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Hon. Richard J. Bartlett
Chairman
New York State Commission on Revision of the Penal Law
155 Leonard Street - Room 654
New York, New York

Dear Sir:

This firm is legal counsel to the George W. Henry Foundation, Inc., an Episcopal connected New York City organization long engaged in providing counselling and psychiatric referrals in the field of homosexuality. As such counsel we have handled numerous homosexual criminal charges involving individuals referred us by the Foundation. The views expressed below with respect to the sections of the proposed Penal Law dealing with homosexual offenses do not necessarily coincide with the views of the Foundation but they do reflect our practical experience in dealing with the pertinent provisions of the present Penal Law in the criminal courts of New York City.

We support the proposal altering the law as to acts of sodomy. Private acts between consenting adults seem well beyond the interest of the law, regardless of the prevalent feeling of society as to the merits of such conduct. Furthermore, it is clear that such private acts, privately performed, have as a practical matter rarely been the subject of criminal prosecution because such acts rarely come to the attention of the police. I would doubt that this change in the law would significantly alter arrest statistics.

Much more significant is the field of alleged "public" activity on the part of homosexuals. As may be known to the Commission, far and away the bulk of arrests for specific homosexual offenses occur under Section 722(8) of the Penal Code, proscribing public loitering for the purpose of soliciting others to commit a homosexual act. Our

experience as attorneys indicates that the occasional "sodomy" arrest involves alleged facts which, if the specific act of sodomy were not a crime, would nevertheless justify an arrest under the Section 722(8), the loitering statute. It seems also evident that Section 250.15(3) of the proposed law is, in effect, substantially similar to Section 722(8) of the present law. It would seem realistic, therefore, to conclude that the position of the homosexual as far as potential arrests are concerned would remain virtually the same under the proposed law.

Yet the homosexual "loitering" provisions of current law, as applied by the police, prosecutors and the courts, seem grossly inconsistent with the rationale of the Commission as reflected in its modification of the sodomy sections and as reflected in the Commission's comment with respect to those sections. Accordingly, for the reasons below, we urge the Commission to consider eliminating Section 250.15(3) of the proposed law.

First, the law is such that entirely private acts and indeed private conversations, if performed in a place loosely denominated as "public", which acts or conversations come only to the attention of the arresting officer, are within the statute. Current court interpretations do not require any showing by the prosecution that others were offended or even knew of the act or conversation. As will become evident to one who observes a few trials in the Criminal Court of the City of New York of Section 722(8) violations, virtually all cases involve plain-clothes arresting officers who hide near couples engaged in suspected solicitations or who impersonate homosexuals and thereby become the "victims" of alleged solicitations. Many, many convictions under the section have been obtained on the bare testimony of the arresting officer that an individual approached him in a "public" place and "invited" him to engage in a homosexual act; no proof that anyone other than the arresting officer knew of the invitation is required. Such trials make clear that it is largely "hidden" conduct which has been brought within the statute. While these acts take place in so-called public places, such trials make clear that they are essentially private acts which plain clothes detectives, by energetic activity, are able to be witness to.

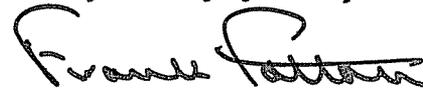
Second, although a conviction under Section 722(8) is merely an "offense" and as a first offense usually results in a suspended sentence, such a conviction, because of its "moral" elements, is a matter of great

seriousness for the defendant, of a seriousness far outweighing the minor sentence meted out. Therefore the field is ripe for extortion, blackmail and "pay-offs". Of great importance in this connection is the fact that the homosexual defendant, in contrast to the usual defendant in the criminal courts, often has the funds to make such payments.

Third, it does, however, seem perfectly reasonable for the public to wish to be protected from offensive homosexual approaches and from visible offensive conduct in public areas by homosexuals. It is also evident that there are particular public places in, for example, New York City, which are homosexual gathering places for purposes of solicitation. It is clear that these locations are well known to the police. I was recently told by an arresting officer that as to one such area, 90th Street and Riverside Park in Manhattan, he could leisurely pick and choose when making an arrest among the numerous homosexuals who congregate there. Yet if it is the aim of the law to rid the community of such gathering places, I suggest that concerted police action under existing park regulations and under other laws lacking sexual overtones would provide an answer. To those familiar with the criminal courts it is evident that Section 722(8) is not used for that purpose but for the purpose of permitting the plain clothes officer an isolated, convenient arrest. If it is the aim of the law to avoid legislating standards of consensual sexual conduct, then the current law and the proposed law are very much at odds with this aim.

As the Commission may be aware, the recent revision of the Illinois Penal Law has eliminated from the law the Illinois equivalent of the New York homosexual "loitering" statute; accordingly there is respectable precedent for the elimination of the New York provision. Under all the circumstances, we would recommend the Commission's giving consideration to the deletion of Section 250.15(3) from the proposed Penal Law.

Very truly yours,



Frank Patton, Jr.

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