Lewdness Law Reinterpreted

Both Gays' Backers, Prosecutors Hail Ruling

BY GENE BLAKE
Times Legal Affairs Writer

Gay rights lawyers and Los Angeles prosecuting authorities are both hailing a state Supreme Court decision that gives a new interpretation to the lewd conduct and sexual solicitation law.

The decision held that the language of the present law is unconstitutionally vague. But instead of striking down the law, the court construed the language in a way to save it.

As written, Section 647(a) of the Penal Code makes it a disorderly conduct misdemeanor to solicit or engage in "lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

The court noted that studies show the overwhelming majority of arrests for violation of the law in Los Angeles County involved male homosexuals.

In its decision Friday, written by Justice Mathew O. Tobriner, the court interpreted the law to include three basic new elements:

—The solicitation must be for conduct to be engaged in publicly. Solicitation for an act to be performed in private is not a violation.

—Lewd or dissolute conduct was defined as involving "the touching of the genitals, buttocks or female breast, for purposes of sexual arousal, gratification, annoyance or offense."

—Only a person who "knows or should know of the presence of persons who may be offended by the conduct" can be guilty of the offense.

The decision was rendered in the case of Don Barry Pryor, who was arrested in Hollywood in 1976 on a charge of soliciting an undercover policeman to perform oral copulation. His case was sent back to Municipal Court for trial under the new interpretation of the law.

Attorney Thomas F. Coleman, who represented Pryor and is cochairman of the National Committee for Sexual Civil Liberties, predicted the decision would bring about substantial changes. He said there would be far fewer arrests and prosecutions in such cases.

"How can they prove that a person knew or should have known (of the presence of persons who may be offended) except in the grossest of cases?" he asked.

"At least it will clean up the act of the vice squad, or have their cases thrown out by the courts or the prosecutors."

However, George Eskin, chief deputy in the Los Angeles city attorney's office, said he did not expect much impact because his office for the last 2½ years has interpreted the statute in much the same way as the new Supreme Court decision does.

He said his office established new guidelines in January, 1977, after enactment of the state law that removed criminal penalties for sexual acts performed by consenting adults in private.

"I take pride and satisfaction in the decision," Eskin said.

Eskin said the guidelines required that the solicitation must be for an act to be performed in public, except for repetitive, aggressive and offensive solicitation. Even that exception was deleted last fall, he said.

Eskin said his office also had been interpreting the conduct in the light of the presence of persons who would be offended. He cited specifically arrests made at the Plato's Retreat West, which his office declined to prosecute.

He pointed out that there were posted warnings at the door to the effect that people should not enter if they might find viewing sexual activity offensive.

"We thought that was not a public place as intended by the statute," Eskin said.

Dan Cooke, Los Angeles Police Department spokesman, said, "We've been going along with the city attorney's guidelines and I don't believe the decision will have any particular impact."

Dist. Atty. John Van de Kamp agreed that the Los Angeles city attorney's office already has a policy "relatively consistent with the decision."

Van de Kamp said he did not believe there were many such prosecutions in the county territory under his jurisdiction. "There has been less activity of that sort by law enforcement," he said.

But Van de Kamp conceded that individual police departments have different policies "and this certainly clarifies it once and for all."

Susan McGreivy, attorney and legal chairman of the American Civil Liberties Union Gay Rights Chapter, said the decision will have "far-reaching impact."

"It will help to equalize the treatment of heterosexuals and homosexuals in terms of solicitation of a sexual act," she said.

The Supreme Court made the new interpretation retroactive to cases still pending on appeal. Defendants whose convictions have become final will be entitled to relief only if there is no material dispute as to the facts and it appears that the new interpretation does not prohibit their conduct.

Eskin said the retroactivity should not affect many cases filed in Los Angeles since the beginning of 1977 but might affect a large number of earlier cases.

Justice William P. Clark dissented from the decision, particularly its retroactive effect.

"The majority create a remedy for which there is no wrong," Clark wrote.

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Sexual Solicitation Statute Given New Interpretation

By BOB de CARTERET

In a ruling applauded by the homosexual community and civil libertarians, the California Supreme Court has given a new interpretation to a criminal statute that prohibits solicitation of lewd or dissolute conduct.

The high court ruled that solicitations can only be illegal if they are for a criminal act to be performed in a public place where other persons would be offended.

The court reviewed Penal Code Sec. 647(a), which declares a person guilty of disorderly conduct, a misdemeanor, if the person "solicits anyone to engage in or ... engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

"We agree with defendant that the phrase 'lewd or dissolute conduct' as construed by past decisions is unconstitutionally vague," Justice Mathew O. Tobriner wrote for the near-unanimous court.

Rather than send the issue back to the Legislature, the court, in a 30-page, majority opinion, went on to define the law from which those persons convicted must register as sex offenders:

"...(W)e construe that section to prohibit only the solicitation or commission of conduct in a public place or one open to the public or exposed to public view, which involves the touching of the genitals, buttocks, or female breast, for the purpose of sexual arousal, gratification, annoyance or offense, by a person who knows or should know of the presence of persons who may be offended by the conduct."

The case, *Pryor v. Municipal Court*, L.A. 30901, involves charges against a male defendant who solicited a plainclothes male police officer, for a sex act the defendant maintains was to be performed in private.

The court said its view is shaped by the Legislature's 1975 enactment of the Brown Act, which legalized private sexual acts of consenting adults.

The court said it believed the solicitation must be limited to criminal sexual conduct.

"More specifically, we hold that this section prohibits only solicitations which propose the commission of ... lewd or dissolute conduct which occurs in a public place, a place open to the public, or a place exposed to public view (emphasis by the court)," Tobriner wrote.

On the issue of public place, Justice Tobriner said:

"...(E)ven if conduct occurs in a location that is technically a public place, a place open to the public, or one exposed to public view, the state has little interest in prohibiting that conduct if there are no persons present who may be offended."

The justice said the courts' interpretation will not depend on the moral views of the judges or jury and does not prohibit solicitation of lawful acts.

Concerning retroactivity, the court said a defendant whose conviction is now final will be entitled to relief by a writ of habeas corpus only if there is no material dispute as to the facts relating to his conviction, and if it appears that the newly construed statute would not have prohibited the conduct.

Joining with Tobriner were Chief Justice Rose Bird and Justices Stanley Mosk and Frank Newman.

Justice Frank Richardson and Wiley Manuel concurred only in the judgment.

Justice William Clark filed a concurring and dissenting opinion in which he objected to the retroactive application.

Attorney Thomas F. Coleman, representing the defendant, said the ruling will warn trial courts that the rights of homosexuals will not be disrespected. He said the ruling will end snooping and spying by plainclothes officers.

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★ LATE NEWS ★

The California Supreme Court, in a decision of national importance, handed down a landmark ruling on September 7 concerning the constitutionality of the criminal statute which prohibits soliciting or engaging in "lewd or dissolute conduct." In a 6-1 decision, the Court ruled that Section 647, subdivision (a) of the State Penal Code prohibits "only the solicitation or commission of conduct in a public place or one open to the public or exposed to public view . . . by a person who knows or should know of the presence of persons who may be offended by the act."

The decision was rendered in the case of *Don Barry Pryor vs. Los Angeles Municipal Court.* Pryor, a San Francisco resident, was arrested on May 1, 1976 during a visit to Los Angeles. Pryor solicited another man for a sex act which he claimed was to be performed in private. The other man turned out to be a plainclothes officer.

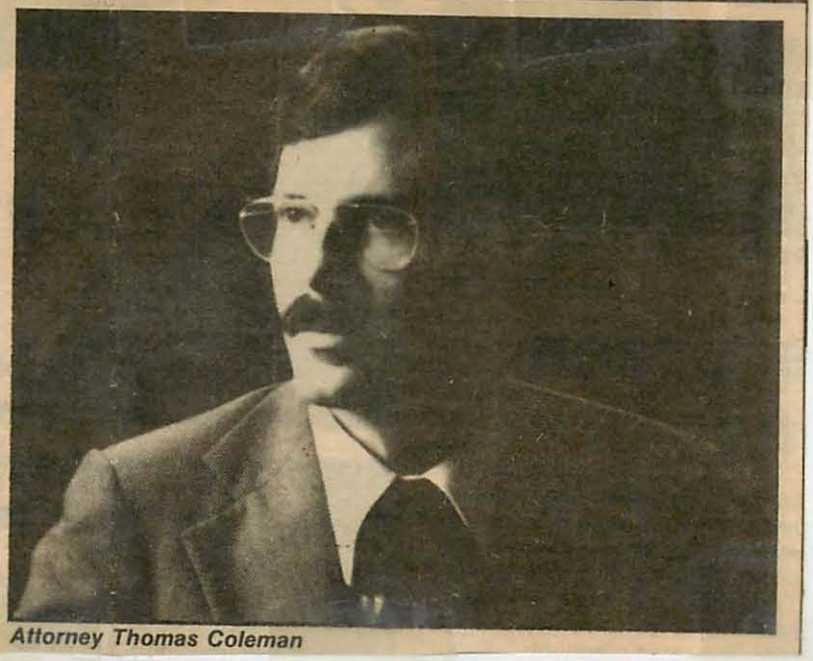
Rather than strike down the statute in its entirety, the Court followed the suggestion of the Los Angeles City Attorney and redefined the statute in such a way as to insure that it meets constitutional tests. "As the Los Angeles City Attorney states in an *amicus* brief filed in this case," the ruling states, ". . . we believe Section 647, subdivision (a), must be limited to the solicitation of criminal sexual conduct."

Thomas F. Coleman, the Hollywood-based attorney for Pryor, and also publisher and managing editor of the *Sexual Law Reporter,* a national legal periodical, stated on September 10, that "to our knowledge, this is the first time an appellate court in the United States has apparently held that a sex statute which does not include the requirement of an offended viewer, may be unconstitutional."

The Court surprisingly gave retroactive effect to its new definition, prompting Coleman to speculate in a press release "that thousands of men previously prosecuted under the statute may be entitled to an overturning of their convictions."

The majority opinion was written by Justice Matthew O. Tobriner. The lone minority opinion was that of Justice William P. Clark, Jr.

Gays beat cops in L.A. legal scrimmage



Attorney Thomas Coleman

What do you do if you find yourself living in a curious state where homosexual acts in private are legal yet you can get pinched for asking some number to perform one with you? Until recently, California was just such a state.

On 1 January 1976, the California legislature removed all legal sanctions against homosex activities in private between consenting persons 18 years or older. (The next big battles, of course, are what constitutes "private" and what defines "consent.") Yet, until 7 September 1979, anyone "who solicits anyone to engage in or who engages in lewd or dissolute conduct on any public place or in any plave open to public view or exposed to public view is guilty of disorderly conduct, a misdemeanor." And likely to get a stiff fine and a year's probation. This was Cal.'s notorious Section 647 (a), the solicitation act. It has been under the powers granted to police by this statute that vice cops have been entrapping gay men for years. Anyone guilty of 647 (a), or under other statutes relating to sexual matters, is registered in Sacramento as well as in their local community as a "sex offender." At this very moment, there are over 200,000 such "offenders" registered in the state capital. (If they could organize, they'd be a powerful voting bloc—and wouldn't the pols toot a different tune?)

But times change, after much doing and much blood. And the California Supreme Court handed down an important decision attacking the existing 647 (a). Three years ago Don Pryor, of San Francisco, was visiting friends in L.A. and exploring the town. Late one evening he found himself around Highland and Selma Avenues, a hot cruising area. A handsome man in a car scouted him out, drove around the block, came back and pulled over. Window was open. Pryor chatted. Fellow asked him to get in. Hunk said: "What do you want to do?" For those of you who don't know, this is what is called A-Cop-Identifying-Question. Vice cops invariably ask it. If you live in a state with an anti-solicitation statute, this should be your signal to get out of the car or continue AYOR. Mr. Pryor told this hunk he was interested in some cocksucking. Hunk revealed himself to be Officer Peters (!) of the LAPD Vice Unit. Pryor was arrested and booked for making an illegal solicitation.

Don Pryor turned for counsel to Attorney Thomas Coleman. This was a smart move. Coleman has, since his graduation from law school, set his sights on bringing down 647 (a). Coleman is a gay activist, co-chairperson of the National Committee for Sexual Civil Liberties and founder of the *Sexual Law Reporter*. Coleman took this case from municipal court to the Cal. Supreme Court and finally got pretty much what he wanted. On 7 September 1979 Justice Tobriner, the most senior member of that bench (and the judge who had written the decision in the recent progay *Pacific Telephone* case) released his opinion, 15 months in the making, which reshaped this statute, removing the ambiguities and the lack of specificities which had encouraged police abuse.

Happily there is in Los Angeles County an intelligent DA, Burt Pines, who agreed to continue prosecution of this case to allow the opportunity for the courts to do something with 647 (a). Since Pines became DA, it has been policy to dismiss most arrests under 647 (a). Good in itself, but doing nothing to invalidate the statutory power. Coleman needed and wanted a test case; Pines agreed to give him the Pryor case.

When I spoke with Coleman, he informed me that this decision will have national impact. "California, and perhaps New Jersey, courts are looked to in the rest of the nation." Coleman found friend-of-the-court briefs filed in this case by the National Committee for Sexual Civil Liberties and the Pride Foundation.

Particularly striking in Tobriner's decision was that the Supreme Court gave retroactive effect to its new definitions of the crime of solicitation. Since many thousands of gay men remain stigmatized as "sex offenders" for activity as harmless as cruising, they now have the chance to purge official records of this label.

Entrapment in New York City under Mayor Wagner and his predecessors was a constant feature in NYC gay male life. Mayor Lindsay, in one of his first acts, forbade police entrapment of homosexuals. Since that time, at least in most large Eastern cities, police entrapment for cruising has been a haphazard and occasional form of gay harassment (barring the police dragnet of 105 men in the Boston Public Library in March 1978).

But in parts of Cal., particualrly in Los Angeles and San Diego, entrapment remains a regular and continuous part of life for faggots. Ex-top-cop in L.A. Ed "There-Is-No-Such-Thing-As-A- Victimless-Crime" Davis was rumored to keep files on prominent political figures arrested for "solicitation" in porno cinemas, peep, shows, gay bars, strip joints, etc. Within the past few years, a deputy to Mayor Bradley and a superior court judge have been arrested for "soliciting." (The judge pleaded and resigned, alas.) Many of the men so arrested (types who patronized porno movies, e.g., which, if you consult the President's Commission's Report on Pornography and Obscenity are not criminal types), have no experience with the courts, are embarrassed to be up on a homosexually-related rap, never see a lawyer and quickly plead guilty.

Though L.A. has been, over the past years, a center for police terror against faggots, DA Burt Pines has been a kind of buffer. His policy has been to dismiss charges which are obviously a result of police entrapment and harassment. Coleman told me that San Diego is now the most vicious city in California for entrapment. The police there have their friends running the DA's office and the courts. Stay away: Bad City, USA.

A friend of mine once said (at a gay day rally) that being homosexual was the nicest way to be a criminal. Well, she's right and it's a great line. But Coleman's victory for Pryor is another one of those small steps which, though it may not make homosexuals or homosexuality any more socially acceptable, will, at least, in this area, keep the goddamn police off our backs. And for that bit of progress, I will gladly abandon some of the nicety and glamorousness of criminality.

THE ADVOCATE

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CALIFORNIA 'LEWD' LAWS REDEFINED

The California Supreme Court has ruled that the state may not punish solicitation in public for a sexual act that is legal in private. The 6-1 decision, issued Sept. 7, is expected to have wide implications for enforcement of solicitation laws, which traditionally have been used to harass male homosexuals.

The case, *Pryor* vs. *Los Angeles Municipal Court*, involves a San Francisco resident who solicited a man in Los Angeles for sex to be performed in private. The man turned out to be an undercover vice officer.

Thomas Coleman, victorious attorney

Pryor was convicted for violating section 647 of the state penal code, which forbids "lewd and dissolute conduct in any public place." The court decision, written by Justice Matthew Tobriner, found that the statute "does not meet constitutional standards of specificity." Tobriner went on to say that solicitations may be prosecuted only if they involve a criminal sexual act. For a sexual act to be criminal, all the following conditions must be met: 1) touching of the genitals, buttocks or female breasts; 2) the touching must occur in a public place (which the court ruled cannot be a closed room, such as a massage parlor, curtained partition in a bookstore, or enclosed toilet stall); 3) it must occur with the specific intent to arouse or offend; 4) further, the person engaging in sex must know or reasonably should know about the presence of someone who would be offended by the activity.

"There is no way that a vice cop can qualify as an offended party under these guidelines," said Thomas Coleman, the Los Angeles attorney who defended Pryor. Though vice squads will be limited by the new ruling, Coleman speculated that police might still be able to prosecute acts of sex they witness in public places.

In its ruling, the state Supreme Court reviewed and analyzed over 70 years of sex rulings, finding all previous interpretations invalid. In an extremely unusual move, the court made its decision retroactive, so that people previously prosecuted under Section 647 may seek reversal of their convictions.

The court concurred with a friend-of-the-court brief filed by the National Committee for Sexual Civil Liberties, a group of lawyers and other professionals working for the dismantling of laws against adult consensual sex. Dr. Arthur C. Warner, of Princeton, New Jersey, co-chair of the group, said the decision "could spell an end to the snooping and spying by plain-clothes police on what amounts to adult sexual or affectionate behavior. It affects the case in which a couple is caught engaging in intimate contact in a car in Lovers' Lane when the only person who observes the conduct is a police officer with a flashlight."

Jerel McCrary of the San Francisco-based Gay Rights Advocates agrees. "It's a solid, well-written opinion that takes out of police hands the ability to arbitrarily enforce solicitation laws."

To find out more about the National Committee for Sexual Civil Liberties, write or call 1800 N. Highland Ave., Suite 106, Los Angeles, CA 90028; (213) 464-6666. The group's East Coast office is at 18 Ober Rd., Princeton, NJ 08540; (609) 924-1950.