BAY AREA REPORTER

SEX SOLICITING LAW GOES DOWN

INFAMOUS 647(a) RULED UNCONSTITUTIONAL

-1979-

By Paul D. Hardman

Last week the California Supreme Court issued a landmark ruling regarding sexual solicitation. The Court struck down the state's criminal statute 647(a) which prohibited the soliciting or engaging in "lewd or dissolute conduct."

The Court voted 6 to 1 to overturn the law (Justice Clark the lone dissenter). The ruling, written by Justice Mathew O. Tobrina, was contained in a 32-page brief and released Friday, September 7.

Los Angeles attorney Thomas F. Coleman, 31, who successfully challenged 647(a), told *B.A.R.*, "This decision should just about put the vice squad out of business." He added that it is one of the "most important cases to come down to protect Gay people in years."

In the ruling the Court reviewed and analyzed all statutory interpretations applied to the subject in this century and then overturned them. The Court noted that the conduct prohibited by law was described in terms of "lustful, lascivious, unchaste, wanton or loose in morals and conduct."

"As construed by prior California decisions," Justice Tobrina wrote in his ruling, the interpretation, "does not meet constitutional standards of specificity."

The case, Don Barry Pryor v. Los Angeles Municipal Court, (Supreme Court # LA 30901), involved a San Francisco resident, who, while on a visit to Los Angeles, solicited another man to engage in a sex act, which Pryor contended was to be performed in private. The solicited man turned out to be an undercover police officer who then arrested Pryor.

The incident occurred on May 1, 1976. Pryor, who is about 30 years of age, was charged and tried for violating Penal Code section 647, subdivision (a). This section declared that a person is guilty of disorderly conduct, a misdemeanor, "Who solicits anyone to engage in or who engages in lewd of dissolute conduct in any public place open to the public or exposed to public view."

It was that particular wording which the Court construed (because of past decisions) to be unconstitutionally vague. However, rather than merely throw out the law, which would have given the legislature the opportunity to re-write it, the Court re-construed the statute to conform to constitutional standards.

In so doing, they rejected all prior interpretations of the statute and adopted a very narrow and specific construction. As now construed, no one may be charged unless the person knows or should know of the presence of persons who may be offended by the conduct which is now limited to actual touching of the genitals, buttocks, or female breast, for purposes of sexual arousal, gratification, annoyance or offense.

"There is no way that a vice cop can quality as an offended party under these guidelines," Thomas F. Coleman, Esq. declared. Coleman was the attorney who petitioned the Court to overturn the statute.

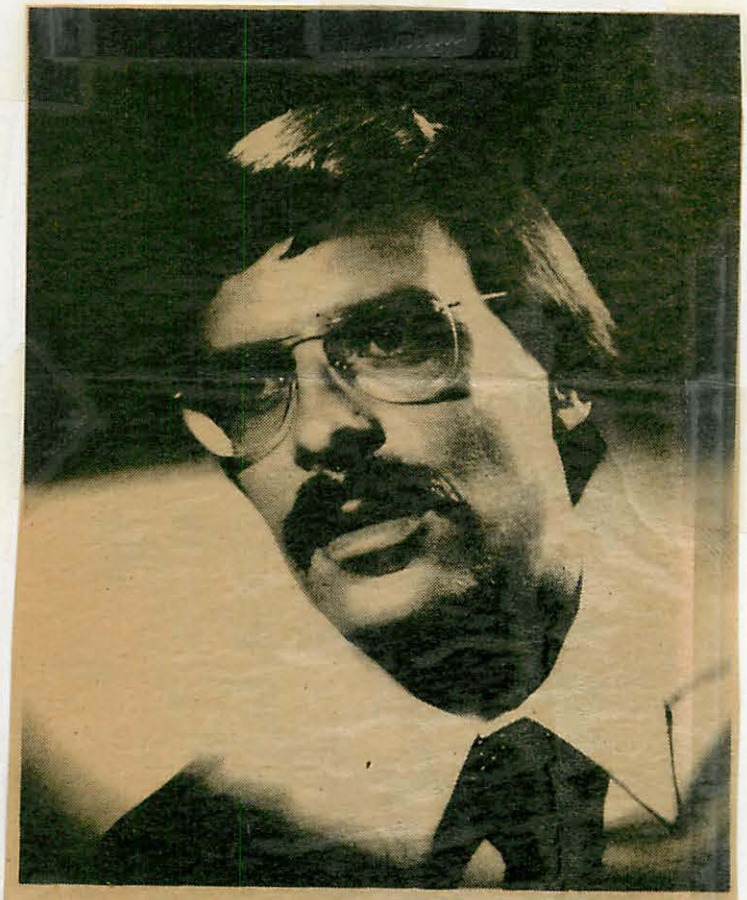
Coleman, at age 31, has already had eight of his cases published by the appellate court and has become a recognized expert in the area of sex law. He is the publisher of the prestigious *SexuaLaw Reporter* and maintains his offices in Hollywood, California.

It is particularly significant that the Court reviewed the statutory terms "lewd and dissolute" and noted that they were not "technical legal terms" but words of common speech. In ordinary usage, they do not imply a definite and specific referent, but apply broadly to conduct which "the speaker considers beyond the bounds of propriety."

The Court went on to rule that all the definitions which have been used over the years by lower court judges and prosecutors were "subjective" and dependent upon the speaker's "social, moral and cultural bias." The term "dissolute" is, according to the Court, "if anything, even less specific;" while the word "lewd" implies a sexual act, "dissolute" can refer to nonsexual acts which exceed subjective limits of propriety.

As the Court noted, narcotics addicts have been labeled as "dissolute."

The Supreme Court soundly criticized the lower courts, police and prosecutors for



Attorney Thomas F. Coleman, who challenged 647(a) before the California Supreme Court. The Court overturned the "solicitation for sex" statute September 7.

SEX LAW STRUCK DOWN

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using the statute as a means of harassing homosexual males. It pointed out that the statute is the direct lineal descendant of the archaic vagrancy statutes which were "designedly drafted to grant police and prosecutors a vague and standardless discretion."

The Court then asked the interesting rhetorical question, ". . . what private, consensual, lawful sexual acts are . . . lewd or dissolute, such that public solicitation of them is criminal?" Some jurors, the Court said, "would find that acts of extramarital intercourse fall within that definition. . ."

The Court then rejected the standard which subject an accused to the moral and sexual attitudes of those who will be called to serve on the jury.

In citing three studies of law enforcement practice in Los Angeles, the Court noted the danger of discriminatory enforcement particularly against male homosexuals who were the overwhelming majority of those arrested under the statute.

Justice Tobrina was particularly incensed over the case People v. Rodriguez, in which two men were arrested and charged with lewd conduct, and convicted for kissing.

Calling attention to the Brown Act which passed in 1975, the Court reminded the lower courts and prosecutors that consensual acts were no longer within the purview of the criminal law.

By limiting the reach of the statute, the decision avoids two substantial constitutional problems: It is probably impossible to define "with constitutional specificity" which forms of private lawful conduct, protected by the Brown Act, are lewd or dissolute conduct when solicited would be unlawful. It would also avoid the "First Amendment" issue, which makes criminal the solicitation of lawful acts merely because the asking was in a "technically" public place.

Clearly, the Court declared, the statute cannot be construed to ban all sexually motivated public conduct, for such a sweeping prohibition "would encompass much innocent non-offensive behavior."

After specifically declaring that there must be "specific intent" to offend, the Court goes on to warn that the state has little interest in the conduct: "We agree; even if the 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."

In addition, a person who has been convicted under the old interpretation of the statute "will be entitled to relief by writ of habeas corpus" the Court ruled, but only if there is no material dispute as to the facts relating to conviction.

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Who Brought Down 647(a)

This case is one of many being handled under the aegis of The National Committee for Sexual Civil Liberties throughout the United States. It is involved in litigation in New York State; Pennsylvania; Ohio; Texas; Oklahoma; Washington, D.C.; and of Course California. Its cases and its attorneys have led the way or have been involved in every major case concerning Gay rights in the past decade including those of Leonard Matlovich; against Senator Briggs; against Anita Bryant; against Prop. 6 (the anti-Gay teacher initiative in California); against Pacific Tel & Tel.

Very little is ever written about the work of the Committee which has its Eastern offices in Princeton, N.J.; West Coast office at 1800 North Highland, Suite 106, Los Angeles, CA; and its Northern California Regional Office at 1782 Pacific Ave., San Francisco. Its members include some of the top men and women in various professional fields and in the higher ranks of the Roman Catholic Church and Protestant churches, located all over the United States and in Canada.

The Committee holds itself available to legislatures in the U.S. to provide expertiese and research in the area of human sexuality and the law. It has close working relationships with several Governors, including Governor Edmund G. Brown, Jr. of California through whom great strides have been effected quietly in reversing the plight of Gay men and Lesbians in this state.

It has not been generally known, but it was the efforts of the National Committee which got the Governor to issue his Executive Order protecting homosexuals in state employment. It was modeled after the Pennsylvania Order which was also the result of the Committee's work with Governor Shapp of Pennsylvania.

The Committee does in the area of sexual civil liberties what the ACLU does in the area of general civil liberties, and a great deal more, according to its Co-Chairman Dr. Arthur C. Warner of Princeton, N.J.

Attorney Coleman is a member of the Committee.