‘All I wanted to do was go home and have some sushi …’ – on the criminality of anti-social behaviour

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In April 2020, Richard Pusey shocked the public when he taunted four dying police officers at the site of a significant crash in Melbourne and recorded the dying Leading Senior Constable Lynette Taylor, pinned to the back of Pusey’s car and begging for help. He responded by filming her and exclaiming: ‘There you go, amazing, absolutely amazing. All I wanted to do was go home and have some sushi and now you fucked my fucking car….’ Subsequently, Pusey was charged and convicted of the – arguably archaic- common law offence of committing an act that outrages public decency. This article examines the capricious, evil and anti-social individuals that have been recognised as acting contrary to our societal standards; exemplified where a dying police officer in her last few moments on Earth is begging for help but is met with Richard Pusey’s odious retort of a hedonistic desire to eat sushi. The devil drives a hard bargain; to convict someone of their antisocial behaviour presents a moral dilemma of convicting antisocial people to stamp out their behaviour to ensure our comfort in society.

R v Pusey

To give context, it is necessary to specifically outline what behaviour Pusey was convicted of. In April 2020, four Victorian police officers pulled Pusey over on Melbourne's Eastern Freeway. While doing this, a sleep-deprived truck driver under the influence of drugs ploughed into them.[1][2] As the police officers lay dead and dying around him, Pusey walked 'slowly and purposefully' around the scene. He then began filming the deceased and then the terminally wounded Lynette Taylor who was pinned against Pusey's destroyed car. It is necessary to frankly set out what happened to establish the issue; the recordings were utterly odious and repugnant.

Pusey said: 'I think everyone got cleaned up, there's four people, four people, look at that.' Pusey then said, 'Look at that, mate, look at that. Oh he's smashed. Look at that. Look at that. Lucky I went and had a piss.' Upon filming the destroyed police car, Pusey said, 'Look at that man, you fucking cunts. You cunts. I guess I'll be getting a fucking Uber home, huh … That is fucking justice, absolutely amazing…'[3] Pusey then zoomed in on Lynette Taylor, and said: 'There you go, amazing, absolutely amazing. All I wanted to do was go home and have some sushi and now you fucked my fucking car…'[4] It was these facts that related to Pusey's charge and conviction for committing an act that outrages public decency. At what point is someone's behaviour so anti-social and repugnant that it is deemed criminal?[5]

Ever since this awful incident happened, it has caught my attention at how outrageously offensive it was; his transgressive behaviour begged belief. It piqued my interest as to what behaviour is so anti-social it warrants criminal intervention. The real question is: how would *you* deal with this? My true answer to this is: I am not entirely sure. Victoria answered this question by using a common law offence: 'outraging public decency'.

18 months later in November 2021, Pusey was subsequently convicted for using a carriage service to cause offence by sending the graphic images.[6] An insurer rejected the claim made for his Porsche. Pusey then made a complaint to the Australian Financial Complaints Authority and uploaded the images with the caption: 'A truck mowed down four hero road safety officers ... it broke a black

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[1] Danny Tran, *Richard Pusey Sentenced for filming dying police officers after Eastern Freeway crash* (28 April 2021) <https://www.abc.net.au/news/2021-04-28/richard-pusey-sentenced-for-filming-police-eastern-freeway-crash/100099402>.
[2] See *R v Singh* [2021] VSC 182.
[3] Ibid.
[4] Danny Tran, *Porsche driver Richard Pusey fronts court with lawyers saying they want case resolved 'as quickly as possible'* (16 July 2020) <https://www.abc.net.au/news/2020-07-16/richard-pusey-face-magistrates-court/12462336>.
[5] Danny Tran, *Richard Pusey Sentenced for filming dying police officers after Eastern Freeway crash*.
[6] Section 474.17 the criminal code act 1995 (Cth).

Porsche and now these cunts won't pay out'. For present purposes, this subsequent conviction is out of the scope of this current discussion. Nor are acts of violence against property or people or anti-social groups such as gangs will not be considered; they are heavily codified within each state's criminal code and need not be reformed.[7] Since this offence is a creature of English common law, this will serve as the basis in interpreting its use in Australia and why it has been used in cases of indecent exposure as opposed to the conduct of Pusey. While Pusey's behaviour is reprehensible, the use of the dormant offence has reinvigorated its potential to be used again. The existing body law regarding outraging public decency is vague and limited in use.

In Australia, there have been six reported examples of the charge 'outraging public decency.'[8] There has been debate in the infamous Pusey case where such a charge is considered archaic,[9] and as Pusey's counsel argued, such a charge does not exist in Australia, and that if the charge exists in Australia, 'the facts in this instance … do not fit the charge.'[10]

It is trite to say that anti-social behaviour is harmful to society, but Pusey's conduct raises a live issue as to what behaviour is so anti-social it warrants criminal intervention. We should consider the ramifications: at what point do we draw the line for the tribunal of fact to consider anti-social behaviour to be criminal? This considers *why* certain anti-social acts should be criminalised. Unusually, the law has been applied from a trend of behaviour that is repugnant, but all factually different enough to not warrant sufficient prosecution under established codified criminal law.

Media opinion at the time suggest that the law is 'archaic' and 'inappropriate' to be used.[11] It stands to reason that this common law approach has been used too few times to properly test its legal intention of punishing those who outrage public decency. While Pusey's actions are morally bankrupt, he did not commit an act beyond taunting the deceased in a shocking manner prompting the question of whether there is a legal right to be repugnant. This means that in circumstances where behaviour is not violent to one's person or property, is it appropriate to criminally intervene where behaviour such as Pusey's was publicly decried but otherwise not violent?

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[7] E.g. *Serious and Organised Crime Legislation Amendment Act 2016* (Qld).
[8] *Director of Public Prosecutions v Pusey* [2021] VCC 478, [42].
[9] Stephen Gray, *Should we revive an archaic law after the Eastern Freeway incident?* (7 July 2021) <https://www.theage.com.au/national/victoria/should-we-revive-an-archaic-law-after-the-eastern-freeway-incident-20210706-p587as.html>.
[10] *DPP v Pusey*, [40].
[11] Stephen Gray, *Should we revive an archaic law after the Eastern Freeway incident?*

THE OFFENCE OF OUTRAGING PUBLIC DECENCY

The first recorded instance of this offence was *Sedley's Case*.[12] In 1675, Sir Charles Sedley was charged with outraging public decency for urinating on a crowd from a balcony in an Oxford tavern in Covent Garden. The legal roots of this charge come from the common law of England and Wales, and have been fundamentally relied upon in Australia for *Pusey*. The elements of the offence were outlined in *R v Hamilton*[13] where His Honour Judge Wraight in *Pusey* relied on the reasoning of Thompson LJ:

> i) An obscene act is an act which offends against recognised standards of propriety, and which is at a higher level of impropriety than indecency. A disgusting act is one "which fills the onlooker with loathing or extreme distaste" …
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> ii) It is not enough that the act is lewd, obscene or disgusting and that it might shock people; … outrages minimum standards of public decency as judged by the jury in contemporary society…

In essence, the two elements provide that outraging public decency requires the Crown to prove that the nature of the act is lewd, obscene or disgusting, and that it outrages public decency. A disgusting act is thus something that fills an onlooker with loathing, 'or extreme distaste' or causes annoyance. Secondly, outraging public decency is defined as something not simple enough to be lewd or to shock people – but it must be of character to 'outrage the minimum standards of public decency' where it is judged by the jury in contemporary society. Further, it is important to recognise the meaning of 'public': it is not necessary that any particular member of society is outraged, meaning that anyone does not have to see the act while it is being carried out.

However, *R v Hamilton* dealt with a practising barrister who, with a camera concealed in a bag, would surreptitiously take videos up the skirts of women. There were 20 hours of footage, including that of a 14-year-old girl.[14] The only example that the Court[15] relied upon that was not a case of indecent exposure, or something in that vein, was *The Queen v Anderson*[16] where the appellant went up to a dying disabled woman, threw water on her, urinated on her, covered her in shaving cream, covered her with a pack of flooring tiles then photographed her. Rather than being charged with assault for these acts,

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[12] *Sedley's Case* (1675) Strange 168, 1 Sid 168.
[13] *R v Hamilton* [2007] 1 QB 224, [30].
[14] *R v Hamilton*, [1].
[15] *DPP v Pusey* [2021] VCC 478.
[16] *The Queen v Anderson* [2008] EWCA Crim 12.

the Crown Court sentenced him to three years imprisonment for outraging public decency.[17] It is not clear how indecent images taken of women and the acts committed in *Anderson* fall within the same purview of this offence.

Application in Australia

The procedural history of outraging public decency is rather limited in Australia; only six cases are recorded:

R v Madercine (1899) 20 LR (NSW) 36	*R v Black* (1921) SR (NSW) 748
R v Udod [1951] SASR 176	*R v Towe* [1953] VLR 381
R v Fonyodi [1963] VR 86	*R v Reinsch* [1978] 1 NSWLR 483

In application, it appears that only New South Wales and Victoria, which have partial criminal codes, retain the praxis of a common law criminal offence as is shared with the offence in England and Wales. For instance, had Pusey committed the acts in Queensland, he could have been charged under the existing *Criminal Code 1899* where s 227 provides the following:

> **227 Indecent acts**
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> (1) Any person who—
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> (a) wilfully and without lawful excuse does any indecent act in any place to which the public are permitted to have access, whether on payment of a charge for admission or not; or
>
> (b) wilfully does any indecent act in any place with intent to insult or offend any person;
>
> is guilty of a misdemeanour, and is liable to imprisonment for 2 years.
>
> (2) The offender may be arrested without warrant.
>
> (3) *Subsection (1)* does not apply to a person who does an indecent act under the authority of an adult entertainment permit.[18]

[17] *The Queen v Anderson*.
[18] *Criminal Code 1899* (Qld) s227.

However, even the scope of this offence appears to apply to a sexual context, especially when read alongside subsection 3, which provides an adult entertainment permit as a defence. An example of recent application of this offence further shows that it has generally been applied to cases of egregious sexual misconduct in public.[19] Thus, in circumstances of anti-social behaviour that is deemed criminal, at least in New South Wales and Victoria as they presently accept common law criminal offences, we are left to the common law of outraging public decency insofar as to prosecute behaviour such as Richard Pusey's.

Of course, we are not bound by the common law of England; although our law is 'the prisoner of its history', it cannot be bound by the hierarchy of an Empire – leaving us free to our own jurisprudence.[20] Further, we must recognise the advent of the *Australia Act 1986,*[21] which succinctly ended the United Kingdom's ability to legislate over Australian matters[22] and the termination of appeals to the Privy Council.[23] That said, the *Australia Act* offers little legislative guidance on the applicability of outraging public decency in Australia, where the charge itself is a common law offence, outside the realm of any legislative control that the *Australia Act* prohibits. Moreover, the court has demonstrated a fundamental reliance on English common law to establish the elements of outraging public decency.[24] [25]

In the Australian context of outraging public decency, all the above cases deal with indecent exposure, with varying degrees of severity and context. For instance, in *Reinsch,* the NSW Court of Criminal Appeal dealt with the appellant (Mr Reinsch) for 'scandalously [exposing] his naked person to the view of divers persons, liege subjects of our Sovereign Lady the Queen'.[26] It appeared, at least at trial, that outraging public decency was an appropriate charge in lieu of wilful exposure because the defendant exposed his penis to a 10-year-old girl from his bathroom window and not in public.[27] The case, heard on appeal, does not deal with the relevant jurisprudence of outraging public decency, but instead sets aside the conviction on a distinction of a jury being the responsible party for determining guilt, while

[19] *Attorney-General for State of Queensland v Sorrenson* [2021] QSC 014.
[20] *Mabo v Queensland* [No 2] (1992) 175 CLR 1, [29].
[21] *Australia Act 1986* (Cth).
[22] *Australia Act* s1.
[23] Ibid s 1.
[24] *DPP v Pusey*, [41]-[43].
[25] David Ross and Mirko Bagaric, *Ross on Crime* (Thompson Reuters, 9th ed, 2021) 3.3335.
[26] *R v Reinsch* [1978] 1 NSWLR 483, [1].
[27] *R v Reinsch*, [6].

it is at the Court's discretion to order a conviction, as conferred within the meaning of s556A of the *Crimes Act 1900*.[28]

Ambiguous Meaning of 'Public'

In *R v Fonyodi,*[29] the applicant had climbed through the window of a flat occupied by a woman. She was asleep in bed, then awoken by the entry and:

> …saw the accused who was a perfect stranger to her standing in the room. She saw him undo the buttons of his trousers and expose his penis. At the same time he suggested that he desired to have sexual intercourse with her.[30]

Again in this matter, English common law was relied upon to give meaning to outraging public decency, where Huddleston B, in *R v Wellard* provided: 'It seems to be established that, speaking generally, whatever openly outrages decency and is injurious to public morals is a misdemeanour at common law…'[31] Logically, Fonyodi was convicted of break and enter given the nature of his crime, but the application of outraging public decency falls into the same legal pitfall as *Reinsch* where a traditional charge of indecent exposure would fail to prove the physical element of a 'public place.'[32]

The element of a 'public place' was contested in *Reinsch*, where it was held that the words 'public place' have 'no magic', and the requirement that the offence of outraging public decency to be in public 'introduces an unnecessary, artificial … [and] meaningless flourish'. Ultimately, the Court held that it was the public committing of the act that is to be evaluated by the Court, with regard to 'the act being committed in, or visible from, a public place' rather than it being strictly conducted in a public place such as exposing one's genitalia on a bus or train instead of a bathroom window.

So, a distinction can be drawn between the meaning of public in a statutory sense and within the meaning of outraging public decency. In *Pusey,* the meaning of public has effectively taken the broader meaning of upsetting society, where His Honour at [54] held: 'the 'public' element of the charge is satisfied by the presence of persons at the scene, the community in general have formed an extremely negative opinion about you and your conduct has had a wider effect on the public generally…'[33]

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[28] *Crimes Act 1900* (NSW).
[29] R v Fonyodi [1963] VR 86.
[30] Ibid.
[31] *R v Wellard* (1884) 14 QBD 63, [67].
[32] See *Summary Offences Act 1966* (Vic) s19(1)(d).
[33] *DPP v Pusey*, [54].

In summary, the submission that Pusey's conduct does not fall within the traditional usage of this offence raises a live issue as to the appropriateness of this law, or the lack thereof in Australia. These historical cases again fall into the same trap that the United Kingdom has faced where there is an extensive overrepresentation of sexual-related crimes as opposed to the acts of *Pusey* or *Anderson*. The legal position on both non-violent and non-sexual acts of outraging public decency are fundamentally ambiguous in applicability where even the meaning of 'public' has changed over time too.

DOG-LAW AND LEGAL MORALISM

Dog-Law

Lord Bingham has committed an extensive passage in considering Jeremy Bentham's criticism of retrospective judicial law, also known as 'dog-law' or 'law following the event'.[34] Bentham scorns judge-made criminal law in *Truth versus Ashurst* where, of course, it is the bench that makes the common law but:

> …Just as a man makes laws for his dog. When your dog does anything, you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do – they won't so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it.[35]

On this interpretation, the appropriateness in charging the accused with outraging public decency is still valid when it has not been created recently, but rather recycled as an offence. Lord Bingham responds that the domestic law of England and Wales has set itself firmly against dog-law. *R v Withers*[36] demonstrated that the bench has no power to create new offences, and as his Lordship provides, '[nor] may the courts nowadays widen existing offences so as to make punishable conduct of a type hitherto not subject to punishment.'[37] At least in common law, there is some precedent in drawing a line in the sand for anti-social common law offences overreaching their function.

While Bingham LJ does not deny the legitimacy of common law offences, his Lordship is wary of the potential of an extension in application that is effectively creating a new offence. Such reconciliation

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[34] *R v Rimmington and Goldstein* [2006] 1 AC 459 HL, [33].
[35] Jeremy Bentham, *Truth Versus Ashurst* (1823).
[36] *R v Withers* [1975] AC 842.
[37] *Rimmington* [33].

is difficult to realise where the appropriateness of using 'outraging public decency' as a catch-all to encapsulate anti-social acts that are outside the scope of existing statutory offences runs the risk of creating dog-law. Outraging public decency is objectionable, not because it was an offence made by the bench, but rather its ambiguity lends itself to vagueness where every time it is used, it creates a fresh occasion for modified law making. In circumstances like in Australia where the offence has such a limited procedural history, it is substantially affected by any instance of its use where further cases in Australia require the Court to look upon the limited pool of cases.

In circumstances where *Pusey* has arrived, we have, on the facts, a man who has filmed deceased and dying police officers at a graphic crash site with a bizarre running commentary insulting the aforementioned. Archaic common law has been applied almost exclusively in recent history to punish sex-related crimes. The mere recycling of the charge of outraging public decency to mould itself to an act that is so factually different to its ordinary application is within itself dog-law.

As a general rule, the Court cannot indefinitely extend the meaning of an offence to include everything that is disliked by the trial judge. However, it is appropriate to make judicial pruning that can have the desired effect of making incremental changes to bring an offence closer to its original nature and logical purpose. That said, the quandary goes both ways in outrightly abolishing the offence.

If the ambit of outraging public decency requires enlargement, then it must be '…done step by step on a case-by-case basis and not with one large leap…'[38] Such a leap from sexual misconduct to that of *Pusey* is difficult to justify. So, in circumstances where recent application of outraging public decency that effectively made dog-law, we can refer to Lord Bingham in saying that 'the courts have no power to create new offences … they have no power to abolish existing offences. That is a task for Parliament, following careful consideration…'[39]

Legal Moralism

The patent question to consider is this: what conduct can Parliament deem criminal? Joel Feinberg ultimately posed this question in *The Moral Limits of the Criminal Law* where there was framework of a Millian[40] interpretation of law, on the state's power over an individual. Feinberg defends a broad spectrum of conduct, from a liberal perspective, on topics such as euthanasia, pornography, hate

[38] *R v Clark (Mark)* [2003] EWCA Crim 991, [13].
[39] *Rimmington*, [31].
[40] Referring to John Stuart Mill *On Liberty*.

speech and obscenity. In reading Feinberg's philosophy of legal moralism, one must be cognisant of the greater implications of law and state, where, inter-alia, concepts of harm, offence, autonomy, responsibility and paternalism are intricate measures in considering the criminality of conduct.[41] Ultimately, Feinberg argues there are certain 'moral harms' that should be outlawed. To help consider whether Pusey's conduct gives colour to the criminality of a 'moral harm' lies in the second volume of Feinberg's *Offense to Others*, where the thought experiment of a 'ride on the bus' can be used for our purposes of understanding the criminality of outraging public decency.

Imagine you are a passenger on a bus rushing to an important appointment. While on your journey, you are confronted with a series of anti-social, yet harmless acts. Some of the acts are an affront to our senses, such as a man scraping his fingernails across a slate, or perhaps someone viewing pornography on their phone. These acts can change to something that is foul or revolting to us, where a fellow passenger could be eating something nauseatingly disgusting.

Other acts can be an affront to our sensibility of religion, morality or civic-mindedness, such as desecrating a flag or Bible. More extreme acts can be an affront to our sense of shame or embarrassment, such as public masturbation or sexual intercourse and a wide range of similar conduct that would solicit such a response. The purpose of this thought experiment is for us to consider the threshold of our tolerance for harmless, but perceived offence to anti-social behaviour.

It succinctly raises the question to consider 'whether there are any human experiences that are harmless in themselves yet so unpleasant that we can rightly demand legal protection from them even at the cost of other persons' liberties.'[42] So, the crux of this legal quandary is unveiled: can we deprive someone's liberty (by conviction) to protect ourselves from their unpleasant conduct?

John Stuart Mill in *On Liberty*[43] takes a staunch liberal answer reminiscent of Immanuel Kant and asserts that the only kind of conduct that the state can criminalise is that of something that will cause harm to others. Feinberg himself argues that even the most tolerant of left-leaning liberals must recognise that there are some forms of harmless but profoundly offensive conduct that can be effectively criminalised.[44]

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[41] Joel Feinberg, *The Moral Limits of the Criminal Law. Vol. 1, Harm to Others.* (New York: Oxford University Press, 1984).
[42] Joel Feinberg, *The Moral Limits of Criminal Law.*
[43] John Stuart Mill, *On Liberty* (1859).
[44] Joel Feinberg, *The Moral Limits of the Criminal Law. Vol. 2, Offense to Others.* (New York: Oxford University Press, 1985) 10.

Is Pusey's Conduct a Moral Crime?

Pusey's conduct, through Feinberg's framework, was an affront to our morality and sense of shame. Most people are thinking, feeling, and caring human beings. We derive our humanity from our ability to think rationally and care for another. Wraight J provides an apt summary for the morality of Pusey's behaviour:

> A normal human reaction of a person coming upon a scene like this, would likely be to immediately telephone 000, or simply to run to the side of the deceased or seriously injured police officers to offer whatever assistance they could…
>
> What you did however was film the scene with a running commentary which on one view may be described simply as bizarre behaviour in the circumstances. It can also be described as extremely insensitive and heartless. Your focus was entirely on yourself. You were upset that your car had been destroyed and seemed to take pleasure in seeing the destruction of the police vehicles. The words you used and the tone of your comments are undoubtedly what makes your conduct offensive and cause outrage. You, yourself later described your behaviour in your record of interview as 'derogatory and horrible'.[45]

Pusey's behaviour was considered offensive by the Court. But whether he should be convicted of it is a deeply reflective expose on one's position on legal moralism. I am a reluctant legal naturalist/moralist, but across jurisprudential thought, there is at least a *minimum* content of morality in our law in order to be an effective legal system.

To rely on the notion that because an act is harmless, it therefore should not be criminalised fails to reconcile that the harm could manifest itself to the functioning of a society. We should not be hijacked by the overt liberal notion that just because it is harmless, it therefore should not be illegal. We must consider the moral dichotomy where by criminalising non-harmful behaviour, we are jeopardising that person's liberty for the sake of our own comfort. In a way, there is a price to pay for the legal

[45] *DPP v Pusey*, [50]-[51].

conformity of societal values that transcend the maximisation of liberal jurisprudence, where the cost of our civic comfort is juxtaposed against the Crown's ability to prosecute the offensive behaviour.

Circumstance and context are essential in determining whether something is inappropriate, for instance, the distinction between one masturbating in their bedroom compared to on a public bus. Policing these criminal acts of indecency[46] is meant to stamp out anti-social behaviour because deeply unpleasant behaviour is not commensurate to the functioning of a good society.

Of course, societal values change over time; homosexuality, in Western countries, was considered an affront to society and deeply unpleasant behaviour. In 1957, debate on the decriminalisation of homosexuality in the United Kingdom was posed as to "not... in our view... to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour"[47]

That said, even the most libertarian of jurists or blasé of moralists would recognise there is almost no cultural shift that would ratify the vehement taunting of dying police officers being stuck in the stigma of its time. The deciding factor in the validity of outraging public decency is ultimately its harm on society. One can take a Millian approach to *Pusey* and recognise that he did not do anything intrinsically harmful, and therefore should not be criminally charged. Conversely, we could look to Feinberg's legal moralism and see that his act, while not harmful, was so repugnant to our morality that it should be criminalised to stamp out such conduct like that in society. I daresay even HLA Hart would find this behaviour necessary to be captured under the minimum content of natural law.

Pusey's behaviour is hard to reconcile on Feinberg's bus ride, where the threshold on criminal intervention lies in the view of the person's own tolerance for anti-social behaviour. Since the inception of outraging public decency in 1675,[48] the threshold of tolerance of anti-social behaviour has been shaped by common law for more than three centuries, leaving the court as the arbiter in determining this sliding scale of morality and its criminal breach. Those of a callous and capricious demeanour do not automatically deserve to have their liberty deprived, but are we willing to jeopardise that to make us feel more comfortable? Immaterial of one's moral standing of the offence, the offence should exist but its present fitness for purpose remains ambiguous.

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[46] *Criminal Code 1899* (Qld) s227.
[47] Committee on Homosexual Offences and Prostitution (UK), *Report of the Committee on Homosexual Offences and Prostitution*, London: Her Majesty's Stationery Office (1957).
[48] *Sedley's Case*.

FOREIGN JURISPRUDENCE ON CRIMES AGAINST MORALITY

Reference to foreign jurisprudence offers little guidance. In the United States Constitution, the First Amendment is a broad legal protection that does not extend to obscenity. It appears that obscenity laws are generally applied to artistic works that prohibit indecent expressions in which there are major disagreements on the meaning of obscene material.

The United States does not follow a violation of public decency offence, but instead has a common law definition established in *Miller v California*[49] where the *Miller* test provides the following criteria: first, whether a reasonable person in application of contemporary community standards would find the work or conduct 'taken as a whole' appeals as a 'prurient interest' to the community; secondly, there must be consideration whether the work depicts a plainly offensive sexual conduct; and finally, if the work 'taken as a whole' lacks value to literature, art, politics, or science.[50] Therefore, obscenity is also not an appropriate case study in managing non-violent anti-social behaviour, where even the common law test on its own lacks clarity on how it is applied. For instance, at what point does a pornographer's content under US obscenity law fall out of line with the standard expunged in the US Supreme Court. Never mind the test, the law itself does not deal properly with members of the public performing deeply repugnant anti-social behaviour.

Similarly, Singapore holds the criminal charge of outraging public modesty under s 354(2) of their Penal Code.[51] The offence, similar to outraging public decency, provides:

> Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with caning, or with any combination of such punishments.

Application of this offence is, however, difficult to reconcile. On 25 August 2021, Singapore police charged ten men with outraging public decency, however all for different reasons. [52] Examples of which are:

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[49] *Miller v California* 313 US 15 (1973).
[50] Ibid.
[51] *Penal Code 1871* (Singapore) s354.
[52] Singapore Police Force, *Ten Men to be Charged For Outrage of Modesty* (25 August 2021) <https://www.police.gov.sg/media-room/news/20210825_ten_men_to_be_charged_for_outrage_of_modesty>.

> Between 2016 and 2020, a 46-year-old man allegedly molested his stepdaughter, who was less than 14 years of age at the material time, on four separate occasions at home. The man will be charged with four counts of outrage of modesty under Section 354(2) of the Penal Code."
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> …a 45-year-old man allegedly molested his 47-year-old female colleague on six separate occasions at their workplace along Mandai Road. The man will be charged with six counts of outrage of modesty under Section 354(1) of the Penal Code.
>
> …a 63-year-old man allegedly molested his 14-year-old granddaughter on two separate occasions at home. The man will be charged with two counts of outrage of modesty …
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> …19-year-old man allegedly molested an 18-year-old woman at a night club along Cecil Street. The man will be charged with one count of outrage of modesty …
>
> … 28-year-old man allegedly molested a 23-year-old woman along Elias Road. In a separate incident on 2 March 2021, the man had used insulting words on another woman in her 20s which caused her to be alarmed. The man will be charged with one count of outrage of modesty …

Prima facie, the offence overwhelmingly seems to function as a catch-all for sexual crimes. Even the nature of the charges ranges from incestual hebephilia, sexual harassment and one purported incident of '[using] insulting words' on another woman. This discrepancy could perhaps be due to statutory limitations of the definition of sexual crimes of their *Penal Code* where ss375-377 requires penile penetration of the mouth, anus, or vagina as the requisite physical elements for the offence – leaving out digital penetration other forms of abuse.[53] In light of this, one must consider the socio-cultural conditions in which these offences lie; where homosexual sexual intercourse is criminalised in s377A, it is indicative that using Singapore as a case study on legislation dealing with anti-social behaviour is not only inappropriate but it faces the same ambiguity in the Anglosphere.

MANAGING ANTI-SOCIAL BEHAVIOUR AND PARLIAMENTARY INTERVENTION

A Greek proverb states that a society grows great where old men plant trees in whose shade they never lie. Continuing the metaphor, we enjoy the shade created by our ancestors and are secured in the bosom of legalism and liberalism to ensure a functioning, healthy and organic society. Men like

[53] See *Penal Code 1871* (Singapore) s375 'Rape' or s376G 'Incest'.

Richard Pusey do not plant such trees. His actions are demonstrably against the congruent values of a liberal society; Pusey has an extensive history of deeply anti-social behaviour.[54] For instance, in 2016, Pusey taunted the wife (who had breast cancer and was holding the drainage bags from a mastectomy only two days prior)[55] of a builder he refused to pay. Pusey said: 'Film me! Film me! Get some more fucking cancer you stupid fucking slut! I hope you fucking die, your metastasis will kick in within ten fucking years! That's what's going to happen.'[56] How do we manage people like Pusey? They are neither violent nor sexual predators, yet have:

> …prominent features of personality-based psychopathology … [with] an enduring disturbance in functioning of aspects of his identity, self worth, self view, and interpersonal dysfunction manifesting in multiple settings and contexts….
>
> He has a complex mixture of core antisocial, borderline, narcissistic and paranoid personality subtypes. His mood problems also include problems with self-regulation. He has a history of being hot-headed, impulsive and volatile. While he admits to such traits, he is prone to rationalising his emotional reactions, even when it is self-evident that it is excessive and unreasonable.[57]

The devil drives a hard bargain; we are faced with the juxtaposition of the value we place on Pusey's liberty against the level of discomfort we are willing to tolerate for Pusey's behaviour. It appears that the sliding scale of Feinberg's bus experiment was not worthy of indicting Pusey on outraging public decency when calling a cancer patient a 'slut' and wishing death upon her, but was recording the deceased police officers and taunting them a step too far? Existing common law for outraging public decency has failed to address this behaviour. Existing statutes in Queensland, Singapore or the United States are not clear either.

Is the offence of outraging public decency needed?

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[54] *DPP v Pusey* [67].

[55] Nic White, *Inside Richard Pusey's eight-month reign of terror over a woman suffering CANCER and her tradie husband - who says the Porsche driver is an 'angry man' because he 'got teased as a child over his name'* (25 April 2020) <https://www.dailymail.co.uk/news/article-8247799/Porsche-driver-Richard-Pusey-tormented-man-cancer-stricken-wife.html>.

[56] The Advertiser, *Porsche Driver Richard Pusey in Cancer Tirade* (23 April 2020) <https://www.adelaidenow.com.au/news/porsche-driver-richard-pusey-in-cancer-tirade/video/1255c2491f76750f8650bb944b63f518>.

[57] Psychiatric report of Dr Adam Deacon in *Pusey* p12 [4].

We can address that there is sufficient argument for an offence of outraging public decency. The law should not be a vehicle to police the idiosyncrasies of people's behaviour, but it is relevant when it reaches a point when an act against morality shocks our humanity, such as when in *Anderson* a man taunts and urinates on a dying woman in a gutter, to *Pusey* making recordings of such reprehensible content. These are actions of capricious, evil and anti-social individuals that have rightly been recognised as contrary to our societal standards. The problem is the mechanism in which Pusey has been charged. If such a case were to happen again, the common law in the area is reliant on an archaic application of dog-law that has failed to share a factual matrix in precedent where instances of indecent exposure do not apply to the acts of *Pusey*. The existing legal instrument in enforcing the offence is lacklustre and ambiguous.

To justify the offence of outraging public decency, we must carefully consider why we have laws to protect morality. While an act may be inherently 'harmless' (at least in a physical sense), one cannot assert that the preservation of social order by outlawing the most capricious of anti-social acts is not an extension of Victorian thinking to stifle the freedom of people's behaviour. Where social values change over time, such as the inclusion and acceptance of homosexual people, one cannot reconcile a shift in socio-cultural trends of sexual inclusiveness to behaviour that uproots the norms of humanity; where a dying police officer in her last moments on this Earth begging for help is met with Richard Pusey's odious retort of a hedonistic desire to eat sushi.

Should it be codified in statute?

In 2015, the UK Law Commission recommended the implementation of a whole new statutory provision, in line with Lord Bingham's judgement and the philosophy of Bentham and Feinberg that such acts of outraging public decency be potentially codified as an act:

> (a) which is of such a nature as to be likely to cause a reasonable person witnessing it shock, outrage or humiliation (the indecency requirement),
>
> (b) in such a place or in such circumstances that it may be witnessed by two or more members of the public (the publicity requirement).[58]

[58] Law Commission (UK), *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 4 June 2015), 52 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/lc358_public_nuisance.pdf>.

The Law Commission further comments that 'it is justified to create or retain an offence of outraging public decency: it is not a tool for the enforcement of morals but a protection of the right to enjoy public spaces without annoyance.'[59] I do not agree with this reasoning because I think the actions of *Pusey* or *Anderson* are not impeding peoples' right to enjoy a public space without annoyance, but are instead demonstrating a monstrous lack of remorse and humanity. The criminal law should not be a functioning arm to gaol those tepidly committing something like the tort of nuisance, but rather convict those who have demonstrated a complete and utter lack of regard for others – it should be an offence with a high threshold.

Extra Curial Punishment and the Implications of a Trial by Jury

In *Pusey*, there was an enormous amount of pre-trial publicity that was recognised by the court. He was called by the media 'The Devil driving a Porsche' and a 'Vile fiend.'[60] The Court recognised that Pusey had multiple death threats made against him, his home was vandalised, his garage door was spray painted with 'vermin' and he was not safe from other prisoners while in gaol.[61]

Extra-curial punishment is not a settled matter at law, but was found as a mitigating feature on sentencing in *Pell.*[62] The same was reflected in *Pusey* where His Honour's sentencing remarks reflected Pusey's publicity as having 'attracted an enormous amount of public antipathy with the consequences that I have outlined above and as such, in my view you are entitled to have that taken into account.'[63] As a consequence of this, any future potential conviction of 'outraging public decency' may have the inherent negative publicity as a mitigating feature in sentencing.

Such acts that outrage public decency will of course attract significant negative attention from the public. The importance of the indictment is that such a charge, while it may be rare, is to be judged by a jury as the contemporary arbiter of what is reasonable, where in practice it applies Feinberg's sliding scale of tolerance to moral crimes in determining guilt. Of course, an implication of a trial by jury is the problems faced with high-profile cases such as *Ferguson*[64] or *Cowan.*[65] We must recognise the

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[59] *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency,* 55 3.97
[60] *DPP v Pusey,* [54].
[61] *Pusey,* [77].
[62] *DPP v Pell* [2019] VCC 260, [140]-[148].
[63] *Pusey,* [78].
[64] R *v Ferguson* [2009] QDC 158.
[65] R *v Cowan* [2013] QSC 337.

constitutional right of a trial by jury[66], which is reinforced in the High Court where Deane J in *Kingswell v R* [1985] emphasised the importance of a trial by jury:

> … [s 80 of the *Constitution*] reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases… That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment…
>
> …the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate…[67]

Where a compromised jury is concerned, *R v Patel* clarifies this inconsistency in recognising a compromised jury deliberation:

> …juries are capable of handling issues of prejudice arising from the pre-trial publicity that has occurred here… I am not persuaded that a properly directed jury will have difficulty in ignoring it in favour of the evidence that is led before it. In other words, I believe that a fair trial can proceed before a jury in spite of the publicity.[68]

While overt negative publicity might not prejudice a jury trial, it ultimately rests on the persuasiveness of counsel and the opinion of the bench. There are legislative mechanisms in place that permit the Court to make a no-jury order in which, at least in Queensland, the competing interests of justice, complexity, retaliation against the jury and significant pre-trial publicity are factors in making such an order.[69]

That said, there is still no clear threshold as to what point the level of pretrial publicity is deemed significant enough to hold a trial without a jury. *R v Baden-Clay* had a significant amount of pre-trial publicity yet a jury trial went ahead.[70] Conversely, notorious paedophile Dennis Ferguson was given a bench-only trial, as His Honour Justice Botting recognised that: '…sexual abuse of very young children excite … strong emotions in our society. One sees … the anger which evidence of such abuse causes.[71]A distinction between *Ferguson* and *Pusey* is that Pusey is not a paedophile. Of course, the court

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[66] *Australian Constitution* S80.
[67] *Kingswell v The Queen* [1985] HCA 72, [47].
[68] R *v Patel* [2012] QSC 419, [46].
[69] *Criminal Code 1899* (Qld) s615.
[70] R *v Baden-Clay* [2014] QSC 265.
[71] R *v Ferguson*.

is competent enough to recognise when publicity may be too much. Our legal system is adversarial by nature, where both sides of the Bar Table enforce their client's interests, with the Bench as the adjudicator. Judge-only trials have their time and place; my concern is that for a moral crime of 'outraging public decency', it is best served as being judged by the public on its merits of guilt. Pragmatically, this is not only as a stopgap between judicial overreach but maintains legitimacy of punishment in the community. In cases that have garnered significant publicity, the matter to be heard by a judge alone only somewhat undermines the process of justice – after all, those on the Bench are still thinking and feeling human beings who are ordinary members of the public.

What conduct should outraging public decency address?

Of the seven cases of outraging public decency in Australia[72], all but one (obviously excluding *Pusey*) have dealt with a sexual aspect.[73] In a random sample of 47 prosecutions in the United Kingdom, there were:

1) 8 cases of indecent exposure of genitals.
2) 21 cases public masturbation.
3) 8 cases of real or simulated sexual activity in public.
4) 8 cases of making intimate videos without consent.[74]

There is sufficient legislation that presently addresses sexual-related crimes that outraging public decency should not address. The words of the offence 'to outrage public decency' is axiomatic in its purpose, where it encapsulates crimes that are shocking to our moral standard of decency. While any crime against morality may very well fall within it, the existing body of law is sufficient to deal with it. For instance, in Queensland, it is an offence to expose your genitals.[75] Furthermore, section 223[76] codifies a strict offence of distributing intimate images without the consent of another person.

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[72] See my provided table of cases under *Application in Australia* on page 5.
[73] *DPP v Pusey*. [42].
Simplification of Criminal Law: Public Nuisance and Outraging Public Decency, 3.94.
[75] *Summary Offences Act 2005* (Qld) S9.
[76] *Criminal Code 1899* (Qld).

Essentially, the charge of outraging public decency should strictly cover acts that are non-violent and non-sexual and are fundamentally reprehensibly immoral. From a utilitarian perspective, the prevention of a serious offence to individuals is a legitimate goal to the functioning of criminal law, so as to prevent any kind of harm or suffering.[77] However, this perspective is difficult to apply because the crime of outraging public decency is not a preventative offence like 'conspiracy to commit crime'.[78] In effect, the charge of outraging public decency should not be something like conspiracy, where it is to deter, punish and stamp out the likelihood of a more serious crime being committed – it is to punish only those acts that are so shocking that they uproot the norms and respectability of a functioning society.

Simester and Von Hirsch have argued that an offence should be criminalised only when it has taken the form of a recognisable wrong, within the scope of insulting behaviour or invading one's privacy.[79] So on that basis, we can assert that acts of extremely anti-social behaviour should be criminalised, not just because they are an impediment for the enjoyment of society without abrasively shocking behaviour, but such acts that outrage public decency are disorderly and fundamentally tear up the fabric of society. Thus, the scope of conduct it should cover must not be a tool to enforce moral standards that differ from person to person, but rather protect our public interests against acts that are shocking and repugnant.

As an offence, the elements must be important to solidify in statute, leaving no wriggle room for dog-law. The offence of outraging public decency is not an appropriate vehicle for sexual misconduct. Its main elements should be limited to an act that is obscene or disgusting, which is judged against a tribunal of fact/jury in a contemporary society. The UK Law Commission has provided insightful commentary on the 'fault element' of codifying outraging public decency, where the defendant should:

> '(1) [know] of the nature of the act or display, or was reckless as to whether the act or display was of that nature; and
>
> (2) knew or intended that the act or display was or would be in a place which is accessible to or within view of the public, or was reckless as to whether or not this was the case.'[80]

All crimes against morality are anti-social and outrage public decency, but not all acts of outraging public decency share the elements of crimes against morality (such as rape or incest). As such, the

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[77] Joel Feinberg, *Offense to Others,* 1.
[78] *Criminal Code* (Qld) s541.
[79] AP Simester and Andreas Von Hirsch, *Crimes, Harms, and Wrongs* (Bloomsbury Publishing, 1st ed, 2011) ch 6, 98.
[80] *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, 3.160.

scope of a criminal charge of outraging public decency fundamentally covers those of an obscene or disgusting nature, immaterial of the defendant's own beliefs.

CONCLUSION

Anti-social acts like that of Richard Pusey incense our morality, often sparking the passions of the mob to treat such people as social lepers. Richard Pusey is a high-functioning person that has demonstrated a capricious capacity to perform extremely anti-social acts that outrage our sense of public decency. He is not strictly a man of violence nor sexual depravity, but rather behaves in a way that uproots the norms of humanity. As a consequence, we are left with the issue of managing such behaviour legally.

People like Pusey have forced our hand in evaluating the legality of their actions. We place the competing interests of upholding their liberty to our desire to enjoy society more comfortably. What Richard Pusey did was abhorrent and shocking, but the existing legal mechanism to which he was convicted was not an appropriate vehicle in enforcing an act that outrages public decency. That said, there is a valid argument for the creation of an offence of outraging public decency reserved at a high threshold for extremely anti-social acts like that such of *Pusey*. Those of a callous and capricious demeanour do not automatically deserve to be gaoled, but it is their actions that shock the public, undermining a minimum standard of acceptable behaviour that should be punishable.

It has been established that the common law offence of outraging public decency is an inappropriate charge for managing anti-social behaviour. The nature of the offence has escaped the scope of judicial pruning over time, where it has taken a dog-law approach of a catch-all offence to punish an act. The Crown was placed in a difficult position with such overwhelming public pressure. They do not have the power to make a new offence, nor abolish it – they were stuck with interpreting the validity of such an offence. Given the abhorrence of Pusey's actions, it was perhaps the lesser of the evils to convict him on that basis while using an inappropriate charge as opposed to not punishing him altogether.

Crimes against morality are against the values of a liberal society, and the existing legal instrument in enforcing the offence is lacklustre and ambiguous. What Richard Pusey committed was a moral crime, and as such, a new offence should be made to guard against the failing in law that governs egregious acts of anti-social behaviour. The price we pay to sleep better at night is the answer to this main question: at what point is someone's behaviour so anti-social and repugnant that it is deemed criminal?

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