread practice. But it is my impression, unless I am wrong, some municipalities have it. It's a new crime in New Jersey. Well, it's a new disorderly persons. It is from the New York Code actually. New York has it.

ASSEMBLYWOMAN KLEIN: Do you think we should have it? I mean, you recommended it, so I assume you think we should. It seems, as somebody said the other day, if you get 20 people on an elevator, they could all be accused of jostling. I was just wondering.

MR. KNOWLTON: Of course, on the Commission we had a number of disagreements. I frankly don't believe it should be a crime either. That was my position, but I lost in the Commission and they thought about it very strongly and there is this other experience and they decided that it should be in there.

ASSEMBLYWOMAN KLEIN: What about public drunkenness? Do you think we should continue that as a crime?

MR. KNOWLTON: I think so. The problem there, as we say in the comment, is that nobody thinks it should be a crime in one sense, but there is really no other way to trigger society to do something about this particular person. Until we have a system where a public drunk will be taken care of in other ways -- and it might be desirable to have other ways to do it. We indicate in our comment, if there were other ways for society to take this man, to protect him from whatever may be transpiring, to try to deal with the problem that causes his drunkenness, then

we would be all in favor of it and we wouldn't make it criminal. But at the present state in New Jersey, there is not any other method and that is why we put it in.

ASSEMBLYWOMAN KLEIN: We did pass a law in the Assembly last month or so, setting up a whole new thing for public drunkenness. Maybe if it gets through the Senate, we can take it out of the Criminal Code.

MR. KNOWLTON: I think I represent the Commission completely on this when I say we would be very happy to see an alternative to making it an offense, because it serves no useful purpose other than to get the man and protect him really.

ASSEMBLYWOMAN KLEIN: Professor, on page 121, where it talks about prostitution and related offenses, under the grading of offenses, (reading) "An offense under Sub-section b constitutes a crime of the third degree if," and then there are four things listed. It seems as though number 1 deserved a slightly lighter treatment than 2, 3 and 4. I wondered why they have been put together. I was inclined to think that 2, 3 and 4 might better be crimes of second degree, and possibly number 1 shouldn't even be fourth degree.

It is Section 2C:34-2 and we are on page 121, the grading of offenses.

MR. KNOWLTON: One, 2 or 3.

ASSEMBLYWOMAN KLEIN: One, 2 and 3 seem to have to do with professional prostitution and 2, 3 and 4 tend to deal with children, etc. It seems to me as though these would be far more serious crimes - "to promote the prostitution of a child under 16, whether or not he is aware of the child's age," rather than, let's say, "owning, controlling, managing or otherwise keeping" a brothel.

MR. KNOWLTON: See if I understand your position correctly. Is it that those that relate to the management and supervision of prostitution, a crime of the third degree would be high enough in that instance, wouldn't it?

ASSEMBLYWOMAN KLEIN: Yes.

MR. KNOWLTON: And you think that maybe the ones involving children should be made a second degree or at least there should be a differentiation between the two. I think that is a good point. I think we ought to reconsider that particular point.

ASSEMBLYWOMAN KLEIN: On gaming, "any person playing for money or other valuable things, at cards, dice, tennis, billiards," does that mean if two people have a friendly tennis game and bet \$5 on the outcome, that they are committing a crime?

MR. KNOWLTON: I think what we did there --

ASSEMBLYWOMAN KLEIN: Should we maintain that?

MR. KNOWLTON: I think what we have here is the present law. I can't answer your question as to whether it would be. I don't think it should be and I gather you don't either.

ASSEMBLYWOMAN KLEIN: Do you think perhaps we shouldn't have such strict laws on, say, social gambling?

MR. KNOWLTON: I don't personally think there should be laws on social gambling and I think it is included perhaps to a greater extent than I would hope that it would be because it is existing law in that regard. We didn't change it.

We didn't do very much on gambling. We didn't get into it very deeply because of the existence of other commissions or groups looking into that problem. I think that is why it comes out this particular way.

ASSEMBLYWOMAN KLEIN: We decided the other day, thinking about this, if you had some children in your home for a party and you played "pin the tail on the donkey" for prizes, you would be committing a crime in New Jersey. Is that right?

MR. KNOWLTON: I don't believe so, but I can't say offhand whether you are right or not. I don't think so though. But, as I said, we did not go into gambling

because of other groups looking into it. We will look into it further if you would care to have us do it.

ASSEMBLYWOMAN KLEIN: So that really is subject to review.

MR. KNOWLTON: Yes.

ASSEMBLYWOMAN KLEIN: Under gun control, was there any attempt to do anything about mail order?

MR. KNOWLTON: No. Again we took the statute which was relatively new at the time and pretty much repropounded the whole thing. In that sense, we did not have a broad study on gun control.

ASSEMBLYWOMAN KLEIN: You said you didn't go into it too much because we had very recent legislation.

MR. KNOWLTON: That's right.

ASSEMBLYWOMAN KLEIN: I only have a few more questions, but I guess you are our expert and that's why I am putting them all to you.

On page 150 - that's 2C:43-10 - why in counties of the first class do we have no sentence exceeding six months shall be confined to the common jail, but in other counties up to eighteen months? Why is that differentiation drawn?

MR. KNOWLTON: This is again the statute. We didn't purport to change the institutional framework of where the sentences went. We changed sentences, we changed parole power, but we did not try to do that. This is existing law, I believe, and I think it depends a little bit on the institutions that are available in counties of the first class. You get into county penitentiary systems, I think. So when you get in a county where there is an institution of a penitentiary nature, like Essex with its penitentiary in Caldwell, the limit is six months; in others - in Morris County, for example - as I understand it, in Morris County we have only a county jail and there it can be up to eighteen months. So I think it relates to the different counties and the institutions that they have.

ASSEMBLYWOMAN KLEIN: I don't quite understand the rationale for that. When a person is sentenced to imprisonment for a term of less than one year, he shall be committed to a common jail in the county, but in counties of the first class, no sentence exceeding six months shall be in the common jail. Otherwise, where would it be?

MR. KNOWLTON: It would be in the county penitentiary.

ASSEMBLYWOMAN KLEIN: In the State Penitentiary?

MR. KNOWLTON: The county penitentiary. I believe they have those. There is the Essex County Penitentiary in Caldwell. You see, in Morris County, they would have to send them to the county jail. We have no other institution. But in Essex County, they wouldn't have to send them to the jail; they could send them to the penitentiary.

ASSEMBLYWOMAN KLEIN: If it is more than six months, they have to go to the penitentiary?

MR. KNOWLTON: That's right, the longer-term institution within the county.

ASSEMBLYWOMAN KLEIN: One thing that troubles me is that we have no parole arrangements for the county institutions as far as I know. Some of these longer sentences could also get sent to county institutions, could they not? Yes, county institutions; it says, ". . . a person sentenced . . . for a term not exceeding eighteen months may be committed to the penitentiary or workhouse of such county instead of the State Prison." Does this mean then that they would not have available the possibility of parole?

MR. KNOWLTON: I think it does and I think that should be changed. But I think it does mean that. Today they are entitled to certain credits on good time and that sort of thing, so the term would not necessarily all be served. But as far as I know there is none today and I think that should be changed.

ASSEMBLYWOMAN KLEIN: In what way would you suggest?

MR. KNOWLTON: I think the counties could create a group. Today on the State institutions, the parole system is handled by two different groups - the Parole Board or by the Managers of the particular institution.

We would centralize everything in the Parole Board. I would suppose the counties could establish managers or they could establish some board to handle the parole situation at the county level. I would imagine legislation enabling them to do that would be a desirable thing.

ASSEMBLYWOMAN KLEIN: You think that we should do something about parole at the county level.

MR. KNOWLTON: I think so. Eighteen months can be a long sentence.

ASSEMBLYWOMAN KLEIN: Is that something new about the judge having discretion to reduce convictions to a lesser degree of offense?

MR. KNOWLTON: That is something new. It is from the Model Penal Code. It is also from the ABA minimum standards of sentencing. For instance, as I understand our system, if a person is convicted of a third degree crime, he will be sentenced somewhere between three to five years. We start out with the presumption of probation. But assume that the presumption has been overcome, so the judge has to put the man in jail. He feels he has to. He may not feel somewhere between three to five would be an appropriate sentence even though the Parole Board would have immediate control. So he could lower it down to four and then give him 18 months. That is a judicial discretion which is different in form from those that have been operating today. Today if a person is convicted of armed robbery, he can go all the way from probation to 20 years in the penitentiary with a minimum and maximum. It is a little different form. It is a little more limited than the judge's discretion today and I, myself, feel it probably will be exceptional in its use in the sense that the judge is going to have to lower the crime. It is something I suppose that he

won't be doing on all but rare occasions. But it is a new one. It is recommended by both the Model Penal Code and the ABA standards of minimum justice.

ASSEMBLYWOMAN KLEIN: Professor, with reference to 2C:51-3, it says -- well, it used to be you were forbidden to vote if you were convicted of a felony, for 10 years, I think, after imprisonment. In this Code, it is still left, I think, that people who are incarcerated would be denied the right to vote. Is that the recommendation of the Commission?

MR. KNOWLTON: That is correct. While they are actually incarcerated, they would not vote. They would vote as soon as they were out. But as long as he is committed under the sentence, he would not vote. The people in the State Penitentiary in Trenton would not vote under our proposal.

ASSEMBLYWOMAN KLEIN: Does that pertain to any offense?

MR. KNOWLTON: It pertains to any offense, although -- well, yes, it does in so far as the sentence of imprisonment could come about. Where any offense could lead to imprisonment and he is actually incarcerated at the time, he would be prevented from voting, that's right.

ASSEMBLYWOMAN KLEIN: Do you have any personal opinion on whether persons in prison or in jail should be permitted to vote?

MR. KNOWLTON: I must confess I don't have very strong feelings. I think there is quite a lot of difficulties in terms of the election with people in jail. I can imagine certain types of crimes - I would think that they probably shouldn't. As broad as this is, I think it would have to be justified basically on a convenience proposition.

I don't see, for instance, any reason why the people in the county jail might not be permitted to vote.

ASSEMBLYWOMAN KLEIN: Maybe they shouldn't vote for Sheriff.

MR. KNOWLTON: Maybe they shouldn't vote for Sheriff. I don't have strong feeling. I think this is about as little a restriction on the right to vote as I have seen. I know of no state that says that they can vote all of the time whether they are in the penitentiary or not.

ASSEMBLYWOMAN KLEIN: Pardon me?

MR. KNOWLTON: I know of no state that goes further than this.

ASSEMBLYWOMAN KLEIN: You know of no state where they vote in jail?

MR. KNOWLTON: No, I do not.

ASSEMBLYWOMAN KLEIN: Maybe that is why the jails are so bad - no constituency.

MR. KNOWLTON: That may be.

ASSEMBLYWOMAN KLEIN: I really felt on the whole it was a most enlightened Code that you have proposed here. You have indicated that there was some differences of opinion among the members of the Committee. Would you care to put forth any personal opinions on some areas of this that were or were not treated?

MR. KNOWLTON: There were differences. Obviously when you have nine people, we had long debates on them. Sometimes we had to vote two and three times. But on the whole, I don't know of anything -- Of course, in that regard, one person has to make a judgment and I made the judgment that the things that I objected to were so minimal compared to the entire Code that I have been in favor of the entire Code and I don't have offhand -- As issues come up, I would be perfectly free to speak, but I don't have a list of things right now. Some of the things that I felt strongly about were areas that we didn't cover. I have strong feelings about some of the areas we didn't cover and maybe that is what kept us from having a real hassle.

ASSEMBLYWOMAN KLEIN: You mean chapters that were not ---

MR. KNOWLTON: -- like the ones where they had other commissions - abortion, capital punishment and some of those areas. But on the Code itself, I suppose I could say I tend to be reluctant to adopt ambiguous conduct references which would include loitering and that sort of thing. But I think they are very crucial to the Code. Many people feel completely different from me on that point. The Commission did. Therefore, I am perfectly willing to go along with it.

ASSEMBLYWOMAN KLEIN: You feel that some of those things are a little bit vague and ambiguous.

MR. KNOWLTON: I think so, yes. My personal opinion is that they are.

ASSEMBLYWOMAN KLEIN: Thank you very much.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer, would you care to ask any questions?

ASSEMBLYMAN KEOGH-DWYER: Yes, Mr. Chairman.

Professor, I notice on page 88 - I believe it is under 2C:21-19 - you talk about making false statement of credit terms. You are referring to the Truth in Lending Act and I wondered if you had taken into consideration - and perhaps it is in this Code, but I haven't run across it -- if you had thought about truth in borrowing? By that I mean, is there a covering statute here or offense for people who knowingly make false statements to lending institutions?

MR. KNOWLTON: I would think that would come under "obtaining by false pretenses."

ASSEMBLYMAN KEOGH-DWYER: I'm sorry. I can't hear you over here.

MR. KNOWLTON: I think that that type of conduct would come under some of our fraud sections. I would have to check through and see precisely where. It's 2C:20-4, which is on page 74. Mr. Graham tells me that is what it would come under, "theft by deception." And it might come under some of the forgery provisions on 78 as well.

I would be very happy to check to see the exact extent of the coverage, but I would think it would come under actually 2C:20-4.

ASSEMBLYMAN KEOGH-DWYER: I was just wondering if it wasn't important enough to have it spelled out by itself as you did in the Truth in Lending Section of 2C:21-19. Trying to hang our hats on one of several sections doesn't serve the purpose as far as I am concerned. I think it should be a specific section dealing with false statements. Because I happen to know, even at corporate levels where they have made fraudulent statements and procured the moneys and gone about their way and hopefully survived.

Professor, there is also one other section that I have a little trouble with. On page 82, 2C:21-8, misrepresentation of mileage of motor vehicle, getting down about half way through, it says, "This provision shall not prevent the servicing, repair or replacement of a mileage registering instrument, which by reason of normal wear or through damage requires service, repair or replacement if the instrument is then set at zero or at the actual previously recorded mileage."

It seems to me that the act defeats itself by saying that you set it at zero. There must be some way to insure the purchaser that he does know what the true mileage of the vehicle is.

I might also say I don't see any section in here where it protects purchasers of new cars. You and I have seen the families of many dealers riding down the street in cars with the stickers still attached to the window, showing the cost, etc. We know that these are new vehicles under the law because they haven't been titled. But on the other hand we also know they put on between ten and twenty thousand miles in a year, let's say, and then it is turned over to some unsuspecting purchaser as a new car very often, not as a demonstrator. I don't notice anything in here that would protect the purchaser along those lines.

MR. KNOWLTON: The latter category may come within the Deceptive Business Practices Act. But I think you are absolutely right. We should consider making a special statute on that. I don't know what the rationale of "is then set at zero" is, other than that it gives notice to the purchaser that the mileage is not correctly recorded. And it is, I gather from what Mr. Graham says, existing law. We got these provisions from the New Jersey Code currently. But I think both of those points ought to be considered.

ASSEMBLYMAN KEOGH-DWYER: Conceivably under the mileage instrument setup, there is nothing to stop a gentleman who wants to sell a car that has a lot of mileage on it from going in and declaring his odometer or speedometer in disrepair and would ask for a new one to be put in there and set at zero or whatever miles they might want to have their car look as though it had gone. I really think it is conflicting right within that section. I think the zero should be taken out.

MR. KNOWLTON: We will consider that.

ASSEMBLYMAN KEOGH-DWYER: Thank you.

ASSEMBLYMAN DICKEY: Mr. Wallace, any questions?

ASSEMBLYMAN WALLACE: No.

ASSEMBLYMAN DICKEY: Just two points I would like to cover, Professor Knowlton. With reference to jury trials, has any consideration been given to the subject of less than the unanimous verdict by jury?

MR. KNOWLTON: No, it has not been. We did deal with the problem of jury trials on the question of six-man juries because the Governor made a special request and asked us to deal with that problem.

The statute, incidentally, which established the Commission was broad enough to include both the criminal law and the procedure. We did not do anything with the procedure because of the short time we had within which to complete the substantive Code and, secondly, because the

procedure, of course, is primarily the responsibility of the Supreme Court and they have a continuing committee on it. So we did not feel the need was as great there.

So we haven't talked about juries other than the question of the six-man jury. We haven't gotten around to the question of whether they need to be unanimous or not. I have a very firm opinion on that, of course.

ASSEMBLYMAN DICKEY: What is your opinion?

MR. KNOWLTON: I believe that the jury trial should be unanimous. I believe to allow less than the unanimous verdict is to undercut the degree of certainty that is required before you impose these kinds of sanctions on somebody.

ASSEMBLYMAN DICKEY: With reference to municipal ordinances, as I read the Code, the proposed Code, a municipal ordinance cannot in any way conflict with this Code. May a municipality, assuming this Code is enacted, continue to have ordinances that deal with subjects that are also covered in the Code as long as they do not conflict with it?

MR. KNOWLTON: I would think that as far as the statutes conflicting, it would depend then if it did not conflict whether or not there was an intention to preempt, in much the same way as the Supreme Court utilized in the case of criminal registration where the Supreme Court found that the Drug Registration Statute preempted the field of registration from the municipality. In that sense, I don't think we go beyond that.

I think our basic problem in this section incidentally is in the words "or by exclusion of that subject from the Code." We face the problem. We had determined that a number of things should not be criminal, including sex relations between consenting adults in private. Now, having arrived at that determination, we thought it would defeat the purposes behind arriving at that determination to have every municipality enact an ordinance on it.

There were a number of instances where we made

those types of expressed determinations. We wanted to limit the power in that by omission and that is a much more difficult problem. But I think that the question, if it does not conflict, would have to be in the question of preemption by the State as the Supreme Court has interpreted it in the registration cases.

ASSEMBLYMAN DICKEY: I would like to make my question a little more specific. In your opinion does this Code preempt the authority of a municipality to enact ordinances on the same subject?

MR. KNOWLTON: I have been talking with Mr. Graham here. I think our provision is that it cannot conflict with either the provision or the policy. We would be only preempting where that policy would indicate a preemption and a municipal ordinance would violate that policy. Other than that, I don't think the Code as such is a blanket preemption of every area.

That is one of the reasons, I think, we had rather long and detailed comments to aid the lawyers or the municipal judges or the people on the governing body in the municipality, to determine what the policy was so they could then enact ordinances perhaps in the same area which do not conflict either with the act or with the policy.

Does that answer your question?

ASSEMBLYMAN DICKEY: I think it does. In other words, using a specific example, if a municipality has an ordinance which defines an offense of causing loud and boisterous conduct on a public street, which I think is covered in the Code, would the municipality be permitted to prosecute under their ordinance or would they be required to prosecute under the Code?

MR. KNOWLTON: I would hope under the Code, but I am not sure, as I said before. That's my problem. It would not be in conflict if it were the same. If the same conduct is covered by the Code and by the ordinance, you might very well argue that it conflicted with the policy

of the State because the policy of the State is that that conduct - say it is petty disorderly conduct - should merit only this degree of punishment.

I think that policy determination would have a conflict with adding more on it if it is precisely the same conduct. And I gather in your hypothetical it was the same conduct. It would fall under both statutes. I would think then they would have to prosecute it under the Code.

ASSEMBLYMAN DICKEY: Thank you. Any other questions from members of the Committee?

ASSEMBLYWOMAN KLEIN: I just had a couple more. Is the whole question of corroboration something new in the question of rape in this statute? New Jersey does not require corroborative evidence, or does it?

MR. KNOWLTON: What we did - and I personally don't feel strongly in regard to this - was we made corroboration as broad as it could be. The Model Penal Code and New York both had a much stricter requirement of corroboration. We put in a requirement of corroboration almost as to any fact. I am not sure just what the New Jersey rule on corroboration is.

In our comments we said - and I am sure they were accurate - that it was not required in rape. So to the extent we have even a minimal requirement of corroboration, it would be a new requirement in New Jersey, not as to seduction, but for rape.

ASSEMBLYWOMAN KLEIN: What?

MR. KNOWLTON: Not as to seduction, but as to rape, it would be new.

ASSEMBLYWOMAN KLEIN: Why did the Commission decide to add that since we have been getting along without it?

MR. KNOWLTON: It is a good question. Maybe some of my colleagues can tell me why we decided to add it. I think there was a feeling that in some situations it would be a safeguard against claims that arose out of other motivations. But, as I say, we made it so broad, it really

doesn't do much. I don't see any reason for it myself.

One of the points on corroboration, as Mr. Graham points out, it applies to the entire section. So it applies to male or female conduct in the deviate behavior as well. It was primarily put in, I gather from his recollection of our discussions, to relate to charges by young people, young girls and young boys; it comes within the age limitations as well. It was thought in relation to those particular complainants, corroboration might be desirable.

ASSEMBLYWOMAN KLEIN: There were examples shown to me over the last couple of years where women received different treatment than men for the same crimes. This mostly had to do with indeterminate sentences for women but not for men. Do you know whether these differentiations have been removed in the Code?

MR. KNOWLTON: They have been removed. Women are sentenced the same as men, depending on whether they are sentenced to reformatories or are given prison sentences, but once they are sentenced for the crime, they are sentenced in exactly the same way as men are.

ASSEMBLYWOMAN KLEIN: Can you tell me why they chose the age 26 as sort of a cutoff for the alternative of a reformatory and a five-year maximum. It is on page 147.

MR. KNOWLTON: In that regard we lowered it, didn't we, from existing law?

ASSEMBLYWOMAN KLEIN: You lowered it?

MR. KNOWLTON: That's right. It is 30 in the reformatory legislation today. We did feel, while we didn't deal with most of the institutional problems - we did feel that 30 was too old, that it had too wide an age gap between people sent there and defeated some of the purpose. At least I felt that way. And we lowered it to 26. I think what it is is an attempt to achieve through a different system somewhat the same thing that is achieved by the Youthful Adult Offender Bill, say, in the Federal Code where they are

sent to particular institutions in the hope of rehabilitation and hope that they will not be placed with hardened criminals and all of the other things that go with making a choice between reformatories and prisons. We thought 26 coincided more with the other statutes dealing with young adult offenders and is probably a better age than the present one.

ASSEMBLYWOMAN KLEIN: Does that in effect mean that anyone over the age of 26 could not be sentenced to a reformatory?

MR. KNOWLTON: It does, yes.

ASSEMBLYWOMAN KLEIN: You don't think whether it is a first offense might be more significant than whether you are 26 or 25?

MR. KNOWLTON: I think you have a variety of factors here, one being age and one being first offense and some of these other things.

New Jersey has in the past singled out age as being a crucial factor in determining which type of institution they would be sent to. I would imagine that in the sentencing process itself, the fact it was a first offender going to a State penitentiary would have some determinative effect on the judge. I don't know that we could build into the institutional things -- or at least I don't know that we felt able to at that particular juncture -- all of the factors that might go into a decision. So we stuck with the age limit as is currently done.

In New Jersey today, of course, the sentence to the State Prison does give flexibility in terms of a variety of institutions. There are a number of institutions within the State Prison System and the people within the institutions are, in fact, transferred by the Commissioner to institutions for a variety of needs.

Secondly, I think that it is important to note that we do give immediate parole eligibility and in that regard how long a person would be there, his record and the facts you are talking about would be relative.

ASSEMBLYWOMAN KLEIN: I was under the impression that the only prisons we have for women are reformatories - Clinton Reformatory. Did you redefine Clinton?

MR. KNOWLTON: That's right. It is Clinton Reformatory today, but we redefine it to make it a State prison as well as a reformatory. Is that correct?

ASSEMBLYWOMAN KLEIN: I thought maybe we didn't have any place for women over 26. You have taken care of that.

MR. KNOWLTON: I think we foresaw that one.

ASSEMBLYMAN DICKEY: Any other question from members of the Committee? Thank you very much, Professor Knowlton.

Are there any other members of your Commission you would like to call as witnesses to further testify as to the report of your study?

MR. KNOWLTON: Well, Judge Gaulkin is here. I think the Judge might like to say something.

ASSEMBLYMAN DICKEY: Well, suppose we have Judge Gaulkin come to the desk, please.

We are pleased to have you with us today, Judge Gaulkin.

E D W A R D G A U L K I N: Thank you very much.

The remark I was going to make was in answer to the lady's question with reference to gambling. I am sure that Professor Knowlton has pointed out to you - and, of course, the Code itself shows - that there were certain areas that we didn't touch at all and other areas that we touched very, very lightly, one of them being gambling.

What I would like to make clear is that in those areas that we touched lightly, we had no intention of foreclosing the Legislature from going much further in lessening those crimes or even eliminating those crimes than we did.

Speaking particularly of gambling - and this is one area, as Professor Knowlton said, we had considerable discussion about - I happen to be one of those who believes

that -- well, to put it this way: I wouldn't be horrified to see gambling taken off the books altogether, which represents, of course, a point of view that not very many on the Commission shared. But I bring that up simply to indicate that I do hope that the Legislature doesn't feel that we have by this Code indicated in those disputed areas a solid, frozen position that this is it and you shouldn't depart from that. That's all I wanted to say.

ASSEMBLYMAN DICKEY: Thank you.

Judge Gaulkin, with reference to gambling, don't you agree that any extension or expansion of the gambling base would require a referendum of the electorate?

JUDGE GAULKIN: Narrowing it - in other words, permitting more gambling - you might have to get a constitutional amendment. But insofar as defining gambling and insofar as modifying the statutes relating to gambling, I think that the Legislature has quite a bit of latitude even within the framework of our present Constitution.

ASSEMBLYMAN DICKEY: For instance, if we were to conceive of off-track betting, don't you think we would have to submit that to the electorate?

JUDGE GAULKIN: I would expect that that would have to be submitted to the electorate.

ASSEMBLYMAN DICKEY: Would you care to define these other areas where you think within the area of statutory change there could be any improvement on the gambling laws?

JUDGE GAULKIN: Well, offhand, I don't have the gambling statute at my fingertips. Take, for example, the question of punishment. That, of course, is within the discretion of the Legislature all the way down the line.

Secondly, some of these statutes have long strings of definitions about pool selling, etc., etc. Many of those definitions could be sharpened. I don't think it would be beyond the authority of the Legislature without a constitutional amendment to take care of situations that

the lady suggested about "pinning the tail on the donkey" or a home pinochle game or a home poker game for a penny. I think a careful study of the gambling laws could yield a great deal that could be cut down and minimized.

ASSEMBLYMAN DICKEY: I think we did that a few years ago with reference to box-top type contests, etc., that heretofore had been in the gambling category.

JUDGE GAULKIN: Yes.

ASSEMBLYMAN DICKEY: Judge Gaulkin, is there anything else you would like to state?

JUDGE GAULKIN: No. I think that Professor Knowlton has covered everything.

ASSEMBLYMAN DICKEY: Any questions from members of the Committee?

ASSEMBLYMAN WALLACE: Judge, I would like to ask just one question. As a layman, and not a lawyer, interested in the public reaction to this vast study that you have made on the Penal Code, could you tell us perhaps what is the greatest impact that you feel this revision would present to the public? In your mind, what study seemed to have taken up most time that would have the greatest impact on the public? I know it is a vague question. What I am trying to find out is what changes have been made here that seem to be more alarming or more varied than perhaps ---

JUDGE GAULKIN: Frankly, I don't find anything in this Code at all alarming, as you, yourself, have seen from reading the Code. There are certain things that certain people become very much exercised about. Take, for example, the question of homosexuality. To some people that is a red flag. I don't think it is to very many people today and I don't think that very many people today are going to become excited over the proposition that we are dropping consensual homosexuality between adults as a crime.

Of course, the areas that would create the most excitement, we are not really going into - for example, the

abortion question. We are leaving that to the Legislature. The drug question we are not touching, largely because you are making a separate and independent study of that. So the really so-called "hot issues" are not in this Code. This Code is a good workmanlike attempt to formalize for the first time the criminal law which has been just a swamp with all kinds of peculiar statutes, some of which you have touched on and some of which are ancient history. I remember there was a statute - I don't know if it is still on the books - about wearing hat pins on trolley cars. Well, we don't have hat pins and we don't have trolley cars, but the statute is on the books, and so on down the line.

Then, incidentally, as the Professor undoubtedly has pointed out to you, the framework of the Code was first worked out by the American Law Institute over a period of many years. I am quite sure you know who they are and the kind of work they do. And since that time, the Code has been followed in a number of jurisdictions with variations to suit local conditions, but as far as I have been able to determine with complete satisfaction by the jurisdictions.

ASSEMBLYMAN DICKEY: Thank you, Judge Gaulkin.

Mr. Graham, would you care to testify?

MR. GRAHAM: I thought, with the Committee's permission, it might be more helpful if I waited until the end of the hearings next week and answered questions that come up and that the Committee might have in the light of the testimony given by other witnesses throughout today and throughout next Thursday.

ASSEMBLYMAN DICKEY: Fine. For the purpose of introducing Mr. Graham, he has been Secretary of the Commission and is a member of a law firm in Newark. We are very pleased you can be with us, Mr. Graham, and hope you will stay if you can.

The next witness will be Mr. Evenchick, Deputy Attorney General.

B A R R Y H. E V E N C H I C K: Mr. Chairman and members of the Committee, I appreciate the opportunity of appearing here this morning on behalf of Director Jahos who unexpectedly could not be with the Committee today as had been scheduled.

The proposed New Jersey Penal Code represents an important element in the creation of a modern system of criminal justice for our State.

At the outset, it should be pointed out that the Code centralizes and streamlines a statutory hodgepodge, which often only fortuitously served the interests of crime prevention and rehabilitation of offenders. One readily discerns in this Code a thoughtfully designed relationship between the substantive offenses there set forth and the punishments provided for commission of those offenses.

The Commentary to the Code makes clear that the drafters' principal sources of information were the Model Penal Code, which was formulated in 1962 by the American Law Institute, the statutes and decisions of other leading criminal law states, such as California and New York, and various decisions and recommendations of both the legislative and judicial branches of our State and the federal government. While there is need for modification before this Code becomes law, on balance it represents a rational and workable approach to contemporary problems of criminal justice.

We in the Division of Criminal Justice have been involved in a detailed study of each and every section of the Code and have also participated in working sessions with the County Prosecutors and their representatives. I wish by this statement to call attention to a number of particular questions that have arisen regarding aspects of the Code. It is our desire and intention to submit to this committee in the near future a final statement which will endeavor to supply suggested answers to these questions.

Subtitle 1 of the Code deals with general provisions. Sec. 2C:1-5 abolishes all common law crimes. However, common law defenses are retained (2C:2-5). In light of the codification of offenses and defenses elsewhere in the Code, the need for retention of common law defenses is unclear. In eliminating all common law crimes, the Code has inadvertently eliminated the crime of criminal contempt, which offense must be added to the Code.

Sec. 2C:1-7 to 10 represents a codification of the law of double jeopardy including a mandatory joinder rule. At present in New Jersey there is no bar to a subsequent prosecution except when the rule of double jeopardy applies. Under the Code, particularly Sec. 2C:1-9a(2), there is a bar in any case where the subsequent prosecution is for an offense which could have been tried on the first prosecution under Sec. 2C:1-7. The penalty for failure to join in an offense unless otherwise excused, is that the State is precluded from subsequently charging the defendant with that offense. Certainly these sections warrant further study by those charged with prosecuting criminal cases in our courts.

Sec. 2C:1-10 provides the circumstances in which a previous prosecution in one jurisdiction, state or federal, bars a subsequent prosecution in New Jersey. This section departs from existing law and in so doing may create the possi-

bility of unseemly races between federal and state authorities to obtain early jurisdiction. Perhaps the solution in multiple prosecution cases lies in the imposition of sentence. It could be that provisions dealing with concurrent sentencing might be adapted to take into account multiple prosecutions in different jurisdictions for essentially the same criminal episode.

It is noteworthy that Sec. 2C:1-7d overrules the decision of the Supreme Court of New Jersey in State v. McGrath, 17 N.J. 41 (1954), wherein it was held that the county court lacks the power to deal with disorderly persons offenses. The Code in the aforementioned section rejects the McGrath holding and provides that whether or not the included offense is an indictable offense, it should be charged to the jury. The question arises as to whether this provision affects the ability of a prosecutor to engage meaningfully in plea bargaining.

The subject of plea bargaining is also involved in the deminimus infraction rule of Sec. 2C:2-11. This provides that a court shall dismiss a prosecution if the defendant's conduct was not so offensive as to predicate criminal liability thereon. There is an absence of guidelines however as to what constitutes a deminimus infraction. Many prosecutors feel that this provision improperly infringes upon their discretion.

Sec. 2C:1-7a(2) provides that an individual may not be convicted for conspiracy and a substantive offense which was

the object of that conspiracy. This is contrary to existing New Jersey law. Consideration should be given to the question of whether or not this is desirable. Elimination of the possibility of a conviction for conspiracy when a conviction for the substantive offense has been obtained could remove the deterrent that exists today by virtue of the ability to indict for conspiracy and to convict separately on that charge.

Traditionally in New Jersey, some power to legislate has been delegated to local governmental units. Under the Code a municipal governing body may not enact any ordinance conflicting with any provision or policy of the Code either expressed or not. Sec. 2C:1-56.7. There may be some difficulty encountered by local officials in determining whether or not a provision would be proscribed by this section of the Code. Some have suggested that there may be considerations of a particularly local nature which should be cognizable by the municipal governing body irrespective of the Code.

Sec. 2C:4-1 et seq. deals with the matter of criminal responsibility. 2C:4-3 makes mental disease an affirmative defense. The effect of this provision is to place the burden of proof upon the State and to require it to disprove beyond a reasonable doubt defendant's affirmative defense of insanity. Some have questioned the necessity for this "shift" in the burden

of proof while others respond by suggesting that this provision is really no different than the present law in New Jersey.

Subtitle 2 of the Code defines specific offenses. There are at least two matters included within this subtitle that are presently undergoing judicial and legislative scrutiny, to wit, the death penalty and the abortion statute. The drafters have expressly refrained from making proposals in these areas but have indicated that their inaction should not be considered as an expression of opinion on the merits. Obviously, the provisions of the Code presently providing for the death penalty will need to be revised in the event there should be a permanent determination in New Jersey to abolish the death penalty. With respect to abortion, the existing New Jersey statute has been declared to be unconstitutional by a federal court. That case is still on appeal. Depending upon the outcome of it and other considerations having to do with the matter of criminal abortion, the existing statute may need to be changed.

Some of the language, employed in Subtitle 2 with reference to particular offenses, is in need of change either to clear ambiguity or to clarify questions that have been raised. Some examples are the kidnapping and sex crimes sections, 2C:13-1 and 2C:14-6(d). 2C:13-1 requires that a person has to be confined for a "substantial" period of time in order for the offense of kidnapping to apply. Use of the word "substantial" with no

definition of that term contained in the section, raises many problems of interpretation that perhaps can be avoided. Section 2C:14-6(d) provides that no person can be convicted of any crime under the Sexual Offenses Chapter (Chapter 14), "upon the uncorroborated testimony of the alleged victim." This section requires additional language in order that this State not be faced with the problems that New York has had in obtaining convictions. Certainly further study is required.

Serious doubts have been raised as to 2C:2-4(c), which makes reliance upon a judicial or administrative decision an affirmative defense in a criminal prosecution. Further study is also required as to 2C:4-7 dealing with the justifiable use of force, particularly deadly force, by law enforcement officers, in order to insure that it adequately protects police officers in the proper performance of their lawful duties. By way of 2C:34-3, the Code provides authority for a sentencing judge to require restitution by a defendant. However, the Code abolishes the authority of the sentencing judge to require a defendant to pay court costs. This whole question of a convicted person being required to pay the costs of his trial is presently pending before our New Jersey Supreme Court.

Subtitle 3 deals with the subject of sentencing. Sec. 2A:42-11 provides that the court may sentence an individual convicted of an offense to a term to coincide with

that which could be imposed for a lesser included offense. Thus, under this provision, e.g., a jury might convict a defendant of a crime of the fourth degree and a trial court might sentence the defendant as if he had been convicted of a disorderly persons offense. The question that is raised is whether or not this provision should be retained since under Sec. 2C:1-7(b) a jury will be charged as to the elements of lesser included offenses including disorderly persons offenses. Thus, if a jury having been charged as to the disorderly persons offense, convicts for a higher offense, query whether the court should have discretion to nevertheless sentence for the disorderly persons violation.

Another section that bears amending is 2C:44-4(d), which permits a sentencing judge to dispose of prosecutions pending in other counties. While there is some merit in this extension of authority to a sentencing judge, no provision is made for notifying the prosecutor of the other counties, in order that he might appear and state his position as to the disposal of one of his indictments.

Sec. 2C:51-2 provides for the forfeiture of public office upon conviction of a crime. However, that section provides that the forfeiture shall not take place until after sentencing. Consideration should be given to whether or not this provision should be amended so the forfeiture would occur upon the return of a verdict by a jury. The forfeiture results from a breach of trust reposed in a particular individual by the public and the public's right to bring about that forfeiture should perhaps not have to wait the imposition of sentence. 41

The Code establishes a sentencing system whereby no minimum is pronounced. This sentencing scheme is designed to work in conjunction with a full-time parole board which hopefully will have the expertise to make the determination as to when the individual should be returned to society. Some question has been raised as to the practical ability of the parole board to handle the enormous number of cases which undoubtedly will be presented, and careful consideration will need to be given to this aspect of sentencing with special emphasis upon the creation of a system whereby the matter of parole can be scientifically determined.

This preliminary statement has raised some questions. It does not purport to deal with all of the questions or possible problems that the Code presents but it does reflect comments frequently voiced during these past several months. As indicated, these and other questions will be treated and will be the subject of specific recommendations to be contained in a final report to this Committee. There has been little reference herein to the innovative aspects of the Code which are regarded to be so important to our modern system of criminal justice. Without detailed discussion, it is appropriate to here mention the fact that the Code stresses the gradation of offenses with concomitant graded sentences. This approach is designed to reduce the disparity

that so often existed in the past in New Jersey depending upon which court the defendant was tried in and what judge pronounced sentence. There was also often a disparity in the statutes themselves. The Code goes a long way towards equalizing treatment and providing realistic punishment for various offenses.

The Code also eliminates the complicated concepts previously developed in our law such as "general criminal intent," "mens rea," "presumed intent," etc. The Code substitutes four different elements of culpability: purpose, knowledge, recklessness and negligence. As to each of these, the Code provides a definition.

Sec. 2C:3 of the Code deals with general principles of justification. Defenses set forth therein depend upon actual belief of the actor. The present law of New Jersey requires that the actor's belief be both actual and reasonable. Under the Code, when the actor actually believes that force is necessary but is reckless or negligent in that belief, he may be prosecuted for an offense for which recklessness or negligence suffices to establish culpability.

This statement is being made as a preliminary statement with the understanding that there will be an opportunity after further study and discussion to appear before you again with concrete and detailed recommendations with regard to the proposed New Jersey Penal Code.

The updating of our criminal law is a healthy thing for New Jersey. There is every indication that under the proposed Code, with modifications, the administration of our laws and of our judicial and penal systems will be enhanced.

Thank you, Mr. Chairman and members of the Committee.

ASSEMBLYMAN DICKEY: Thank you, Mr. Evenchick.

Can you tell us how much time your department will require to study this Code further to make the recommendations you have suggested?

MR. EVENCHICK: If compatible with the wishes of this Committee, I would imagine that by the end of the summer this report would be forth coming.

ASSEMBLYMAN DICKEY: Fine. I have talked to Mr. Jahos about it and I told him that we would be pleased to receive those additional recommendations.

MR. EVENCHICK: We will certainly get them to the Committee as soon as possible, but surely no later than the end of the summer. Between today and that time, there are going to be continuing meetings - tomorrowing, for example - among the prosecutors and the Division of Criminal Justice for the express purpose of dealing with these and other questions.

ASSEMBLYMAN DICKEY: Will the prosecutors present a separate statement from that of the Attorney General?

MR. EVENCHICK: That has not been finally decided. I understand Prosecutor Schragger of Mercer County, who is presently the Chairman of the County Prosecutors Association, has been and will continue to be meeting with a group of prosecutors, a representative group, for the purposes of making recommendations and proposals. I would imagine, depending on the outcome of his work, those proposals will either take the form of a separate report or will be combined with the report of the Division.

ASSEMBLYMAN DICKEY: Fine. Any questions from other members of the Committee?

ASSEMBLYWOMAN KLEIN: Mr. Chairman, would it be possible to get your report in pieces so that we didn't have to wait until the end of the summer to get it all at once. It sounded as though you raised some very comprehensive questions. What would you think of that?

ASSEMBLYMAN DICKEY: Well, I think we will leave it to the Attorney General as to how he wants to submit his report.

MR. EVENCHICK: Certainly, Mrs. Klein, if possible, we will gladly accommodate the Committee, if that would be helpful.

ASSEMBLYWOMAN KLEIN: I have a hard time absorbing all this. It would be very helpful to me personally to see it as you went along, without getting it all at once.

MR. EVENCHICK: I will be happy to convey your request to Director Jahos and if we can accommodate you, we will certainly do that.

ASSEMBLYWOMAN KLEIN: I was interested in your remark about public office, to be required to give up the office at the time of the guilty verdict. Would that be before or after a series of appeals?

MR. EVENCHICK: Before. I might point out to the Committee that there is at least one case in recent history in New Jersey which arose out of what has come to be known, I gather, as the Hudson County Seven Trial in the Federal Court. One of the defendants, an officeholder in Hudson County, sought by civil action to restrain the Prosecutor of Hudson County from taking any action to interfere with his officeholding. And the Prosecutor of Hudson, Prosecutor Gaulkin, and the Attorney General took the position that under the existing statute the forfeiture occurred at the time of the sentencing and that position was upheld by the court in New Jersey.

We believe, as my remarks have indicated, that a violation of public trust of the kind of offense that this statute speaks to requires for the protection of the public that an individual who has been convicted -

and by conviction, I mean when the jury returns and announces its verdict - the public can be best protected by seeing to it that that convicted individual ceases immediately from holding his office. Of course, there is the appeal, which may or may not occur. In the event that person's conviction should be reversed, there are provisions whereby he can be made whole, whether that means returned to office or paid salaries that he may have forfeited. But the point is, steps can be taken subsequently so that this individual is not irreparably injured as a result of the conviction. But, after all, when a jury has considered the charges and then convicted the individual, we believe it would be better for the forfeiture to occur at that time.

ASSEMBLYWOMAN KLEIN: Why did the court decide that it should be at the time of sentencing?

MR. EVENCHICK: Well, the court was concerned with what the word "conviction" meant within the existing statute. This particular defendant argued it meant imposition of sentence, that there was no conviction within the strict meaning of that term until sentence was imposed. And we took the position that conviction occurred when the jury returned its verdict. The court agreed that for purposes of this statute -- there were some other factors which I think need not be gone into here -- but the court was satisfied that for purposes of this particular statutory construction, the conviction occurred at the time of the verdict as opposed to the pronouncement of sentence.

It sometimes happens that there is a significant amount of time that goes by between the verdict and the sentence. There must be a pre-sentence report prepared. So we would prefer not to risk any undue amount of time going by and have that forfeiture occur when the jury speaks.

ASSEMBLYWOMAN KLEIN: Is sentence declared before the appeal?

MR. EVENCHICK: Yes. The sentence is declared

initially by the trial judge and upon the sentence being imposed, the notice of appeal is filed and then the appeal process begins. Of course, that process, as we know, may take a considerable amount of time.

ASSEMBLYMAN DICKY: Mr. Wallace?

ASSEMBLYMAN WALLACE: I just have one question concerning the reversal of a decision or a sentence. In the case of a public official who has a term and the term has perhaps one or two years to go at that particular time, would he be reinstated to his public office?

MR. EVENCHICK: I am not thoroughly familiar, Mr. Wallace, with the provisions of the statute that deal with officeholding and the return to office. The Code does not deal with this subject. It is dealt with, however, in other existing statutes.

My understanding - and I may not be correct about this - is that such an individual would be returned to office for the balance of his term; but Judge Gaulkin is indicating with a negative nod that that is not so; therefore, perhaps Judge Gaulkin would want to clarify that.

JUDGE GAULKIN: My impression is if the time has expired, if the calendar period of his term has expired, there is no way of putting him back.

ASSEMBLYMAN DICKY: I don't think that was the question, Judge Gaulkin. The question was whether he could be restored to office if there were some time left.

JUDGE GAULKIN: If there were a reversal during the period, that might be possible. I am not sure. I won't answer that because there might be a special election and there might be a substitution that would make that impossible.

ASSEMBLYMAN DICKY: Any other questions of the Deputy Attorney General? Mr. Keogh-Dwyer.

ASSEMBLYMAN KEOGH-DWYER: Sir, I respectfully disagree with the Commission's findings in that area. It would seem to me that you are concerned about injury to the defendant; I am thinking about injury to the electorate. I don't think

it is fair, unless the defendant has gone through his right of appeals to the highest court. I have often found the trial court is inaccurate in its findings. And I think you would be doing the people who elected him, the electorate, a great disservice by having him immediately withdrawn from office upon conviction.

MR. EVENCHICK: Well, I, of course, occupy a rather insulated seat here this morning in bringing for your consideration questions that have been raised. I would not at this time offer my own view on that particular point, except to underscore that, under the Code, the forfeiture occurs not at the conclusion of the appeal and I hope I did not cause any confusion in my remarks earlier. The forfeiture occurs on the imposition of sentence. What I was suggesting was that it might occur sooner than that upon the verdict of the jury.

ASSEMBLYMAN KEOGH-DWYER: It would seem to me that in such matters specific mandatory time limits should be set both with the courts and the appellant if we are talking about public office, if you could take that under consideration.

MR. EVENCHICK: Again I will certainly convey those remarks when we have our in-house conferences. They will be considered.

ASSEMBLYMAN KEOGH-DWYER: Thank you.

ASSEMBLYMAN DICKEY: Thank you very much Mr. Evenchick.

Our next witness is Mr. Stanley Van Ness, Public Defender of New Jersey.

S T A N L E Y C. V A N N E S S: Good morning, Mr. Chairman and members of the Committee.

ASSEMBLYMAN DICKEY: Do you have a copy of your statement?

MR. VAN NESS: No, I do not have a prepared statement as such. This is by way of a preliminary reaction from our office also. As you might well imagine, the Code is not too readily digested at one sitting or at two sittings.

We have an ongoing procedure now for review and we would hope that we could provide the Committee with a detailed analysis of the Code again by the end of the summer, I am sure, but hopefully before that time.

My purpose in coming this morning is primarily to react and to make some general observations about the Code. At one point when the Attorney General was going through his list of problems that he found with the Code, I thought I might be able to accept it in toto. Since it didn't meet with his approval, it wouldn't in all probability meet with ours. But that is not so. We do have some problems with it which probably means that the Code is a very workable document for the Legislature to begin its consideration.

I probably should tell the Committee where I come from on this thing. There are certain basic hypotheses that I should lay out for the Committee, things that I feel are wrong with the existing state of the criminal law. For instance, it is my firm belief that we are presently making criminal many acts which should not be treated in that fashion.

Secondly, it is my firm position that we are imposing sentences on persons that are excessive for the conduct that is prohibited and that are frequently disparate in that one person is being punished more severely for an offense that does not seem to differ in any material respect from an offense that another person has been charged with.

Thirdly, I think that our parole system as presently operated, more so six months ago, but still troublesome -- that parole system is counter-productive and that it is not accomplishing what it seeks to accomplish in reducing the rate of recidivism.

The fourth hypothesis that I begin with is that the present state of the criminal law is chaotic, that you cannot make sense out of the provisions that are frequently enacted. I think the Chairman might recall a dispute or a conversation that he and I had several years ago when there

was a problem about people intruding into public schools and causing disturbances. And the Legislature's reaction to that, as has frequently been the case in the past, was to enact a statute prohibiting it.

Well, the Commission addressed itself to that particular statute and suggests that it really isn't necessary because the conduct that was prohibited by that statute is prohibited by at least two or three other statutes that are on the books now and were on the books at that time.

I think it is a natural thing for a Legislature to do when a problem arises, to say, "let's get rid of the problem by making it a crime to continue that course of conduct." I think that is the basic reason why our criminal statutes have grown up in such a hodgepodge fashion.

From those four basic positions, we have attempted to examine the Code and find that on all scores it represents a substantial improvement. For instance, its approach to a parole problem, beginning first with the elimination of minimum terms and theoretically making a person eligible for parole immediately, then requiring a full-time parole board, and one or two other aspects, addresses itself to this problem of parole. I don't think that it goes far enough and one of the things we will submit to the Committee is a Model Parole Act that has been developed primarily by the National Legal Aid and Defender Association, in the hope that it will be evaluated along with the Commission's recommendations. But there is no doubt in my mind that if the Commission's recommendations were to be adopted tomorrow by this Legislature in the area of parole, that it would represent a substantial improvement.

On the subject of over-criminalization, I think the Code drafters have taken a substantial step forward in eliminating some of the private consensual sexual acts. I don't think that they have gone far enough in reaching this problem of victimless crime. I think the problem of

prostitution requires some thorough analysis. Again it may be an area where the Legislature should consider that this is, I am told, the oldest profession - it has been with us notwithstanding criminal interdiction for centuries - and we may begin to recognize that trying to punish some of this conduct in a criminal fashion, again is counter-productive.

At the very least, I would point out that if prostitution is to be continued as an offense, then I cannot understand the difference in treatment that the Code would make between a woman who solicits and the male who patronizes. I believe the Code would make the solicitation a disorderly offense but the man who makes use of those facilities is only a petty disorderly offender. That is extremely difficult to reconcile.

On the problem of excessive sentences, the Code does limit the discretion that a trial judge presently has. I think you will find that the gradations of crimes, if you try to match them with our current penalties, would indicate that the maximums are set at a somewhat lower level and that the distance that a trial judge can travel between a minimum and a maximum is a shorter distance under the Code than under existing law and I think that that is a substantial improvement.

Of course, the whole concept of attempting to rationalize the law, to put it all down in one place where persons can consult it and understand it, eliminating some of the ambiguous definitions that we lawyers have labored with over the years, is a substantial improvement.

In some specific areas, I think the Code addresses itself to the problem of felony murder. It first eliminates any thought that it is making a decision one way or another on capital punishment but, proceeding under the assumption that capital punishment is going to be around, makes some recommendations regarding felony murder, which I think are great improvements. No longer is the situation where murder

actually occurs by inadvertence in the course of a robbery, such as would make a person subject to a first-degree murder offense. There is a narrowing of the area of felony murder and that concept has resulted in what I think are frequently absurd results where, let's say, two persons are engaged in a robbery, commit the robbery, flee, and a policeman shoots one of the two as they are fleeing from the robbed store, and the other defendant is held accountable for murder in the first degree. You can reach those kinds of absurd results under our present law of felony murder when there was clearly no intention on the part of either of the participants to do anything that would run the risk of loss of life.

As I mentioned before, the removal of adultery, fornication and other sexual offenses from the Code is a substantial improvement.

The Code addresses itself to the problem of non-support and I think takes a very realistic approach. The only time that you are going to lock a man up for non-support is where his conduct is persistent. Now the situation is where a person is willful or the judge determines that his failure to support his family is willful, he can be arrested or locked up and then it defeats the whole purpose in terms of supporting the family. The Code, I think, pushes the individual toward shouldering his obligations rather than relieving him of those obligations by putting him in jail and then putting the family on welfare. I think that is a realistic, sensible improvement on the present law.

The way in which the Code addresses the problem of fines is an improvement, saying that they will consider the ability of an individual to pay that fine rather than what was the case before the United States Supreme Court spoke on the subject of \$30 or 30 days.

There is a presumption against imprisonment in the Code. I happen to think that when we put a person into

prison, in 75 or 80 per cent of the time, we can predict with great certainty that we will have future problems with him, that society has got to start taking sensible risks with people and avoiding the incarceration of a young man who then learns how to become a professional criminal behind walls. I think the Code's emphasis on a presumption of probation is good and that hopefully, if the Code is enacted, we will have fewer people being sent to prison. As I mentioned before, the parole system would suggest that we would have fewer people retained in prison. That I think has got to be good for society's interest in the long run.

The Code seeks to eliminate certain disabilities that have attended the conviction of crime in the past and in that regard improves the chances of rehabilitation. A person who has served his time ought to be placed in such a situation where he can function as nearly as a human being as possible. The disabilities that have been built up over the years about jobs, whether a man can get a job if he is an ex-convict, whether he can vote, these things have all been barriers to rehabilitation, in my judgment, and I think the Code takes a sensible approach in seeking to eliminate some of those barriers.

Lest I be accused of having had something to do with the authorship of the Code, I would like to point out certain problems that we see with it. In broadening the area of attempts, we find that the drafters are making criminal more acts than were the case previously. In fact, what they are doing is moving back in time the point at which a person can be convicted of an attempt. Now an attempt by its very definition is a situation in which no crime has been consummated. We have serious problems with making criminal more acts that do not result in crime than is presently the case.

The question of conspiracy, the Code does broaden the crime of conspiracy in some material respects and, as a

Defense Attorney, I am reminded of Justice Jackson's condemnation of the crime of conspiracy as being a "Prosecutor's darling". Frequently it's the kind of crime where proof of criminal acts - the possibility of proving that is remote or impossible and we find a number of people dragged into a conspiracy trial and once in a conspiracy trial a number of protections that are available to a criminal defendant become meaningless in terms of what other people said about his role; hearsay provisions are let down. It's a kind of snare, once a person is trapped in, that is extremely difficult to get out of. And we think that, on some occasions, persons who have only marginal contacts with any criminal enterprise are swept into this conspiracy charge. So we would have serious problems about any broadening of the crime of conspiracy and we think the Code does broaden.

The most substantial problem we find with the Code is the introduction of the new concept of extended sentences.

Now the Code, under 2C:44-3, provides that an extended sentence - that means it can be tacked on to the sentence that goes with the crime for which a person is committed -- that the extended sentence or extended term can be imposed if a person is a persistent offender. I have a real problem with the standards the Code would set to determine when a person was a persistent offender. I believe that if a person has committed two crimes while over the age of 18, on the third go-round he can have this extended term tacked on. Well that would fail to take into account say a person who at 19 or 20 had a couple of run-ins with the law and then lived an exemplary life for 20 or 30 years and then had a third unfortunate occurrence. The judge, under the Code, could treat that person as a persistent offender when any realistic appraisal of his life style would suggest that he has not been a persistent criminal offender over the course of his adult life.

So too the definition of professional criminal. Now the Code would permit an extended term to be imposed if they found that an individual was a professional criminal, and the closest thing to a definition is that he is found to have supported himself through the fruits of crime.

Well, take the drug addict who might be supporting himself through criminal activity, which frequently is the case - to have him classified as a professional criminal, with the possibility of the extended term, I think loses sight of the fact that he is really a person suffering from an illness that ought to be treated in a more humane fashion and in a fashion that is more likely to protect society from future activity on his part.

A third area in which an extended term can be imposed is where a person is dangerous or mentally abnormal. This purports to subsume the sex offenders act and then to add some other situations that are undefined, but wherever a person is found to have engaged in this conduct and it is compulsive and repetitive behavior that he can be labeled a mentally abnormal person and have the extended term imposed.

Under the present law, the sex offender - and all indications are that they are being treated with a fair measure of success at Rahway now -- those persons are incarcerated for a period no longer than the maximum period that could be imposed for the crimes that they committed. We could have here a situation in which a person could be incarcerated for a much longer period of time than the maximum for the crime which he committed, and that is a determination which is made by a judge on the basis of a psychiatrist's report, not something that a jury determines.

One other area where the extended term comes into play is where the person is found to be a dangerous,

armed criminal.

You have a situation under the Code where a person who commits a robbery while armed is subjected to more severe penalties. If you then tack on the extended term for being armed, it occurs to us that you may have a double jeopardy problem but certainly you have a situation in which the individual is being hit twice, in effect, for the same criminal conduct.

As I said at the outset, I think that the Code, if enacted as it is, would represent a substantial improvement in our Criminal Law. But I would hope that the Committee would take the opportunity of evaluating each of these sections in some detail because I think that the Code can be improved upon. We will certainly provide the information that is available to us in the hope that it will be of assistance to the Committee. I don't think that it is something that should be enacted overnight and I am sure that is not the Committee's intention. It is a good document now and I think it can be made a better document with some care and consideration.

Perhaps I should make mention of one other problem that does bother me and that is the loitering section that Professor Knowlton mentioned was not of his doing, so to speak. But that section is so broad, in our judgment, as to permit a person's arrest on the merest kind of suspicion and we would have serious question as to whether it met constitutional requirements that arrest be made only on probable cause.

I realize that that is kind of a rambling exposition of our position on it. I do emphasize the fact that we will be continuing our evaluation of this Code and we will provide the Committee with a detailed appraisal of the Code or those portions of the Code that we think we can intelligently comment on.

ASSEMBLYMAN DICKEY: How much time will you need, Mr. VanNess, to complete your report?

MR. VAN NESS: Well, certainly, we have never been accused of needing less time than the Attorney General but we will try to have it done before the end of the summer.

ASSEMBLYMAN DICKEY: Fine.

Do any members of the Committee wish to ask Mr. VanNess any questions? Mrs. Kline?

ASSEMBLYWOMAN KLEIN: I was interested, Mr. VanNess, when you mentioned the difference between the solicitor and the person who uses the service. Isn't it true that the solicitor could be a man?

MR. VAN NESS: The solicitor could be a man.

ASSEMBLYWOMAN KLEIN: So it is not a differentiation based on sex.

MR. VAN NESS: It isn't a differentiation based on sex but in a real way it usually works that a woman is the solicitor. But I think in either event if the conduct is to be considered criminal for the reasons stated in the commentary, that it increases the incidence of VD, that it's destructive of a family, that it supports organized crime, - if, in fact, that is the case, then I don't see how you can draw a rational distinction between the person who provides and the person who uses the service. I would think, though, that very serious consideration ought to be given to the question of prostitution generally, in terms of whether all forms presently interdicted by the Criminal Law should be so treated.

I would say the same thing about gambling too. I share Judge Gaulkin's view that our present gambling statutes do not make much sense. Perhaps this isn't his view; I'll hold it as my own - that they don't make much sense when you can bet on a horse at the racetrack but if you can't get to the racetrack and you bet on a horse you stand in danger of going to jail; or you can buy a lottery ticket at the news stand but you can't buy it

from the neighborhood bookie. Those are problems that - I think the Criminal Law should appear rational to the people who are expected to abide by it. And I think you would have a very difficult time trying to explain to the man on the street why one form of gambling is all right and the other is bad, particularly when he may have a very close relationship with his neighborhood bookie.

ASSEMBLYWOMAN KLEIN: On the prostitution question, is it your impression that many people are incarcerated on the crime of prostitution?

MR. VAN NESS: I don't think that many people are incarcerated but they are frequently hassled, they are frequently arrested; they spend a night in jail. There is almost a license attached to the conduct by the fines, \$50 or \$75 fine which is usually paid by the pimp, is the word on the street. I think that it does not really eliminate - well, if you could eliminate prostitution, fine; I just don't think it can be eliminated. And if it can't be eliminated, then I think it can be handled in a more sensible fashion and in fact might reduce the incidence of venereal disease, might dry up the activity of a source for financing organized crime, might even have some benefits in terms of family relationships. I realize that sounds a little extreme but I just don't see the prostitution that is presently about and, were it dark and we cared to take a walk six blocks from this very building you could watch people ply their trade quite brazenly in the open. I don't think making that criminal protects the family.

ASSEMBLYWOMAN KLEIN: I was interested to note that the penalty for sexual intercourse when you know you know that you have venereal disease is less than the penalty for soliciting.

MR. VAN NESS: I did not see that. I find that difficult to rationalize also.

ASSEMBLYWOMAN KLEIN: Do you feel that having prostitution as a crime contributes to corruption?

MR. VAN NESS: Oh, I think it does quite clearly contribute, particularly since people aren't being incarcerated and are instead being hassled. I think it certainly holds out the opportunity for the policeman who is inclined to be corrupt to make some money on the side from the prostitute or her procurer by offering some protection.

ASSEMBLYWOMAN KLEIN: Well, by eliminating adultery and sexual acts between consenting adults as crimes, are we not saying it's a crime only if it's for the exchange of money?

MR. VAN NESS: That would seem to be the logical conclusion. And, again, I don't know that the exchange of money is, in and of itself, sufficient to warrant the impact of the Criminal Law. We're really talking about a moral problem and one that I think ought to be handled by agencies that are more likely to improve morality than is the law enforcement establishment.

ASSEMBLYWOMAN KLEIN: Do you have any problems with that business about the strikes, boycotts, and so forth, the threat to bring about or continue a strike, boycott or other course of action?

MR. VAN NESS: There seems to be one problem with the language used - and I don't remember the exact section but when you called it to Dr. Knowlton's attention I underlined a couple of words there that dealt with something about it being believed to be in the interest of -- page 59 - is for the benefit of the group in whose interest the act or acts. I can see some situations that might develop where a person, a labor organizer or a labor leader, might be found not to be acting in the benefit of the persons that are part of his union. I don't know. I think you could find reasonable people who would quarrel whether any strike benefits the membership in a meaningful way. Certainly there are no

short-range benefits. And I would suspect that could be handled by proper instruction. But it does leave open a question in my mind.

ASSEMBLYWOMAN KLEIN: Recently there have been some cases brought to light of stores that were forced to put certain products on their shelves which were actually, I guess, the products of organized crime, under the threat of a strike. Do you think that's what this is aimed at?

MR. VAN NESS: I think that's what it's aimed at and I think that is certainly something that criminal law ought to be concerned with. If I had any quarrel with it at all, it's with the language that I mentioned which might be made more clear.

ASSEMBLYWOMAN KLEIN: Do you think threatening a store with a boycott if they did not change their employment practices, for instance, could be construed as criminal?

MR. VAN NESS: If such conduct could be viewed as not being in the benefit or for the benefit of persons - if you are thinking in terms of the Civil Rights boycotts, I assume that you are; I would doubt that such activity could be viewed as nonbeneficial to the group being served but, conceivably, a lot of strange things are happening now.

ASSEMBLYWOMAN KLEIN: Of course. Thank you.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer, any questions?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKEY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No.

ASSEMBLYMAN DICKEY: Thank you very much, Mr. Van Ness.

MR. VAN NESS: Thank you.

ASSEMBLYMAN DICKEY: We will recess now for lunch and return in one hour.

(Recess)

(Afternoon session)

ASSEMBLYMAN DICKEY: Ladies and gentlemen, we will reconvene the public hearing before the Assembly Judiciary Committee.

We will call as our next witness Anne Elwell, Esq., National Organization for Women. Paula Kassell is with you also, Mrs. Elwell.

Would you state your full name and address, please.

P A U L A K A S S E L L: Paula Kassell, 25 West Fairview Avenue, Dover, New Jersey. I represent the National Organization for Women, and I would like to put into the hearing a resolution passed by the National Organization for Women at its last national conference, September 3 to 6, 1971, in Los Angeles. It is NOW Resolution 115:

WHEREAS, rape victims meet with disbelief and/or derision when attempting to report a rape to police, and

WHEREAS, the conventional method of investigation is to pry into the private life of the rape victim in order to excuse the act committed, and

WHEREAS, when the case is brought to court, the victim's personal life is on trial with attendant publicity, and

WHEREAS, the crime of rape as legally defined treats women as a separate class,

THEREFORE BE IT RESOLVED: That NOW take a strong position that the crime of rape be redefined as felonious assault,

FURTHER: That we work against humiliating treatment of rape victims by police officers, judges, district attorneys, probation officers and other legal personnel as well as by society generally, and

FURTHER: We recommend that the investigation of these cases be done by women.

That's the end of the Resolution.

The chapters of NOW in New Jersey strongly support this resolution and urge that the proposed Penal Code be brought into compliance with the items starred above. Those two items are:

WHEREAS, the crime of rape as legally defined treats women as a separate class, and

THEREFORE BE IT RESOLVED: That NOW take a strong position that the crime of rape be redefined as felonious assault.

And I would like to talk a little bit about the psychological aspects. I have a degree in psychology and training and experience as a Social Caseworker.

I think the revision was envisioned to protect men from being trapped by some women intent on punishing them under the feeling that hell has no fury like a woman scorned. But to legislate to protect against this contingency is to legislate the freedom of the real rapist. A man who can forcibly rape is a psychopath; he has psychopathic elements in his personality. And a man who rapes once will rape again; in fact, he will rape repeatedly.

It's generally conceded that thousands of rapists are free, free to rape again in New York, for instance, because of the New York State Law requiring corroborative evidence. And the men who wrote the revised statute in New Jersey may be concerned primarily with protecting men from vindictive women. The women of NOW are concerned with the safety of the women of New Jersey; we're concerned about our own safety and our daughters' safety.

I can get terribly emotionally concerned about protection of my daughter. With luck and precautions, we've been able to raise her safely so far, protected from sexual assault, but now she is in her twenties, on her own, and no longer under our protection. And I want to know, must she live in a society where it is almost

impossible to convict a rapist, in a society where rapists are returned to the streets.

So, along with your own protection from vindictive women, think of the protection of your daughters and your wives and your young nieces before you introduce corroborative evidence into the laws of New Jersey for rape.

Thank you, and Miss Elwell will continue on.

Oh, you want to ask questions.

ASSEMBLYMAN DICKEY: Mrs. Klein, do you wish to ask this witness some questions?

ASSEMBLYWOMAN KLEIN: I have no questions.

ASSEMBLYMAN DICKEY: I really have no questions to ask.

Do you have any questions, Mr. Wallace?

ASSEMBLYMAN WALLACE: I have no questions.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYWOMAN KLEIN: Mrs. Kassell, you implied almost that a rapist is beyond saving. Did you mean to imply that?

MRS. KASSELL: No. But I think if he is returned to the street there is no chance of him having any rehabilitation or treatment.

ASSEMBLYWOMAN KLEIN: Do you feel that criminal treatment or criminal punishment, punishment for crime is a proper treatment for a rapist?

MRS. KASSELL: No. I believe a rapist needs psychiatric treatment.

ASSEMBLYWOMAN KLEIN: Would you have any recommendations to make in terms of the treatment of a rapist, or the handling of an accused rapist?

MRS. KASSELL: No. I am afraid I can't answer that question. Perhaps I don't understand what --

ASSEMBLYWOMAN KLEIN: Well, would you recommend that in the case of an accusation of rape there should be

some kind of psychological tests or examination, and that in the case of a convicted rapist perhaps it should be handled through the facilities of a mental hospital rather than through a prison?

MRS. KASSELL: I have not looked into that and I prefer not to answer off the top of my head.

ASSEMBLYWOMAN KLEIN: As a Psychologist with Casework training, you didn't have any experience with this kind of case?

MRS. KASSELL: No.

ASSEMBLYWOMAN KLEIN: You are concerned that the amount of corroborative evidence that has been introduced into this statute would make it very difficult to convict anyone of rape?

MRS. KASSELL: Yes.

ASSEMBLYWOMAN KLEIN: When I asked a question previously, it was indicated that it's a very broad interpretation of corroborative evidence. Did you find that when you were looking at the statute?

MRS. KASSELL: Yes, I did. But I still feel that it will return rapists to the streets. I think there will be men who are in fact guilty of rape who will not --

ASSEMBLYWOMAN KLEIN: It will be difficult to get them convicted?

MRS. KASSELL: Right.

ASSEMBLYWOMAN KLEIN: Do you know anything about New Jersey's record in terms of conviction of rapists since we do not have this kind of statute now?

MRS. KASSELL: No.

ASSEMBLYWOMAN KLEIN: Thank you.

ASSEMBLYMAN DICKEY: Thank you very much.

Mrs. Elwell.

A N N E E L W E L L: My name is Anne Elwell. My address is 108 Washington Street, Newark, New Jersey. I am an Attorney recently admitted to the New Jersey Bar

and a member of the National Organization for Women, and I am testifying here today on behalf of that organization.

The Legislative Committee of New Jersey NOW has examined with various New Jersey Attorneys, other than myself, the implications for women of various provisions of the proposed Penal Code.

On the whole, we have been pleased with the new Code, particularly in its recognition of the obsolescent laws pertaining to sexual acts between consenting adults. We are concerned, however, with the addition of two provisions in the section of sexual assault, namely, 2C:14-6(b)4 and 2C:14-6(d).

The first of these provisions requires a complaint for sexual assault be filed within three months of the offense.

The second provision requires corroboration of sexual assault independent of the testimony of the victim.

We believe both provisions to be a dangerous step backward in the administration of criminal justice arising out of an archaic and indefensible prejudice toward women. These provisions deny for sexually assaulted persons, usually women, the same protection of the law that is accorded to others, since it requires those women to meet a higher standard of proof.

The commentary to the provision requiring a prompt complaint states that sound reasoning indicates the one who has been subjected to an act of violence will not delay in bringing the offense to the attention of the authorities. If this in fact is what sound reasoning indicates, then why is there no such requirement for other crimes of violence within the Code?

Furthermore, doesn't sound reasoning indicate that anyone subjected to any crime, not only those of violence, would not delay in bringing the offense to the attention of the authorities. Is there any reason

why we should be less suspicious of a complaint of robbery unreported for six months than a complaint of rape unreported for six months? Sound reasoning would indicate in fact that there should be less suspicion attached to a delay in the report of a rape than in the report of a robbery.

The report of a rape is enormously difficult for a woman. She must explain to persons she does not know and has no reason to believe sympathetic, not the breaking of a window of her apartment or the rifling of her car, the violation of sexual parts of her body. She must expose her emotions and her personal humiliation. Often women are reluctant to do so when they may in fact be doing so in vain, since there is no assurance of their assailant being captured.

Sound reasoning would indicate that many women choose to report acts of rape only when their conscience dictates that they must face that personal public humiliation in an effort to possibly prevent another woman from becoming another victim of the same assailant.

As the commentary points out, even without such a provision there are protections against an insincere complaint. A prosecutor would hesitate to institute prosecution on a stale complaint unless the case were extremely credible. This protection is deemed sufficient for all other crimes under the Code. There is no reason why it should be deemed insufficient for sexual assaults.

There is no indication whatsoever in the commentary as to why the drafters of the Penal Code proposed to add a requirement of corroboration of sexual assaults. Corroboration is required in only three other states that I can find, - Iowa, Connecticut and New York.

I was unable to obtain any statistics on

rape in Iowa or Connecticut or New York beyond 1969 due to a time limitation before this testimony. But in New York in 1969 there were 1,085 cases of rape reported and 18 convictions. Even if one accepts the theory that men are occasionally falsely accused of rape, it is difficult to believe that 1,067 women were lying; yet New York, which has a conviction rate of 90% for all other crimes, has a conviction rate of 1.7% for rape. This enormous discrepancy is due solely to the corroboration requirement in that State.

Rape is a crime which obviously is committed in secret. Even less than robbery or other assaults, it is committed in settings where there are no witnesses - in dark hallways, streets, within the closed doors of a house or an apartment. Even circumstantial corroboration is often difficult to produce. When several men overwhelm and beat a woman, bruises and torn clothing will be present; but the assailant who controls his victim with a gun or a knife, as is most often the case, will cause no bruises as a result of his voice.

The natural instinct of a woman assaulted is to go home, take a bath, and compose herself, - a natural destruction of evidence. With the existence of this provision, we would require corroboration of the least easily corroborated crime.

Writers on the subject have agreed that the only rationale for corroboration is the suspicion that women lie about rape, that women file complaints of rape not because they have actually been raped but because they're angry with their boyfriends. Such paranoia is totally unsubstantiated. To suggest that a woman will report a rape to the police, submit to investigation and interrogation, and go to public trial to testify to a personally humiliating act because she is angry at her boyfriend is more than ludicrous and rises to the level of barbaric. It well may be that some women lie about

rape. It is accepted that persons lie about other crimes. But with regard to other crimes we trust and have trusted the system of criminal justice to sift out the insincere complaints; we trust the ability of the prosecutor to recognize insincere complaints; we have faith in the ability of effective cross examination to expose a lying complainant; we have faith in the ability of a jury to distinguish truth from lies; and in extraordinary situations, of course, the judge has the power to set aside a verdict.

The major authorities on evidence adamantly attack statutes requiring corroboration in rape cases stating that such a requirement is totally inconsistent and unreasonable, making convictions for that offense almost impossible. And in New York, the State with the longest history of the corroboration requirement, a heavy attack is now being launched on that statute not only by women's groups who represent those historically victims of its injustice but by law enforcement authorities, most particularly the State Association of District Attorneys.

It would be unfortunate if New Jersey were to institute a statute that may soon be repealed in the State which has the most experience with it.

Thank you.

ASSEMBLYMAN DICKEY: Thank you, Miss Elwell.

Does any member of the Committee wish to ask Miss Elwell any questions?

Mr. Klein?

ASSEMBLYMAN KLEIN: I have one question. The statistics that you gave on convictions in New York rape cases, do you have any breakdown as to what portion of those were violent rapes and which of them were non-violent in nature?

MISS ELWELL: No, I don't. And my background is as a sociologist and psychologist and I am interested in those kinds of statistical breakdowns. I did not have

the time. I would be interested in doing that and I would be happy to submit it in memoranda to this body, if you would wish.

ASSEMBLYMAN DICKEY: We would be pleased to receive that.

Mrs. Klein?

ASSEMBLYWOMAN KLEIN: You have the statistics on New York which has a very strict corroborative evidence law.

MISS ELWELL: Yes.

ASSEMBLYWOMAN KLEIN: Do you have statistics on any states that don't have that corroborative --

MISS ELWELL: No, I don't. And, once again, that's work that I would be happy to do; I did not have time to do it before coming here today.

ASSEMBLYWOMAN KLEIN: I was intrigued by Mr. Klein's question. How do you differentiate between violent and non-violent rape?

MISS ELWELL: Very good. I assumed when he asked the question that there were divisions such as are in this Penal Code between I think what you call aggravated assault and non-aggravated assault. However, I would suspect that there aren't such divisions and, therefore, all I would be able to give you would be statistics on rape in other states, or perhaps rape in connection with another crime of violence.

ASSEMBLYMAN KLEIN: I didn't know whether the question was asked of the witness or of me but apparently it was asked of me, and I think that the distinction - and maybe the terminology is an inappropriate one, but there are rapes that involve people who have some relationship with each other, they know each other, and then there are rapes where the victim is a complete stranger to the assailant, and generally the latter category is considered a violent one and the other one is perhaps inappropriately called non-violent but I think generally considered that way, and that's the distinction I was

talking about.

MISS ELWELL: That would be incidents between someone, at least at the beginning, ~~who is a compulsory~~ companion of the rapist.

ASSEMBLYMAN KEOGH-DWYER: Yes.

MISS ELWELL: Those kinds of statistics would not exist. If you were free to read the transcripts of rape trials then you would have that information. We do not.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer, any questions?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKEY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No questions.

ASSEMBLYMAN DICKEY: Thank you very much, Miss Elwell.

The next witness, Mr. Thomas Jenkins, Chairman, New Jersey Afro-American Law Enforcement Officers Association.

I don't see Mr. Jenkins.

The next witness is Dr. Arthur C. Warner, Co-Chairman of the National Committee for Sexual Civil Liberties, American Civil Liberties Union of New Jersey.

A R T H U R C, W A R N E R: I am here representing not only the National Committee for Sexual Civil Liberties of which I am National Co-Chairman --

ASSEMBLYMAN DICKEY: Would you state your full name and address, please?

DR. WARNER: Arthur C. Warner, 98 Olden Lane, Princeton, New Jersey.

As I was about to say, I'm representing not only this Committee of which I'm National Co-Chairman, a list of the members of which I would like to take the liberty of distributing to the Committee right now, if I may. (See p. 40 A) but I have also been asked by the American Civil Liberties Union of New Jersey to represent

them this afternoon with respect to the particular provision which I have come here to discuss, which is Section 2C:34-3, the solicitation provision in the proposed Penal Code.

Let me say at the outset that our Committee approves very much of the general tenor of the Code. As the name of our Committee indicates, we are particularly concerned with the area of sex and the removing from the Criminal Code - not only of this State but we are a National Committee, all of the states -- the removal of criminal sanctions against private acts between consenting adults.

We feel that the Commission has done a very good job with one exception and that is the sexual solicitation provision. And I would like to take a little time first, this afternoon, to discuss the rationale of these provisions that are found in a number of states but not in all of them, and also to give our position with respect to them.

The archetype of all these state solicitation statutes was an English Act of 1898 which prohibited persistent importunities amongst males. Most states required, until the Model Penal Code, an actual solicitation before the criminal law could be implemented. But Section 251.3 of the Model Penal Code actually introduced a new theory of solicitation, namely, it proscribed loitering plus intention to solicit. I should say that solicitation statutes in many jurisdictions are subsumed under a number of heads - they may be known as soliciting or loitering for the purpose of soliciting or making an indecent proposal.

And I should also say, at the outset, that what we are discussing are conversations, solicitations. We are not here to suggest that any kind of sexual act in public should be legalized. We're talking simply about conversations.

Now the rationale, of course, of all of these

statutes is presumably to prevent affront and offense to the public. And this is clearly stated of course, in Section 2C:34-3 in which it is indicated that the law can be implemented only where there is offense or alarm to others.

Let's examine first what the crime consists of. We think of them as being public acts. In truth, they are no more public than if you and I in a stadium, at a Princeton game, for example, were to have a private conversation. They are private conversations, the locus of which is a public place; but it does not necessarily follow from this that because the locus is public that they are heard by anybody else except the individual they are addressed to. So, the first thing we have to ask ourselves is, are these fully public? The next thing is, to what extent do they offend or alarm? And this involves the entire character of these statutes because it is almost impossible to find a conviction in any jurisdiction that does not involve a plainclothesman or a plainclothesman who is connected with a vice squad; that is a complaint by private individuals claiming that they have been offended or alarmed are virtually unknown.

Now this is not only the experience of our own Committee which has looked into this matter for some time but it was the view of the group of six authorities who a few years ago made a very in-depth study of the homosexual solicitation laws. Because I should also have said at the outset that while these statutes are framed, as is this statute, to include heterosexual solicitations as well as homosexual ones, they are in fact are used administratively only against homosexuals, and they are the big catchall which brings homosexuals within the purview of the law. It's not the sodomy laws - as important as it is to repeal them insofar as they apply to sexual acts between adults in private.

Basically the burden of what I am going to say is that the sexual solicitation statutes are not only unjust but they do not protect the public from anything, and that their mere presence on the statute books serves as a device for victimizing the, mainly, homosexual.

Now I want to refer to this study which was most important because this sets the tone for our whole understanding of it. It appears in the U.C.L.A., University of California, Los Angeles, Law Review, and it's known as The Consenting Adult Homosexual and the Law. Every aspect of the laws against homosexual solicitation was examined by these six researchers. In a sense it can be called the Woolfenden Report on the solicitation statutes.

They found, for example, that so far as they were concerned they could find no evidence at all of any convictions in their jurisdiction of California outside of police-instituted arrests.

Now we are confronted here with a dichotomy because if this offense constitutes such a public outrage, we must ask ourselves why it is necessary to employ decoy methods in order to apprehend the victim, or rather the alleged culprit, because this is a universal method by which offenders under these statutes are apprehended.

In many jurisdictions vice squad officers devote themselves full-time and appear in mufti, that is in plainclothes, to deliberately entice - and I use the word "entice" because their conduct does not go all the way involving entrapment, it doesn't constitute legal entrapment but it's enticement, de facto enticement, and that is the only way in which anyone can be brought within the purview of the law.

The U.C.L.A. investigative service on interviewing police departments found that communications from private citizens concerning solicitation by homosexuals are extremely rare.

This brings us to the next question and that is the extent to which the class of persons that these statutes are supposed to protect are in fact protected.

Again, the U.C.L.A investigators pointed out that either citizens are not outraged by this type of behavior or that homosexuals are discreet as to whom they solicit.

I think our statutes of these kinds have to be based on empirical fact and not on hypothetical assumptions as to the nature of homosexual solicitations. There is a great deal of evidence, and the evidence is overwhelming - and I'm quoting now from a field survey that was made in England: "Most homosexuals who are cruising for partners do not brazenly solicit the first available male, nor are they going to employ glances, gestures, dress and engage him in conversation to elicit a promising response from the potential partner before an unequivocal solicitation for a lewd act is pandered."

Again, from another Researcher, Michael Scofield: "The great majority of homosexual solicitors are merely trying to find out if the other man is homosexual by the use of words or an inquiring look which would go unnoticed by the man who was heterosexual."

The question, I submit, that has to be asked is, To what extent do these statutes actually protect people from affront or alarm? Now on this score our Committee is pleased with the professed rationale behind this section. Then if we were confronted with a statute that was doing this, there would be no objection to it. But, by definition, this kind of a statute cannot do it.

And the next question that arises is, offenses and alarms caused by sexual solicitations are obviously a form of harassment - why does this form of harassment require a specific section in the statute of its own when we have right in the Code, in the form of - well, I

will give the section in a moment - but there is in the Code a general harassment statute - yes, 2C:33-4 subsection (c). Now we would submit, or rather we would ask why that provision does not suffice for all forms of alarm 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?

Remember, this Code is going to be legalizing, in private, adultery, fornication and sodomy. It is to be expected therefore that people are going to communicate with each other in order to accomplish these acts in private.

It's illogical and inconsistent with this repeal on the one hand to prescribe ordinary communications between people in order to gain these professed ends which are now licit; in fact, we submit that Section 2C:34-3 is simply legal sophistry. All it does is provide in many jurisdictions a sufficient number of arrests for police officers who are short of their arrest quota. This is true in some jurisdictions.

And I am sure that I don't need to mention the fact that a statute of this kind is open to a great deal of blackmail and corruption.

Now, having said this, let me go into the actual background, as we see it, of 2C:34-3. If the Committee will look on page 122 it will see there as Source or Reference, Model Penal Code 251.3 and Proposed Federal Code 1853. And I should like to take the Committee's attention for a short while to discuss those two provisions which are used as justification for this provision.

251.3 is the Model Penal Code's solicitation provision. It's drafter was Professor Louis Schwartz

of the University of Pennsylvania Law School. 1853 was an equivalent provision originally in the Proposed Federal Criminal Code but which was then repudiated by the staff. And the final provision, as it emerged in the completed draft of the Federal Criminal Code was 1861 which is based on a completely different theory of jurisprudence. The reason for this is the following: 251.3 of the Model Penal Code was Professor Schwartz's thinking ten or fifteen years ago. Our own Committee, on a number of occasions over the past few years, had occasions to discuss the whole empirical situation so far as statutes like this are concerned, and Professor Schwartz changed his mind; so much so that he even made a commitment that if the Model Penal Code were ever published, which it never has been, that there would be a comment placed at where 251.3 is to the effect suggesting an alternative, namely, to have no such solicitation provision at all.

The result was that when the final draft of the Federal Criminal Code was submitted to the President and Congress, a year last January, it did not have 1853, it had 1861, which is a completely different provision. It is based basically on the harassment statute of New York State, which is Section 240.25. And that lumps together a number of different acts, some sexual and some non-sexual, which involves harassing others.

I will give you an example of what I am talking about by quoting from that statute. It proscribes: "Whether any person is guilty of an offense if with intent to harass, annoy or alarm another person, or in reckless disregard of the fact that another person is harassed, annoyed or alarmed by his behavior, he (1) engages in fighting or in violent, tumultuous or threatening behavior, makes unreasonable noise, in a public places uses abusive or obscene language, obstructs vehicle or pedestrian traffic, and, finally while loitering in a public place for the purpose of soliciting sexual contact he solicits such contact."

Now there is a further provision, and this is very important: "Complaint by member of the public required. Prosecution under paragraph (F)" - also some other paragraphs here but what we're concerned about is paragraph (F) of this Federal provision which is - while loitering in a public place for the purpose of soliciting sexual contact, to solicit such contact. Prosecution under paragraph (F) of subsection 1 shall be instituted only upon complaint to a law enforcement officer by someone other than a law enforcement officer.

In short, if the law is to protect the class of people which it professes to protect, that it do so without being a source of either blackmail or official corruption.

Now the general view of our Committee is that a humane and decent Criminal Code in the area of private sexual conduct should have no solicitation provision. Why do we say this? The State of Illinois has now gone for 11 years, not only having repealed its adultery, fornication and sodomy laws as they apply to private sexual conduct between consenting adults but it has had no solicitation law for that period of time, and no one is suggesting that the standard of public morals in Illinois is any different or worse than anywhere else in the country.

Connecticut did the same thing three years ago, effective last October. And I would bring to the Committee's attention the fact that demographically and geographically Connecticut is very similar to New Jersey. It's adjacent to New York; the size of its cities are roughly the same; the ethnicity of its population is comparable.

The same is true of the State of Hawaii which did that this year. And, furthermore, the State of New Mexico has never had a solicitation provision.

I have mentioned before, and I think it's

worth pointing out, that many of these solicitation provisions are not called solicitation laws. They may be framed with both heterosexual and homosexual conduct in mind but, because of the vast changes that have occurred in the area of sexual morality, administratively these laws today are employed exclusively against homosexuals. And the intention of these laws is quite clear, despite the fact that they may be even-handed in their actual wording.

The temporary State Commission for Revision of the Criminal Laws in New York, which sat in 1964 and drafted the present New York Penal Code, originally had a provision very similar to this which was going to proscribe both heterosexual and homosexual provisions. At the public hearings it was brought to the attention of that Commission that the provisions as they then stood would have made criminal a young man who on a park bench asked a girl whether she wanted to go to bed with him. And the Commissioners said, and I was there at the hearings and heard them say this, "Oh, no, we didn't intend to do this." So what they did was simply limit the thing to homosexual solicitation. The point is, they didn't need to do so because de facto, administratively, the law wouldn't have been handled that way.

Now I am only too aware of the fact that a provision that limits prosecutions to private complaints could be interpreted as a reflection on the law enforcement forces. It is not the intention of our Committee at all to make any such suggestion or insinuation. We simply would like to go along with what Whitman Knapp, former Chairman of the New York City Crime Investigating Committee, did point out two years ago with respect to all such laws - and I have here what he said - I can't find it at the moment but the gist of it was that all of these laws involving the area of sex, particularly private sexual conduct, and the Sabbath laws, which he

used as another example, are open to and unfortunately are extensively used for corruption.

Now when we are talking about the matter of blackmail, and I am talking now of private blackmail, the Commission is to be commended for removing from the Criminal Code fornication, , adultery and sodomy between private adults. And I should mention the fact, too, that our Committee, of course, is concerned in the whole area of private sexual conduct. We were to have been amicus in the case last year which went to the Supreme Court of this State challenging a fornication law of this State. You may recall that the Supreme Court avoided the Constitutional issue, although the defendant who was charged under it was acquitted - a welfare client, I think, he was from Union or Monmouth County, I'm not sure - we were to have been amicus in that case.

I would like to speak for a few moments about the matter of blackmail. By removing all of these crimes from the statute book, the Commission has put a great crimp in the activities of blackmailers because they fatten on these private sexual crimes. However, that is only half the picture. The homosexual solicitation statutes stand as one of the very important avenues of blackmail and so long as they exist they will continue to do so in view of the fact that they do not, as I've tried to emphasize, protect the class of people that they're intended to protect because there simply are not private complaints. One ought to ask the question very carefully, why do we have these statutes at all.

Nevertheless, I am not unmindful of the fact that the Committee here may decide, for reasons of its own, that some form of solicitation statute is necessary. And we are,, therefore, respectfully submitting to the Committee additions, in the form of amendments, to this proposed section 2C:34-3. If the Committee would take a look at 2C:34-3, it could easily see what we've done

because we've taken them really from the Federal Criminal Code.

We start as the proposed section says:

"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" and we use the words "for sexual contact" because that's the wording that the Federal Code uses and it makes sense, as you will see, "for sexual contact or offering himself for the purpose of engaging in sexual activity" and then we add, "and actually solicits such sexual contact or sexual activity."

You will notice that 2C:34-3, as it is written, proscribes loitering plus intention to solicit; it does not require an actual solicitation. This comes from the Model Penal Code 251.3, the section which I've indicated has really been repudiated by its authors. And this is what introduced the new element, namely, penalizing mere intention to solicit rather than actual solicitation. So we've required first an actual solicitation.

Then, taken from the Federal proposals, a new section (b): "Complaint by Member of the Public Required. Prosecution under this section shall be instituted only upon complaint to a law enforcement officer by someone other than a law enforcement officer who claims to have been solicited." Now we've added the words "who claims to have been solicited" for this reason: After the Federal provisions had been proposed and they had just been submitted to the Congress, we made a further examination of this very long article that I referred to you in the U.C.L.A. Law Review. It actually comes to about 200 pages. And we noticed something very peculiar there, that in the records of some of the California Police Departments - and although I'm speaking about California, I should point out that this matter of solicitation is pretty common

throughout the Country although there are some local differences -- we found that on the books of the police departments something like 80% or 90% of the arrests under these statutes were ostensibly done as a result of complaints. Well, this seemed rather startling in view of all of the other evidence to the contrary. Upon further examination, the following was discovered.

Someone might telephone the police department of "ABC" City and say, "Do you know that in such and such a bar there is homosexual solicitation going on?" and this would be done in February, and the Police would say, "Yes, we're aware of that, fine." In August the Police decided, for reasons of their own, to make an arrest at that bar, and they may have arrested 15 or 20 people for soliciting. Every one of those arrests would be on the books as the result of a complaint, the complaint having been in February.

Now, when we're talking about complaints, we're talking about complaints by people who have actually been affronted. And that is why these words were put in. And I am violating no confidence when I say that Professor Schwartz, who was head of the staff of the National Commission for Reform of Federal Criminal Laws, said that had he been aware of this at the time, they would have put this language in. In fact, the comment of the National Commission is very interesting, and this is the reason for the provision. I am quoting from the Revised Edition of this study. This is the earlier one but I have photostats of the Revised one.

"Because the conduct described may not be offensive to the person to whom it is directed and because protection of the sensibilities of a law enforcement officer are not the the purpose of the section, it is provided that a private person must initiate the complaint."

Now, finally, there is a third section, and

that is: "Punishment upon conviction under this section shall not involve imprisonment."

Now, as a petty disorderly persons offense, I think I'm right, that those found guilty under this provision could be sentenced up to 30 days, although it is true that the chances of that are not great but there is that risk. I submit to you, what therapeutic benefits would ensue from sentencing to a prison a notoriously homosexual offender for 30 days? Certainly it would appear that the example of Delaware ought to be followed.

Now the Delaware Legislature has before it at the present time a new penal code which is going to do, in the area of sodomy, just what this code is going to do, but in the case of solicitation it is going to make it only a finable offense, no matter how many times it is repeated, up to \$500.

Now, we are going to submit copies of the proposed additions to this Statute. It is true that a statute like this may appear to be very small, so far as its tenor is concerned. I think we ought to realize something else. We know a great deal more, since Kinsey, about the whole ideology of homosexuality. Instead of thinking of it, as the professionals would say, a rara avis, that is, a very rare occurrence, we know that a substantial number of the population engages in homosexuality at some time and some for the entire portion of their lives.

The homosexuals of this country are, by any reasonable standards, the second largest minority in the country. The U.C.L.A. investigators pointed out that in California between 90 and 95% of all arrests of homosexuals come under the solicitation laws, that is for conduct which involves no sexual act at all but involves a conversation, solely a conversation.

We submit that it is utterly inconsistent to legalize sodomy and yet to proscribe conversations calculated to result in sodomy in private. And this raises

another issue and that is the constitutionality of these statutes.

Now, it is quite clear that it is only very recently that homosexual defendants even contemplated challenging constitutionally of such statutes because the easiest thing to do would be to plead guilty and take what, in most cases, amounted to a relatively small fine and just silently steal away. Well, this is no longer the case. I have here in my portfolio a case that was decided only two months ago in Colorado which challenged not a state statute but a municipal ordinance but which involved the very same two elements that were involved here, namely, loitering plus intention to solicit. And I think it is interesting to read what the Court did say, when it unanimously - a three-judge county court in Colorado -- as I understand, when the constitutionality, either statewise or federal, of a statute is questioned, a three-man county court, like the three-man federal court, is set up. The Court declared:

"The ordinance, upon examination, contains two elements, to wit: being in a public place and 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 states by the Fourteenth Amendment as shown by *Winters vs. New York*. In short, the ordinance in question goes even beyond the strong rights secured to the people under Freedom of Speech. We hold, therefore, that freedom of thought cannot be limited nor prohibited by law. And we find clearly, beyond all reasonable doubt, that the ordinance is unconstitutional on its face as violative of the Fourteenth Amendment."

Certainly, we are going to have to do some

serious thinking about the constitutionality of all of these solicitation statutes, particularly where - and this is the point -- while Colorado has, since this case was decided, repealed its sodomy law, so far as it is applicable to consenting adults in private, at the time this case was decided it had the traditional sodomy law that most jurisdictions had. Now, if this was unconstitutional before the repeal of the sodomy law, how much stronger is the case, in terms of state policy, where your code professes to liberalize private consensual acts in private between adults, how much stronger is the case for the law not to penalize ordinary conversations.

Now it's rather interesting, the English Act that I referred to, way back in 1898, which can be looked upon as the granddaddy of all these solicitation statutes, uses the word "persistently" - it's only one who "persistently", that is the solicitor who refuses to take no for an answer.

Should we not really be asking ourselves this: Is there a legitimate place in 20th century jurisprudence for criminal proscription of a solicitor who simply directs his question to another adult? Should we not expect any reasonable adult to be able to say no? Is this any different than any other person who is trying to market his wares - and I'm not trying to be facetious - and he does it in an offensive way? There are many things that offend us. Should we not be able to say no without the intervention of the criminal law?

However, even if we do feel - and we would suggest this only as a halfway step -- even if this Committee does feel that some kind of a solicitation statute is better than nothing - even though, as we tried to point out, they protect no one - then at least it should be surrounded with the safeguards that we have suggested.

We have underlined the additions to this proposed section that we would strongly urge the Committee

to adopt. (See p. 55 A)

ASSEMBLYMAN DICKEY: Thank you very much, Dr. Warner.

Any questions from members of the Committee?

ASSEMBLYMAN KLEIN: Dr. Warner, I must say that at least that portion of your comments which relates to an amendment that would require that there be an overt act certainly seems to me would be a very valid one. I am a little troubled, though, about some of the comments that you make. On the one hand you have suggested that solicitation is not truly a public offense and, on the other hand, you point out that, for example, in California the complaints are made by members of the public who are not victims of the solicitation. Is there not some inconsistency between those two points of view? Doesn't the California experience suggest that there are members of the public who are offended and that solicitation is indeed a public act?

DR. WARNER: No. There are two kinds of possible offenses. There is the offense that is suffered by the individual to whom the solicitation is addressed, and then there is the offense that can come vicariously from a third party who may, infrequently it's true, be privy to that solicitation by having overheard it, or perhaps just be aware by the general area in which this is going on that he assumes solicitation is going on and so he is offended.

Now, I think by definition the latter kind of offense has never been considered to be within the purview of the protection of the Criminal Law; that is, it is not intended to protect the sensibilities of people who are not themselves open to the solicitation. And this brings up a point that I neglected to mention.

Our Committee has not drafted this statute entirely isolated and without consultations with some members of the Commission that drafted this. As a result

of speaking to some members of the Commission, I think it would be only fair to say that the Commission made a mistake and was unaware, at the time, that when they used Proposed Federal Code 1853 and Model 251.3 they were using sections which have now been repudiated, and 1853 no longer exists; it's 1861.

Furthermore, I have been permitted to say, by Professor Knowlton, with whom I have discussed this on several occasions, that he was not averse to any of these proposals at all. In fact, I don't think it would be wrong to say that a few of the words in it were suggested by him rather than my own.

So that what we are asking does not go contrary to the sense of what the Commission is proposing to do; nor is it inconsistent with what is found in other places.

But, to get back to this matter of the offense, I don't know of any solicitation statute that is intended to protect the sensibilities of third parties - this is like a third party contract, so to speak, - who merely may object to the general idea that homosexuals or heterosexuals are in a place and are soliciting. I doubt very seriously whether anywhere the law has gone this far. It's intended to protect individuals who are allegedly affronted by the solicitations. Now there are some, there's no doubt about it, both heterosexual and homosexual. The question to ask is: What is the situation in a state such as Connecticut? What is the situation in a state such as Illinois? Mind you, we're not talking about solicitations for prostitution - let's make this clear; we're talking about a situation where there is no commercial element involved at all. And I don't think I did make this clear. We're talking simply of - and this is what raises the First Amendment issue - an ordinary request to perform a licit act, and the request is only addressed to another person.

ASSEMBLYMAN KLEIN: Well, I don't want to prolong the debate on that particular issue but let me

just turn to one other area of your comments.

DR. WARNER: Surely.

ASSEMBLYMAN KLEIN: And that is your suggestion that these complaints, by and large, only come from police officers --

DR. WARNER: They do.

ASSEMBLYMAN KLEIN: -- and that there should be a requirement that the person who was solicited be the complainant.

DR. WARNER: Yes.

ASSEMBLYMAN KLEIN: I'm sure you heard the previous speaker. Isn't the real reason why the victim does not make a complaint - isn't it essentially the same reason why women delay in making complaints about sexual offenses against them? In other words, the indignity of the situation is such that the person who has been offended doesn't want to talk about it, doesn't want to complain about it. And I ask you, is that not a real valid reason why these complaints are not made?

DR. WARNER: I don't think there is any doubt about what you say, that there is a certain percentage of people who are solicited that don't want to get involved in what they conceive to be a whole messy business; they simply don't want to go in and report it to the authority. There is no way of knowing how high a percentage this is but there certainly are some. But the next question we have to ask is, what does the present law do to protect those people? The law doesn't interfere at all, doesn't act as a deterrent to prevent solicitation; it doesn't at all. This doesn't answer the point that the class of people who are supposed to be protected, the very people you mention are not being protected by these laws. That point, I would think, is unassailable, unless we've missed something.

ASSEMBLYMAN KLEIN: Your suggestion is that no one is protected by these laws?

DR. WARNER: No one except the tender sensibilities of the vice squad officers whose professional duty is to daily or nightly get as many arrests as possible.

ASSEMBLYMAN KLEIN: Yes, but if a particular individual is regularly soliciting at random members of the public and he solicits 9 times and 9 members of the public who are solicited, are offended but for reasons which I have just indicated don't want to make a complaint, and on the tenth occasion he solicits a vice squad officer who does make a complaint, is not the public protected?

DR. WARNER: That is true. One can always conceive of law school cases that are fine in text books but which are so divorced from reality as to make us ask should our laws be framed with respect to these extraordinary cases in mind. In terms of the social evils that these statutes produce, in terms of blackmail and corruption

Any little two-bit thug, to put it bluntly, knows that the solicitation laws are an open sesame to shaking people down. In fact, on this score we do have some evidence because a few years ago, about 3 or 4 years ago, or 6 years after the sodomy and solicitation laws had been repealed, our Committee made a study in Chicago. Now, it is well known, as I say, that any two-bit crook - if he can't think of doing anything else, can't steal a car, always knows that shaking down a queer is an easy way of getting money. Now what we did was take a sampling of people who had come out of prison. They were not in there for blackmail; they were not there for any sexual reasons or blackmail, but they were the milieu, the criminal milieu that frequently and constantly engaged in this. And what we found was this. We found basically, almost unanimously, amongst these

petty hoods, as I said, well, there's nothing we can do anymore, you can't shake them down anymore, basically there were no more pickings.

What I would submit in all respect is that in terms of the hypothetical individual that might be protected - and I say "might" because the evidence is so overwhelming in the other direction - to permit on the statute books, as Whitman Knapp pointed out, these kind of laws that do nothing but contribute to blackmail is really an outrage to human morality, if you may use the term. It's the laws here that produce the moral situations. They don't protect anyone. Oh, sure, I've heard of a case now and then. That is it.

ASSEMBLYMAN DICKEY: Mrs. Klein, have you any questions?

ASSEMBLYWOMAN KLEIN: Just one. Basically, I am very sympathetic to your position, particularly in terms of not amending these statutes but of not having them. Now, you have indicated that the statute unamended would, no doubt, in your opinion, be found to be unconstitutional.

DR. WARNER: I think in the climate of judicial opinion today in terms of Griswald, plus the extension of Griswald that came a few months ago - and you know the Brennan decision, Eisenhart vs. Beard, the birth control case in Massachusetts.

ASSEMBLYWOMAN KLEIN: Well, you did state that in your testimony. What I wanted to ask was, if you amend it, as you suggest, with the addition of these phrases, is it less likely to be unconstitutional in your opinion?

DR. WARNER: That is true. We would in a sense be legitimizing the statute. But we're honorable enough to say, we realize political imponderables being what they are, if the Committee, for reasons of its own, wanted only to give us half a loaf, all right.

ASSEMBLYWOMAN KLEIN: You would prefer that.

DR. WARNER: Yes. But in fact the ACLU, when they commissioned me to represent them, as well as my own Committee, instructed me to make quite sure that they don't want this statute at all. And I think the best proof of it is that you've got New Mexico that never had one, you've got Illinois --

ASSEMBLYWOMAN KLEIN: Dr. Warner, I just want to ask you one other question.

DR. WARNER: I'm sorry.

ASSEMBLYWOMAN KLEIN: I just feel that you gave very complete testimony and I didn't want to --

DR. WARNER: Well I tend to be verbose.

ASSEMBLYWOMAN KLEIN: Are you aware of any statutes in the ABC Laws that pertain to loitering within bars that affect the loss of a liquor license?

DR. WARNER: Yes. There was a case decided in this State, I think in 1966, known as Val's Bar decision. Basically, the administrative regulations of the ABC until that time gave cause for revocation of a liquor license to any proprietor who permitted his establishment to be a congregating place for homosexuals.

ASSEMBLYWOMAN KLEIN: Is that still on the statutes?

DR. WARNER: No. We won that in the Supreme Court of this State.

ASSEMBLYWOMAN KLEIN: Well that is no longer --

DR. WARNER: We were amicus in that case. It was pointed out that the mere presence of homosexuals was not warrant for removing a license.

ASSEMBLYWOMAN KLEIN: So that at present in New Jersey a license cannot be suspended because of that.

DR. WARNER: I would say it cannot. Right.

ASSEMBLYWOMAN KLEIN: Thank you.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No questions.

ASSEMBLYMAN DICKEY: Assemblyman Wallace?

ASSEMBLYMAN WALLACE: No questions.

ASSEMBLYMAN DICKEY: Dr. Warner, you dealt with the homosexual in this matter of solicitation; I wonder if I could turn your thoughts, for a moment, to the so-called V Girls that we read about in our neighboring city of Philadelphia, and there we find solicitation by professional ladies of customers in the taverns. I don't know whether that happens in Princeton or not --

DR. WARNER: To my knowledge, it doesn't.

ASSEMBLYMAN DICKEY: With reference to your amendment then, there would be a violation because there would be an actual solicitation. Is that right?

DR. WARNER: Well, it wouldn't affect your other sections here because these would be solicitations for commercial reasons and they wouldn't come under the purview of what they are intending to amend.

ASSEMBLYMAN DICKEY: I see.

DR. WARNER: You see? We do feel that this whole matter of prostitution is something that needs a great deal of study. We discussed this, a number of members of our Committee, three years ago in a conference in Chicago with Miss Pearl Hart, and we realize we just haven't given it enough study. But the point is, when you have a commercial business, to begin with you're talking in many cases of solicitation plus, not only the commercial element but a commercial element means you've got a business, it means you've got employees, you have employers and, like all businesses, they are trying to increase their business. And this adds elements that don't exist with respect to the simple solicitations; in fact, it would be better if we had another word but we use the word "solicitation" for both, yet one is commercial and one is non-commercial.

ASSEMBLYMAN DICKEY: I see the distinction now.

DR. WARNER: I ought to tell you an example of the police corruption, the extent to which police will go, and the example is Chicago.

Illinois, as I said, has no such statute but there have been innumerable cases where there have been solicitations, a private solicitation of a vice squad man in plain clothes in Chicago and a homosexual would say, "Come to my apartment for some fun." and the vice squad man will say, "Fine." Then the vice squad man will say, "Let's stop at this cafeteria and have some coffee." So they go in and have some coffee and the homosexual will pay the 20¢ for the two cups of coffee, at which point he will be arrested, the payment for the coffee being the alleged consideration for the solicitation bringing it under the prostitution act of the state.

Now it is true that these cases are thrown out but they are thrown out only after the person has been arrested, although not booked, and his employer very often gratuitously told that his employee has been arrested on a morals charge. It's because of the enormity of some of the transgressions on personal liberty that these statutes give rise to, although not in this jurisdiction, that the whole theory behind them is rotten.

ASSEMBLYMAN DICKEY: All right. Thank you very much.

DR. WARNER: There is one last thing. We are somewhat worried about the extent to which this Code does not fully go along with the doctrine of preemption because it is quite clear that if municipalities can by individual ordinance defeat the policy of the State if you were to modify this in the sense that we've indicated, it would defeat the whole policy, particularly since a statute like this is a typical subject for municipal regulation. Now if the present language of the preemption provision seems good but, in view of what I heard this morning, we begin to have a few doubts. So, whatever is done, we would

like to be sure that with respect to this provision certainly, whatever it ends up with, adoption of pre-emption would apply and that no local ordinances could contravene the policy laid down.

ASSEMBLYMAN DICKEY: You heard the testimony of Dr. Knowlton on that subject?

DR. WARNER: Yes, I did. I obviously assumed that what Professor Knowlton said was correct.

ASSEMBLYMAN DICKEY: Do you wish to submit some language that you think might strengthen that section on preemption?

DR. WARNER: Not at the moment, no. What I am going to leave with the Commission are copies of a memorandum that we did, which would be our second memorandum to the Commission, and if the language seems a little critical and overharsh it's because we had originally made representations to the Commission along the line of the Federal provisions and then we found that we had been completely ignored by their using these repudiated provisions. So if the tenor of this memorandum is a little on the complaining side, I think all of us, including the members of the Commission - some of which have already seen it - are not going to be surprised. I would like to leave these copies with your Committee, together with our proposed new language.

Now, Dr. Valente who is, I believe, the next gentleman on your list to speak, is on our Board of Advisors, the Board of Advisors of our Committee, and the former Chairman of the Department of Religion at Seton Hall.

ASSEMBLYMAN DICKEY: All right. We will call Dr. Michael F. Valente, Seton Hall University, representing the National Committee for Sexual Civil Liberties.

M I C H A E L F. V A L E N T E: I am Michael F. Valente and I reside at 232 Sanford Avenue in Newark. I am President of the Institute for the Study of Ethical

Issues in New York City, former Chairman and presently Associate Professor in the Department of Religious Studies at Seton Hall University. And I am a member of the Advisory Board to the Committee of which Dr. Warner is the Chairman.

I would like to speak very briefly in favor of the excellent work on the proposed Code in removing certain statutes that had attempted to regulate private sexual acts. I see the new Code as offering New Jersey the opportunity to move forward, legislatively, and in some areas take the lead in bringing the Criminal Law to the genuine service of protecting the common good without pandering to the private moral convictions of any individual or group.

I would like to stress that religious groups no longer take the absolutist, monolithic view of sexual morality that they did take in the past. There has been considerable reinterpretation of past thinking along these lines and I think that one finds today considerable conviction all across the board that matters of sexuality surely ought not to be the concern of the Criminal Code even though for some individuals or indeed for some religious groups some of these matters are conceived of as sinful or matters of conscience. I have in mind, for example, contraception. There are certain individuals who, as a matter of conscience, feel that engaging in an act of contraceptive coitus would, if unrepented, condemn them for all eternity to hell. And this is a legitimate religious viewpoint, I think, for the persons who hold it, but I believe that we have turned away, in this country, at least as of a couple of years ago, in all of the states now, from laws that would prohibit contraceptive coitus.

I would like to mention further that - to bring us up to date rather quickly - there are certain ministers who today are even advising and counselling

individuals to engage in acts that have been proscribed in the past, such as fornication, premarital sex, even adultery.

I think what I am trying to get at is, if the law is based upon religious conviction, these religious convictions seem to have been based upon a concept of natural law. The natural law doctrine to which I refer is a doctrine of human sexuality that requires that every sexual act be open to procreation. And, consequently, things like contraception in any form, homosexual acts, would be proscribed by certain religious viewpoints but current natural law theory tends to repudiate the idea that anything is unnatural to man if it is a product of his ingenuity and inventiveness. There are those who would make the following kinds of religious statement: "I refuse to fly in an airplane because if God had intended me to fly he would have given me wings." "I will not allow my underaged child to have his appendix removed because it is against my religious viewpoint, it violates the natural law."

As far as New Testament scripture is concerned, I find nowhere in the New Testament an in-depth discussion of either sexuality or sexual morality. I feel that the prohibitions that we sometimes find are attempts to convey a religious message, specifically a message of concern for one's fellow man, and that they naturally use examples of ordinary or accepted or customary behavior from their own times, from their own years, from their own circumstances, and I think these are used as illustrations only and ought not be confused with the sacred message itself.

Furthermore, while we have seen situations in the past in which the Criminal Code proscribes certain actions based upon religious morality, I think it is wide religious conviction today that it would be immoral, even religiously speaking, to retain on the statute books laws that are essentially unenforceable, laws that might

invite corruption, blackmail or extortion, and laws that might foster disrespect for the law.

It is dangerous to the respect for law, which we need so desperately today, to allow any private interest lobbies to derail the attempts of the Commission's proposed Code to bring the law into harmony with the widespread convictions of most ordinary persons.

And if I may speak as an ordinary person, I certainly wouldn't want any of my tax monies devoted to the various kinds of law enforcement, whether this be the salaries of the policemen or the judge or prison officials, or whatever, in cases involving private sexual activities. I think that's a waste of my hard-earned money.

Finally, I would like to make, if I may, one comment on imprisonment. I think that imprisonment must be used very sparingly as it is so dehumanizing, that from my own viewpoint, insofar as I have been able to reflect upon what I see around me, imprisonment creates within a person very often the desire to function antisocially for the remainder of his life in a kind of attempt to balance out or redress the terrifying dehumanization that any loss of freedom, such as imprisonment, implies. Because it's the very essence of man's nature, as man, that unlike the lower animals he possesses a rational mind and it is not by sheer instinct but by his irreplaceable freedom to choose to act.

Thank you.

ASSEMBLYMAN DICKEY: Thank you very much,
Dr. Valente.

Any questions from members of the Committee?
(No questions)

Thank you very much.

Does anyone else wish to testify before the Committee? Would you step forward, sir. May we have your name, please?

J O S E P H F. S H A N A H A N: Mr. Chairman,
my name is Joseph F. Shanahan, Lambertville, New Jersey.

I would like to preface my remarks by saying
that I am speaking not for any organization but for
myself as a concerned individual.

I would like to respectfully call your at-
tention to certain philosophic and legal aspects to two
sections of the proposed Code, one of which has to do
with the public and the other with the private interest.
If the points I have in mind have already been raised
by you gentlemen and ladies, or others, and have been
explained or pursued in more detail by the Commission,
I would appreciate knowing how they were resolved.

I would further like to call your particular
attention to the fact that basic to this whole matter
is the legal problem that, generally speaking, if it is
not described in this Code it is not a crime. The
particular section stated:

"Common law crimes are abolished and no conduct
constitutes an offense unless the offense is defined by
this Code or another statute of this State."

It is obvious that these sections must be
studied in great detail to avoid any omissions. It is
with that in mind that I am bringing my second point
before you for your serious consideration.

My first point is a general one and has to do
with proposed Section 2C:33-10 - Desecration of Venerated
Objects. This section pointedly and directly excludes
the flag as a venerated object - the Commission stating on
page 299 of Volume II of the Report, "We do not continue
the policy as to the flag. We believe the existing
Federal statutes to be sufficient in this area." I
would strongly urge that this Committee recommend that the
flag of the United States be included in particular when
that section is offered for adoption. I don't know if the
Commission went into the Federal area any further but it

is my opinion that, practically speaking, this particular offense is usually a comparatively trivial matter which is better handled locally as a non-crime, as it would be in this section, and not as a Federal matter. At any rate, where is the harm in so including it?

My next point is in reference to proposed Section 2C:28-5 - Tampering with Witnesses and Informants; Retaliation Against Them.

First, I would like to raise a question here that has to do with the use of the word, "informant" and the negative connotation that flows from it. It seems to me to be equated with informer or one who informs for hire and, therefore, is ill chosen and misleading. Assuming that the Commission has used the word "informant" to describe one who is applying to the courts for legal redress - why not use that more dignified and oft-used word "complainant"?

This brings us to what I believe is a problem of omission in paragraph (a) of this statute. How does the statute, as it is worded, forbid the possible prevention of one from asserting his legal right to complain to the courts in the face of threats to himself or third parties? If after some consideration this Committee does see a problem here, I would suggest that the inclusion in sub-paragraph (1) of the words, "Not to complain" or words of similar meaning might clarify it.

Perhaps I could clarify my own meaning with a hypothetical case. Suppose a union official on an employer's premises assaults an employee. The employee makes a complaint to the local magistrate and the union threatens to strike unless the employee withdraws the complaint. The employer offers the employee the choice of withdrawing the complaint or being fired. Would the conduct of the employer be forbidden by this section?

I would like to close here by thanking the Committee for affording me this opportunity to appear

here and state my case.

ASSEMBLYMAN DICKEY: Thank you very much, Mr. Shanahan.

Does any member of the Committee wish to ask Mr. Shanahan any questions?

(No questions)

Thank you very much, sir.

MR. SHANAHAN: Thank you.

ASSEMBLYMAN DICKEY: Does anyone else wish to testify? (No response)

If not, this public hearing will be continued on Tuesday, June 27, at 10 A.M.

(Hearing adjourned)

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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'être 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 20:34-3 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 heterosexual 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 verbatim 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 authoritativeness 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 Commission 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 ingreqlently 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 blackmail, 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. 20:34-3 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. 20:34-3 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 peddler 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. 20:34-3 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. 20:34-3 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. 20:34-3 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. 20:34-3 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. 20:34-3 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. 20:34-3, 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. 20:34-3 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 be 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 reëxamining 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 omitted 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,

Professor Walter E. Barnett
Dr. Arthur C. Warner

Co-chairmen National Committee
for Sexual Civil Liberties

Section 20:34-3 --- 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

PROPOSED SECTION 2C:34-3 (new language is underlined)

(A) 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 for sexual contact or offering himself for the purpose of engaging in sexual activity and actually solicits such sexual contact or sexual activity.

(B) Complaint by Member of the Public Required. Prosecution under this section shall be instituted only upon complaint to a law enforcement officer by someone other than a law enforcement officer who claims to have been solicited.

(C) Punishment upon conviction under this section shall not involve imprisonment.

Following is from the comment of the National Commission on Reform of Federal Criminal Laws when recommending the same provision as sub-section (B) above:

"Because the conduct described may not be offensive to the person to whom it is directed and because protection of the sensibilities of a law enforcement officer are not the purpose of the section, it is provided that a private person must initiate the complaint."
(Final Report to the President and Congress, Washington, 1971, pp. 269-270.)

