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Ordinary Folk and Cottaging: Law, Morality, and Public Sex

PAUL JOHNSON*

The Sexual Offences Act 2003 introduced a new statutory offence of 'sexual activity in a public lavatory' into English law. Although written as a gender-neutral offence, the statute was formulated and enacted on the basis of concerns about male homosexual sexual activity in public lavatories ('cottaging'). This paper examines the justifications for, and implications of, the legislation. It considers the main arguments made in support of the offence and situates these within established moral, legal, and social debates about homosexuality. The paper considers the relationship between conceptions of public and private morality in relation to the legal regulation of homosexual sex. It goes on to explore the complex nature of regulating public sex in relation to sexual practices which often maintain high degrees of privacy. The final part of the paper argues that the legislation is largely in contradiction with the realities of police work and contemporary law enforcement.

INTRODUCTION

The Sexual Offences Act 2003 introduced a new statutory offence of 'sexual activity in a public lavatory' (Section 71) into English law:

> 71 Sexual activity in a public lavatory
>
> (1) A person commits an offence if –
> (a) he is in a lavatory to which the public or a section of the public has or is permitted to have access, whether on payment or otherwise,

* *Department of Sociology, University of Surrey, Guildford, Surrey GU2 7XH, England*
p.johnson@surrey.ac.uk

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(b) he intentionally engages in an activity, and,
(c) the activity is sexual.

(2) For the purposes of this section, an activity is sexual if a reasonable person would, in all the circumstances but regardless of any person's purpose, consider it to be sexual.

(3) A person guilty of an offence under this section is liable on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.[1]

The Act makes it a criminal offence for a person to engage intentionally in sexual activity in a lavatory to which the public or a section of the public has access and on summary conviction carries the maximum penalty of a term of imprisonment of six months. Section 71 creates a distinction between the lawfulness of sexual activity in a public lavatory and sexual activity in other public places. Public sexual activity is not illegal per se unless it causes demonstrable offence to others. Such activity is punishable under the common law[2] and by section 5 of the Public Order Act 1986 which covers harassment, alarm, and distress resulting from threatening, abusive or insulting behaviour.[3] Section 71, however, makes sexual activity in public lavatories a criminal offence regardless of its potential or actual impact upon the public.

Although section 71 is written as a gender-neutral offence it was enacted on the basis of concerns about male sexual activity in public lavatories ('cottaging'). Since the offence came into force, it has been used exclusively to prosecute men. Between May and December 2004, 17 male defendants were proceeded against, resulting in 15 guilty verdicts, whilst in 2005 a further 46 males were prosecuted and 34 found guilty.[4] Between the offence coming into force and the end of 2005, 28 males and one female had been cautioned.[5] It is not possible to report national arrest statistics for section 71 since the offence is not included in the Home Office Counting Rules for recording crime. Nevertheless, cautioning and prosecution data show that

1 The offence was brought into force in May 2004 by the Sexual Offences Act 2003 (Commencement) Order 2004.
2 Sexual activity in public places becomes an offence under the common law if it comprises 'open lewdness, grossly scandalous behaviour, and whatever openly outrages decency or is offensive and disgusting, or injurious to public morals by tending to corrupt the mind and destroy the law of decency, morality and good order' (*Archbold: Criminal Pleading, Evidence and Practice* (2002)). The Criminal Justice Act 2003 s. 320 makes such an offence triable either way.
3 Under s. 5 of the Public Order Act 1986 a person commits an offence if he 'uses threatening, abusive or insulting words or behaviour, or disorderly behaviour' or he 'displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress'.
4 Home Office Research Development Statistics (RDS) – Office for Criminal Justice Reform. Personal correspondence.
5 Home Office, id.

section 71 is being applied almost exclusively to male sex. Whilst the Home Office claimed in February 2006 that they were 'confident that the police are not using this offence to target the activities of gay men',[6] it is clear that the offence has not been applied to heterosexual sexual activity.

This paper examines the justifications for, and implications of, section 71. It begins by tracing the legislative background to the statute, locating its genesis within a longer legal tradition of regulation around male homosexual sexuality. It then goes on to consider the main arguments made in favour of the offence and situates these within an established set of moral, legal, and social discourses about male homosexuality. The paper focuses particular attention on the long-standing and problematic relationship between conceptions of public and private morality in relation to the legal regulation of male homosexual sex. It also shows how anxieties and fears about male homosexual sex, rather than public sex generally, form the basis for this specific type of legal regulation. The final part of the paper considers the statute in relation to contemporary practices of operational policing and argues that it is largely in contradiction with the realities of police work and law enforcement.

BACKGROUND TO THE OFFENCE

Whilst section 71 is ostensibly a new offence, its genesis in statute has a longer history. Its origins can be traced to several separate offences found in the Sexual Offences Act 1956: buggery,[7] gross indecency,[8] and male soliciting.[9] The Sexual Offences Act 1967, which partially decriminalized 'homosexual acts' (buggery and gross indecency) conducted in private by men over the age of 21, retained the framework of the 1956 legislation so that homosexual acts which fell outside of its rubric of privacy remained criminal. The 1967 Act specified homosexual acts not to be private in circumstances 'when more than two persons take part or are present' or when they take place 'in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise'.[10] Notwithstanding subse-

6 Home Office, *Sexual Offences Act 2003: A stocktake of the effectiveness of the Act since its implementation* (2006) 9.

7 Section 12 of the Sexual Offences Act 1956 made it 'an offence for a person to commit buggery with another person or with an animal'.

8 Section 13 of the Sexual Offences Act 1956, which criminalized gross indecency between men, created two offences: first, it became an offence 'for a man to commit an act of gross indecency with another man, whether in public or private, or to be a party to the commission by a man of an act of gross indecency with another man' and second 'to procure the commission by a man of an act of gross indecency with another man'.

9 Section 32 of the Sexual Offences Act 1956 made it 'an offence for a man persistently to solicit or importune in a public place for immoral purposes'.

10 Sexual Offences Act 1967 s. 1(2).

quent reductions in the age at which men could legally engage in consensual, private homosexual acts (from 21 to eighteen in 1994,[11] and then to sixteen in 2000[12]) the offences regulating sexual acts between men in the 1956 Act remained in force until their repeal by the Sexual Offences Act 2003.

When the government began the process of sexual offences reform which culminated in the 2003 Act (first outlined in the consultation document *Setting the Boundaries: Reforming the Law on Sex Offences*[13]), it made clear its intentions to reform the offences in the 1956 Act covering male homosexual acts. Driven, in part, by the requirement of Article 14 of the European Convention on Human Rights (incorporated into English law by the Human Rights Act 1998), the government argued that gender specific offences produce 'anomalies and inconsistencies in the way offenders are dealt with for what is essentially similar behaviour' and that 'unless there was a specific reason, offences should be couched in gender-neutral terms'.[14] *Setting the Boundaries* also contained the specific recommendation that the 'criminal law should not treat people differently on the basis of their sexual orientation'.[15]

In line with that recommendation, the government proposed to repeal all of the specific offences regulating sex between men contained in the 1956 Act. In considering the offence of gross indecency the government argued that it 'effectively creates a series of victimless crimes by criminalizing behaviour between adult homosexual men which is within the law when the participants are men and women'.[16] Similarly, in relation to the offence of buggery, it proposed that the existing legislation was 'discriminatory' and that there was no 'justification for retaining the offence of buggery, or anything like it, to deal with consensual adult anal intercourse, and every reason in terms of fairness and equity to remove it from the law'.[17] In relation to the existing offence of soliciting by men, the government criticized its 'broad wording' which has enabled it 'to be interpreted very widely' as a 'means of regulating behaviour between homosexual men which, if conducted between men and women would be seen as no more than "chatting-up".'[18]

In proposing to repeal the offences regulating male homosexual sex contained in the 1956 Act, the government recognized that this would remove the existing statutory provision (contained in the 1967 Act) regarding homosexual acts not conducted in private. Anticipating criticism

11 Criminal Justice and Public Order Act 1994 s. 145.
12 Sexual Offences (Amendment) Act 2000 s. 1.
13 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000).
14 id., p. 97.
15 id., p. 101.
16 id., p. 102.
17 id., p. 102.
18 id., p. 104.

regarding the repeal of the specific provision covering homosexual acts in public lavatories, *Setting the Boundaries* recommended the creation of a new offence to deal with sexual behaviour that a person knew or should have known was likely to cause distress, alarm or offence to others in a public place. This new statutory provision, the government argued, would 'protect members of the public from being unwilling witnesses to sexual behaviour', or from being 'harassed or intimidated in their use of public space and facilities', but ensure that the 'criminal law should apply to all sexual behaviour in public and not in particular to same sex behaviour'.[19] Conceptualizing sexual activity in public as an issue of public order, rather than as abuse or exploitation, the government argued that it would be 'unnecessary and disproportionate to prohibit all sexual activity in public' because 'the nuisance [is] not the sexual activity itself but the fact that it is seen by others and that it occurs in situations where it is likely to cause distress or offence'.[20] Therefore, *Setting the Boundaries* made clear that a 'discreet couple should not be penalised' by any new offence.[21]

Setting the Boundaries recommended an offence equivalent to section 5 of the Public Order Act 1986. This new offence, it was proposed, should contain an objective test that any sexual activity had caused genuine distress, alarm or harassment to other people and, therefore, be triggered only by complaints to the police. It was also proposed that the new offence should enable a warning to be given by police officers in order to end a public nuisance prior to arrest.

Responses to *Setting the Boundaries* showed broad support for the government's proposals to equalize the law with respect to sexual orientation[22] but the recommendation to create a new public order offence relating to sexual activity in public received less support.[23] The government recognized, in its command paper, *Protecting the Public*, that this disagreement was largely based on concerns, 'encouraged by some media misrepresentation', that the repeal of the specific offences regulating male homosexual sex 'will result in the legalisation of cottaging and gay sex in

19 id., p. 124.
20 id., p. 125.
21 id., p. 125.
22 In response to recommendation 44 of *Setting the Boundaries* on making the law neutral with regard to sexual orientation, there were a total of 45 responses with 39 agreeing, four disagreeing, and two expressing no view; recommendation 45 which proposed to repeal the offences of buggery and gross indecency received 39 responses with 33 agreeing and six disagreeing; and recommendation 47 which proposed the repeal of soliciting by men received 36 responses with 28 in agreement and eight in disagreement. See Home Office, *Response to 'Setting the Boundaries: Reforming the Law on Sex Offences* (2002).
23 Recommendation 56 of *Setting the Boundaries* which proposed a new public order offence relating to sexual activity in public received a total of 71 responses of which 24 agreed, three disagreed, and 44 agreed in part. See Home Office, id.

public'.[24] In response to this anxiety within the mass media,[25] the government was keen to assert that all sexual activity in public deemed offensive, irrespective of whether it was heterosexual or homosexual, would be criminal. However, in accordance with the principle that the 'discreet couple' should not be criminalized, the government proposed that the new offence would not 'interfere in everyday behaviour in public that does not cause offence to the vast majority of people' or 'criminalise sexual activity that takes place outdoors but in an isolated place where one would reasonably expect not to be observed'.[26]

The subsequent Sexual Offences Bill 2002/3 proposed to repeal all specific offences regulating male homosexual sex and contained the new offence 'sexual activity in public' (section 74). Section 74 proposed to make it an offence for a person to intentionally engage in specific sexual activities in a public place where a person knows that, or is reckless to whether, he or any other person engaged in the sexual activity will be seen by a non-participating party ('sexual' was defined as specific acts of penetration and touching which involved genitals). The Sexual Offences Bill 2002/3 was successfully read by the House of Commons and introduced into the House of Lords in January 2003. During the Bill's passage through the House of Lords, section 74 was severely criticized and subsequently withdrawn by the government. It was proposed instead by government that all sexual activity in public should be regulated by the existing common law and by section 5 of the Public Order Act 1986. However, in defiance of the government's proposed repeal of the specific law regulating homosexual sex in public lavatories, the Lords, during Committee in May 2003, created the new offence of 'sexual activity in a public lavatory'. This was successfully passed during Lords debates and subsequently retained by the House of Commons when the Bill was enacted.[27]

24 Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences* (2002; Cm. 5668) 10.

25 The leader, 'This is a Freedom too far', from the *Express* on 20 June 2002 is a good example of this moral anxiety:

> What individuals do in the privacy of their own home is not our concern and homosexuals should be allowed the same freedom in this regard as heterosexuals. However, to allow gay men to have sex in public toilets simply because there is not a law to stop mixed sex couples from doing so is as preposterous as it is dangerous [. . .] Rather than liberalizing the law for homosexuals Mr Blunkett [then Home Secretary] should tighten it up for everyone.

26 Home Office, op. cit., n. 13, p. 32. This construction of a fictional 'discreet couple', engaged in sexual activity in an 'isolated place', who do not cause offence to 'the vast majority of people' was challenged by those who argued in favour of specific measures regulating sexual activity in public lavatories. Cottaging was deemed by conservative commentators, as I explore later in the paper, to never be isolated or discreet and always offensive to the majority of people.

27 Whilst the government yielded to the Lords' amendment and included section 71 in the Sexual Offences Act 2003, it did not accept the Lords' proposal that the offence

The creation of section 71 can be seen to continue the legal preoccupation with sex between men found in the 1956 and 1967 Acts. It was formulated, as I explore in the remaining parts of this paper, in response to a number of moral arguments made against the abolition of the specific offences regulating male homosexual 'public' behaviour. The accommodation which the government made to these arguments resonates more widely with the tendency of legislators to capitulate to conservative opinion regarding homosexuality. For example, during the formation of what became the Employment Equality (Sexual Orientation) Regulations 2003, which prohibits discrimination by employers on the grounds of sexual orientation, the government, under pressure from religious groups and conservative commentators, incorporated a significant exemption for religious employers. Under section 7 of those regulations, an employer can apply a requirement of sexual orientation to a specific form of employment in order that an employee's sexuality 'comply with the doctrines of the religion' and does not come into conflict with 'the strongly held religious convictions of a significant number of the religion's followers'.

Therefore, whilst it might be argued that some recent changes in the law reflect a greater social acceptance of homosexuality – for instance, the repeal of section 28 of the Local Government Act 1988 in 2003 – the law still maintains a number of important distinctions around the homosexual/heterosexual binary. The Civil Partnership Act 2004, for instance, while widely regarded as enfranchising greater citizenship rights to gay men and lesbians, also maintains a clear distinction between homosexuals and heterosexuals with regard to marriage. Furthermore, the type of citizenship bestowed by the Civil Partnerships Act 2004 can be seen as part of a broader social transformation through which a new construction of homosexuality has emerged around the dyad of 'good' and 'normal' gays (who gain greater citizenship rights by mirroring the normative patterns of heterosexual monogamous relationships and private 'family life') and 'bad' and 'abnormal' gays who are positioned as outsiders threatening the core heteronormative values of society.[28]

The incorporation of section 71 into the 2003 Act highlights a broader tension between the government's public commitment to a liberal, equitable, and tolerant approach to homosexuality (as originally outlined in *Setting the Boundaries*) and its tendency to envision homosexuality within 'traditional' heterosexist and conservative terms. As Phoenix and Oerton argue, this

should carry a maximum term of imprisonment of two years. Unlike the offences with which it is grouped in the Act (exposure, voyeurism, intercourse with an animal, and sexual penetration of a corpse – these all fall under 'other offences'), section 71 was not made an indictable offence and therefore does not carry a maximum term of imprisonment of two years.

28 See C. Johnson, 'Heteronormative Citizenship and the Politics of Passing' (2002) 5 *Sexualities* 317-36. See, also, D. Richardson, 'Locating Sexualities: From Here to Normality' (2004) 7 *Sexualities* 391–411.

might be seen as one aspect of the more general ascendancy of a new moral conservatism around sexuality, which, since the late 1990s, has encouraged an intensification of informal and formal control of sex in British society.[29] However, section 71 must also be seen to continue a much longer tradition of distinguishing male homosexual sex as a domain requiring specific legal regulation and, as such, maintains an authoritarian morality around male homosexual sex long embedded in English law.

COTTAGING: A MORAL PREOCCUPATION

From the time the government began its process of reform of sexual offences it repeatedly asserted that the law should not be used as a device to regulate the 'private morality' of individuals: the 'criminal law', it argued, 'is not an arbiter of private morality but an expression of what is needed to protect society as a whole'.[30] This statement reflects the view that the law should not interfere with the consensual sexual behaviour of adults but, rather, protect individuals from the danger or harm of sexual coercion. The law should therefore be based on a 'public morality' that does not 'criminalise activity because certain sections of society disapprove of it' but should curtail behaviour that 'society as a whole is not prepared to tolerate'.[31]

The relationship between public morality and law raises a number of long-standing questions about both the influence of morality upon law and the extent to which private morality should be free from legal regulation.[32] For instance, in Devlin's formulation, law is not only an expression of morality but an instrument through which immorality and vice should be suppressed.[33] Devlin rejected any sphere of private morality exempt from law and argued that the proper purpose of any legal instrument is to enforce and command moral principles (moral principles, in this sense, being crystallizations of the sensibilities to be found in the minds and feelings of 'reasonable men' travelling on the Clapham omnibus).

The government's use of public morality in *Setting the Boundaries* is more in sympathy with the formulation found in the Wolfenden Report[34] which underpinned the 1967 Act (of which Devlin was a severe critic). In maintaining a distinction between private and public morality, it preserves

29 J. Phoenix and S. Oerton, *Illicit and Illegal: Sex, Regulation and Social Control* (2005).
30 Home Office, op. cit., n. 13, p. 98.
31 id., p. 100.
32 Hart's classic essay, *Law, Liberty and Morality* is useful here because of its explicit focus on the law regarding homosexual sex. See H.L.A. Hart, *Law, Liberty and Morality* (1963).
33 P. Devlin, *The Enforcement of Morals* (1965).
34 *Report of the Committee on Homosexual Offences and Prostitution* (1956; Cmnd. 247).

spaces for activities which, whilst regarded as 'deviant' by majority opinion, are not subject to the criminal law. Unlike Devlin's argument, this means that private 'immorality' can be tolerated in so far as it remains private and does not cause harm or damage to 'society as a whole'. This approach is in compliance with Article 8 of the Human Rights Act 1998 which guarantees a right to individual privacy that can only be interfered with by the state under circumstances deemed necessary in a democratic society (such circumstances cover the 'protection of morals').

The government's formulation of public morality, social tolerance, and law in *Setting the Boundaries* recalls Durkheim's understanding of law as the moral 'nervous system' of an extremely differentiated organic society that depends upon the reproduction and maintenance of high levels of solidarity.[35] Law, in this sense, is one formal mechanism through which the moral boundaries and thresholds of the 'acceptable' and the 'deviant' are formulated and promulgated in order to reproduce the 'cultural integrity of the community'.[36] Law, understood this way, should intervene in deviant behaviour only when it threatens the accepted moral values of a *whole* community.

The legal regulation of adult homosexual consensual sexual conduct makes the relationship between the law as an expression of public morality and the private morality of sexual citizens intensely problematic. The Sexual Offences Act 1967 which decriminalized homosexual acts 'in private' engaged a form of regulation based on a 'public' disapproval of homosexuality by legalizing only conduct that was hidden from view. In this sense, what were ostensibly 'private' acts between consenting adults remained criminal in public on the basis that their visibility was deemed offensive to public morality. This same 'public disapproval' of homosexuality was evident during the development of section 71 when justifications were made for legislation that represented and served a general public morality. As in 1967, homosexuality was argued to be so threatening to public morality that specific regulation was needed for homosexual sex which 'spills out' from the socially controlled boundaries of the private sphere.

However, what is claimed as public morality to support section 71 is very often a heteronormative[37] representation of sex and sexuality which, loaded with cultural assumptions about, and moral objections to, homosexual sex, fails to recognize the right of those it criminalizes to a private morality however different that morality might be from a statistical norm. The justification for this, it is argued, is that the activity in question is beyond the

35 E. Durkheim, *The Division of Labour in Society* [1893] (1964).

36 K.T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (1966) 11.

37 I use the term 'heteronormative' throughout this paper to mean that which legitimates and privileges heterosexuality as normal and foundational whilst marginalizing other sexualities as deviant.

threshold of what 'society as a whole is prepared to tolerate'. A legal instrument suppressing such activity is therefore justified, in the Durkheimian sense, by the protection it affords to the moral integrity of the community. However, this consensual, functionalist view of law-making has often been criticized by those who see law not as an expression of community custom but as an instrument protecting partisan interests.[38] For whilst law is often depicted as an expression of general public sentiment, free from political or sectarian interest, it is often rooted in and expresses particular social and cultural values which become hegemonized and stabilized as normative – as in, for instance, the values of the 'reasonable *man*'.[39]

The public morality that was invoked as the basis for section 71 can been seen not as representative of 'society as a whole' but as the views of a number of key and influential stakeholders – those moral entrepreneurs who marshal 'public opinion' or 'community sentiment' as validation and legitimation for their values and beliefs.[40] In the case of section 71, three main stakeholders – peers in the House of Lords, Christian groups, and commentators in the national press – invoked 'the public' to argue for the creation of the statute.

During parliamentary debates, for instance, peers juxtaposed the 'offensive public nuisance of homosexuals'[41] with the 'general public sentiment which is that public lavatories are not places for sexual activity'.[42] 'Ordinary people',[43] 'decent, law-abiding communities',[44] 'the vast majority of people',[45] 'doctors, parents',[46] and 'all right-thinking people' support section 71, it was argued, because to them 'sexual activity in public toilets is an anathema'.[47] As one peer put it when speaking in favour of the statute: 'I can speak for ordinary folk.'[48] The Christian Institute, petitioning the House of Lords to retain specific offences regulating male homosexual sex, argued that there are 'moral differences' between homosexual and heterosexual sex that 'have long been recognized in law, and by the majority of people'.[49]

Sexual activity in lavatories, peers argued, was recognized by 'the public' as a significant and serious social problem that required a specific statute to

38 For example, R. Quinney, *Class, State and Crime* (1977).
39 C. Smart, *Feminism and the Power of Law* (1989).
40 See S. Cohen, *Folk Devils and Moral Panics* (2002, 3rd edn.). See, also, S. Hall, C. Critcher, T. Jefferson, J. Clarke, B. Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* (1978).
41 644 *H.L. Debs*., col. 789 (13 February 2003).
42 648 *H.L. Debs*., col. 577 (19 May 2003).
43 644 *H.L. Debs.,* col. 779 (13 February 2003).
44 649 *H.L. Debs.*, col. 69 (9 June 2003).
45 id., col. 66.
46 id., col. 71.
47 id., col. 72.
48 id., col. 74.
49 The Christian Institute, *Sex Offences Review: Response by The Christian Institute* (February 2001).

respond to it. Such activity in public toilets, they claimed, had been 'a serious public problem for decades', 'a great problem that needs to be addressed',[50] and the 'fact that the activity even has a recognized slang name is indicative of the scale of the problem' which is 'a blight on many communities'.[51] One peer greatly welcomed the introduction of the new offence on the basis that it is 'something that preoccupies quite a number of my constituents, because we have a plethora of seaside gardens that have lavatories, which, unfortunately, have attracted a considerable amount of sexual activity'.[52] The statute was important, the Lords felt, and failure to enact it would create 'the most appalling possibilities'.[53]

What are these appalling possibilities for 'the public' that require separate statutory provision within the criminal law? Primarily, section 71 was justified by legislators on the basis that it would protect individuals from witnessing grossly indecent sexual acts. Children, in particular, were invoked as emblematic of those requiring this protection. 'What mother', asked one peer, 'would want to send her young child into a public lavatory if she believed that homosexual activity might take place there?'[54] As another peer argued: 'One of the things we have to worry about most under the present law, but even worse, under the repeal of the law relating to gross indecency, is the effect on young people, including small children.'[55]

It is important to note that in these debates there was *no* suggestion that section 71 would protect children from potential sexual abuse by men in this context. Rather, concerns focused on the potential for children to witness men involved in homosexual sexual activity and the imagined detrimental effects this may have upon them. In this sense, the invocation of 'children' and 'childhood' in these debates can be seen to function, as Lauren Berlant would argue, as ideal representations of pure, normal, untainted and, crucially, heterosexual citizenship in need of protection from the imagined horrific impact of homosexuality.[56] Yet, if the primary aim of the legislation was to protect children and adults from the 'shock' of witnessing sexual behaviour, then one of the implications of section 71 is that it diminishes the scope of that protection. In replacing the government's proposed offence of 'sexual activity in a public place' with section 71, the Lords limited the protection of the Act to one specific context.

In fact, the enactment of section 71 had little to do with any evidence about the impact of witnessing sexual activity or its effects upon communities. If such concerns had been central, Parliament would not have

50 648 *H.L. Debs.,* col. 579 (19 May 2003).
51 649 *H.L. Debs.*, col. 67 (9 June 2003).
52 414 *H.C. Debs*. col. 611 (3 November 2003).
53 649 *H.L. Debs.*, cols. 70–71 (9 June 2003).
54 644 *H.L. Debs.*, col. 789 (13 Feb 2003).
55 649 *H.L. Debs.*, col. 71 (9 June 2003).
56 L. Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (1997).

rejected the proposed offence of 'sexual activity in a public place' which made complaints by individuals and communities central to criminalizing all public sex acts that caused offence. The basis for section 71 is less the protection of individuals from harm or damage and more the assertion of a moral principle.[57] Section 71 criminalizes activity not because it may cause offence but because it is deemed *in principle* offensive: 'activity that takes place in a public lavatory, that is not witnessed and that does not outrage public decency when the event takes place, is still an offensive activity'.[58]

The creation of section 71 can be seen to express a disapproval of homosexual sex which is formulated, justified, and legitimated by a *heterosexual* morality.[59] As Melanie Phillips argued in the *Sunday Times,* when she talked about this 'unpleasant and offensive' activity as an 'affront to human dignity': 'heterosexuals just do not behave like this'.[60] Heterosexuals, of course, do have public sex which others, including children, could (and do) encounter. Yet Phillips's argument, like those made by peers, supports the criminalization of a specific form of consensual sexual activity not because of the extent of its actual or potential harm but because it is deemed to be outright immoral. As such, section 71 applies Devlin's argument[61] that, in the case of male homosexual sex in public lavatories, there can be no private acts which do not cause harm to society as a whole. As a result, it closes the legal space afforded to the 'discreet couple' who might have sex in public and go unseen by a non-consenting third party and makes any 'private acts' in a public lavatory automatically criminal. For those who supported section 71, contrary to the view expressed in *Setting the Boundaries*, the nuisance *is* the sexual activity *itself* rather than any impact caused by it.

HOMOSEXUAL PUBLIC SEX: MATTER OUT OF PLACE

The demarcation around sexual activity which section 71 makes depends entirely upon the context of the public lavatory. Whilst, for example, the Christian Institute argues that the 'right place for sex is in the bedroom, not a

57 The same use of the law to assert a conservative morality can be seen in the case of section 28 of the Local Government Act 1988. For a full discussion of the relationship between law, morality, and homosexuality in the formation of section 28, see A.M. Smith, *New Right Discourse on Race and Sexuality: Britain 1968–1990* (1994).

58 648 *H.L. Debs.*, col. 585 (19 May 2003).

59 It is important to note, as Michael Warner argues, that conservative homosexual individuals and groups have often supported the restriction and regulation of public sex. In this sense, the regulation of homosexual public sex cannot always be seen simply as an expression of homophobia. See M. Warner, 'Zones of privacy' in *What's Left of Theory? New Work on the Politics of Literary Theory*, eds. J. Butler, J. Guillory, and K. Thomas (2000).

60 M. Phillips, 'Why should gays have the right to have public sex?' *Sunday Times*, 30 July 2000, 21.

61 Devlin, op. cit., n. 33.

public lavatory',[62] section 71 does not make that distinction. It distinguishes not between sexual activity in public and sexual activity in private but focuses on one specific context.[63] If one were unaware of the background to this offence one might be forgiven for asking why this form of public sex needs a special statutory measure when sex that takes place, for instance, in cars, on public transport, in the woods, does not? One might argue that there is nothing intrinsically different or deviant about the sexual acts which take place in a public lavatory and those which take place in public elsewhere.

However, whilst the wording of section 71 could be seen to criminalize acts simply because of the place in which they happen the statute is, in practice, focused upon specific types of *people* within that place. Parliamentary deliberations around section 71 showed a concern not for the policing of public sex generally, nor for the general policing of sex in public lavatories, but for the policing of *homosexual casual sex*. The debates about sexual activity in public places which surrounded the creation of section 71 focused upon a number of enduring ideas about homosexuality, public sex, and cruising. Specifically, they incited and reiterated a heteronormative discourse about public sex which demarks cottaging outside of the parameters of 'conventional' sex – both public and private – and as an activity that is beyond the threshold of what can be considered socially acceptable behaviour. In doing this, justifications for the offence relied upon, and reiterated, established ideas about homosexual men who engage in public, casual sex – ideas about, as Warner puts it, those oversexed monsters that haunt urban alleyways and public toilets.[64] The result is the performative inscription of a particular type of sexual figure who is deviant, abnormal, suspect, and in need of regulation by the criminal law.

It is the relationship between persons, practice, and place which distinguishes this form of public sex as 'seedy and, frankly, disgusting'[65] and constitutes it as the most 'unsafe and dangerous behaviour'.[66] In articulating a legal solution to this 'dangerousness', section 71 aims to prevent public toilets from being a 'safe haven'[67] for disgusting practices and to 'prevent an awful evil from being committed'.[68] This 'awful evil' is *not* public sex generally. It is not, for instance, sex which might take place in 'virtually uninhabited countryside, woodland and moorland' where 'young people have for centuries past pursued their romances which would not be possible

62 The Christian Institute, *Legalising sexual activity in public toilets: how the Sexual Offences Bill effectively legalizes a major public nuisance* (2003).
63 Nowhere else in the criminal law is a specific context or place cited where consensual public sexual activity may or may not take place.
64 Warner, op. cit., n. 59.
65 649 *H.L. Debs.*, col. 68 (9 June 2003).
66 644 *H.L. Debs.*, col. 807 (13 February 2003).
67 id.
68 649 *H.L. Debs.*, col. 72 (9 June 2003).

in the family home'.[69] In such cases peers agreed that the law should not 'criminalize the couple having a romantic interlude on a starry night on the moors'.[70]

Representations of sex in public lavatories contrast sharply with those of the 'courting couple'. What defines this distinction is the connection between the place where the activity happens, the people involved in the acts which take place, and the relationship between such persons. The attempt to regulate cottaging does not depend simply on the physical location of lavatories since, after all, public toilets can be found on, or close to, the same moorland inhabited by the 'courting couple'. Rather than being an issue of physical location, it is the sexual geography of public toilets which is being regulated. The regulation of cottaging, like other forms of public sexual activity deemed deviant, can be understood in terms of how public space is policed according to (hetero)sexual norms.[71] Public lavatories are essentially 'troublesome' landscapes because they comprise highly contested spaces: the long-standing appropriation of toilets by men for the purpose of sex (as a 'safe haven') disrupts and resists continued attempts to de(homo)sexualize these spaces.

A key organizing principle of the sexual geography of public sex is the way in which sexual encounters and places are understood in relation to a heteronormative narrative of sex, romance, and love.[72] The representation of the bucolic 'courting couple' invokes imagery of sex in relation to hetero-sexual romantic love. Cottaging, on the other hand, emphasizes homosexual anonymous sex between strangers. The heterosexual public sex of the 'courting couple' in rural moorland does not automatically invoke moral anxiety because, although it *may* cause offence, it has an accepted and tolerated place within a hegemonized narrative of heterosexual intimacy and

69 648 *H.L. Debs.*, col. 582 (19 May 2003).

70 id.

71 There is now a diverse body of literature that focuses upon the spatial construction of sexuality and sex. One of the key aspects of this literature is an attempt to understand how particular spaces and landscapes are imprinted with culturally constructed ideas of sexuality which, in turn, come to shape the experiences of those within them (see, for example, D. Bell and G. Valentine (eds.), *Mapping Desire: Geographies of Sexualities* (1995)). One important element of this work has been the recognition that most 'everyday' public space is normalized as heterosexual and precludes non-heterosexual displays of desire. Hubbard's recent work argues that most public space is experienced by non-heterosexuals as 'aggressively heterosexual' and that the function of such space is to enforce conformity to a heteronormative construction of citizenship – see P. Hubbard, 'Desire/disgust: mapping the moral contours of heterosexuality' (2000) 24 *Progress in Human Geography* 191–217; P. Hubbard, 'Sex Zones: Intimacy, Citizenship and Public Space' (2001) 4 *Sexualities* 51–71.

72 For a full discussion of the ways in which heterosexual narratives of love and intimacy structure sexuality and sexual conduct, see P. Johnson, *Love, Heterosexuality and Society* (2005).

love.[73] And even though it is sex that takes place in public it is intelligible within what Berlant and Warner describe as 'a core national culture' of heterosexualized intimacy 'imagined as a sanitized space of sentimental feeling and immaculate behavior'.[74] On the other hand, cottaging always remains essentially matter out of place – an awful evil that resists the embedded heteronormative narratives of 'responsible' and 'good' intimacy associated with the contemporary sexual citizen.[75]

The legislation is built not on criminalizing a type of consensual sex in public merely because it takes place in public or that 'the public' have the ability to see or access it but because it is always regarded as wrong in principle. Since the enactment of the Act, the government has now been forced to reconceptualize its position (in order to rationalize the compromise it allowed) and now draws a clear legal *and* moral distinction between this and other types of sexual activity:

> The Government believe that sexual activity in public toilets is wholly inappropriate. On the other hand, if a couple take care to find an isolated area where they may reasonably expect to be unobserved in order to engage in sexual activity, we would not wish to criminalise them. However, we do wish to make it absolutely clear that sexual activity in public toilets is wrong. We do not wish to allow offenders to argue that they did not expect someone else to see or hear them because it was late at night, or to question whether an unfortunate witness was really distressed by their activities.[76]

In this formulation the public lavatory can never be an 'isolated area' where one would might 'reasonably expect' not to be observed having sex. The statute does not afford those engaging in sex in a public lavatory to be able to claim, as all other individuals elsewhere would be able, that they did not expect to be seen or heard. Furthermore, the offence does not depend upon the testimony of any 'distressed' or 'unfortunate witness'.

73 This is not to suggest that all heterosexual public sex falls within a normative narrative construction of romantic love and intimacy. One need only think of the recent media coverage of 'dogging' (the practice of sexual activities between heterosexual couples in parked cars witnessed by voyeurs) to see that such activity has attracted both moral outrage and condemnation. For a full discussion, see D. Bell, 'Bodies, Technologies, Spaces: On "Dogging"' (2006) 9 *Sexualities* 387–407. However, it is interesting to note that when 'dogging' received high-profile coverage in the media, along with calls for a new law to regulate it, there was no suggestion by government of reformulating the principles outlined in *Setting the Boundaries*. Rather, the government restated that sexual activity in a public place would not be criminalized if it was sufficiently isolated and unlikely to be witnessed. As an example of this, see the following BBC article in which Richard Byrne, from the Rural Affairs and Environment Group at Harper Adams University College in Newport, Shropshire, makes the case that dogging operates at the 'fringes of legality and social acceptability': <http://news.bbc.co.uk/2/hi/health/3119024.stm>.

74 L. Berland and M. Warner, 'Sex in Public' (1998) 24 *Critical Inquiry* 547–66, at 549.

75 D. Bell and J. Binnie, *The Sexual Citizen: Queer Politics and Beyond* (2000).

76 414 *H.C. Debs*., col. 612 (3 November 2003).

The clear difference between the standard of complaint required for public sex outside of public lavatories and the outright criminalization of sexual activity inside them reveals a continuing moral anxiety about the nature of these spaces. The fact that the threshold for prosecuting this offence is much lower than in all other cases of public sex, that upon conviction a defendant attracts a more severe punishment,[77] and that convictions have been obtained exclusively from men, shows a continuing legal preoccupation with male homosexual sex. This preoccupation centres on a long-standing desire to enclose homosexuality in 'private' and to censure it from public view. In this sense, it expresses a continuing public fear of male homosexual sex.

A PUBLIC FEAR OF HOMOSEXUALITY

Section 71 engages a form of regulation around a specific form of conduct in an attempt to, like the Sexual Offences Act 1967, eliminate it from public view. The statute does not specifically refer to any particular genital acts but makes the broadest activity illegal if it takes place in a public lavatory. Any bodily contact between two or more people – such as kissing or hugging – as well as any activity conducted alone becomes criminal in a public lavatory 'if a reasonable person would, in all the circumstances but regardless of any person's purpose, consider it to be sexual'. This broad wording criminalizes a whole range of activities between adults which, if they took place in public and outside of a lavatory, would be legal. This was justified on the basis of 'fears' that 'members of the public' could unwittingly encounter grossly indecent acts. As the *Daily Express* argued, members of the public should 'be able to use [lavatories] for their designated purpose without fear of stumbling across couples indulging in a sexual act'.[78]

In discussions about such sexual activity it is always the 'publicness' of lavatories which is emphasized. Yet, ironically, it is the very privateness of public toilets which afford the possibilities for the sexual encounters which take place within them. Like all public sex outside of the home, sexual activity in public lavatories involves intimate and private encounters between those involved. As Humphreys's study showed, such encounters are premised upon a highly discreet form of interaction designed to maximize privacy and preclude visibility to unwilling participants.[79] As Humphreys argues, public toilets are chosen by men for sex precisely because of the legitimacy and opportunity they afford for private and intimate contact. Men who engage in such encounters, as Desroches's research

77 Those found guilty of offences under Section 5 of the Public Order Act 1986 are liable on summary conviction to a fine but not a term of imprisonment.

78 *Daily Express*, 20 June 2002.

79 L. Humphreys, *Tearoom Trade: Impersonal sex in public places* (1970).

shows, often favour out-of-the-way and seldom used lavatories that are less frequented by 'the public'.[80] And even when lavatories situated in densely populated urban spaces are used by men for sex, as Bech's study of cottaging in railways stations shows, it is the high volume and fast throughput of users in such facilities which creates liminal spaces of anonymity and privacy.[81]

Given that most sexual activity is conducted in public lavatories by participants seeking to maximize the invisibility of encounters, it is highly unlikely that non-participants would 'stumble' across it. Humphreys's study, which uses a covert methodology, shows that only deliberate participation in this activity will normally penetrate the acute privacy of its interaction order. Therefore, the idea that the law is policing something 'public' is misleading. As Moran notes of the offences regulating homosexual sex in the 1967 Act, it is the law, and the verbosity about homosexual sex that justifies it, which transforms what might otherwise be private encounters into publicly visible ones.[82] In other words, the law, and its application, captures and renders visible activities which would otherwise remain known only to those consenting to engage in them.

Why should there be a continuing fear about sex of this kind? One of the key reasons is because public toilets are public spaces in contemporary culture which afford high degrees of privacy that, simultaneously, curtail and resist inspection. For instance, unlike almost everywhere else in modern urban society, public toilets are rarely subject to the forms of surveillance which are increasingly ubiquitous. As one peer recognized during debates on section 71, they resist the creep of CCTV on the grounds that such surveillance within a toilet cubicle would be regarded by the 'general public' as 'grossly intrusive and totally unacceptable'.[83] It is precisely because public toilets maintain this high degree of privacy that makes them potential spaces for private encounters. A cubicle, with a locking door, affords a high level of privacy to those inside of it.

It is the very privacy of this space which simultaneously generates fears about and attempts to erase potential homosexual acts within it. Section 71, like the 1967 Act, is proposed as a legislative solution to the practical problem of 'policing behind closed doors'. As the Chair of the Police Federation argued:

> what goes on behind closed doors between consenting adults of the right age is appropriate, but that should not be in public toilets [. . .] it is not an appropriate use of public toilets [and] I think the law needs to make that very explicit.[84]

80 F.J. Desroches, 'Tearoom trade: A research update' (1990) 13 *Qualitative Sociology* 39–61; F.J. Desroches, 'Tearoom Trade: A law enforcement problem' (1991) 33 *Cdn. J. of Crim.* 1–21.

81 H. Bech, *When Men Meet: Homosexuality and Modernity* (1997).

82 L.J. Moran, *The Homosexual(ity) of Law* (1996).

83 Christian Institute, op. cit., n. 62.

84 House of Commons Home Affairs Committee, Fifth Report, *Sexual Offences Bill*, HC (2002–03) 639, 15.

The offence of gross indecency required proof that a sexual act had taken place rather than proof of the act causing offence to a witness. Section 71 continues this tradition of gross indecency and is intended to send, as one peer put it, 'a strong signal to those who seek sexual activity in a public lavatory, especially behind the cubicle door'.[85]

Section 71 can be seen as a representation of fears about homosexual conduct that might take place *in* public but go unseen *by* the public. It expresses the anxiety of the Christian Institute that if 'two men step into a toilet cubicle and lock the door [it] may be perfectly obvious what they are up to, but they cannot be seen'.[86] Justifications for section 71 show a heightened anxiety about the publicness of homosexual sex even if it is not visible or seen. For instance, peers argued that such activity might be 'overheard': 'ordinary people are as outraged by hearing such sexual activities in public lavatories as they are by seeing it'[87] and a 'witness may see two men go into the cubicle and hear them engaging in sexual activity'.[88] Research studies show that sexual activity between men in public lavatories is premised on unspoken and silent interaction lest it attract unwanted attention.[89] Yet even non-visible or audible activity is, it was argued, objectionable: 'even though it be in the cubicle with the door closed, one can see the feet under it and one will be totally aware of what is going on'.[90] The broad definition of what can be deemed sexual in section 71 allows the visible presence of feet to be indicative of sexual activity (because the witness – a 'reasonable person' – is 'totally aware of what is going on') and therefore makes such activity a criminal offence.

Male homosexual sexual activity in public toilets rarely invokes public complaints to the police and is almost exclusively a victimless offence.[91] Furthermore, section 71 is the only offence in the Sexual Offences Act 2003 that punishes sexual activity that is both consensual and involves no victim. Section 71 should therefore not be seen as an instrument designed to protect victims from sexual offences but as an expression of a fear of male homosexual sex (as a literal expression of homophobia). The argument by one peer, that section 71 would actually protect homosexuals, reveals how fear and disgust of homosexuality is at the root of justifications for this offence:

> I can see fathers going into those toilets with their sons and being so disgusted about what their son is going to see that it will give rise to an outbreak of homophobia. Some fathers will feel as I would feel were I 20 years younger and saw such activity in a public toilet like taking physical action against those involved.[92]

85 649 *H.L. Debs*., col. 78–79 (9 June 2003).
86 Christian Institute, op. cit., n. 62.
87 644 *H.L. Debs*., col. 779 (13 Feb 2003).
88 649 *H.L. Debs*., col. 69 (9 June 2003).
89 Humphreys, op. cit., n. 79; Desroches, op. cit., n. 80.
90 649 *H.L. Debs*., col. 72 (9 June 2003).
91 Desroches, op. cit., n. 80.
92 649 *H.L. Debs*., col. 72 (9 June 2003).

One of reasons that public lavatories invoke such strong fears about homosexual sex is because they are never sexually neutral spaces. They routinely bring individuals together in spaces which serve to hide their bodies and body parts from those outside but, in the process, make them visible to those inside. To speak of public toilets as non-sexual spaces is to ignore the careful consideration given to designing spaces to minimize sexual contact. As Moran argues, the fear of potential sexual contact is written into the architecture of public toilets

> in the use of frosted glass that might provide natural light but prevent a public display; in the design of the stalls; in the erection of barriers between the stalls to secure individuality during the private act of urination; in the separation of space into individual private cubicles; in the provision of lockable doors to secure that individual space; the installation of ceiling to floor partitions to ensure the division of one from another; in the use of brick and stone to guarantee the separation of bodies.[93]

Public toilets always offer a high degree of privacy for individual bodies but simultaneously afford the opportunity for those same bodies to be brought together in private sexual configurations. It is this erotic *homo*sexual potential, built into public institutions, which makes them inherently problematic in (heterosexual) public life.

Public lavatories are unique in contemporary society because they are public facilities that allow individuals to access private spaces free of charge (or for a small payment) and resist the increasing surveillance and securitization found in most other public space. From toilet compartments on trains, to facilities in shopping centres, to those which are situated on public streets, these spaces are centrally located within, but enclosed and dislocated from, the public world that surround them. If we characterize public spaces as ever more subject to the type of panoptic gaze described by Foucault, public toilets, and especially the cubicles inside of them, remain relatively dark spaces free from the light of any permanent external inspection.[94] Even the careful construction of public lavatories designed to stifle sexual potential and discipline individual conduct – by maximizing visibility through lay-out, furniture design, lighting, and technological methods of surveillance – is significantly limited by the thresholds of privacy which public toilets demand. Section 71 is an attempt to invade these private spaces and render them amenable to policing. Since such spaces severely restrict the gaze of actual inspection, section 71 can be seen as essentially an exercise in 'moral panopticism'.[95] That is, an attempt to 'reach inside' public lavatories and create moral spaces which encourage self-disciplining individuals to desist from committing immoral acts.

93 Moran, op. cit., n. 82, pp. 141–2.
94 M. Foucault, *Discipline and Punish: The Birth of the Prison* (1979).
95 D. Lyon, 'The Search for surveillance theories' in *Theorizing Surveillance: The Panopticon and Beyond*, ed. D. Lyon (2006).

One of the striking features of the justifications for section 71 is that they sharply contradict contemporary policing practices. The stated aim of the offence was to enable greater arrests and prosecutions of individuals engaged in sexual activity in public lavatories. Yet the low numbers of defendants cautioned or prosecuted shows that the offence may not be significant in terms of policing. Indeed, since the 2003 Act came into force, the Home Office have been keen to state that section 71 will not be used to target the activities of 'gay men'.[96] In principle, the policing of public sex is driven by public complaints and investigations rely upon high levels of officer discretion in terms of exercising powers of arrest. These important facets of policing are recognized in the law in relation to all instances of public sex except sex in a public lavatory. Section 71 was formulated to remove the need for the police to rely on public complaints and curtail the discretion of investigating officers in the hope of increasing detections and prosecutions. In this sense, section 71 maintains an inflexible approach to policing which is out of step with policing orthodoxy.

Section 71 maintains the same requirements upon policing as the previous law of gross indecency. It was in recognition of the need for a more flexible approach in policing that the original government proposed offence of 'sexual activity in a public place' was designed. That proposed offence sought to maximize police discretion in dealing with offenders by allowing officers to issue warnings to end activities without arresting individuals. The House of Commons' Home Affairs Committee saw a significant advantage in empowering the police to be able to issue warnings in this way.[97] Warnings can now be issued for all public sexual activity (under section 5 of the Public Order Act 1986) except sexual activity in a public lavatory. Similarly, the original government-proposed offence emphasized the need to rely on a degree of objectivity regarding the nature of public complaints (that they were not solitary complaints but were expressions of community concerns) and a test regarding the degree of distress caused to individuals. Section 71 removes the need to rely upon either complaints or witnesses.

There are many practical problems with section 71 in relation to operational policing. The offence does not reflect the way in which individual and community concerns are currently translated into police work. It contradicts the approach of police forces in terms of their current commitment to

96 This is obviously to allay any concerns within the 'gay community' that the offence is being used by the police to proactively single out the sexual activities of 'gay men'. Yet, such an assurance fails to recognize the complex relationship between sexual orientation, sexual practice, and social identity which means that men engaging in cottaging might not be 'gay men' who are, or not, part of a 'gay community'. See n. 104 below.

97 Home Affairs Committee, op. cit., n. 84, p. 16.

problem-orientated policing. And it is largely out of step with the policies and practices of United Kingdom police forces and their policies on policing male sex in public. For instance, the ACPO guidance on responding to complaints about cottaging emphasizes the need to carefully assess, through consultation with LGTB groups and other local community groups, whether such complaints represent isolated incidents or a community problem (ACPO recognize that the vast majority of complaints about public sex are likely to relate to men who have sex with men).[98] In the case of genuine community problems, and where a stepped police response is necessary, ACPO encourage a range of measures to dissuade individuals from participating in public sex (through the use of health outreach workers, posters, media, and so on), followed by situational crime prevention measures (control of facility, access control, signage, surveillance, and so on), before any preventative patrolling is undertaken.

Individual force policy, for example, the *Merseyside Police Lesbian, Gay & Bi-Sexual Force Policy*, emphasizes that in the case of genuine community complaints (as opposed to those motivated by homophobia),[99] a multi-agency problem-solving approach should be taken, followed by the use of outreach workers, to dissuade individuals from participating in public sex (this is regarded as effective and resource efficient). Where such an approach fails, Merseyside Police recommend 'low key' discreet patrolling by uniformed officers which they regard as 'effective in warning individuals about their conduct'. If uniformed patrolling is engaged, Merseyside Police recommend that officers speak to and leaflet persons frequenting toilets and inform them of the nature of the complaints received. Like most United Kingdom police forces, and in line with the ACPO guidance, Merseyside Police policy is to mount pre-planned operations to make detections and collect evidence for prosecutions as a last resort.

The Merseyside policy, like the ACPO guidance, places significant emphasis on measures which increase deterrence rather than those which maximize detections. This is driven by recognition within policing that detections do not significantly impact upon the 'problem' of cottaging because they do not necessarily produce a reduction in offending. In line with the enforcement approach of problem-orientated policing, emphasis is placed on identifying the 'pinch-points' in the conditions generating problems.[100] As one account from a beat officer in Leicestershire shows, the success of adopting a multi-agency and problem-oriented policing approach is measured by its deterrent effect rather than its increase in detections:

98 ACPO, *ACPO Guidance of the Policing of Public Sexual Activity* (2000).

99 The distinction between 'genuine' and 'homophobic' complaints is not straightforward since homophobia may underwrite complaints about genuine incidents of sexual activities. See n. 101 below for an example of this.

100 N. Tilley, 'Introduction: Analysis for Crime Prevention' in *Analysis for Crime Prevention*, ed. N. Tilley (2002).

> These toilets are on an isolated lay-by. We get a couple of complaints every year from the villagers that live nearby through the parish council etc etc. We know about them and it's year in year out.[101] We commenced an operation telling people who sit in their cars that within the next few weeks people will be prosecuted for any offences that come to light. As well as that, the reason why this lay-by was used is because it's overgrown. The trees are thick, and it's very, very isolated although very near a main road. So, the Action Group decided to contact the county council to get the trees thinned, so that it's not isolated any more. The operation has been successful – we've had just one caution.[102]

The strategy of using a partnership approach to deter public sex also emphasizes liaisons with LGBT groups. Such an approach is a requirement of the Crime and Disorder Act 1998 which stipulates that the police and local authorities must cooperate with local community groups in policing partnerships.[103] Leaving aside the problematic nature of the relationship between the police, LGBT groups, and individuals who have sex in public lavatories,[104] an example of such a partnership approach can be seen in the following statement issued on the website of MESMAC North Wales in February 2007:

> North Wales Police in partnership with the local Gay Community have announced that they will step up patrols in the vicinity of the public toilets in LLANGEFNI on Anglesey. The announcement came following a number of complaints from residents and the local Community Council that men seeking sex with other men are using the toilets. Officers have initially warned men who use the toilets that uniformed Police patrols in the area will be targeting the toilets to deter their use for sexual purposes.[105]

101 This description highlights the complexity of distinguishing between complaints that are 'genuine' and those motivated by homophobia. The quote begs the question why 'villagers' would be concerned about an 'isolated lay-by' which is 'nearby' but not in the village? If the physical location of the public lavatory is isolated from the village then the basis for the complaint is unlikely to be motivated by actual encounters between villagers and individuals using the lay-by for sexual activity.

102 Quoted in A. Leigh, T. Read, and N. Tilley, *Brit Pop II: Problem-orientated policing in practice* (1998) 14.

103 D. McGhee, 'Beyond toleration: privacy, citizenship and sexual minorities in England and Wales' (2003) 55 *Brit. J. of Sociology* 357–75.

104 Stephen Tomsen's recent work on the policing of homophobic violence shows that there is a tendency within policing, and public policy generally, to categorize men engaged in public sex as individual members of a vulnerable sexual minority of 'gay men'. Whilst it has long been known, Tomsen argues, that many men engaged in homosexual public sex do not self-identify as homosexual, and are not part of a wider LGTB community, the failure of current policy formulations to recognize this means that men who fall outside of the category 'gay' are increasingly marginalized. The same problem may be identified with regard to partnerships formed between the police and LGTB groups for the purpose of policing cottaging. The effect of such an approach is the failure to recognize, and meaningfully engage with, many of the men participating in this activity. See S. Tomsen, 'Homophobic Violence, Cultural Essentialism and Shifting Sexual Identities' (2006) 15 *Social & Legal Studies* 389-407.

105 <http://www.gayline.co.uk/>.

In terms of operational policing, section 71 seems largely out of step with the policies and practices of United Kingdom police forces. The above example from North Wales is typical of policing which is driven by public complaints and enacted with the purpose of deterring and warning offenders. Unlike section 71, the Public Order Act 1986 significantly enhances police work in this respect since it allows police forces to assess complaints in relation to the degree of harm being caused by activities and empowers officers with the power to issue warnings prior to arrest.

CONCLUSION

In continuing to regulate sexual activity in the context of public lavatories, the criminal law maintains a specific focus on male homosexual sex. Whilst the wording of section 71 is gender-neutral, its practical enforcement, in terms of suspects cautioned or proceeded against for the offence, shows that it is being used in relation to men who have sex with men. If the law continues to be used to prosecute men exclusively in this way then it fails to deliver the stated purpose of the government's process of sexual offences reform and maintains a bias in law towards gender and sexual orientation. It is both possible and likely that section 71 will be challenged on the basis that it discriminates on these grounds. It is also possible that, following the ruling by the European Court of Human Rights in *A.D.T.* v. *The United Kingdom*, section 71 may be challenged on the grounds that it disproportionately and unnecessarily interferes with the right to privacy under Article 8 of the European Convention on Human Rights.[106]

One of the most contentious aspects of section 71 is that it affords the police a wide range of powers to detect suspects. Despite the current guidelines issued by ACPO and individual police forces regarding the policing of public sex, the law still retains the scope for the police to act as agents provocateurs in order to detect would-be offenders. There is a long

106 The case contested the conviction of a male defendant for gross indecency following his prosecution, under the Sexual Offences Act 1956, for engaging in sexual indecency with more than two male persons present. Whilst the prosecution and conviction were in accordance with the law, the applicant complained that this interfered with his right to privacy under Article 8 of the European Convention on Human Rights. The government contended that such interference was necessary 'for the protection of morals and the rights and freedoms of others'. Whilst the European Court of Human Rights agreed with the government 'that, at some point, sexual activities can be carried out in such a manner that state interference may be justified', they ruled that where sexual activity takes place 'in circumstances in which it was most unlikely that others would become aware of what was going on' (in other words when such activities are 'genuinely "private"') such interference is not proportionate or necessary in a democratic society. *A.D.T.* v. *The United Kingdom*, 31 July 2000, Judgment, Strasbourg (Application no. 35765/97).

history of policing gross indecency in this manner (beginning with the 'pretty policemen' of the 1960s) where men have been entrapped by undercover police officers. Unlike in all other public environments, the law allows public lavatories to be policed in order to detect offenders who are causing no public nuisance or harm. And in public lavatories this applies only to same-sex sexual activity (since the single-sex design of public toilets makes it implausible that opposite-sex police officers could act as agents provocateurs in an attempt to detect would-be heterosexual offenders).

Section 71 upholds the tradition of the 1967 Act and provides a legal basis through which to distinguish the policing of sex in a public lavatory from all other public sex. It is, as Foucault would call it, a 'technology' which makes a physical space a particular legal environment and allows those who enter it to be policed in a particular way.[107] It reiterates the belief that homosexual public sex is immoral and antithetical to the interests and values of 'society as a whole'. And it sustains ideas and understandings about those who commit such offences as dangerous deviants that require special forms of social control and regulation.

107 See M. Foucault, 'Technologies of the Self' in *Technologies of the Self: A Seminar with Michel Foucault*, eds. L.H. Martin, H. Gutman, and P.H. Hutton (1988).