

Changing the Way We Think about Change

Shifting Boundaries, Changing Lives

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Dirty words? Challenging the assumptions that underpin offensive language crimes

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Earlier this year, the New South Wales Law Reform Commission ('the Commission') recommended an inquiry into the possible abolition of the crime of using offensive language. The Commission stated that:

Community attitudes towards the use of language, especially swear words, have changed substantially. Some people may find swearing offensive but the issue under consideration is whether it should be a criminal offence (New South Wales Law Reform Commission, 2012, p. 310).

Calls to repeal this offence are not new, yet they continue to be ignored by successive governments and the broader public.

This paper critiques the adjudication of offensive language crimes, focusing on the vague definition of offensive, the cryptic construction of the reasonable person and the elusive concept of community standards. In part one of this paper, I define and give a general overview of offensive language crimes, and examine the existing literature on the unequal enforcement of these crimes. In part two, I discuss how the law requires judges to shun expert linguistic evidence in favour of their 'common sense', thereby rehashing prejudicial stereotypes about language, sex and place. In part three I analyse two cases in which judges espouse opinions that women ought to, and have a greater capacity for self-restraint when it comes to swearing, and that swearing should be reserved for masculinised spaces. I draw upon critical sociolinguistics and the notion of swear words as 'dirty' words to argue that these vague constructions enable police and judges to discriminate against those who challenge their concept of 'order' and 'disorder'.

Offensive language crimes

In New South Wales, s 4A(1) of the *Summary Offences Act 1988* (NSW) makes it an offence to use offensive language in or near, or within hearing from, a public place or school ('the 1988 offence'). Last year, there were approximately 6,000 offensive language incidents recorded in NSW alone (NSW Bureau of Crime Statistics and Research, 2011). It is a defence to a charge under s 4A(1) if the defendant satisfies the court (on the balance of probabilities) that he or she had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence (s 4A(2)).

New South Wales is not alone in criminalizing offensive language. Similar offences, which criminalise offensive, abusive, insulting, or obscene language, exist across Australia. For example, in Western Australia, s 74A of the *Criminal Code Act 1913* (WA) makes it an offence to 'behave in a disorderly manner', which includes the use of 'insulting, offensive or threatening language' in a public place, a police station or lock-up. A person found guilty of the WA offence of behaving in a disorderly manner can be fined up to \$6,000. Offences which criminalise offensive, abusive, insulting, or obscene language overlap considerably (Walsh, 2005), and I use the term 'offensive language crimes' when referring to these offences. In Queensland and the Northern Territory, offensive language crimes attract a term of up to six months' imprisonment.

The conservative Liberal-National Coalition Government led by Nick Greiner introduced the broad NSW offence in 1988, repealing the narrowly worded offence under s 5 of the *Offences in Public Places Act 1979* (NSW), which prohibited a person from:

without reasonable excuse, in or within view or hearing from a public place or school behav[ing] in such a manner as would be likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or seriously affronted ('the 1979 offence').

The 1979 offence had attracted considerable criticism from members of the Liberal Party and the NSW Police Force, who argued that the requirement that reasonable persons be 'seriously alarmed or seriously affronted' by the behaviour or language in question placed excessive limitations on police powers and discretion to deal with unruly or undesirable behavior in public space (Hiller, 1983, p. 103). The hostile reaction of police was evident in an advertisement published by the NSW Police Association on 20 August 1979 stating:

You can still walk the streets of NSW, but we can no longer guarantee your safety from harassment...

....Is it possible that the Offences in Public Places Act (1979) could be the seed from which a growth of pattern of New York style street crime will be the future harvest?

When the 1988 offence was introduced, the National Party argued that a more comprehensive offence with a custodial penalty attached to it was necessary in order to 'prevent widespread obnoxious behaviour before it's too late' (New South Wales Legislative Assembly, 1 June 1988, p. 1155). In his second reading speech to the Summary Offences Bill 1988, the Attorney General John Dowd stated:

Underlying the Bill is the Government's concern that all citizens have the right to enjoy public facilities without harassment or interference....The community will have confidence that this legislation will adequately deal with public order, and the police will have confidence that it can be properly enforced (New South Wales Legislative Assembly, 31 May 1988, p. 804).

The 1988 offence and the accompanying penalty of up to three months' imprisonment sparked little opposition from the NSW Labor party, save for the criticism that the new Act was a 'pussy-cat Act' that did not go far enough (New South Wales Legislative Assembly, 1 June 1988, p. 1173).

Despite introducing a custodial sentence, the Attorney General implored police and magistratestouse arrest and imprisonment as a last resort for Indigenous defendants. However his requests were largely ignored. It was not until a review of the legislation that the three-month custodial penalty was removed by the *Summary Offences (Amendment) Act 1993* (NSW). Theremoval of the custodial penalty was prompted in part by the Royal Commission into Aboriginal Deaths in Custody, and also by the reaction to the 1992 ABC documentary *Cop it Sweet*, both of which highlighted the harsh operation of the legislation on Indigenous Australians. The maximum penalty for using offensive language under the 1988 offence is now\$660, or up to 100 hours of community service (ss 4A(3), (6)).

A development that has taken place in the last decadeis that policein many Australian jurisdictions, including NSW, Queensland and Victoria, have the power to issue fines, or infringement notices for offensive language(Leaver, 2011). Thus police are now performing the conflicting roles of witness, victim and judge in perceiving and punishing offensive language.

Recent literature on offensive language crimes focuses on the discriminatory policing and enforcement of such crimes, particularly in relation to Indigenous Australians. Academics from a range of disciplines have critiqued this aspect of the offence (Cunneen, 2001, 2008; Lennan, 2006, 2007; Morreau, 2007; Walsh, 2004, 2005; White, 2002).

The literature demonstrates a deep hypocrisy in the enforcement of offensive language crimes. Chris Cunneen (2001, p. 96) describes how in August 1988, an 18-year-old Aboriginal youth was arrested and charged with offensive behaviour for wearing a t-shirt which highlighted Aboriginal deaths in police custody. Police commonly arrest people for using swear words such as *fuck*, *prick* and *cunt*, which are frequently used amongst police officers and sometimes used by police officers towards members of the public(Brockie, 1992; Cunneen, 2001; Wooten, 1991). Police are often the victims of offensive language crimes, and almost always the witnesses. As Cunneen writes, such charges:

are often representative of direct police intervention and potential adverse use of police discretion. Except for a notional 'community', the victim of the offence is almost invariably the police officer, as shown in numerous studies in most Australian jurisdictions (Cunneen, 2001, p. 29).

Theover-policing and over-criminalization of Indigenous persons' and other minorities' use of 'offensive' language is well documented. With this in mind,the next part of this paper questions how judicial opiniononswearing rationalise an excessive level of police power over some of the most vulnerable members of society.

Language ideologies and offensive language

In my critique of offensive language crimes I draw upon critical sociolinguistic research and the concept of language ideologies. Sociolinguistics is the study of the complex relationship between language and the social context in which it is used. It assumes that language both reflects and shapes society (Eades, 2010, p. 5). Critical sociolinguistics is 'critical' in that it is concerned with questions about access, power, disparity, difference and resistance (Pennycook, 2004, p. 797).

The law is one of the most linguistic of institutions: legislation, police investigations, court proceedings and judgments all being overwhelmingly linguistic processes (Gibbons, 2004, p. 289). Offensive language crimes have an obvious linguistic dimension. In fact, they are a typical example of what forensic linguist Roger Shuy labels 'language crimes', in other words, crimes in which certain kinds of language use are criminalised. Writing about language crimes, Shuy argues that linguistic issues are often overlooked in the law:

Most people use language so easily and naturally that they tend to not really see it very well. What people hear is often colored by their own professional vision, schemas, presuppositions, and expectations (Shuy, 2005, p. xii).

When analysing offensive language, judges and police often do not reflect on how their own frames of reference skew their linguistic interpretations. In applying ideas from critical sociolinguistic research, I am not concerned with prescriptive judgments: professing to scholars the 'correct' way in which language should be understood. Instead, I am interested in exploring and critiquing prejudices about language use that inform judicial interpretation of offensive language crimes, and perpetuate further inequality.

Language ideologies

How we understand language is shaped by the small worlds that we inhabit: the viewpoints and stories we embrace, ignore and reject. To deal with the linguistic dimension of offensive language crimes, judges cannot consult linguistic experts. Expert evidence on questions of language and literature is inadmissible in offensive language cases (*Howie v Winter* (1934) 12 LGR 62; *Prowse v Bartlett* (1972) 3 SASR 472; *Dalton v Bartlett* (1972) 3 SASR 549; *E (a child) v The Queen* (1994) 76 A Crim R 343). Instead, judges rehash folk knowledge as to the way language operates. I use sociolinguist Diana Eades' understanding of the term 'language ideologies' as taken-for-granted or 'common-sense' assumptions about how language works, which permeate legal decision-making. These representations have been socially, culturally and historically conditioned (Eades, 2010, pp. 241-242).

Importantly, 'Ideologies of language are not about language alone' (Eades, 2010, p. 242; Woolard, 1998, p. 3). They also 'serve to rationalize existing social structures, relationships and dominant linguistic habits' (Eades, 2010, p. 242). Similarly, laws that circumscribe language are not just about words, but also seek to control other aspects of human life: conflicts about race, class, culture and gender. Ideological positions often become naturalised into the law (Mayr & Simpson, 2010, p. 56). This process of naturalisation can align people to the mainstream or dominant thinking without questioning the bases of these assumptions.

What is 'offensive'?

The imprecise nature of offensive language crimes creates a space in which language ideologies about swearing flourish. The NSW Parliament chose not to define 'offensive,' the Attorney General stating that it is 'a broad term with which members of the public are familiar' (New South Wales Legislative Assembly, 31 May 1988, p. 804). The case law provides little guidance as to the meaning of this adjective, save for the vague definition provided by O'Bryan J in the oft-cited case of *Worcester v Smith* [1951] VLR 316, in which his Honour stated that 'offensive' means:

...such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person (at 318).

The word 'calculated' in this definition is misleading, as the balance of authority suggests that there is no subjective *mens rea* element in offensive language crimes. Offensive language and behaviour must be conscious and deliberate in the sense that it is not accidental, but the prosecution does not have to prove an intention to offend, or knowledge that the conduct would offend (see *Police v Pfeifer* (1997) 68 SASR 285; *Police v Atherton* [2010] SASC 87).

This definition of offensive outlined in *Worcester v Smith* was adopted by Kerr J in *Ball v McIntyre* (1966) 9 FLR 237. In that case the defendant, Desmond Ball, climbed a statue of George V and hung a placard on the statue that read *I will not fight in Vietnam*. Ball refused to remove the placard or climb down, and was arrested for behaving in an offensive manner contrary to s 17(d) of the *Police Offences Ordinance 1930-1961* (ACT) (now repealed). Commenting on the meaning of offensive, Kerr J held that:

Some types of political conduct may offend against accepted views or opinions and may be hurtful to those who hold those accepted views or opinions. But such political conduct, even though not thought to be proper conduct by accepted standards, may not be offensive conduct within the section. Conduct showing a

refusal to accept commonly held attitudes of respect to institutions or objects held in high esteem by most may not produce offensive behaviour, although in some cases, of course, it may (at 241).

These flexible judicial statements make it clear that judges are reluctant to circumscribe police discretion in dealing with offensive language and behaviour. Police may target a wide range of language, including language that does not involve any threat of violence or other unlawful activity. Courts have also held that it is an error of law to state that words are necessarily indecent regardless of the context in which they are used (*Hortin v Rowbottom* (1993) 68 A Crim R 381; *Bradbury v Staines*; *Ex parte Staines* [1970] Qd R 76; *Dalton v Bartlett* (1972) 3 SASR 549). Furthermore, it is not necessary to demonstrate that some person has actually been offended by the accused's language. The test is an objective one, determined from the perspective of a reasonable person (*R v Connolly and Willis* [1984] 1 NSWLR 373).

The abstract nature of the term 'offensive', the inadmissibility of expert evidence on questions of language, the lack of any subjective *mens rea* standard, and the application of the 'reasonable person' standard all contribute to the wide discretion bequeathed upon judges and police when interpreting offensive language crimes.

The reasonable person and community standards

We can see a rather cautious, normative discourse develop around the construction of the reasonable person in the case law on offensive language. This hypothetical person is not thin-skinned, nor overly thick-skinned (Re Marland [1963] 1 DCR 224; but see *McCormack v Langham* (Unreported, Supreme Court of NSW, 5 September 1991, Studdert J)). He or she is apparently reasonably tolerant, understanding, and contemporary in his or her reactions (*Ball v McIntyre* (1966) 9 FLR 237). However the reasonable person has some sensitivity to social behaviour, and social expectations in public places (*Evans v Frances* (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990). A reasonable person is neither a social anarchist, nor a social cynic (*Spence v Loguch* (Unreported, Sully J, Supreme Court of New South Wales, 12 November 1991). And in interpreting the perspective of the reasonable person, the court must have regard to contemporary community standards or the standards of 'right-thinking', 'decent-minded' people (*Melser v Police* [1967] NZLR 437; *Crowe v Graham* (1967) 121 CLR 375; *Heanes v Herangi* [2007] WASC 175).

Thus the case law demonstrates that reasonable people are altogether unremarkable. The reasonable person is not sceptical of existing hierarchies. Reasonable people adhere to the status quo. Judges do not acknowledge the cultural and historical assumptions that inform their view of who this right-minded person is. In referring to the illusory, abstract standards of 'decent, right-minded people' and an imagined 'community', courts are able to apply their own naturalised prejudices relating to swearing and proper language use.

When arbitrating offensive language cases, the judiciary clings to a belief in their ability to discern 'community standards' on bad language, even in the face of sociolinguistic research that demonstrates that there are no universal norms on swearing. Attitudes towards bad language change throughout time, across cultures and between individuals (Hughes, 2006; McEneaney, 2006; Montagu, 1967). Bad language is as much a social/historical phenomenon as a linguistic one (McEneaney, 2006).

The complex cultural and historical foundations of attitudes towards bad language are forgotten in the assessment of who this 'reasonable person' might be. Magistrates and judges reject linguistic evidence in favour of language ideologies on what is offensive. Their judgments are infused with normative statements about age, sex and social class, as well as arguments about purity, power and 'proper' English usage. The judges adopt folklinguistic theories on 'bad language', relying on moral absolutist beliefs, referring to concepts such as morality, decency and common sense, without assessing the assumptions that have informed such beliefs.

The illusive reasonable person test in offensive language cases has not entirely escaped criticism from members of the judiciary. In *White v Edwards* (Unreported, Supreme Court of New South Wales, 5 March 1982), Yeldham J considered a charge under the repealed s 5 of the *Offences in Public Places Act 1979* (NSW), of behaving in a manner as would be likely to cause reasonable persons to be seriously alarmed or seriously affronted (the predecessor to the 1988 offence, discussed above). The facts were that at around 12.15am on 28 February 1981, a young person was standing near an intersection in Kings Cross, Sydney. The young person was with a group of five or six friends, 'dressed in attire similar to that worn by "punk rockers"'. The young person said *Fuck off cunts* and *Get fucked you cunts*, in a loud tone of voice. These words were heard by a nearby police officer.

Justice Yeldham contemplated the difficult task of determining what constitutes the standards of 'reasonable persons' early in the morning at Kings Cross, asking whether this objective test:

...envisages the standards of prostitutes, of dedicated church-goers, of young people or of old, of visitors to the area or of residents of Kings Cross? In the course of argument one counsel said that "at Kings Cross you may find a prostitute shoulder to shoulder with an Archbishop"...The very nature of a place such as Kings Cross, where there is to be found a large cross-section of persons, not all of whom may be regarded as "reasonable", emphasizes the problem (at [5]-[6]).

Justice Yeldham's critique of the reasonable person test is unusual. For the most part, magistrates and judges do not embark on a critical assessment of who this reasonable person might be. Instead, they hide behind a cloak of objectivity in order to proffer their own thoughts on who should and should not swear, who may and may not be sworn at, and the spaces in which swearing is or is not permissible. The concerns raised by Yeldham J about the reasonable person standard give rise to the question of how, in a pluralist society, might a police officer or magistrate make an 'objective' assessment about the offensiveness of language. What values does the 'reasonable person' in Australia hold in relation to swearing across a multitude of public places?

Case studies

Del Vecchio v Couchy

To further explore judicial discourse relating to the reasonable person and community standards, I turn to the Queensland case of *Del Vecchio v Couchy* [2002] QCA 9. This case concerned a charge of using insulting words in public contrary to s 7(1)(d) of the *Vagrants Gaming & Other Offences Act 1931* (Qld) (which has since been repealed and replaced by the offence of public nuisance under s 6 of the *Summary Offences Act 2005* (Qld)).

To summarise the facts of this case, at approximately 4.00 am on 21 September 2000, in inner-city Brisbane, an intoxicated, homeless, disoriented Indigenous woman, Melissa Jane Couchy, was approached by a male police officer, Sergeant McGahey. McGahey asked Couchy if she wanted to go to 'the compound' – a nearby shelter. Couchy replied: *Sarge, the Compound is for fucking dogs*. A nearby female police officer then asked Couchy to state her full name and address. Couchy replied: *You fucking cunt* (or words to similar effect). Couchy was arrested for using insulting language and received a sentence of three weeks' imprisonment. While her sentence was reduced to seven days on appeal to the District Court, Melissa Couchy's appeals against conviction to the District Court, the Queensland Court of Appeal and to the High Court were rejected.

Couchy's case is not unusual. Couchy was homeless, which increases her visibility in public spaces. She is Indigenous and so is much more likely than a non-Indigenous Australian to be charged with using offensive language (NSW Bureau of Crime Statistics and Research, 1999). Indigenous persons are also subjected to a greater degree of intervention in their everyday activities, including the 'most intimate parts of their lives' (Ronalds, Chapman, & Kitchener, 1983, p. 171). Couchy's Indigenous identity is also significant in that a growing body of evidence suggests that many Indigenous Australians use swearwords differently and more frequently than non-Indigenous Australians (Taylor, 1995, p. 236).

There is an obvious power asymmetry in Couchy's case; the police are in a position of authority, and she is not. The police officers felt empowered to direct the defendant as to how she should act, what she should say, and where she must go, even if Couchy was not legally obliged to comply with these directions. Couchy had few tools at hand to subvert this power asymmetry. Taking into account the fact that she is Indigenous, frequently occupied 'public spaces' and regularly came into contact with the police, we might perceive her use of the word *cunt* to be an expression of resistance or perhaps sheer frustration, in response to the suggestion that she be transported to 'the compound'.

However the courts do not entertain such a sympathetic reading.

The Queensland Court of Appeal denied that Couchy's 'Aboriginality', her poverty and the 'plight of Indigenous people in the community' were relevant to the assessment of whether a reasonable person would regard her language as insulting with regard to contemporary community standards. The Court effectively asserted that taking Couchy's Aboriginal identity and poverty into account would be an example of reverse discrimination. In the Court of Appeal transcript, Douglas J states that:

I just think to add the word "Aboriginal" stretches the bar too far; it's not necessary.

McPherson JA agrees, going on to suggest that:

You mean that if I said these words I'd be guilty of an offence, but if she says them she's not?

... One law for the rich and another for the poor.

Thus, in the name of 'equality before the law', the Court refuses to acknowledge fundamental aspects of Couchy's identity and social situation.

While McPherson JA's hypothetical example, that 'if [his Honour] said these words [he'd] be guilty of an offence, but if she says them she's not' may be persuasive in theory, it is almost impossible to imagine a scenario in which any of the Queensland Court of Appeal judges might be arrested or imprisoned for using insulting language. As white, upper-class Australian males, they occupy an elite position in society. Linguist Brian Taylor has observed that people who enjoy a more privileged position in Australian society, by virtue of their profession, social status, education and 'connections' are rarely prosecuted for using what Taylor calls 'high category' swear words such as *cunt* or *fuck*, even where they use these words in relatively public locations (Taylor, 1995, p. 232). Meanwhile, less privileged members of society, including those disadvantaged by poverty, homelessness, those whose language deviates from 'Standard English' and Indigenous persons continue to be overrepresented in offensive language cases (Taylor, 1995, p. 234).

While the Queensland Court of Appeal blinded itself to selective aspects of the appellant's identity, both the Queensland Court of Appeal and the High Court were very alive to the issue of gender, offering their own hypotheses about how a reasonable male or female might perceive the use of the word *cunt* to a female. The judges profess to be concerned about 'equality before the law', and yet do so inconsistently. While their Honours assumed that a reasonable female would react to the word *cunt* in a different manner to a reasonable male, they also assumed that a homeless, intoxicated Indigenous woman should not be held to a different standard of language use compared to a white, upper-class male.

The judges reject sociolinguistic evidence that there is no universal standard on insulting language, instead relying on language ideologies which are highly evaluative, emotional and aesthetically judgmental, drawing links between swear words, disorder, incivility and harm (Burridge, 2010; Cameron, 1995; Wajnryb, 2004). As Paula Morreau (2007) argues, by applying so-called 'universal' standards, judges effectively penalise the failure of Indigenous and other marginalised defendants to adhere to majority (white) values.

The common sense assumptions about how males and females react to swearing are even more pronounced when Melissa Couchy's application for special leave to appeal is heard before Gummow, Callinan and Heydon JJ in the High Court of Australia (*Couchy v Del Vecchio* [2004] HCATrans 520). In the hearing of the application, Gummow J states:

The form of words here and the gender of the officer to which they were addressed are quite significant in a way. This is a very strong form of words.

Justice Callinan adds:

Even a very well-trained police officer might be offended by these – a female police officer particularly, having regard to the words....

... The other point is that, despite equal opportunity, perhaps even today the fact that those words were said to a woman might provoke a physical response on the part of men who were also present. I think there were male police officers present here too, is that not right?

It is incredible that in the twenty-first century, Australian High Court judges are entertaining assumptions about female delicateness and male gallantry in interpreting whether language is 'offensive'. The judicial statements of both the High Court and the Queensland Court of Appeal provide a vivid illustration of how judges adopt an essentialised view of men and women, in which both sexes must conform to certain stereotypes when reacting to the utterance of the word *cunt*. While a female should react in horror and disgust upon hearing the word *cunt*, a male might feel compelled to defend the distressed female, perhaps even in violence. The judges choose to ignore anything that complicates their normative assumptions about swearing in the presence of a female, particularly the defendant's Aboriginality, her poverty and her intoxication.

McCormack v Langham

In *McCormack v Langham* (Unreported, Supreme Court of New South Wales, Studdert J, 5 September 1991) the respondent, Geoffrey Langham, was having lunch at Leo's Hot Foods in Lismore, NSW. Approximately 30

people were in the restaurant, including adults and children. Two police officers walked into the restaurant, and Langham was alleged to have said (with some degree of foresight) in a loud voice: *Watch these two fucking poofers here, how they fuckin' persecute me.*

Geoffrey Langham was arrested and charged with using offensive language. Magistrate Pat O'Shane dismissed the charge, finding that the language complained of was 'language of common usage these days and not such as would offend the reasonable man'.

When the case was heard on appeal, Studdert J overturned Magistrate O'Shane's ruling and remitted the matter for re-hearing. In assessing the offensiveness of the language, Studdert J stated that:

What might pass as inoffensive language if exchanged between footballers in an all male environment in a dressing room after a match might well offend if repeated in mixed company in a church fete.

This statement was cited with approval by Higgins J in *Saunders v Herold*(1991) 105 FLR 1.

And thus what are essentially gender-biased, aesthetic tastes become naturalised into law. The judges advocate the cordoning off of 'all-boy' spaces, so that men may 'talk dirty' amongst themselves, free from any disapproval of the opposite sex. It is acceptable for males to swear amongst males, at the football – a heavily masculinised space, for that is merely dirt amongst dirt. But by swearing amongst churchgoers, in the presence of a police officer, in mixed company, or in front of children, we are polluting clean spaces, and thus offending the natural order of things.

A threat to police authority?

A significant feature of both *Couchy's* and *Langham's* cases is that the defendants uttered swear words towards, or in the presence of police officers. Implicit in the sanctioning of such conduct is that swearing at or in the presence of police might undermine a police officer's authority. It is clear from judicial and parliamentary statements that offensive language crimes are primarily about commanding respect for police. When the *Summary Offences Act 1988* (NSW) was introduced in June 1988, the Attorney General stated:

The police- young men and young women-have to suffer foul and offensive language from people trying to breach their authority. I will not have police officers insulted (New South Wales Legislative Assembly, 1 June 1988, p. 1178).

Courts have also recognised that challenges to police authority are likely to be considered disorderly or offensive conduct (*Heanes v Herangi* [2007] WASC 175 at [177]).

Offensive language crimes could conceivably target an indefinite number of insulting or abusive phrases. Yet prosecutions are limited to a small number of swearwords, primarily *fuck* and *cunt*. Do these swear words have an inherent quality that renders them a threat to police authority?

The law cannot seek to censure swearwords *per se*; such an aim would be futile. American and English linguistic research has demonstrated that swearwords are uttered at a relatively high frequency - a rate of 0.3-0.7% of total words used. This can be benchmarked against the frequency of first personal pronoun use (such as *we*, *us*, or *our*), with such words occurring at a 1.0% rate. As linguist Timothy Jay states, language researchers do not regard personal pronouns to be low-frequency words (Jay, 2009, p. 156). So the law cannot possibly sanction the use of all swear words. Nor could police conceivably target every use of the words *fuck* or *cunt* in a public place. Instead they must select certain words, uttered by certain people, in certain places. These people are often the most vulnerable and visible members of our society. Why?

Dirty Words

Offensive language can be conceived of as language out of place. This notion of language out of place is central to how the law understands offensive language. We are historically and socially conditioned to perceive swear words as 'dirty words', without questioning why this is so. Many can hardly articulate the word *cunt*, preferring euphemisms such as 'the c-word', let alone turn their mind to what *cunt* might mean in a given context, or try to understand it as anything other than dangerous or unspeakable. This understanding of swear words as dirty or filthy is so deeply engrained that it requires no explanation. In *Couchy's* case, the Magistrate finds it unnecessary to explain why the word *cunt* is offensive; it just is, stating:

Any word other than cunt I think may have put a doubt in my mind. But the word "cunt" itself, I would hold to be insulting of a female, be it a police officer or otherwise.

We might perceive swear words as the dirt of our language. Anthropologist Mary Douglas considers the link between tabooed practices, the construction of 'dirt' and the ordering of society in *Purity and danger: An analysis of the concepts of pollution and taboo* (Douglas, 1966). Douglas states that humans classify, separate, purify and punish dirty ideas, practices and people to 'impose system on an inherently tidy experience' (Douglas, 1966, p. 4). She argues that dirt offends against order, but only where dirt is 'out of place'. Similarly, swear words only offend against order when they pollute a public space, but in certain spaces, do not transgress any perceived system. There is no such thing as absolute dirt; dirt exists in the eye of the beholder (Douglas, 1966, p. 2). And it is the dominant ideology that labels that which is 'dirty' and that which is 'clean':

Dirt then, is never a unique, isolated event. Where there is dirt, there is a system. Dirt is a by-product of a systemic ordering and classification of matter, in so far as ordering involves rejecting inappropriate elements (Douglas, 1966, p. 35).

Just as dirt out of place contaminates a space, it is only where swear words are uttered out of place that they offend right-minded people (Burrige, 2010). Swear words are only 'dirty' in certain contexts. It is up to police, judges and magistrates to determine what these contexts are. Uttered amongst equals, for example amongst police officers, swear words are perfectly permissible. Yet where there is asymmetry, the consequences are criminal.

Conclusion

In this paper I have argued that magistrates and judges rely on simplistic assumptions about language, place and gender in order to inform their interpretation of offensive language crimes. The law requires that judges reject expert evidence and resort to their own prejudices regarding community standards and the qualities of the reasonable person, leading to inconsistent results that too often discriminate against the poor and disenfranchised. In defining offensive language as that which offends hypothetical persons in selective contexts, the law legitimises the imposition of police power on the powerless.

The case studies that I have discussed exemplify the language ideologies that judges and magistrates espouse to classify words as 'offensive' and therefore contaminative of a space. Offensive language is clearly a malleable construct. While the judiciary links the offensiveness of language to gender, sport and religion, they reject or downplay considerations of homelessness, intoxication, Aboriginality and power.

Sociolinguistic research points to the conclusion that police, magistrates and judges cannot fairly and objectively interpret what is offensive language. This idea tears at the very foundation of offensive language crimes. Are we prepared to accept this research, or must we continue to allow adjudicators to cling to ill-informed stereotypes about swearing, and in doing so, punish people and ideas that transgress the elusive line between order and disarray?

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