DIRTY TALK:

A CRITICAL DISCOURSE ANALYSIS OF OFFENSIVE LANGUAGE CRIMES

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CERTIFICATE OF ORIGINAL AUTHORSHIP

I certify that the work in this thesis has not previously been submitted for a degree, nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

Elyse Methven

Signature of Student: Date: 02 March 2017

ETHICS APPROVAL

Ethics approval for this research was granted by the University of Technology Sydney (HREC UTS 2011–498A).

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TABLE OF ABBREVIATIONS

1849 Act	Vagrancy Act 1849 (NSW)
1849 Ordinance	Police Ordinance 1849 (WA)
1851 Act	Vagrancy Act 1851 (NSW)
1861 Ordinance	Police Ordinance 1861 (WA)
1902 Act	Vagrancy Act 1902 (NSW)
CDA	Critical discourse analysis
CIN	Criminal infringement notice or penalty notice
Criminal Code (Cth)	Criminal Code Act 1995 (Cth)
Criminal Code (WA)	Criminal Code Act 1913 (WA)
CP Act (NSW)	Criminal Procedure Act 1986 (NSW)
LEPRA	Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)
NSWLRC	New South Wales Law Reform Commission
Police Act	Police Act 1892 (WA)
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
SO Act (NSW)	Summary Offences Act 1988 (NSW)
SO Act (NT)	Summary Offences Act 1978 (NT)
SO Act (Qld)	Summary Offences Act 2005 (Qld)
SO Act (SA)	Summary Offences Act 1953 (SA)
VGOO Act	Vagrants Gaming and Other Offences Act 1931 (Qld)

ABSTRACT

This thesis analyses criminal justice discourse as it relates to offensive language crimes in Australia. Across Australia, and elsewhere, it is a crime to use offensive, indecent or obscene language in or near a public place. These crimes are governed by broadly drafted provisions that allow police and judicial officers significant discretion in determining offensiveness. Although offensive language crimes can theoretically target a multitude of words and phrases, in practice, the laws are used to police and punish a small selection of swear words.

Provisions that circumscribe offensive speech have a linguistic dimension. This dimension has been under-theorised in previous scholarship on the topic. Accordingly, my thesis places *language* at the centre of offensive language crimes, by interrogating how such crimes are represented and legitimised as a particular discursive formation within the criminal justice system. My thesis asks two questions: Firstly, how is offensive language represented in criminal justice discourse? Secondly, how are offensive language crimes legitimised in criminal justice discourse?

I employ a distinct approach to these questions by employing critical discourse analysis ('CDA') as my primary methodological tool. CDA is not strictly a 'method', but rather, a loosely grouped body of work that views language as both shaping and shaped by society. Analysts works from the premise that we cannot neutrally represent reality. Instead, we construct (and reconstruct) reality, including social identities, subject positions, social relationships and systems of knowledge and belief, through language. I use the phrase 'criminal justice discourse' to describe socially constructed ways of signifying reality, through language, in the criminal justice system.

My thesis situates its linguistic analysis of offensive language crimes in broader social, political and historical contexts. I draw into the frame linguistic research on swearing, and literature relating to metaphors, purity and disgust. The thesis structure is based on the following themes: language interpretation in the courts; swearing, danger and disgust; context; objective standards; and power, order and authority. These themes are derived from my doctrinal analysis of offensive language crimes and ideas that inform and legitimise the criminal punishment of swearing.

My thesis reconceptualises how offensive language is interpreted in the criminal law. I extend existing scholarship by highlighting how criminal justice discourse creates and entrenches power inequalities, augments judicial discretion, ignores difference and promotes unfairness. I demonstrate how discourse shapes perceptions about things, people, ideas and words that are deemed 'out of place' and worthy of criminal sanction.

CHAPTER ONE
A LINGUISTIC APPROACH TO OFFENSIVE LANGUAGE CRIMES

> In a society such as our own we all know the rules of exclusion. The most obvious and familiar of these concerns what is prohibited. We know perfectly well that we are not free to say just anything, that we cannot simply speak of anything, when we like or where we like; not just anyone, finally, may speak of just anything.[1]
>
> — Michel Foucault, *Orders of Discourse*

1.1 Introduction

In each society there are prohibitions on what can or cannot be said. There are also restrictions on who can speak, and where. These prohibitions may take the form of unwritten social mores, civil codes or alternatively, criminal prohibitions. One such prohibition is the use of offensive language in or near, or within hearing from, a public place or a school.[2] Swearing in public is the most common target of this crime.

My thesis questions how it has come to be that in Australia, swearing in public attracts criminal censure—'the strongest formal censure that society can inflict'.[3] Laws that criminalise offensive, insulting, abusive, obscene or indecent words, used in or near a public place, exist in various forms throughout Australia.[4] I confine my analysis to these state and territory crimes, which I term 'offensive language crimes'. The adjectives 'offensive', 'insulting', 'obscene' and so on, are not defined in legislation, nor do statutory lists itemise prohibited words. Instead, nebulous definitions of the adjectives 'obscene', 'insulting' and 'offensive', many of which overlap, have been developed in case law.[5]

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[1] Michel Foucault, 'Orders of Discourse' (1971) 10(2) *Social Science Information* 7, 8. The original lecture was delivered in French at the Collège de France on 2 December 1970, and translated into English by Rupert Swyer.

[2] *Summary Offences Act 1988* (NSW) s 4A(1) ('*SO Act* (NSW)'). This offence is examined in detail in Chapter Four.

[3] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 2013) 1.

[4] *Crimes Act 1900* (ACT) s 392; *SO Act* (NSW) s 4A; *Summary Offences Act 1978* (NT) ss 47 and 53 ('*SO Act* (NT)'); *Summary Offences Act 1966* (Vic) s 17(1)(c) ('*SO Act*'); *Summary Offences Act 2005* (Qld) s 6 ('*SO Act* (Qld)'); *Summary Offences Act 1953* (SA) s 7(1)(a) ('*SO Act* (SA)'); *Police Offences Act 1935* (Tas) s 12; *Criminal Code Act 1913* (WA) s 74A ('*Criminal Code* (WA)'); alongside these, there are a number of specific laws that prohibit, for example, speech on public transport or in a park. See, for example NSW Law Reform Commission, 'Penalty Notices' (Report, 2012) 13[1.36].

[5] For discussion, see Chapter Four.

Since their inception, offensive language crimes have not sought to punish the use of *all* words that could be construed as offensive in *all* public spaces.[6] Instead, only the use of select words (primarily swear words) in select spaces—retrospectively determined by individual police officers and magistrates[7]—attract police attention and are deemed worthy of punishment.

Laws that criminalise the use of obscene, indecent or profane words in public have existed in New South Wales ('NSW') since the mid-19th century. Similar laws were eventually adopted by all Australian colonies. In this colonial era, swear words such as 'whore', 'bugger', 'bloody' and 'bastard' were considered unutterable in public, particularly in the presence of women and children. They were thereby amenable to criminal punishment.[8] Currently, police overwhelmingly target the 'four-letter words' 'fuck' and 'cunt'.[9] For this reason, offensive language crimes are colloquially referred to as 'swearing' or 'anti-swearing' laws.[10]

Despite their characterisation as 'petty' or 'minor' offences, offensive language crimes attract punishments of up to six months imprisonment in the Northern Territory ('NT') and in Queensland.[11] And swearing in public is subject to significant police attention.[12] Alongside traditional court processes, police officers in most Australian jurisdictions have powers to issue 'on the spot fines' (penalty notices or 'CINs') for offensive or obscene language.[13] The NT stands alone in granting police the additional power to conduct so-called 'paperless arrests' for profane, indecent or obscene language in public, and thereby hold the person arrested for up to four hours in custody (or 12 hours where intoxicated) without a warrant or criminal charge.[14] This power has been employed extensively since it first came into

[6] See Chapter Three.

[7] See Chapter Seven on constructions of context.

[8] Michael Sturma, *Vice in a Vicious Society* (University of Queensland Press, 1983); Jo Lennan, 'The Development of Offensive Language Laws in Nineteenth-Century New South Wales' (2007) 18 *Current Issues in Criminal Justice* 449.

[9] NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities' (2009) 57; NSW Anti-Discrimination Board, 'Study of Street Offences by Aborigines' (Report, 1982) 48–9.

[10] See, eg, James Leaver, 'Swear like a Victorian: Victoria's Swearing Laws and Similar Provisions in NSW and Queensland' (2011) 36 *Alternative Law Journal* 163; Karl Quinn, 'The Curse of the Foul-Language Law' *The Age* (online), 1 June 2011 <http://www.theage.com.au/it-pro/the-curse-of-the-foullanguage-law-20110531-1fepo.html>; AAP, 'Victoria's Anti-Swearing Laws Are #@$%' *The Age* (online), 17 July 2011 <http://www.theage.com.au/victoria/victorias-antiswearing-laws-are--20110717-1hjub.html>.

[11] *Crimes Act 1900* (ACT) s 392; *SO Act* (NSW) s 4A; *SO Act* (NT) ss 47 and 53; *SO Act* (Vic) s 17(1)(c); *SO Act* (Qld) s 6; *SO Act* (SA) s 7(1)(a); *Police Offences Act 1935* (Tas) s 12. Alongside these, there are a number of specific laws that prohibit, for example, speech on public transport or in a park. See, for example NSW Law Reform Commission, above n 4, 13[1.36].

[12] 4 068 incidents of offensive language were recorded by police in 2015, see NSW Bureau of Crime Statistics and Research, 'New South Wales Recorded Crime Statistics 2015' (2015) 16.

[13] For an examination of these powers, see Chapter Four.

[14] *Police Administration Act 1978* (NT) ss 123 and 133AB.

operation, and Indigenous Australians comprise over 80 per cent of people detained in the NT under the paperless arrest regime.[15]

Given the apparent trivial nature of the speech that offensive language crimes primarily seek to punish—swearing; the broad and unclear ambit of these crimes; and their disproportionate enforcement against minority and disadvantaged groups, a number of academics, government researchers and practitioners have questioned their legitimacy and continued relevance.[16] After a comprehensive review of the use of penalty notices for offensive language, the NSW Law Reform Commission ('NSWLRC') in 2012 recommended a government inquiry into the abolition of the offence.[17] The NSWLRC stated: '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'.[18] Rather than follow this recommendation, in March 2014, the NSW Government more than tripled the penalty notice fine amount for offensive language from $150 to $500.[19]

My thesis joins academics, practitioners and the NSWLRC in their concerns regarding the legitimacy and continued relevance of offensive language crimes. However, my primary point of distinction is that I explore the legitimacy of offensive language crimes through the prism of discourse. Prior to my thesis, there has been a lack of understanding as to how discourse influences interpretations of, and justifications provided for, offensive language crimes. My thesis raises legal consciousness as to how criminal justice discourse on offensive language maintains, promotes and challenges ideologies and unequal power structures. I show how discourse affects perceptions in the criminal law of swear words being disorderly or 'out of place',[20] and worthy of criminal punishment. I have thus far outlined the parameters of my

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[15] ABC, 'High Court Rules on NT Paperless Arrest Powers', *The Law Report*, 17 November 2015 <http://www.abc.net.au/radionational/programs/lawreport/high-court-rules-on-nt-paperless-arrest-powers/6943296#transcript>.

[16] See, eg, Luke McNamara and Julia Quilter, 'Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)' (2013) 36 *University of New South Wales Law Journal* 534; Luke McNamara and Julia Quilter, 'Turning the Spotlight on "Offensiveness" as a Basis for Criminal Liability' (2014) 39 *Alternative Law Journal* 36; Lennan, above n 8; Rob White, 'Indigenous Young Australians, Criminal Justice and Offensive Language' (2002) 5 *Journal of Youth Studies* 21; Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen and Unwin, 2001) 95–7; Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 *University of Queensland Law Journal* 123; Hal Wootten, 'Aborigines and Police' (1993) 16 *University of New South Wales Law Journal* 265; Ken Buckley, *Paranoia, Police and Prostitution: The Operation of the Offences in Public Places Act, 1979* (Council for Civil Liberties, 1981); Robert Jochelson, 'Aborigines and Public Order Legislation in New South Wales' (1997) 34 *Contemporary Issues in Crime and Justice* 1.

[17] The NSWLRC stated 'Of all the options considered above we are most strongly inclined towards the abolition of the offence of offensive language' NSW Law Reform Commission, above n 4, 310–11.

[18] Ibid 310.

[19] See *Criminal Procedure Regulation 2010* (NSW) sch 3.

[20] Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966) 44.

thesis. In what follows, I establish my motivations for undertaking the thesis; demonstrate its originality; explicate how it furthers knowledge in the fields of criminal law and forensic linguistics; and finally, outline its structure.

1.2 Situating the thesis

1.2.1 Motivation

My interest in offensive language crimes was sparked whilst working on confiscation proceedings as a NSW government lawyer. The defendant, an Indigenous man, faced the prospect of his assets being confiscated by the State. The man had been charged with and convicted of ongoing supply of prohibited drugs.[21] He had first come into contact with the criminal justice system more than a decade earlier, as a teenager, charged with using offensive language.[22] It was striking that this initial crime of using offensive language was so trivial by comparison to the magnitude of the punishment—financial and custodial—that the State was then exacting on him for ongoing drug supply. My intuitive response was that a law prohibiting offensive language seemed anachronistic, even for the 1990s. I wondered whether this crime still existed and if so, which words police commonly targeted and whether it was actively enforced.

Not only is the use of offensive language in public still a crime in NSW, this offence is also extensively policed, and disproportionately employed against Indigenous persons. Between July 2015 and June 2016, NSW police recorded 3 913 incidents of offensive language, a number that remained stable over that year and the preceding year.[23] Of the 1 167 adults proceeded against by NSW police whose offensive language charges were heard by a court,[24] 192 (17 per cent) were Indigenous Australians. 1 836 adults were proceeded against by NSW police by way of a CIN, and 316 of CIN recipients (17 per cent) were Indigenous. A total of

[21] An offence contrary to *Drugs Misuse and Trafficking Act 1985* (NSW) s 25A(1), carrying a maximum penalty of 25 years imprisonment.

[22] *SO Act* (NSW) s 4A(1).

[23] The recorded criminal incident data presented in the report are based on information derived from the NSW Police Force Computerised Operational Policing System (COPS). Only those incidents reported to, or detected by, police are included: 'New South Wales Recorded Crime Statistics Quarterly Update June 2016' (NSW Bureau of Crime Statistics and Research, 2016) 5, 25 <http://www.bocsar.nsw.gov.au/Documents/RCS-Quarterly/NSW_Recorded_Crime_June_2016.pdf>.

[24] The data provided to the author by the NSW Bureau of Crime Statistics and Research encapsulated POIs proceeded against to court by way of a court attendance notice or proceeded against other than to court by way of youth justice conference, caution young offenders act, cannabis caution, other drug caution, criminal infringement notice, infringement notice or warning. POIs were not a count of unique offenders, but where an individual has been involved in multiple criminal incidents throughout the year that person appears as a POI multiple times.

308 juveniles were proceeded against (145 to court and 163 other than to court) for using offensive language, 69 of whom were Indigenous (22 per cent).[25] Of those 1 451 adults whose charges for offensive language were finalised by a NSW criminal court between July 2015 and June 2016, 1 281 adults were found guilty (34 per cent of whom were Indigenous) and 28 adults were found not guilty. The offensive language charges brought against a further 142 adults were otherwise disposed of.[26] The most common penalty imposed by a NSW court where offensive language was the principal offence was a fine.[27] This statistical data demonstrates that Indigenous Australians continue to be disproportionately charged with, and fined for, using offensive language, despite comprising less than three per cent of the NSW population.[28] It also demonstrates the large reliance of NSW police on the use of non-traditional criminal justice enforcement tools such as CINs to police offensive language, an issue which I return to in Chapter Four of the thesis.

My initial sense that a crime targeting swearing in public was obsolete, and also risked selective enforcement, motivated the writing of this thesis. This in a society where swear words pervade television shows and movies, songs and everyday conversations. It is not insignificant that my first exposure to the crime of offensive language involved a young Indigenous man in Redfern, who had become, like too many Indigenous Australians, intimately familiar with the criminal justice system from a young age though swearing at, or in the presence of, police.[29] A key impetus for writing this thesis is my personal despair at the disproportionate number of Indigenous Australians subjected to police powers and thereafter entangled in the criminal justice system because they had sworn at, or in the vicinity of, 'the authorities';[30] the consistent failure of police and the courts to institute diversionary measures

[25] This data was sourced privately by the author from the NSW Bureau of Crime Statistics and Research and provided in an email dated 4 November 2016: 'NSW Criminal Court Statistics July 2014 to June 2016: Offensive Language and Offensive Behaviour' (NSW Bureau of Crime Statistics and Research, 4 November 2016).

[26] The category of 'other outcome' includes matters that have been withdrawn by the prosecution, cases which have been dismissed by the lower courts due to mental health or illness, or cases where the matter was otherwise disposed of due to the person being deceased or the matter being transferred to the Drug Court: Ibid.

[27] The NSW Bureau of Crime Statistics and Research provided the author data of the principal penalty where a person has been found guilty of more than one offence, and offensive language was the offence which received the most serious penalty. It should be noted that the crime of offensive language is commonly charged amongst more serious crimes, including assault police, resist arrest, and offensive behaviour, therefore this statistic may not be an accurate reflection of the types of offensive language penalties imposed by courts: Ibid.

[28] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* (2013) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.

[29] White, above n 16; Cunneen, above n 16; Chris Cunneen, 'Changing the Neo-Colonial Impacts of Juvenile Justice' (2008) 20 *Current Issues in Criminal Justice* 43.

[30] In 2009, the NSW Ombudsman found that nine out of every 10 Aboriginal Australians issued with a penalty notice failed to pay on time, resulting in higher numbers of Aboriginal people becoming entrenched in the fines enforcement system: NSW Ombudsman, above n 9, vi. I interrogate the construction of police as 'authority figures' in Chapter Nine.

for minor crimes; and a perceived need to drastically overhaul policing practices and criminalisation policies in light of unnecessarily large numbers of Indigenous people in Australian juvenile detention facilities and prisons.[31]

1.2.2 Literature on offensive language crimes

The questions I devised for my thesis—how is offensiveness constructed, and how are offensive language crimes legitimised, in criminal justice discourse—arose out of my examination of existing research on offensive language crimes; my desire to question how common sense ideas about swearing, disorder, place and disgust inform criminal prohibitions of offensive language; and my finding, after surveying the literature, that the role of criminal justice discourse in structuring understandings of offensive language has been largely neglected. In this part, I explain how my research questions draw on, but also depart from, the existing literature on offensive language crimes. I highlight the originality of my research in light of identified gaps in the literature, and situate my research in the interdisciplinary field of law and language.

1.2.2.1 Offensive language crimes: the elements

The existing research on offensive language crimes has clarified their legal elements, with the most in-depth doctrinal analysis of these crimes having been conducted in NSW. Criminal law scholars Luke McNamara and Julia Quilter have argued that the legal nature of offensive language and behaviour crimes is 'poorly understood',[32] and to readdress the lack of robust judicial scrutiny or academic analysis of these crimes, have engaged in a rigorous doctrinal analysis of offensive language and offensive conduct offences in NSW.[33] Drawing on the High Court of Australia decision *He Kaw Teh v The Queen*,[34] McNamara and Quilter have argued that at the very least, the prosecution should have to prove subjective *mens rea* in

[31] The position in WA is particularly disturbing. In 2013–14, Aboriginal young people made up on average more than 78 per cent of all young people in detention in WA. Aboriginal young people alleged to have committed an offence were diverted away from the courts by police through cautions and Juvenile Justice Team referrals at a much lower rate than their non-Aboriginal peers: '"There Is Always a Brighter Future" Keeping Indigenous Kids in the Community and out of Detention in Western Australia' (Amnesty International, 2015) 13.

[32] McNamara and Quilter, 'Time to Define the Cornerstone of Public Order Legislation', above n 16, 534.

[33] McNamara and Quilter, 'Time to Define the Cornerstone of Public Order Legislation', above n 16; See also Donna Spears, Julia Quilter and Clive Harfield, *Criminal Law for Common Law States* (LexisNexis Butterworths, 2011); David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (The Federation Press, 6th ed, 2015) 509–44.

[34] (1985) 157 CLR 523.

relation to the element of offensiveness.[35] They have also persuasively argued that due to their breadth and propensity for arbitrariness, offensive language crimes should be abolished.[36]

Criminal law barrister Mark Dennis has provided a practical discussion paper, written primarily for criminal defence lawyers, on the legal elements of, and strategies for defending, offensive language charges.[37] In Chapter Four of this thesis, I add a new perspective to their doctrinal analysis, which serves as a springboard for my CDA of offensive language crimes in Chapters Five to Nine. My doctrinal analysis of state and territory offensive language crimes draws together common threads and irregularities in the prosecution and punishment of these crimes, with a focus on the jurisdictions from which my case studies emanate: NSW, Queensland and Western Australia ('WA'). I identify gaps in the theorisation of offensive language crimes and explain how my distinct approach of using CDA will address these gaps.

1.2.2.2 Historical analysis

Various historical aspects of offensive language crimes, particularly in 19th century NSW, have been examined by legal academic Jo Lennan and legal historian Michael Sturma.[38] Lennan has compared the operation of offensive language laws to how the laws in NSW were justified in rhetoric since the establishment of the colony in 1788 to 1835; and then again from 1835 until 1908.[39] Lennan reasoned that during the first period, the rhetoric in relation to the law against insulting or offensive language was wholly consistent with the law's effects: 'to suppress and control the convict population'.[40] In the second period, although the laws continued to operate in a disciplinary fashion, they were 'increasingly justified in idealistic terms' such as 'to protect the vulnerable in society from verbal abuse.'[41] Lennan's identification in this article of a 'clear divergence between the ideals by which the laws were

[35] McNamara and Quilter, 'Time to Define the Cornerstone of Public Order Legislation', above n 16, 559–60.

[36] McNamara and Quilter, 'Turning the Spotlight on "Offensiveness" as a Basis for Criminal Liability', above n 16.

[37] Mark Dennis, '"Dog Arse Cunts": A Discussion Paper on the Law of Offensive Language and Offensive Manner' <http://criminalcle.net.au/attachments/Offensive_Language_and_Offensive_Manner_Discussion_Paper__Dog_Arse_Cunts.pdf>; the Queensland Crime and Misconduct Commission has analysed the legal framework of Queensland's public nuisance in 'Policing Public Order: A Review of the Public Nuisance Offence' (Report, Queensland Crime and Misconduct Commission, 2008) pt 2; see also Bill Walsh, 'Offensive Language: A Legal Perspective' in Diana Eades (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (University of New South Wales Press, 1995) 203.

[38] Lennan, above n 8; Sturma, above n 8.

[39] Lennan, above n 8.

[40] Ibid 449.

[41] Ibid.

justified and the manner of their operation'[42] is consistent with her earlier analysis (discussed below) of the legitimacy of offensive language laws.[43]

Sturma's analysis—meshing literary analysis with criminal statistics—has concentrated on the prosecution of obscene language crimes in colonial NSW from 1831 to 1861.[44] Sturma found that during this period, the prevalence of 'obscene' language was a matter of great concern to all: 'not only the police and magistracy, but also private citizens were active in regulating this particular aspect of social behaviour.'[45] Sturma deduced that the making of legal complaints against its use was a means by which one could assert one's own superior class position and respectability vis-à-vis another: 'By morally downgrading others before the magistracy, persons might increase their own chances of being regarded as respectable.'[46] And yet, this research has overlooked how *language*, particularly that of magistrates, journalists and politicians, fashioned assumptions that swear words were dirty, dangerous and deserving of criminal proscription. In Chapter Three, I draw on previously unanalysed sources from newspaper archives to examine how discourse has shaped historical perceptions regarding the need for, and purpose of, offensive language crimes. I focus in Chapter Three on ideas that are central to my interrogation of how swear words are constructed as 'matter out of place'[47] in criminal justice discourse. I examine a procedural aspect of offensive language trials that has received scant academic analysis: the use of a 'slip of paper' in offensive language trials upon which a defendant's allegedly 'foul' words were written to prevent contamination of spectators within and beyond the courtroom.

1.2.2.3 Constitutionality

A body of literature has examined the constitutionality of offensive language crimes, in particular, the question of whether and how such crimes impinge upon the freedom of political communication implied in the Australian Constitution. Anthony Gray has drawn on the High Court of Australia case *Coleman v Power* and deduced that prohibitions on insulting, obscene or offensive language in public rest on constitutionally shaky ground.[48] Gray has further argued that there are no sound justifications for limiting protection of speech

[42] Ibid 455.

[43] Jo Lennan, 'The "Janus Faces" of Offensive Language Laws: 1970-2005' (2006) 8 *UTS Law Review* 118.

[44] Sturma, above n 8.

[45] Ibid 131.

[46] Ibid 135.

[47] Douglas, above n 20, 44.

[48] (2004) 220 CLR 1; see Anthony Gray, 'Bloody Censorship: Swearing and Freedom of Speech' (2012) 37(1) *Alternative Law Journal* 37, 39.

in Australia to 'political' speech.[49] The scope of my research question does not extend to examining the constitutionality of crimes which curtail the use of swear words in, or near, a public place. Nevertheless, I cannot ignore how swear words function as a tool to oppose and destabilise established power structures.[50] Accordingly, in Chapter Nine I consider instances in which swear words have been used to voice discontent at political policies and challenge 'authority'. Following the Supreme Court of the United States case *Cohen v California*,[51] I contend that a strong society is one that allows for, and even protects, dissident messages, including where that message is conveyed via swear words.

1.2.2.4 Unequal application of offensive language crimes

The existing literature on offensive language crimes has demonstrated that they are ill-defined and unequally apply to persons who are disenfranchised or minority groups: people who are homeless, young people, Indigenous Australians and those with a mental illness.[52] A number of government and non-government agencies and commissions have documented the disproportionate penalisation of Indigenous Australians for offensive language compared to non-Indigenous Australians. The Aboriginal Justice Advisory Council in 1999 found that on average, Indigenous people were 15 times more likely to be prosecuted for offensive language or conduct than the rest of the NSW population.[53] The most common outcome for Indigenous people appearing on offensive language or conduct charges was to be sentenced after pleading guilty.[54] Indigenous persons were much less likely to defend their charges, and police frequently employed the strategy of charging defendants with offensive language in combination with one or more other crimes against, or affecting, police officers (colloquially known as the 'trifecta' or the 'hamburger with the lot'; a combination of the offences of offensive language/conduct, resist arrest, hinder police and/or assault police).[55] More recently, in 2009, the NSW Ombudsman found that Indigenous Australians accounted for 7.4 per cent of all CINs issued (83 per cent of which were for offensive conduct or offensive language),

[49] Gray, above n 48, 40.

[50] Connie Eble, *Slang & Sociability: In-Group Language Among College Students* (The University of North Carolina Press, 1996) 124.

[51] 403 US 15 (1971).

[52] See especially Tamara Walsh, 'Won't Pay or Can't Pay-Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland' (2005) 17 *Current Issues in Criminal Justice* 217; Tamara Walsh, 'Poverty, Police and the Offence of Public Nuisance' (2008) 20 *Bond Law Review* 7; Tamara Walsh, 'Who is "Public" in a "Public Space"?' (2004) 29 *Alternative Law Journal* 81.

[53] Aboriginal Justice Advisory Council, 'Policing Public Order: Offensive Language and Behaviour, the Impact on Aboriginal People' (1999).

[54] Ibid.

[55] More than a quarter of Aboriginal people charged with offensive language/ conduct were also charged with an offence against police: Ibid.

although Aboriginal people comprised less than three per cent of the NSW population.[56] Recent statistics which I have sourced from the NSW Bureau of Crime Statistics, outlined above, demonstrate that from July 2015 to June 2016, Indigenous Australians comprised 17 per cent of all adult CIN recipients for offensive language.

Research conducted by Tamara Walsh, an academic in law and social justice, has predominantly focused on the inequitable operation of the public nuisance offence in Queensland.[57] Walsh's data, primarily obtained through court observations in Queensland, has shown demographic characteristics of persons appearing in court on public nuisance charges. Walsh found that Indigenous people, people experiencing psychiatric, mental or cognitive impairment, and homelessness, were disproportionately represented amongst those charged with public nuisance-type offences.[58] Lennan has drawn on Jürgen Habermas's *Between Facts and Norms* to assess the legitimacy of the crime of offensive language in NSW:[59] the operation of the law versus the terms (the 'ideals' or 'norms') the law sets for itself.[60] Lennan has argued that despite an appeal by the NSW Attorney-General when the Summary Offences Bill 1988 (NSW) was introduced in Parliament for police to use arrest and custodial sentences for offensive language as a last resort, Indigenous people continue to be disproportionately affected by offensive language laws. [61] Lennan has further asserted that the overwhelming failure of police and the courts to enforce offensive language laws when offensive language has been directed *towards* Indigenous Australians means that the 'inequality in the law's application seriously undermines its legitimacy … The law has more commonly been used as an instrument of racism than as a legal means of punishing racist expression.'[62] My thesis shares Walsh's and Lennan's concerns regarding the unequal application of offensive language crimes, and Lennan's doubt as to their legitimacy. However, neither academic has addressed how *discourse* has legitimised the criminal

[56] NSW Ombudsman, above n 9, iv.

[57] Walsh, 'Won't Pay or Can't Pay-Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland', above n 52; Walsh, 'Poverty, Police and the Offence of Public Nuisance', above n 52; Walsh, 'Who is "Public" in a "Public Space"?', above n 52; Tamara Walsh, 'The Impact of Coleman v Power on the Policing, Defence and Sentences of Police Nuisance Cases in Queensland' (2006) 30 *Melbourne University Law Review* 191; Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses', above n 16; Tamara Walsh, 'No Offence: The Enforcement of Offensive Language and Offensive Behaviour Offences in Queensland' (2006).

[58] Walsh, 'Won't Pay or Can't Pay-Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland', above n 52; Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses', above n 16; Walsh, 'Who is "Public" in a "Public Space"?', above n 52.

[59] See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (John Wiley & Sons, 2015).

[60] Lennan, above n 43.

[61] Ibid 122.

[62] Ibid 126–30.

punishment of swearing. I fill this gap in identifying how 'primary definers'[63] in criminal justice debates—judges, magistrates, attorneys-general, lawyers, academics, media commentators, police, police ministers and police union officials—rationalise the existence of offensive language crimes and their selective application.

1.2.2.5 Policing offensive language crimes

Criminologists Chris Cunneen and Rob White have each demonstrated how police play a pivotal role in the overrepresentation of Indigenous persons, particularly juveniles, in the criminal justice system for offensive language crimes.[64] Both have argued that police use offensive language crimes as a tool to stifle resistance, and disproportionately control the everyday activities of Indigenous Australians. Cunneen has encapsulated the role of police officers in defining and determining criminal offensiveness, stating: 'Except for a notional "community", the victim of the offence is almost invariably the police officer'.[65] Jarrod White has emphasised that the preoccupation of modern policing with the use of public space renders those who more are more reliant on public space for socialising—youth, the 'working class' and many Indigenous persons—'peculiarly subject to the policing gaze, regulation and coercion'.[66]

Cunneen and White have joined Commissioner Hal Wootten of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'), and investigative journalist Jenny Brockie in documenting how police have disproportionately arrested Aboriginal people for using swear words such as 'fuck', 'prick' and 'cunt', words frequently spoken both amongst police officers and by police officers to members of the public.[67] This hypocrisy is highlighted by sociolinguist Brian Taylor, when he documented a police officer arresting an Aboriginal man for saying to police: 'Don't tell me to get fucked'.[68] This research, however, has neglected the role of legal-politico discourse in legitimising police authority over Indigenous lives. My thesis demonstrates how criminal justice discourse conceals the myriad choices that police make in exercising their discretion, and downplays their discriminatory application of

[63] Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 18–19.

[64] Cunneen, above n 16; Cunneen, above n 29; White, above n 16.

[65] Cunneen, above n 16, 29.

[66] Jarrod White, 'Power/Knowledge and Public Space: Policing the "Aboriginal Towns"' (1997) 30 *The Australian and New Zealand Journal of Criminology* 275, 277–8.

[67] Cunneen, above n 16, 96; Jenny Brockie, *Cop It Sweet* (ABC Television, 1992); Hal Wootten, *Royal Commission into Aboriginal Deaths in Custody* (AGPS, 1991); White, above n 16.

[68] Brian Taylor, 'Offensive Language: A Linguistic and Sociolinguistic Perspective' in Diana Eades (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (University of New South Wales Press, 1995) 219.

offensive language crimes. In particular, I provide an original and necessary perspective to studies on the relationship between police and offensive language crimes in Chapter Nine, where I use CDA to interrogate how police, through their language and their distinct 'cop-speak' register, foster an impression that they can objectively distil general ideas about offensiveness.

1.2.2.6 Penalising Indigenous Australians for everyday speech

White, sociolinguist Diana Eades, Taylor, and anthropologist and Indigenous scholar Marcia Langton, has each explained that in punishing Indigenous people for swearing, the legal system effectively penalises Indigenous Australians for words used in 'routine, everyday communication'.[69] Their research identifies the relative nature of taboo: what is considered offensive or 'swearing' for many Indigenous communities is that which is forbidden by Indigenous Law, such as 'swearing to certain kinds of "poison relations"—in-laws, or a sister swearing in front of a brother'.[70] According to Langton, many Indigenous Australians do not conceptualise, and have not historically conceptualised, swearing as a predominantly masculine pursuit; in other words Indigenous Australians do not attach additional stigma to the use of curse words by, or in the presence of, Indigenous women.[71] Meanwhile, many non-Indigenous Australians have conceived of swear words as being largely the prerogative of men, a perception that was acute in Victorian times,[72] and is still fostered by recent criminal justice discourse, as I establish in Chapter Seven.

Taylor has provided a linguistic framework for analysing swear words in Australian English by setting out the 'taboo-loading' of swear words, then examining how legal responses to swear words have diverged, depending on whether the person in question occupied a more privileged position in society (if, for example, they had 'connections' or a high level of education) or whether the person could be considered 'underprivileged' by way of homelessness, poverty or an insufficient command of 'Standard English'.[73] My thesis makes a unique contribution to this research in Chapter Eight, where I critique how judicial officers

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[69] White, above n 16, 31; Taylor, above n 68; Marcia Langton, 'Medicine Square' in Ian Keen (ed), *Being Black: Aboriginal Cultures in 'Settled' Australia* (Aboriginal Studies Press, 1988) 201; Diana Eades, *Courtroom Talk and Neocolonial Control* (Mouton de Gruyter, 2008) 70–1.

[70] Marcia Langton et al, '"Too Much Sorry Business": Report of the Aboriginal Issues Unit of the Northern Territory' (Vol 5, Australian Government Publishing Service, 1991) 352.

[71] Langton, above n 69, 208.

[72] See especially Melissa Mohr, *Holy Shit: A Brief History of Swearing* (Oxford University Press, 2013) 193; Tony McEnery, *Swearing in English: Bad Language, Purity and Power from 1586 to the Present* (Routledge, 2006) 116; Geoffrey Hughes, *Swearing: A Social History of Foul Language, Oaths and Profanity in English* (Blackwell, 1991) 209–12.

[73] Taylor, above n 68, 219.

construct and apply the abstract symbols the 'reasonable person' and 'community standards' to construct individuals and groups as either 'in place' or 'out of place'. I ask distinct questions, and provide a distinct linguistic perspective, to those of Taylor; I use CDA as my primary theoretical tool to examine the discourse of, and language ideologies relied on by, police officers, politicians, lawyers and judicial officers to describe, criminalise and punish the use of swear words. I reject Taylor's formulation and application of a tabulated 'taboo-loading' to words, given that a word's taboo value is context-specific.[74] My research provides a truly critical and unique exploration of how discourse constructs a taken-for-granted 'knowledge' around offensiveness and swearing in offensive language cases.

The foregoing review of the literature on offensive language crimes has established that the existing research has relied primarily on doctrinal, historical and empirical analyses to demonstrate the over-policing of offensive language crimes in relation to Indigenous Australians and vulnerable groups; identify inconsistencies and gaps in the legal interpretation of offensive language crimes; and question their legitimacy on a number of fronts—from failing to be applied in accordance with their stated purposes, to their questionable constitutionality. My review of the literature has shown that the disproportionate punishment of Indigenous Australians and other minorities for swearing is well documented, as is the capacity for offensive language crimes—due to the breadth of their legal elements, and the general failure of judicial officers to interpret and apply these elements consistently and seriously—to be abused.

1.2.3 A new perspective on offensive language crimes

My thesis examines the unequal application of offensive language crimes, their capacity for abuse, their legal elements, and the assumption that swear words are criminally offensive, by applying a distinct viewpoint; I use CDA as my primary theoretical tool. My research departs from the existing literature on offensive language crimes in that I conduct a closer examination of how the law's *language* affects the interpretation of offensive language crimes and their legitimacy. My thesis's primary claim to originality is in its recognition that language—'the privileged medium in which we "make sense" of things, in which meaning is produced and exchanged'[75]—is central to understanding offensive language crimes. In fact,

[74] See Chapter Seven.

[75] Stuart Hall, 'Introduction' in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (Sage, 1997) 1.

such crimes are an exemplar of what linguist Roger Shuy has labelled a 'language crime':[76] a law that criminalises certain kinds of speech.[77] The crime of using offensive language is created through language—legislation. Parliamentarians debate the form and content of, and need for, this legislation by using words, which are subsequently transcribed into Hansard. The crime of offensive language is committed through speech. Police and other witnesses use words to describe the offensive language incident in court, and a magistrate or judge, through their language, manages the conduct of court hearings and pronounces her or his reasons for judgment. Academics and the media appraise these laws, and their enforcement, through the written and spoken word. In each of these instances, language is the medium through which a 'reality' about offensive language is created and reproduced.

My thesis proffers an approach that places language at the centre of offensive language crimes. It does so by recognising that the law is an incredibly linguistic institution: legislation, police investigations, court proceedings and judgments all being overwhelmingly linguistic processes.[78] A command of clear and precise oral and written communication, and a fluency in 'legalese', are key skills that a lawyer must master. Questions of language meaning regularly determine the outcome of legal disputes; indeed, it is taken for granted that lawyers, judges and legal scholars are preoccupied with thinking and arguing about the 'true' or 'correct' meaning of contracts, statutes and legal principles. Interpretation is such an intrinsic part of the legal process that issues which could more properly be framed as *linguistic* issues are instead typically framed as *legal* issues: 'Most people use language so easily and naturally that they tend not to see it very well'.[79] Legal practitioners and scholars regularly fail to see, or acknowledge, how theories about language and interpretation influence their constructions of 'the law'.

1.2.4 Forensic linguistics

In bringing linguistic issues to the fore, my thesis contributes to the field of research known as 'forensic linguistics' (law and language). Forensic linguists are concerned with the application of linguistics to 'legal texts, spoken legal practices and the provision of evidence for criminal and civil investigations and courtroom disputes',[80] and thus recognise the pivotal

[76] Roger Shuy, *Creating Language Crimes: How Law Enforcement Uses (and Misuses) Language* (Oxford University Press, 2005).

[77] Ibid xii.

[78] See Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1986) 38 *Hastings Law Journal* 805.

[79] Shuy, above n 76, xii.

[80] Malcolm Coulthard, Tim Grant and Krzysztof Kredens, 'Forensic Linguistics' in Ruth Wodak, Barbara Johnstone and Paul Kerswill (eds), *The Sage Handbook of Sociolinguistics* (Sage, 2011) 529, 529.

role of language in constituting 'reality'.[81] Researchers in this now 'thriving'[82] field came together in 1993 with the foundation of the International Association of Forensic Linguistics, and again in 1994 through the publication of a dedicated journal, *Forensic Linguistics: The International Journal of Speech, Language and the Law*.[83]

Scholars in forensic linguistics draw on various linguistic methodologies and concentrate on a variety of topics, broadly divided into three main areas: the facets and workings of written language in the law; language in the legal process, from police interrogation to the courtroom; and the ways that linguistic experts can contribute to the legal process.[84] As my research method (detailed in Chapter Two) establishes, my thesis is necessarily situated across all three areas: I analyse court transcripts, and therefore legal language used within the courtroom; I examine written legal texts (including parliamentary debates, statutes and judgments); and I consider the role that experts in linguistics could potentially play in ascertaining offensiveness.[85]

Forensic linguists have drawn upon linguistic methodologies that include sociolinguistics (and critical sociolinguistics), conversational analysis, pragmatics, critical linguistics and CDA,[86] to examine topics ranging from the socio-pragmatic uses of questions in police interviews and trials; how 'success' in the courtroom is intertwined with one's ability to speak legalese; to the limits the legal system places on linguists expressing their expert opinions.[87]

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[81] Susan Ehrlich, 'Courtroom Discourse' in Ruth Wodak, Barbara Johnstone and Paul Kerswill (eds), *The Sage Handbook of Sociolinguistics* (Sage, 2011) 361, 367–8; The term 'linguistics' refers to the discipline concerned with the 'scientific' study of language, the genesis of which is generally attributed to Ferdinand de Saussure, the 'father of modern linguistics': Ferdinand de Saussure and Wade Baskin, *Course in General Linguistics* (Columbia University Press, 2011).

[82] Coulthard, Grant and Kredens, above n 80, 530.

[83] Alison Johnson and Malcolm Coulthard, 'Introduction: Current Debates in Forensic Linguistics' in *The Routledge Handbook of Forensic Linguistics* (Routledge, 2010) 1, 1.

[84] Ibid.

[85] See especially Chapters Five and Ten.

[86] See, eg, Diana Eades, 'Understanding Aboriginal English in the Legal System: A Critical Sociolinguistics Approach' (2004) 25 *Applied Linguistics* 491 (critical sociolinguistics); Diana Eades, *Sociolinguistics and the Legal Process* (Channel View Books, 2010) (sociolinguistics and critical sociolinguistics); Penelope Pether, 'Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project' (1999) 24 *Southern Illinois University Law Journal* 53 (critical discourse analysis); Janet Ainsworth, 'In a Different Register: The Pragmatics of Powerlessness in Police Interrogation' [1993] *Yale Law Journal* 259 (pragmatics); Elizabeth Stokoe and Derek Edwards, 'Lawyers in Interviews' [2010] *The Routledge Handbook of Forensic Linguistics* 155 (conversation analysis).

[87] Lawrence Solan, for example, has identified a reluctance of the law to succumb to interference by linguistics in contributing to interpretation of meaning, a role traditionally left to judges and jurors: Lawrence Solan, 'Can the Legal System Use Experts on Meaning' (1998) 66 *Tennessee Law Review* 1167; See also Janet Ainsworth, 'Linguistics as a Knowledge Domain in the Law' (2006) 54 *Drake Law Review* 651; John Conley and William O'Barr, *Just Words: Law, Language, and Power* (University of Chicago Press, 2005); John Conley, William O'Barr and Allan Lind, 'The Power of Language: Presentational Style in the Courtroom' [1979] *Duke Law Journal* 1375; Gregory Matoesian, 'Language of Courtroom Interaction' [2013] *The Encyclopedia*

For example, Janet Ainsworth has used pragmatic speech-act theory and in particular, ideas about 'powerless' language (those who speak in a so-called 'female register') to expose problems in relation to the legal determination of whether an arrestee has invoked their right to legal counsel.[88] Malcolm Coulthard and Alison Johnson have summarised common features of 'legalese', examples of which include the use of *legal archaisms* (such as 'be it enacted' and 'hereunder'); an abundance of particular *modal verbs* (such as 'may', 'shall' and 'must'); the use of *nominalisations*—nouns replacing more complex processes (such as 'the girl's *injury* happened at …' or 'on the *prosecution* of a person for bigamy'); and negation (such as 'innocent misrecollection is *not uncommon*').[89] One can identify in forensic linguistics literature divergent views as to the potential for such language to be abused. Peter Tiersma has argued that 'legalese', with its complex and lengthy sentences, wordiness, embedding and impersonal constructions, can exclude those 'who have not learned to "talk like lawyers"'[90] and argued that reform of legal language is necessary to redress such exclusion.[91] Meanwhile, Vijay Bhatia has countered Tiersma's argument for simplification, contending that reformist programs of simplification of statutes and other legal documents can result in 'under-specification' in legislative writing. Paradoxically, this can give the judiciary *too much* discretion (and therefore power) when interpreting legal instruments.[92] What both authors have in common is an appeal for close examination of how the law uses language, including the ways in which legal language can obfuscate, exclude those 'who do not belong'[93] and increase power differentials. My thesis addresses the capacity for language to do each of these things in the context of offensive language crimes. For example, in Chapter Eight, I explain how judicial officers use an abundance of *negative assertions* when describing 'the reasonable person': they tell us who the reasonable person is *not*, but neglect to tell us who the reasonable person *is*. I show how negative assertions add little by way of substance to the qualities of this abstract identity.

A decisive influence on my thesis has been Eades, whose significant contribution to forensic linguistics has been to show how language in Australian courtrooms disadvantages

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of Applied Linguistics; Gregory Matoesian, *Law and the Language of Identity: Discourse in the William Kennedy Rape Trial* (Oxford University Press, 2001); John Gibbons, 'Language and the Law' in Alan Davies and Catherine Elder (eds), *The Applied Handbook of Critical Linguistics* (Blackwell, 2004) 285.

[88] Ainsworth, above n 86.

[89] These examples have been extracted from Johnson and Coulthard, above n 83, 10 (emphasis altered); citing Peter Tiersma, *Legal Language* (University of Chicago Press, 1999); John Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* (Wiley, 2003).

[90] Tiersma, above n 89, 69.

[91] Ibid.

[92] Vijay Bhatia, 'Legal Writing: Specificity' [2010] *The Routledge Handbook of Forensic Linguistics* 37.

[93] Tiersma, above n 89, 69.

Indigenous witnesses and defendants, with a focus on those who speak the dialect Aboriginal English. Eades has conducted an ongoing critical sociolinguistic analysis of the *Pinkenba case*: a committal hearing which took place in Brisbane in 1995 concerning a number of police officers charged with the unlawful deprivation of liberty of three young Aboriginal boys.[94] Eades examined the 'lexical struggle' between lawyers over labels or 'lexical items' in court hearings, showing the importance of these labels in persuading the judge or jury as to one side's case theory, and underscoring how linguistic techniques can manipulate meaning in a way that disadvantages Aboriginal witnesses and victims.[95] Her research highlights how linguistic control in the courtroom is asserted over the lives of Aboriginal Australians. This lexical struggle in the law is reflective of, and contributes to, broader societal struggles between Aboriginal Australians and the state.[96] My thesis is motivated by Eades's identification of how language contributes to Indigenous disadvantage in the legal process, a theme explored throughout my thesis. I apply Eades's research on 'language ideologies'[97] (a concept theorised in Chapter Two) to examine how judicial officers propagate 'common sense' ideas about swearing in the criminal law.

1.2.5 Contribution to forensic linguistics scholarship

My thesis contributes to the above-outlined body of forensic linguistics scholarship in illuminating how criminal justice discourse creates a reality around what is offensive and in doing so, reproduces and transforms power relations. I selected CDA as the appropriate source of concepts and tools to apply to my selected legal texts while auditing a course in linguistics co-taught by linguists Alastair Pennycook and Theo van Leeuwen at the University of Technology Sydney, *Language and Power.* This particular form of discourse analysis 'examines the ways in which language use (or discourse practices) reproduce and/or transform power relations within society.'[98] I use CDA—with its focus on the constitutive nature of discourse, and the interrelationship between language, power and society—to uncover how linguistic techniques fashion ideas about words as dirty, sexual or violent;

[94] Ultimately the presiding judge determined that there was not enough evidence to proceed to trial: Diana Eades, 'Cross Examination of Aboriginal Children: The Pinkenba Case' (1995) 3(75) *Aboriginal Law Bulletin* 10; see also Eades, above n 69; Diana Eades, 'Lexical Struggle in Court: Aboriginal Australians versus the State' (2006) 10(2) *Journal of Sociolinguistics* 153.

[95] Eades, 'Understanding Aboriginal English in the Legal System: A Critical Sociolinguistics Approach', above n 86, 499–501.

[96] Eades, 'Lexical Struggle in Court', above n 94, 155–6; research on lexical labels and struggles in the courtroom has also been conducted by Gregory Matoesian, *Reproducing Rape: Domination through Talk in the Courtroom* (University of Chicago Press, 1993); Susan Ehrlich, *Representing Rape: Language and Sexual Consent* (Psychology Press, 2001); Janet Cotterill, *Language and Power in Court: A Linguistic Analysis of the O.J. Simpson Trial* (Palgrave Macmillan, 2003).

[97] Diana Eades, 'The Social Consequences of Language Ideologies in Courtroom Cross-Examination' (2012) 41(4) *Language in Society* 471.

[98] Eades, above n 86, 15. I theorise CDA further in Chapter Two.

legitimise the criminal punishment swearing; and further entrench structural inequalities. The sources of my analysis comprise a selection of court judgments, court transcripts, police facts sheets, police witness statements, parliamentary debates and speeches and newspaper articles on the topic of offensive language. I use these sources to form a picture of 'criminal justice discourse'[99] on offensive language. I apply CDA primarily to six case studies: *McCormack v Langham*, *Conners v Craigie, Jolly v The Queen, Police v Grech*, *Heanes v Herangi* and *Del Vecchio v Couchy*.[100] Using court transcripts, police facts sheets, witness statements, and judgments from these offensive language cases, I examine how the language of police, lawyers, and judicial officers represents offensive language and legitimises the notion that swear words are dirty, dangerous or disrespectful, and warrant criminal punishment.

1.3 Thesis overview and chapter outline

I have thus far explained my research question; my motivation for undertaking the research; the innovation of my research question; and my approach to understanding offensive language crimes in light of the existing literature on these crimes. Chapter Two explicates my key theoretical approaches and methodology. Following this, Chapters Three and Four provide historical background to, and outline the legal doctrine on, offensive language crimes. These chapters form the basis of my CDA of key elements of, and themes in relation to, offensive language crimes in Chapters Five through to Nine. In these chapters I use CDA to interrogate criminal justice discourse on offensive language, drawing primarily on the texts outlined in Part 1.2.5 above. I show how lawyers, judicial officers, police and politicians perpetuate myths about swear words, including that they are by their very nature sexual, disgusting or violent; how legal fictions such as 'the reasonable person' and 'community standards' can augment police and judicial discretion; and how ideas about an ideal 'public order' is fashioned in the minds, and to suit the interests, of the most privileged members of Australian society. As my thesis progresses, it should become clear that many of our 'cherished classifications'[101] about public order in criminal law can and should be subject to contestation. I here provide a brief précis of each chapter of my thesis.

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[99] See Chapter Two.

[100] See *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991); *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993); *Jolly v The Queen* [2009] NSWDC 212; *Police v Grech* (Unreported, Waverley Local Court, 94/10, Magistrate Williams, 3 May 2010); *Heanes v Herangi* (2007) 175 Crim R 175; *Del Vecchio v Couchy* [2002] QCA 9.

[101] Douglas, above n 20, 45.

Chapter Two – Theoretical Framework

Chapter Two explains my theoretical framework, methods and substantiates my choice of CDA as my primary research tool. The chapter defines key terms employed throughout my thesis, namely criminal justice discourse, legitimation, recontextualisation, power and ideologies. I introduce each of my case studies, provide the underlying rationale for my selection of texts and outline the process by which I obtained them. The chapter also establishes what I mean when referring to the phenomena of swearing.

Chapter Three – The Unwieldy Path of Offensive Language Crimes

Chapter Three traces shifting discourses on offensiveness, emanating from politicians, the judiciary, the police force and the media from 1849, the year in which the first comprehensive offensive language crimes were introduced in NSW, to the present. This chapter endeavours to undo part of the 'genesis amnesia'[102] that has allowed us to treat 'moral evaluations'[103] about swearing and offensiveness—ascriptions of a moral value to words and people such as 'good' or 'bad', 'polite' or 'impolite'—as 'common sense' or natural. I explore the procedural practice of the use of a slip of paper in past offensive language cases upon which a defendant's alleged 'dirty words' were written, and use my findings to reflect on modern-day rituals of containment in offensive language trials and legal judgments in Chapter Six.

Chapter Four – Legal Analysis of Offensive Language Crimes

Chapter Four outlines and critiques the legal doctrine on offensive language crimes in Australia, to inform my CDA in the ensuing chapters. This chapter has a particular focus on the jurisdictions of NSW, WA and Queensland, the states from which my case studies were drawn. After providing a brief overview and comparison of the legislation, I examine judicial interpretations of core legal elements of offensive language crimes, including the meaning of 'offensive' (as well as obscene, indecent, insulting, abusive or threatening); the reasonable person standard; the assessment of community standards; the relevance of context; the meaning of 'public place'; and the defence of 'reasonable excuse'. In addition to these elements, I consider various procedural aspects of the prosecution and punishment of offensive language crimes, including the use of CINs for offensive language. My doctrinal analysis raises a number of anomalies and ambiguities, which must be considered in light of

[102] Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977) 79.

[103] Theo van Leeuwen, *Discourse and Practice: New Tools for Critical Discourse Analysis* (Oxford University Press, 2008) 109–10.

my historical analysis in the preceding chapter, and my application of CDA to interpretations of offensive language crimes in Chapters Five to Nine.

Chapter Five – Judges Masquerading as Linguists

Following my doctrinal analysis, in Chapter Five I begin to unpack strategies of legitimation in offensive language cases. I use CDA to illuminate the linguistic techniques employed by judicial officers to legitimise their ability to objectively and fairly ascertain offensiveness. I critique the content of their 'language ideologies' with reference to linguistic literature on swearing.

Chapter Six – The 'Unmentionables': Verbal Evasions and Metaphorical Constructions of the Harm in Offensiveness Speech

I continue my critique of language ideologies on swearing in criminal justice discourse in Chapter Six. In this chapter, I draw extensively on the Supreme Court of WA case *Heanes v Herangi*,[104] to argue that representations of swear words—chiefly the use of euphemisms, circumlocutions and metaphors—play a pivotal role in depicting and transforming swear words as 'dirty', 'bad' or physically forceful. [105] As in the previous chapter, I critique the content of these discursive representations with reference to linguistic literature on swearing and ideas about disgust, contamination and containment.

Chapter Seven – 'A Weed in an Exquisite Garden': Constructing Context in Offensive Language Cases

Chapter Seven considers the interrelationship between discourse, offensiveness and depictions of things that are 'in place' or 'out of place' in criminal justice discourse. Unlike much of the existing literature on offensive language crimes, which fails to question the relevance of discourse in constructing context, and/or assumes places to be pre-determined and objectively identifiable, I take a critical view of context. I show in this chapter how contexts are constructed discursively, through transformation, repetition, emphasis, categorisation, differentiation and exclusion. I reveal how language choices in representing context fundamentally shape perceptions about words, people and activities that disrupt, do not belong in, or pose a threat to, 'orderly' public space.

[104] *Heanes v Herangi* (2007) 175 Crim R 175.

[105] *Ibid.*

Chapter Eight – In the Eye of the Beholder: Constructing the 'Reasonable Person' and 'Community Standards' in Offensive Language Cases

Informed by linguistic research, my thesis posits that it is impossible for one person to objectively ascertain the offensiveness, or otherwise, of swear words; ideas about 'dirty words' are not shared, but are mediated by the idiosyncratic experience and perceptions of the individual. Nevertheless, the law deems that when adjudicating offensive language charges, offensiveness must be ascertained from the perspective of 'the reasonable person' having regard to 'contemporary community standards'. In Chapter Eight I use CDA to analyse constructions of the reasonable person and community standards in offensive language cases. Drawing on the cases *McCormack v Langham* and *Del Vecchio v Couchy*,[106] I illustrate how judicial officers can exploit these supposedly 'neutral' standards to amplify their discretion; include some but exclude 'Others';[107] and selectively close their eyes to issues of identity, history, culture, and racial and political tensions.

Chapter Nine – 'Four-letter' Threats to Authority? Representations of Power, Authority, Order and Discretion

While Chapters Five to Eight predominantly focus on the language of judges, Chapter Nine recognises the pivotal role of the language of police in determining offensiveness, and in validating the criminal punishment of swear words. This chapter interrogates an assumption that has long been regarded as 'common sense' in Australian criminal law: that swearing at police officers is a 'threat to authority' warranting criminal punishment. I locate the historical and continuing role of police in defining, monitoring and punishing offensive language crimes. I question how authority, power and discretion are represented and obscured in criminal justice discourse on offensive language crimes. I show that discourse is central to understanding how police are constructed as legitimate 'victims' of offensive language crimes—thus validating police authority, augmenting police discretion and sustaining unequal power relations.

[106] *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991); *Del Vecchio v Couchy* [2002] QCA 9.

[107] See Edward Said, *Orientalism: Western Conceptions of the Orient* (Penguin, 1st ed 1978, 1995) 24.

Conclusion – What to do with Dirty Words?

In my concluding chapter, I synthesise the main arguments of my thesis and explain the significance of my findings. I evaluate my research methodology and propose areas for further research. I suggest possible applications of my findings and identify theoretical and policy implications arising from my work, including areas in which change is needed to redress the injustices identified by my thesis. The thesis concludes with an argument that we need to reimagine the concept of public order, and to reconsider if the punishment of swearing fits within that order. I appeal for further legislative inquiry into, and ask politicians to rethink, how offensive language crimes are policed, interpreted and punished across Australia.

CHAPTER TWO
THEORETICAL FRAMEWORK

2.1 Introduction

In my introductory chapter, I established that the role of discourse in conceptualising offensive language and legitimising offensive language crimes has up till now been relatively opaque. I argued that the criminal punishment of swearing in public cannot be adequately understood without accounting for criminal justice discourse. In this chapter, I explain my theoretical framework, method and substantiate my choice of CDA as my primary methodological tool. I turn to CDA to demonstrate that ideas about offensiveness in criminal law are not natural, fixed nor final; instead, they are socially and historically contingent. I use CDA to render the historical and social contingency of offensiveness more transparent. I interrogate the function of criminal justice discourse in constructing realities about offensive language that have become naturalised within, and have even attained the status of, law. I introduce my sources for analysis, provide the rationale for my selection of texts and outline the processes by which I obtained them. Following this, I theorise key ideas employed throughout my thesis: namely swearing, discourse, criminal justice discourse, legitimation, recontextualisation, power and ideologies.

2.2 Why CDA?

I turn to this specific form of qualitative analysis—CDA—while acknowledging the possibility of applying alternative methodological frameworks to the study of offensive language crimes. As I explained in Chapter One, scholars have already studied these crimes from a variety of historical, doctrinal, criminological, sociological and even linguistic perspectives. Given the discriminatory and inequitable policing and enforcement of offensive language crimes,[1] I could have, for example, adopted a predominantly feminist, critical race theory or Indigenous perspectives-focused approach to offensive language crimes. I might have instead conducted a comparative approach to offensive language crimes, comparing state and territory jurisdictions in Australia to those in other common law jurisdictions, such as the United Kingdom or New Zealand. I could have chosen from a variety of language analysis approaches used in the forensic linguistics literature—both critical and non-critical—including applied linguistics, discourse analysis, conversational analysis, critical applied

[1] See my summary of this inequitable enforcement in Chapter One.

linguistics and critical sociolinguistics.[2]

Of all these approaches, the aims of my thesis align best with the goals of CDA: to denaturalise ideologies that have become naturalised in relation to offensive language and to describe how relations of power shape, and are shaped by, discourse.[3] As my thesis asks how offensiveness is discursively constructed through criminal justice discourse, and focuses on the inter-relationship between language, power, ideology and the law, CDA offers the most appropriate approach to my thesis question. The emphasis on interdisciplinarity in CDA enables my research to be enriched by the insights of linguistic research on swearing, feminist scholarship, critical race theories, Indigenous scholarship, critical criminological scholarship and ideas about order, offensiveness and being 'in place' or 'out of place'.[4] I draw on this diversity of scholarship to challenge ideological assumptions made in criminal justice discourse in relation to the criminalisation and punishment of offensive language.

2.3 Selection of sources

My thesis analyses representations of offensiveness and legitimation of offensive language crimes through a diversity of texts, namely:

- court judgments (accessed online, in libraries, and also by application to courts)
- court transcripts (accessed via court files, or by application to courts)
- police facts sheets (accessed via court files)
- police witness statements (accessed via court files)

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[2] Applied linguistics is 'an area of work that deals with language use in professional settings, translation, speech pathology, literacy and language education … a semiautonomous and interdisciplinary … domain of work that draws on but is not dependent on areas such as sociology, education, anthropology, cultural studies and psychology', whereas critical applied linguistics is 'a way of doing applied linguistic that seeks to connect it to questions of gender, class, sexuality, race, ethnicity, culture, identity, politics, ideology and discourse': Alastair Pennycook, *Critical Applied Linguistics: A Critical Introduction* (Lawrence Erlbaum Associates, 2001) 3, 10; discourse analysis 'studies language use beyond the sentence level', while conversational analysis would limit the focus of my research to the study of conversations in the institutional context of the courtroom. Critical sociolinguistics 'typically uses a range of sociolinguistic approaches (both macro and micro) in combination with social theoretical analysis to examine the role of language in power relationships': Diana Eades, *Sociolinguistics and the Legal Process* (Channel View Books, 2010) 14–15.

[3] Pennycook, above n 2, 80–81.

[4] See, eg, Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966); Tim Cresswell, *In Place/Out of Place: Geography, Ideology, and Transgression* (University of Minnesota Press, 1996); Ruth Wajnryb, *Expletive Deleted: A Good Look at Bad Language* (Simon and Schuster, 2005); Keith Allan and Kate Burridge, *Forbidden Words: Taboo and the Censoring of Language* (Cambridge University Press, 2006); Margaret Thornton, *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995); Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2002); Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Moreton-Robinson, Aileen (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 75; Michael Coyle, 'Notes on the Study of Language: Towards a Critical Race Criminology' (2010) 11 *Western Criminology Review* 11.

- parliamentary debates and speeches (accessed online and in libraries)
- newspaper reports and editorials (accessed online)

These texts comprise my criminal justice discourse (see below) in relation to offensive language crimes. In selecting texts, I followed critical discourse analyst, Norman Fairclough's, advice that '[s]elections of texts to represent a particular domain of practice should ensure the diversity of practices is represented … and avoid homogenization.'[5]

My analysis centres around six case studies: *McCormack v Langham*, *Conners v Craigie, Jolly v The Queen* and *Police v Grech* in NSW; *Heanes v Herangi* in WA; and *Del Vecchio v Couchy* in Queensland.[6] I accessed, where available, witness statements, police facts, hearing transcripts and judgments for each case by way of court file and court transcript applications. My research sources were accessed using methods approved and overseen by my university's research ethics committee (HREC UTS 2011-498A). My selection hinged on my research question; I selected cases that address how offensive language is represented and offensive language crimes are legitimised in criminal justice discourse. I based my selection of cases on the following criteria. First, each case was heard in the criminal jurisdiction, and considered the issue of a defendant's liability for an offensive language charge. Second, each was heard in the previous 30 years, given that aside from my historical analysis (Chapter Three),[7] my research is concerned with contemporary constructions of offensive language.[8] To avoid homogenisation and to ascertain a diverse spectrum of perspectives, all cases, with the exception of *Police v Grech*, were considered at lower and appellate court levels, and all cases, including *Police v Grech*, were subjected to media, practitioner and/or academic commentary. The cases therefore generate and respond to a plurality of perspectives on offensive language and its criminal punishment. Further, each case involved the use of swear words: namely 'fuck' and its derivatives, 'cunt' (or a combination of the two) and 'prick'.[9] To form a multifaceted picture of criminal justice discourse on offensive language, my thesis extends its analysis to legislation, explanatory memoranda, second readings speeches, media commentary, and a broader pool of offensive language case law.

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[5] Norman Fairclough, *Discourse and Social Change* (Polity Press, 1992) 35.

[6] *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991); *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993); *Jolly v The Queen* [2009] NSWDC 212; *Police v Grech* (Unreported, Waverley Local Court, 94/10, Magistrate Williams, 3 May 2010); *Heanes v Herangi* (2007) 175 Crim R 175; *Del Vecchio v Couchy* [2002] QCA 9; see also *Conners v Craigie* (1994) 76 Crim R 502.

[7] I detail my selection of texts for historical analysis in Chapter Three.

[8] Note that the case *Del Vecchio v Couchy* considers the sub-set of offensive language crimes of using 'insulting' language in a public place.

[9] In addition to the word 'fucking', the case *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991) also involved the pejorative 'poofter'.

This body of material constitutes a 'criminal justice discourse' on offensive language crimes, a phrase that I explain in Part 2.4.2 below. This multiplicity of voices permits me to conduct a distinct and robust CDA of how swear words, the reasonable person, community standards, context, power, authority and order are constituted in criminal justice discourse.

2.3.1 Limitations of sources

My selection of texts, sourced primarily from six offensive language cases, necessitates that a substantial proportion of my analysis is confined to judicial, as opposed to other forms of, criminal justice discourse. Accordingly, my thesis predominantly focuses on the normative impact of the language of magistrates and judges in fashioning a reality around offensiveness.

I am mindful of the fact that judicial discourse forms only part of the picture in constituting understandings of offensive language and legitimising its criminal punishment. It is important not to overstate this influence. One must also recognise the role of executive and legislative arms of governments in crafting and enacting broad offensive language provisions with open-ended legal elements, which consequently augments police and judicial discretion. The legislature in each Australian state and territory has not only drafted broad offensive language provisions, but has also chosen to maintain offensive language crimes on statute books in the face of criticism of these laws from law reform agencies, academics and practitioners,[10] rather than confine their scope or repeal the laws.

Police officers similarly play a determinative role in choosing when and how to respond to instances of swearing in or near public space. As I explain in Chapter Nine, which focuses on discursive representations of police power, police have significant discretion in deciding whether to activate the legal and extra-legal tools available to them in policing language; police officers may choose to respond to a person's behaviour formally (for example, by administering a formal caution, issuing a CIN, serving a summons or using powers of arrest), informally (for example, by issuing an informal caution) or they may take no action at all.[11] The response of police officers to swear words is not always guided primarily by legislation

[10] See, eg, NSW Law Reform Commission, 'Penalty Notices' (Report, 2012); Luke McNamara and Julia Quilter, 'Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)' (2013) 36 *University of New South Wales Law Journal* 534.

[11] See Rob White and Santina Perrone, *Crime and Social Control* (2nd ed, 2005) 39–41; relevantly, the NSW Bureau of Crime Statistics and Research recognises that 'shifts in policing policy can also have a marked effect on the number of recorded drug offences, cases of offensive behaviour or of receiving stolen goods': 'New South Wales Recorded Crime Statistics: Quarterly Update March 2016' (NSW Bureau of Crime Statistics and Research, 2016) 25.

or case law. Police may fine or charge someone with offensive language in order to 'save face' or to maintain a perception that they command authority in public space. As one police officer said in 2009 in relation to making a decision to issue a CIN for offensive language:

> I'm not going to let anyone walk down the street and just swear at me when I'm off duty or on duty or whatever, you know carrying on like idiots … people see you and they expect you to take action and do something about it ... there's expectations of when you're the police in a small community that you will enforce these minor things.[12]

A further limitation with regard to my selection of sources is that due to the prevalence of CINs for offensive language; the predominance of guilty pleas for offensive language as opposed to contested hearings; and the lack of appeals of local court decisions with respect to offensive language charges,[13] magistrates and judges have few opportunities to scrutinise offensive language cases. Because of this, it is difficult to form a comprehensive picture of judicial discourse with regard to offensive language. Also, appellate judicial discourse is atypical amongst judicial discourse in relation to offensive language. As stated above, I have attempted to address this shortcoming by obtaining judgments and transcripts at both lower and appellate court levels. Further, while appellate court judgments are uncommon with regard to the thousands of offensive language matters proceeded against by charge or CIN each year, my thesis recognises that the discourse emanating from appellate judges is of particular ideological significance, given that the contents of appellate decisions become 'authorities' on which criminal law practitioners and prosecutors rely when determining the legal elements of offensive language crimes. I have also addressed this concern by accessing lower court judgments and transcripts in each of the six cases to reflect the fact that, where contested, offensive language cases are largely finalised at local or magistrates court levels.

Although I acknowledge that offensive language crimes are legitimised by non-discursive means, the distinctive nature of my thesis is predicated on its unique attention to how *discourse* represents offensiveness and legitimises the criminal punishment of swearing. My focus on how 'primary definers'[14] in the criminal justice system shape common sense ideas about swear words and their punishment is something which has previously gone unacknowledged in the literature, and is the gap which my thesis addresses. Having outlined

[12] NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities' (2009) 60; See also 'Policing Public Order: A Review of the Public Nuisance Offence' (Report, Queensland Crime and Misconduct Commission, 2008) 116.

[13] 'NSW Criminal Court Statistics July 2014 to June 2016: Offensive Language and Offensive Behaviour' (NSW Bureau of Crime Statistics and Research, 4 November 2016) 201.

[14] Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 18–19.

and justified my selection of sources, the following part details how I use CDA to examine discursive representations of offensive language.

2.4 Critical discourse analysis

CDA is not strictly a 'method', but rather a loosely grouped body of work that views language as both shaping and shaped by society.[15] Analysts works from the premise that there is no neutral representation of reality; instead, we construct and reconstruct reality through language.[16] Being *critical,* CDA is concerned with how linguistic strategies work to naturalise ideologies and power relations in discourse. CDA aims to denaturalise these ideologies and expose power relations.[17]

While CDA draws upon multiple linguistic and social theories, its origins can largely be traced back to Hallidayan linguistics, whereby M.A.K. Halliday in 1978 devised a method of linguistic analysis that incorporated social semiotic functions into a theory of grammar: a 'systemic-functional grammar'.[18] Halliday's 'functional' model was informed by a theory of language that proposed that language structures 'have developed in response to communicative needs', rather than a linguistic model, which assumed language structures to be 'natural', 'universal' and 'unaffected by social function'.[19] Halliday's linguistic theories were adopted by Roger Fowler, who in 1979, together with Bob Hodge, Gunther Kress and Tony Trew, generated the discipline of Critical Linguistics through their text *Language and Control*.[20] By analysing the linguistic structure of texts in light of their interactional and wider social contexts, Fowler et al demonstrated 'how linguistic structures are used to explore, systemize, transform, and often obscure, analyses of reality; to regulate the ideas and behaviour of others; to classify and rank people, events and objects; to assert institutional or personal status'.[21]

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[15] Andrea Mayr and Paul Simpson, *Language and Power: A Resource Book for Students* (Routledge, 2010) 51.

[16] Roger Fowler, 'The Intervention of the Media in the Reproduction of Power' in Iris Zavala, Teun van Dijk and Myriam Díaz-Diocaretz (eds), *Approaches to Discourse, Poetics and Psychiatry* (John Benjamins Publishing, 1987) 67, 67.

[17] Mayr and Simpson, above n 15, 51.

[18] See Michael Halliday, *Language as Social Semiotic: The Social Interpretation of Language and Meaning* (University Park Press, 1978).

[19] Roger Fowler et al, *Language and Control* (Routledge, 1979) 3.

[20] Fowler et al, above n 19.

[21] Ibid 3.

Now an 'established paradigm in linguistics',[22] CDA emerged as a movement following a meeting in 1991 in Amsterdam between Teun van Dijk, Norman Fairclough, Ruth Wodak, Gunther Kress and Theo van Leeuwen, who came together to discuss theories and methods of discourse analysis, especially CDA.[23] Each of these scholars has fashioned their own way of 'doing CDA',[24] drawing from a range of linguistic ideas, methods and tools.[25] CDA scholars adopt the *critical* approach to linguistics advanced by Fowler et al, but shift the emphasis to how *discourse* is interconnected with social structure, power and ideology.[26]

Like critical linguistics, CDA has an 'intense linguistic character', relying on linguistic categories like vocabulary, metaphor, transitivity, agency and modality.[27] Many of these linguistic categories are derived from Halliday's systemic-functional grammar, who has maintained that '[a] discourse analysis that is not based on grammar, is not an analysis at all, but simply a running commentary on a text'.[28] There is no set list of linguistic devices to draw upon. Instead, the selection of linguistic devices is a matter for the researcher to determine, based upon their relevance to the question.[29] The emphasis of CDA on linguistic features enables analysts to ground their theoretical concerns with power, ideology and inequality in a detailed analysis of texts. Importantly, CDA unashamedly takes an interventionist approach; CDA adopts the perspective of the less powerful or those who suffer: 'empowering the powerless, giving voices to the voiceless, exposing power abuse, and mobilizing people to remedy social wrongs'.[30] This correlates to focal aims of my thesis: to demonstrate how power is exercised through criminal justice discourse in ways that constitute and govern individual subjects, and to challenge dominant ideas about offensiveness by giving voice to subjugated, unheard and transgressive voices and interests. Consistent with CDA's aim to

[22] Ruth Wodak, 'What CDA Is About - A Summary of Its History, Important Concepts and Its Developments' in Ruth Wodak and Michael Meyer (eds), *Methods of Critical Discourse Analysis* (Sage, 2001) 1, 4.

[23] Published as 'Discourse and Society 4(2)'. Some of the most notable critical approaches to discourse analysis have been developed by these academics, see Wodak, 'What CDA Is About - A Summary of Its History, Important Concepts and Its Developments', above n 22; Norman Fairclough, *Language and Power* (Longman, 1989); Fairclough, above n 5; Teun van Dijk, *Racism and the Press* (Routledge, 1991); Teun van Dijk, *Elite Discourse and Racism* (Sage, 1993); Theo van Leeuwen, *Discourse and Practice: New Tools for Critical Discourse Analysis* (Oxford University Press, 2008); Gunther Kress and Theo van Leeuwen, *Multimodal Discourse: The Modes and Media of Contemporary Communication* (Bloomsbury Academic, 2001).

[24] Teun van Dijk, 'Multidisciplinary CDA: A Plea for Diversity' in Ruth Wodak and Michael Meyer (eds), *Methods of Critical Discourse Analysis* (Sage, 2001) 1, 95.

[25] Wodak, 'What CDA Is About - A Summary of Its History, Important Concepts and Its Developments', above n 22, 4.

[26] Ibid 3.

[27] Dolores Fernandez Martinez, 'From Theory to Method: A Methodological Approach Within Critical Discourse Analysis' (2007) 4 *Critical Discourse Studies* 125, 127.

[28] Michael Halliday, *An Introduction to Functional Grammar* (Arnold, 1985) xvi–ii.

[29] Michael Meyer, 'Between Theory, Method, and Politics: Positioning of the Approaches to CDA' in Ruth Wodak and Michael Meyer (eds), *Methods of Critical Discourse Analysis* (Sage, 2001) 14, 25; Martinez, above n 27, 127.

[30] Jan Blommaert and Chris Bulcaen, 'Critical Discourse Analysis' (2000) 29 *Annual Review of Anthropology* 447, 449.

remedy social wrongs, in my concluding chapter I propose ways for policy makers to address and mitigate the inequalities and injustices identified in my thesis.

2.4.1 Discourse

CDA can be distinguished from other critical linguistic approaches in that it finds 'the larger discursive unit of text to be the basic unit of communication.'[31] Thus Fairclough distinguishes *discourse*, or a discursive unit, from a *text*. Fairclough uses the term discourse to refer to 'the whole process of interaction of which a text is just a part.'[32] Discourse therefore does not simply refer to an extended stretch of text, rather, it is a way of signifying a particular domain of social practice from a particular perspective.[33] According to Fairclough, a text is a 'piece' of discourse that is a product rather than a process: a text is the 'product' of the process of text production, which can be either spoken or written (or both spoken and written).[34] In my thesis I draw on the theorisation of discourse by both Fairclough and van Leeuwen (discussed in more detail in Part 2.5.1.1 below).[35] Each author's conceptions of discourse are largely drawn from, and associated with that of French philosopher and historian Michel Foucault. For instance van Leeuwen 'builds on' Foucault's conception of discourse, defining the term as 'socially constructed ways of knowing some aspect of reality'.[36] The term discourse is also regularly used in two additional senses: to identify the language associated with a particular social field, practice or institution, so that you can have 'legal discourse', 'political discourse', 'academic discourse' and so on, or alternatively, to denote 'a way of construing aspects of the world associated with a social perspective (e.g. a "neo-liberal discourse of globalization")'.[37]

2.4.2 Criminal justice discourse

In my thesis, I have developed the phrase 'criminal justice discourse' as a hybrid of these first two senses of discourse. Criminal justice discourse encompasses socially constructed ways of

[31] Wodak, 'What CDA Is About - A Summary of Its History, Important Concepts and Its Developments', above n 22, 2.

[32] Fairclough, above n 23, 24.

[33] Ruth Wodak, 'The Discourse-Historical Approach' in Ruth Wodak and Michael Meyer (eds), *Methods of Critical Discourse Analysis* (Sage, 2001) 63, 66.

[34] Fairclough, above n 23, 24.

[35] Van Leeuwen, above n 23.

[36] Theo van Leeuwen, 'Discourse as the Recontextualization of Social Practice: A Guide' in Ruth Wodak and Michael Meyer (eds), *Methods of critical discourse analysis* (Sage, 2009) 144, 144; citing Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press, 1980).

[37] Norman Fairclough, 'Critical Discourse Analysis' in James Paul Gee and Michael Handford (eds), *The Routledge Handbook of Discourse Analysis* (Routledge, 2013) 9, 11.

signifying reality in the field of criminal justice. In other words, my thesis is concerned with how reality is constituted in the specific domain of offensive language crimes from a number of criminal justice perspectives. I do not conceive of criminal justice discourse as one consolidated, homogeneous voice, but as a plurality of perspectives. Nevertheless, there are voices that dominate the construction of offensive language crimes; I concentrate on these 'primary definers'[38] in criminal justice debates in my thesis. I examine how knowledge around offensiveness is constructed through the language of judicial officers, politicians, police officers, lawyers and the media, while also considering how their knowledge has been (or could be) resisted or disrupted. I turn to the criminal justice texts outlined above—court transcripts, judgments, police statements, newspaper reports and editorials, and parliamentary debates—to demonstrate that the language of powerful players in the criminal justice system, like those of other institutions that exercise power over the lives of others (for example, religious institutions, the educational system, the media) structures how we conceive of swear words and their criminal punishment.

2.5 Method: Three-dimensional discourse analysis

To interrogate criminal justice discourse on offensive language crimes, I draw on Fairclough's three-dimensional conception of discourse, as well as van Leeuwen's work on discourse as the recontexualisation of social practice.[39] Following his innovative approach to critical language study in *Language and Power*,[40] Fairclough has been credited with devising the 'most elaborate and ambitious'[41] theorisation of the CDA program in his 1992 text *Discourse and Social Change*.[42] Fairclough's model sees discourse as consisting of three interconnected dimensions:

1. *Text;*
2. *Discourse practice* (how texts are produced, interpreted and distributed); and
3. *Social practice* (how power relations and ideologies are reproduced, challenged or transformed through discourse).

The relationship between these three interconnected dimensions is represented in Figure 2.1.

[38] Hogg and Brown, above n 14, 18–19.

[39] Fairclough, above n 5, 73; van Leeuwen, above n 36; van Leeuwen, above n 23.

[40] Fairclough, above n 23; see also Norman Fairclough, *Language and Power* (Longman, 2nd revised ed, 2001).

[41] Blommaert and Bulcaen, above n 30, 448.

[42] Fairclough, above n 5.

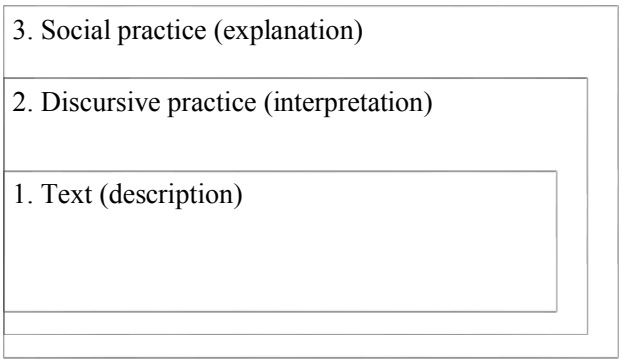

Figure 2.1 Fairclough's three-dimensional conception of discourse[43]

Fairclough has offered three corresponding descriptions of these dimensions of critical discourse analysis: *description*—concerned with the formal properties of a text; *interpretation*—concerned with the relationship between text and interaction (the processes of production and interpretation); and *explanation*—concerned with the relationship between interaction and social context.[44] Through an 'orchestrated and recursive analytical movement between text and context', the analyst not only considers the language of texts, but also their production, interpretation and relationship to society.[45] I elaborate on each of these three dimensions—text analysis, discursive practice and social practice—and explain how they inform my thesis in the following part.

2.5.1 Text analysis

The first dimension is 'discourse as text' or text analysis.[46] Text analysis involves systematically analysing textual features in order to expose how ideologies are submerged within the texts at various levels. This stage, which Fairclough also terms 'description', is concerned with the formal properties of texts—the linguistic features and grammatical and lexical structures of the texts—and how these are incorporated in the overall formation of texts. [47] Text analysis is technical in nature and requires knowledge of linguistics, given that it incorporates linguistic elements including choices and patterns in vocabulary (such as wording or metaphors); grammar (words combined into clauses and sentences, including

[43] Ibid 73.

[44] Fairclough, above n 23, 26.

[45] Allan Luke, 'Beyond Science and Ideology Critique: Developments in Critical Discourse Analysis' (2002) 22 *Annual Review of Applied Linguistics* 96, 100.

[46] Fairclough, above n 23, 25.

[47] Ibid 26.

transitivity and modality); cohesion (how clauses and sentences are linked together); and text structure (large-scale organisational properties of text).[48]

2.5.1.1 Recontextualisation

A useful concept that allows us to consider how social practices ('socially regulated ways of doing things'[49]) are represented in texts is *recontextualisation*, as theorised by Theo van Leeuwen.[50] When magistrates, politicians, police officers and so on, talk or write about offensive language, they recontextualise the language and the context in which it was used: by reallocating roles, rearranging the social relations between the participants, reordering the events and reframing the context.[51] In considering recontextualisation, the analyst considers how social practices, including participants and their roles and identities, actions, times and locations, are described in different texts to achieve various purposes. [52] Recontextualisations can add detail, transform persons and events, provide legitimations, eliminate detail or shift focus.[53]

To illustrate how recontextualisation works, I provide here examples of recontextualisation in political and media rhetoric, from a different domain to that considered in my thesis—the domain of war. When politicians and commentators discussed or evaluated the social practice of the United States administration imprisoning detainees in Guantanamo Bay from 2002, during the so-called 'War on Terror', their representations necessarily recontexualised the social practice of imprisonment. The words that were used (*vocabulary*) to describe the practice became significant in terms of ideological meanings they created, especially if these 'lexical items'[54] (see below) became largely adopted and accepted in political, media and social discourse. Consider, for example, the different ideological implications of the following terms used by politicians, military personnel and media commentators during the wars in Afghanistan and Iraq post 9/11: 'prisoner of war' vs. 'unlawful enemy combatant', 'collateral damage' vs. 'the killing of innocent civilians', 'hunger strikes' vs. 'long term non-religious fasting', and 'single cell occupancy' vs. 'solitary confinement'.[55] Although these

[48] Fairclough, above n 5, 75; Blommaert and Bulcaen, above n 30, 448.

[49] Van Leeuwen, above n 23, 6.

[50] See van Leeuwen, above n 23; van Leeuwen, above n 36.

[51] Van Leeuwen, above n 23, 13.

[52] Ibid 1–22.

[53] Ibid vii.

[54] Diana Eades, 'Lexical Struggle in Court: Aboriginal Australians versus the State' (2006) 10(2) *Journal of Sociolinguistics* 153, 153.

[55] See, eg, ABC Radio National, 'Extreme Secrecy of Guantanamo Bay's Camp Seven Revealed by ABC Foreign Correspondent', *AM*, 29 April 2014 <http://www.abc.net.au/am/content/2014/s3993855.htm>.

couplings might share the same *denotation* (put simply, a word's dictionary definition)[56] — for instance, both 'single cell occupancy' and 'solitary confinement' describe a person that has been detained alone in a cell—their *connotations* are ideologically distinct. The former 'Gitmo' expression, single cell occupancy, implies that the occupant has been granted the privilege of private accommodation. The latter phrase, solitary confinement, suggests psychological punishment by way of isolation and restriction of movement. If the term 'single cell occupancy' is adopted by military personnel, public servants, politicians and commercial media outlets, the term not only becomes the preferred wording in social and political debates, but also influences, and even becomes naturalised in, how people conceptualise the social practice of isolating prisoners of war (or to use the 'Gitmo' term, 'unlawful enemy combatants') in cells. Through recontextualisation, the practice is no longer smeared with the taint of cruelty or illegality, but is recast as something as innocuous (and lawful) as the state providing accommodation to an 'occupant'.

I draw on van Leeuwen's idea of recontextualisation throughout my thesis, especially in Chapter Seven, in which I establish that representations of context shape how offensive language is conceived. I discuss how the prosecutor and Supreme Court judge in *Heanes v Herangi* use 'lexical items' to *negatively appraise* the defendant: describing him variously as 'like a smart alec', 'this fellow' and 'a complete menace'.[57] I argue that these lexical items, coupled with intertextual references to 'young people behaving badly' in the Supreme Court judgment, slot the defendant (who was 22 years old at the time of the Perth Magistrate's Court hearing) into a category of deviant youth warranting criminal punishment.

2.5.1.2 Legitimation

My critical examination of offensive language crimes would be incomplete without interrogating how people justify the existence of offensive language crimes, and assumptions about power relations and authority. In examining these aspects—the *why* of offensive language crimes—I draw on van Leeuwen's work on legitimation in discourse.[58] In representing social practices, discourses do not simply describe what is going on; they also define what is a legitimate perspective, and what is not: they 'evaluate' social practices, 'ascribe purposes' to them, 'justify' them and so on.[59] Legitimations are all about the *why* of

[56] David Crystal, *Dictionary of Linguistics and Phonetics* (John Wiley & Sons, 2011).

[57] Transcript of Proceedings, *Jonathan Stephen Heanes v Western Australia Police Force* (Supreme Court of Western Australia, SJA 1111 of 2006, Johnson J, 27 March 2007) 79; Eades, above n 54.

[58] Van Leeuwen, above n 23, 105–6.

[59] Ibid 6.

social practices; they are 'reasons that either the whole of a social practice or some part of it must take place, or must take place in the way that it does'.[60] Van Leeuwen contends that this *why* aspect of representation is even more important than the representations of the social practices themselves.[61] My thesis acknowledges and highlights the central role that legitimation plays in the criminal punishment of swear words, as well as in practices and customs of legal representation and interpretation more generally. I acknowledge an uncomfortable paradox: that just like the defendants who have been put on trial for swearing in offensive language cases, most of those who prosecute or advocate punishment of swear words—politicians, judges, police officers, media commentators and lawyers—have used, and will continue to use swear words in public and private conversations, as well in repeating or 'mentioning'[62] 'unmentionables' used by a defendant in court. (Indeed, it has been widely documented that police in particular have a culture of swearing).[63] As psycholinguist Timothy Jay's extensive research on cursing in the United States has found: 'Curse words are used persistently over a person's lifetime and are frequently uttered in public ... we say taboo words as soon as we speak and we continue to swear into old age even through dementia and senile decline.'[64]

When the vast majority of people swear, each and every day, they do not fear prosecution by the state. Despite the ubiquity of swearing in Australia, as this thesis will show, many of its politicians, judges, police officers and media commentators continue to legitimise offensive language crimes, as well as their own ability to define, curtail and punish offensiveness. My thesis critiques justifications provided by these groups as to why offensive language crimes must exist, or must exist in the way that they do, and police officers' rights to be respected and obeyed, and how these justifications serve a number of political ends, including the preservation of particular ideological orders and the heightening of police and judicial power and discretion.

2.5.2 Discursive practice

The second dimension goes beyond the level of textual analysis and turns to *discursive practice*: the processes of production, distribution and consumption.[65] This dimension is concerned with the relationship between text and interaction. It sees the text as the product of

[60] Ibid 20.

[61] Ibid 6.

[62] Luke Fleming and Michael Lempert, 'Introduction: Beyond Bad Words' (2011) 84(1) *Anthropological Quarterly* 5, 6.

[63] See, eg, Jenny Brockie, *Cop It Sweet* (ABC Television, 1992).

[64] Timothy Jay, 'The Utility and Ubiquity of Taboo Words' (2009) 4 *Perspectives on Psychological Science* 153, 155.

[65] Fairclough, above n 5, 78.

a process of production, and a resource in the process of interpretation.[66] Fairclough has written that this dimension acknowledges that texts are open to varying interpretations, depending on context and interpreter, and that 'social meanings … cannot simply be read off from the text without considering patterns and variations in the social distribution, consumption and interpretation of the text.'[67] To illustrate this point, one can consider how a written legal judgment is produced, distributed and consumed. A judicial officer produces this particular genre of text, its primary audience being the parties to the dispute (for instance, prosecution and defendant or plaintiff and defendant), and its primary purpose being to inform such parties of the outcome of their legal dispute, including how various factual and legal issues have been resolved. But the audience of a legal judgment extends beyond this, as does its utility. A legal judgment can be disseminated to, and consumed by, appellate and lower court judges, lawyers, barristers, paralegals, law students, academics, the media, policy makers, politicians, interested stakeholders and the public. And a judgment is consumed for myriad purposes, it might be read as a 'statement of the law', applied as precedent, subjected to appeal for possible legal or factual errors, scrutinised for scholarly analysis or used for calls for legislative change.

A useful concept that considers a text's relationship to other texts is *intertextuality*, a term that encapsulates 'the property texts have of being full of snatches of other texts', as well as their distribution, where texts undergo 'predictable transformations as they shift from one text type to another'.[68] The judgment itself undergoes various transformations: the original text (either an oral judgment delivered *ex tempore* then transcribed into written text, or alternatively, a written judgment that may also be delivered aloud in court) may be summarised or critiqued in a case note, book, article or a thesis; its contents, or an abridged version thereof, may be relayed orally to others in a report or interview; its facts, its *ratio decidendi* (the reasons for the decision, or for principles that the case establishes, which may have precedential value) or its *obiter dicta* (a judicial officer's expression of opinion which is not essential to the decision and therefore not legally binding as precedent) may be the subject of consideration, criticism, application or reversal in subsequent legal cases. And the judgment itself is a product of the author's transformation of other texts, including prior cases, witness statements, affidavits, police facts, witness testimony and advocates' submissions. It is important to note that the interpretation, distribution, aims and effects of legal judgments cannot be neatly accounted for; they are varying and complex, and although they might strive for clarity, the meaning of legal texts can be ambivalent and is dependent upon the interpreter.

[66] Fairclough, above n 23, 26.

[67] Fairclough, above n 5, 28.

[68] Ibid 84.

It is also in this second dimension of Fairclough's three-dimensional model—discursive practice—that the analyst considers a text's 'force' or its 'actionable component'.[69] The force of a text depends upon its audience. For example, the force of a criminal legal judgment on a defendant—the action that a judgment enacts upon an accused, including conviction, acquittal, punishment, compensation or freedom – is significant, material and life-altering. Finally, in the second dimension of discursive practice, one should also consider the 'coherence' of a text: firstly, how a text's sequential parts are related so that they 'make sense'; secondly, the naturalised ways in which *we*, the interpreters, make sense of texts, drawing on our own 'common-sense assumptions and expectations'.[70] There are ritualised, institutionalised ways in which lawyers, through law school, are trained in the common law system to read a judgment; a legal education teaches lawyers to read and accept at face value the facts upon which a judge relied, and to locate the *ratio decidendi* and the *obiter dicta* of a decision. But there are also transgressive or unorthodox ways of reading a legal judgment. One can query (as my thesis does) the 'facts', including how a judge came to accept one version of events over another or others; the legitimacy of the legal principles that the judge relied upon; the act of 'judging' another; and questions of objectivity, fairness and transparency.[71]

2.5.3 Social practice

The final stage of analysis in Fairclough's three-dimensional model is discourse as *social practice*, which considers the relationships between texts, processes and their social conditions.[72] In this stage, the analyst must theorise and describe 'the social processes and structures which give rise to the production of a text' and 'the social structures and processes within which individuals or groups as social historical subjects, create meaning in their interaction with texts.'[73] The analyst explains what texts *do* in the world—their power and social effects—with reference to broader social theoretic models.[74] The concepts of power,

[69] Ibid 82.

[70] Fairclough, above n 23, 78.

[71] For example, the Australian Feminist Judgments Project involved a group of academics who apply feminist perspectives to original legal judgments, and is a significant, contemporary example of transgressive readings and re-writings of judgments so as to demonstrate judicial subjectivity, and the possibility of alternative interpretations and legal outcomes: *Australian Feminist Judgments Project: Re-Imagining and Re-Inventing Australian Court Decisions* <http://www.law.uq.edu.au/the-australian-feminist-judgments-project>; see also Heather Douglas et al, *Australian Feminist Judgments: Righting and Rewriting Law* (Bloomsbury Publishing, 2014).

[72] Fairclough, above n 23, 26.

[73] Wodak, 'What CDA Is About - A Summary of Its History, Important Concepts and Its Developments', above n 22, 3.

[74] Luke, above n 45, 102.

hegemony and ideology, theorised in more detail below, help the analyst conceptualise the relationship between discourse and social inequality.[75] I therefore consider how criminal justice discourse constitutes offensiveness in light of structural and institutional aspects of the criminal justice system, incorporating broader ideas on swearing, purity, (dis)order and disgust (see Part 2.7 below) into my analysis. An example of where I interrogate the relationship between power and inequality is in Chapter Nine, which examines how the social practice of swearing at police officers is transformed into the more abstract notion of 'disrespecting authority', an abstraction that has become naturalised in criminal justice discourse and broader understandings of how the public should, or should not, interact with police. I argue that discourse plays a fundamental role in sustaining and increasing police discretion, separating 'the police' from 'the public', promoting unequal power relations between these two groups, and enabling ideas about police authority to 'develop roots into the system'[76] so that the imposition of power by police over the populace appears natural or 'given'.

What should transpire from a three-dimensional approach to CDA is a 'principled and transparent shunting back and forth between the microanalysis of texts using varied tools of linguistic, semiotic, and literary analysis and the macroanalysis of social formations, institutions, and power relations that these texts index and construct'.[77] At every stage I will not simply describe a text, but also *interpret* its interactional processes, and *explain* the relationship between interaction and social context. Emphasis and choice inevitably influence each stage of my analysis, and for this reason, I remain conscious that my research practice is influenced by a pre-determined set of questions and personal subjectivities that arise from my experiences working in the criminal justice system.

2.6 Power and ideologies

The concepts *power* and *ideologies* are integral to my analysis of how offensiveness is constituted through criminal justice discourse. This part of the chapter grounds these potentially nebulous terms that I employ throughout the thesis. Power is central to, and further theorised in, my penultimate chapter, which is concerned with how power, order and authority are constructed and legitimised in criminal justice discourse.

[75] Brenda McKenna, 'Critical Discourse Studies: Where to From Here?' (2004) 1 *Critical Discourse Studies* 9, 10.

[76] David Paletz and William Harris, 'Four-Letter Threats to Authority' (1975) 37 *The Journal of Politics* 955, 963.

[77] Luke, above n 45, 100.

2.6.1 Power

CDA is 'where analysis seeks to understand how discourse is implicated in relations of power'.[78] An analyst must be attuned to how ideas and conventions relating to power are naturalised through language, including how people obtain, exercise, resist, subvert or alter distributions of power.[79] This is not to ignore the fact that power can be enacted through material action, but to emphasise that power is also constructed and disseminated through language. Much of my thesis is concerned with power struggles expressed through the language of law, and through language about 'the law'. Unequal power relations are implicated in a number of assumptions interrogated in my thesis: that judicial officers or police officers, are appropriate arbitrators of offensive language (Chapters Five, Eight and Nine); that experts in linguistics should be excluded from giving evidence in offensive language trials (Chapter Five); that 'the reasonable person' has no history, culture or racial identity (Chapter Eight); that there are contemporary community standards on offensive language (Chapter Eight); that swear words best not be uttered in certain contexts, such as in the vicinity of women and children (Chapter Seven); and that there is an ideal minimum standard of language use in public, to which we should all aspire (Chapter Eight).

In conceptualising power and its relationship with language and the law, I draw primarily on Foucault's notion of power as relations of difference.[80] According to Foucault, power is not predetermined; it is not something that a person or an institution either has, or does not have. Nor is power a fixed unit of exchange. Instead, power is relational; it exists in relations of power and is a site of 'ceaseless struggles and confrontations':[81] 'power is not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategical situation in a particular society.'[82]

Consider, for example, a situation in which an Indigenous woman swears at a police officer. This social practice can be recontextualised (see above) in more abstract terms as resisting or contesting unequal power relations, including challenging the legitimacy of white authority over Indigenous Australians. The police officer might exercise her discretion to charge the

[78] Hilary Janks, 'Critical Discourse Analysis as a Research Tool' (1997) 18(3) *Discourse: studies in the cultural politics of education* 329, 329.

[79] Wodak, 'What CDA Is About - A Summary of Its History, Important Concepts and Its Developments', above n 22, 11.

[80] Ruth Wodak, 'Aspects of Critical Discourse Analysis' 11 <http://userpages.uni-koblenz.de/~diekmann/zfal/zfalarchiv/zfal36_1.pdf>; Michel Foucault, *The History of Sexuality Vol 1* (Penguin Books, 1978) 94–7.

[81] Foucault, above n 80, 92.

[82] Ibid 93.

Indigenous woman with an offensive language crime, thereby compelling her to physically come before a Court and be dealt with according to 'the law'. If this exchange were to take place in the Northern Territory, a police officer might exercise their discretion to conduct a 'paperless arrest' of that Indigenous woman, so as to hold her in custody for up to four hours (or 12 hours if she is intoxicated), then issue her with a criminal infringement notice.[83] Then consider occasions in which a police officer declares a defendant to be 'under arrest', or a magistrate declares a defendant 'guilty' of using offensive language. Through these speech acts,[84] the police officer and magistrate are exercising power over the defendant, constraining her physical autonomy, perhaps forcing her to surrender money, and beyond this, shaping and constraining the choices that a defendant might have outside the institution of the law (including in job prospects, relationships and so on). These are examples of 'unequal encounters'[85] between participants in the criminal justice system, in which a person, after swearing in public, may be contesting their position of relatively less power vis-à-vis that of a police officer, who by virtue of her or his office, is able to exacerbate that inequality by punishing, controlling and constraining that person's actions and words.

In using CDA as my primary theoretical framework, I am also concerned with how linguistic forms (for example, metaphors, presuppositions, the passive voice or the simple present tense) are used in various expressions and manipulations of power. On many occasions throughout my thesis I show how judicial officers regularly use *presuppositions*—propositions embedded in clauses so that they are presented to the reader as 'given', already known or in existence[86]—to augment their discretion and/or increase the impenetrability of their reasoning. As I explain in Chapter Eight, presuppositions can be cued with the definite article 'the', such as in the sentence: '*The* reasonable person would find the defendant's language insulting'. In this sentence '*the* reasonable person' is presumed to be already in existence (unlike where the *indefinite article* is used, as in '*a* reasonable person'). I will demonstrate that presuppositions enable judicial officers to avoid the question of *who* this reasonable person is, what background they have, and which viewpoints they hold, and hence allow judicial officers to evade their responsibility to provide adequate reasons for their legal findings.

[83] *Police Administration Act 1978* (NT) ss 123 and 133AB.

[84] John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, 1969); See John Austin, *How to Do Things with Words* (Oxford University Press, 1975); Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton University Press, 2009) 162–6; Judith Butler, 'Burning Acts: Injurious Speech' (1996) 3(1) *The University of Chicago Law School Roundtable* 199; Fairclough, above n 23, 46.

[85] Fairclough, above n 23, 44–6.

[86] Ibid 152.

2.6.2 Ideologies

Ideologies are an important means by which unequal power relations are established and maintained; as sociologist John Thompson has recognised, ideology is 'meaning in the service of power'.[87] Similar to Thompson and Fairclough, I conceive of ideologies in this thesis as particular ways of representing and constructing society, rather than as class-driven 'belief systems'.[88] I further draw upon sociologist Göran Therborn's three-level analysis to consider how ideologies structure meaning.[89] Therborn has conceptualised ideologies as defining:

1. what exists and what does not exist;
2. what is good, just and appropriate, and what is not; and
3. what is possible or impossible.[90]

For example, one might adopt the ideological position that the reasonable person exists in the law. Or, one might instead argue that although the reasonable person does not exist, the idea of the reasonable person is a fair, appropriate and just standpoint from which to judge human behaviour in law. Alternatively, one might form a view that the reasonable person does not exist, and that the standard is inappropriate, unfair and unjust, but nevertheless, that the reasonable person has become so entrenched within legal areas (such as in the legal areas of defamation, negligence or involuntary manslaughter), that it would be practically impossible to replace the reasonable person standard with an alternative, more appropriate viewpoint. In this framework, ideology is constituted at three levels: what exists, what is good and what is possible, with ideological arguments considering one or more of these three levels.[91] In the following chapters, I examine a number of ideological propositions in relation to the reasonable person, and more broadly, in relation to offensive language crimes: their purpose, their appropriateness and their fairness (or lack thereof). I consider whose interests are served by dominant ideological positions, and what power relations are being maintained by ideologies.

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[87] John Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Cambridge University Press, 1990) 5.

[88] Fairclough, above n 5, 86–91.

[89] Göran Therborn, *The Ideology of Power and the Power of Ideology* (Verso, 1999).

[90] Ibid.

[91] See also Cresswell, above n 4, 14.

2.6.2.1 Language ideologies

I use a particular phrase to refer to 'taken-for-granted "common-sense" knowledge' about how language works: 'language ideologies'.[92] I apply sociolinguist Diana Eades's work on 'language ideologies' in the law, where she has argued that language ideologies 'permeate the legal process'. [93] Significantly, sociolinguistic and linguistic anthropologist Jan Blommaert has recognised that language ideologies are socially, culturally and historically conditioned.[94] The impact of language ideologies extends beyond language; they 'serve to rationalize existing social structures, relationships and dominant linguistic habits'. [95] I further theorise and apply the concept of language ideologies to criminal justice discourse in Chapter Five, in which I explore how judicial officers 'masquerade' as linguists in offensive language cases.

2.6.2.2 Common sense and genesis amnesia

My concern with language ideologies is closely connected with my inquiry in this thesis as to how common sense 'wisdom' is acquired in relation to offensiveness. Common sense is an essential component of legitimation; once ideas attain the status or appearance of common sense, they become very difficult to challenge or undermine.[96] To unravel these 'truths', a critical scholar must demonstrate that common sense ideas are not natural, but have been naturalised over time. A useful concept I employ in my thesis is that of 'genesis amnesia', a phrase coined by sociologist Pierre Bourdieu to encapsulate the process by which we forget the history of human-made 'truths', a process of 'the forgetting of history which history itself produces'.[97] Bourdieu has argued that genesis amnesia is 'encouraged (if not entailed) by the objectivist apprehension which, grasp[s] the product of history as an *opus operatum*, a *fait accompli'*. [98] This results in an 'unconscious'[99] of how common sense knowledge is produced, and thus this 'knowledge' becomes uncontested and largely uncontestable. I will illustrate the operation of, and attempt to unstitch, instances of genesis amnesia throughout my thesis, particularly in Chapters Three and Six, where I interrogate historical and contemporary reactions of disgust, and the (mis)attribution of harms to swear words. In the following

[92] Eades, above n 2, 241.

[93] Ibid.

[94] Jan Blommaert, *Discourse: A Critical Introduction* (Cambridge University Press, 2005) 253.

[95] Eades, above n 2, 242.

[96] Van Leeuwen, above n 23, 20–1; for a feminist critique of common sense 'knowledge' in the law, see Graycar and Morgan, above n 4.

[97] Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977) 79.

[98] Ibid; see also van Leeuwen, above n 23, 20–1.

[99] Bourdieu, above n 97.

chapter, I begin this unravelling by showing how ideas and practices in the Victorian period constituted ideas about swear words being dirty or dangerous.

2.7 Interdisciplinary approach

Critical discourse analysts recognise that the inextricable link between linguistic and social matters necessitates an interdisciplinary approach to its scholarship.[100] An interdisciplinary approach is central to understanding 'how language operates in representing and transmitting knowledge, in organizing social institutions, or in enacting power'.[101] In this part, I explain how I adopt an interdisciplinary approach in my thesis, using a range of literature to critique constructions of offensive language crimes in criminal justice discourse.

As I explain in my doctrinal analysis (Chapter Four), community standards of offensiveness are deemed a matter for 'judicial notice', upon which expert evidence is neither necessary nor permitted. Accordingly, the law has thus far resisted any incursion by linguistic experts when determining offensiveness in law. I show in Chapter Five how judicial officers are given immeasurable freedom to pick and choose from whichever linguistic or folk-linguistic ideas and theories they see fit, without being subjected to the kinds of rigorous critique to which linguists are exposed. I rely on a range of linguistic studies and ideas to critique judicial assumptions about swearing throughout my thesis and offer an essential, informed perspective to ideas in the criminal law about swearing, order and place.[102]

2.7.1 Swearing

As my thesis interrogates assumptions about swear words in criminal justice discourse, it is important to establish what I mean by the phenomenon of swearing. My thesis uses the phrases 'swear words', 'curse words' or 'four-letter words' more or less interchangeably to refer to an ever-changing assortment of terms that have been socially tabooed. The word *taboo*, deriving from the Tongan term *tabu*, refers to a 'ban or inhibition resulting from social custom or aversion'.[103] Virtually all societies retain taboos against the use of certain words.[104]

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[100] Martinez, above n 27, 126.

[101] Ibid.

[102] See especially Jay, above n 64; Timothy Jay, *Why We Curse: A Neuro-Psycho-Social Theory of Speech* (John Benjamins, 1999); Wajnryb, above n 4; Allan and Burridge, above n 4; Melissa Mohr, *Holy Shit: A Brief History of Swearing* (Oxford University Press, 2013); Tony McEnery, *Swearing in English: Bad Language, Purity and Power from 1586 to the Present* (Routledge, 2006).

[103] Jay, above n 64, 153; citing *The American Heritage Dictionary of the English Language* (Houghton Mifflin, 2000); see also Kate Burridge, 'Linguistic Cleanliness Is Next to Godliness: Taboo and Purism' (2010) 26 *English Today* 3.

No words are universally tabooed and swear words are constantly being discarded or invented, and their taboo value modulated or augmented with time. As linguist Sidney Baker recognised in 1945: '[i]t is probable that several of the vulgarisms against which objection is raised today will gradually fall into disuse for the simple reason that they have laboured too long and have been decolourized.'[105]

Being ever-changing, it is impossible to delimit a stable list of swear words. However, swear words have a number of properties in common. They are generally used figuratively; in other words, they are not interpreted literally (although they can be), and are mostly restricted to colloquial styles of language.[106] Thus we recognise the exclamation: 'Fuck off!' which employs a colloquial style, but would be taken aback if a person were to use the more formal expression: 'Copulate off!' Or, as cultural and English language historian Henry Hitchings has pointed out, the expression 'Fuck me!' should not (usually) be understood as an invitation, but an exclamation of shock or surprise.[107] An example of the literal use of a swearword would be when the word 'fuck' is used to denote 'have intercourse' (as in 'let's fuck tonight') or when 'shit' is used literally to describe faeces (as in 'to take a shit'). Because of this, swear words are not necessarily offensive due to their denotative meaning. 'Vagina' has the same denotative meaning as 'cunt', and yet the word 'vagina' is not generally considered to be offensive or vulgar. In Chapters Five and Six, I will discuss instances in offensive language cases where judicial officers have confused a swear word's denotation with its connotations, mistakenly argued that swear words are necessarily sexual, or assumed that a word is necessarily offensive if it has a sexual connotation.

Linguists have identified a number of other ways to recognise swear words. One can consult reference works on curse words or taboo language, or examine instances in which people substitute euphemisms or circumlocutions for 'unmentionables' (itself a euphemism), such as the utterance of 'shoot' or 'sugar' instead of 'shit' or other avoidance strategies, such as 'the f-word', 'c---' or 'b*tch'.[108] The ideological impact of such circumlocutions, when used in criminal justice discourse, will be examined in Chapters Three and Six. One can also locate the coprolalia (uncontrollable swearing) of those individuals with Tourette's Syndrome who tend to shout the most inappropriate words in their language.[109] As Jay has explained, in the

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[104] Geoffrey Hughes, *Swearing: A Social History of Foul Language, Oaths and Profanity in English* (Blackwell, 1991) 8–9.

[105] Sidney Baker, *The Australian Language* (Angus and Robertson, 1945) 257–8.

[106] Allan and Burridge, above n 4, 75.

[107] Henry Hitchings, *The Language Wars: A History of Proper English* (Farrar, Straus and Giroux, 2011) 241.

[108] Allan and Burridge, above n 4; Fleming and Lempert, above n 62, 5–6.

[109] Jay, above n 36, 154.

United States, those with Tourette's Syndrome tend to shout words such as *fuck* or *motherfucker* but not *poop*.[110]

Swear words can also be distinguished from other words in the English language by identifying their semantic range. Swear words may refer to or constitute:

a) sexual organs and activities (for example, 'cunt', 'dickhead' or 'wanker');
b) religious figures or beliefs (for example, 'Damn it' or 'Jesus Christ');
c) scatological objects or ideas (for example, 'shit', 'piss' or 'bloody');
d) animal names (for example, 'cow', 'bitch' or 'dog');
e) ancestral allusions (for example, 'son of a bitch' or 'bastard'); or
f) offensive slang (for example, 'cluster fuck').[111]

My analysis in this thesis is confined to these particular semantic fields. The scope of my thesis does not extend to considering judicial language ideologies in relation to ethnic, religious, racial or other discriminatory slurs (for example, 'nigger' or 'faggot') or words that refer to perceived physical, psychological or social deviations (for example, 'retard' or 'loser')—although these areas warrant further inquiry from a CDA perspective.[112] In Chapters Six and Ten I question why police and judicial officers tend to use offensive language charges to target swear words, where they might more appropriately be used to sanction the use of slurs based on the target's (actual or perceived) religion, race, ethnicity, gender, sexual orientation, physical disability or cognitive impairment. A number of authors have further divided swear words into the categories of profanity, blasphemy, obscenity, vulgarity, slang, epithets, insults, slurs and scatology.[113] Although I consider the differences in *legal* meanings between words such as 'offensive', 'insulting', 'abusive', 'profane', 'obscene' and 'indecent' in Chapter Four, I do not draw semantic distinctions between these terms for the purposes of this chapter.

2.7.2 Purity, context and disgust

The concept and construction of expectations about what or who is 'in place' and 'out of place' are fundamental to the law's interpretation of whether language is offensive. I interrogate ideas about order/disorder and how this relates to constructions of context

[110] Ibid; Jay, above n 102, 3–7.

[111] Jay, above n 64, 154.

[112] For preliminary work in this area, see Elyse Methven, 'Racist Rants and Viral Videos: Why the Law Alone Can't End Racism' *The Conversation* (online), 6 April 2014 <http://theconversation.com/racist-rants-and-viral-videos-why-the-law-alone-cant-end-racism-30107>.

[113] Wajnryb provides a glossary of these terms in Wajnryb, above n 4, 17–22.

throughout my thesis. Thus, I turn at multiple points, in considering representations of (dis)order, offensiveness, and designations of people and their words as 'in place' or 'out of place', to the ideas of anthropologist and cultural theorist Mary Douglas in *Purity and Danger: An Analysis of Concepts of Pollution and Taboo.* In this book, Douglas identifies that taboo 'protects the local consensus on how the world is organised. It shores up wavering uncertainty. It reduces intellectual and social disorder.'[114] Taboo confronts and diminishes the threats posed by ambiguity and anomaly.

Importantly, Douglas conceives of dirt as being 'matter out of place'[115]—something that is in the wrong place at the wrong time. And when we denounce a concept, behaviour or thing as dirty, we taboo it.[116] But dirt (like swear words) is only deemed disgusting when it materialises in locations where it shouldn't be: under our nails, in our food or on clothing. In contrast, dirt is not met with reactions of disgust if situated where it is perceived to 'belong': outdoors, in a garden bed, in a playground or on a football field. Douglas's work therefore highlights the centrality of *context* to a culture's fear or disgust associated with things, words, ideas, behaviour and people. Dirt is 'a relative idea'. [117] As Douglas illustrates:

> Shoes are not dirty in themselves, but it is dirty to place them on the dining table; food is not dirty in itself, but it is dirty to leave cooking utensils in the bedroom, or food bespattered on clothing; similarly, bathroom equipment in the drawing room, clothing lying on chairs; out-door things in-doors; upstairs things downstairs; under clothing appearing where over-clothing should be, and so on.[118]

Douglas's definition of dirt as matter out of place presumes the existence of an order: a system or a mode of classification.[119] Douglas identifies that '[d]efilement is never an isolated event. It cannot occur except in view of a systematic ordering of ideas'.[120] To separate ideas and things into that which is dirty, and that which is clean, is to order our environment. This order is generally not transcribed into a set of clear rules (as with offensive language crimes), nor drafted into a legal code, but rather, it remains unstated and assumed: a symbol of shared societal 'standards' or 'expectations'. Labelling a word 'dirty' helps fashion and impose a symbolic order, and maintain the illusion of a consensus as to that order.

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[114] Douglas, above n 4, xi.

[115] Ibid 50.

[116] Ibid xi.

[117] Ibid 44.

[118] Ibid 44–5.

[119] Ibid 44, 50.

[120] Ibid 51.

I apply Douglas's exploration of matter designated to be 'in place' or 'out of place', and the relationship of such designations to conceptions of order, to my CDA of offensive language crimes. I use her work to underscore the relativity of ideas about offensiveness, and query whose interests they serve or undermine My thesis also considers, as Douglas has, how society responds to things deemed unclean – does it try to ignore the offending word, person, substance or behaviour, or do we contain it, attempt to displace it or even obliterate it?[121]

2.7.3 Symbolic constructions of community and the reasonable person

In order for the law to label speech criminally offensive, and thereby subject the person who used it to criminal sanction, there must be shared societal standards on appropriate and inappropriate language in the first place. My thesis argues that discourse plays a crucial role in fashioning an illusion of shared standards. Accordingly, the final text that informs my theoretical framework, primarily my analysis in Chapter Eight, is the essay of anthropologist Anthony Cohen, 'The Symbolic Construction of Community'.[122] Cohen has written that the word 'community'—like other abstract words including 'freedom', 'justice' or 'love'—is easily exploited as a 'symbol', allowing its 'adherents to attach their own meanings to it'.[123] Chapter Eight applies Cohen's ideas about the symbolic nature of community to the discourse surrounding 'community standards' and 'the reasonable person' in offensive language cases. I argue that the use, acceptance and application of phrases such as 'the reasonable person', 'community expectations' or 'community standards' fail to acknowledge, and prevent judicial officers from considering, the diversity of views on what is offensive in public places. I criticise magistrates and judges for not critically engaging with the question of *who* the reasonable person might be or what the community might entail; what values she, he or it might hold; what attributes they might have or what boundaries might enclose it; and what historical, cultural and political contexts inform their views. I argue that primary definers in the criminal justice system exploit the 'symbolic' nature of the reasonable person and the community in order to present their individual assessments of offensiveness as natural or common sense, and obscure or subjugate those ideas that deviate from their own. In short, they use these symbols to impose a semblance of shared standards about words that are 'in place' and words that are 'out of place'.

[121] Ibid 48–9.

[122] Anthony Cohen, *The Symbolic Construction of Community* (Ellis Horwood, 1985).

[123] Ibid 15.

2.8 Conclusion

In this chapter I have outlined my theoretical framework and methodological approach to examining how offensive language crimes are represented and legitimised in criminal justice discourse. I have set out the tools and texts that I will apply to my analysis, in particular, Fairclough's three-dimensional approach to CDA. I have defined key terms—namely swearing, discourse, recontextualisation, legitimation, power and ideology—that I employ in my thesis. I have summarised key concepts about order, place, dirt and disgust that inform my CDA of offensive language crimes. But before I apply CDA to my case studies on offensive language crimes, I will contextualise the subject of my inquiry by explaining how offensive language crimes developed in Australia, and the historical discourse which naturalised the assumption that 'four-letter words' should be punished. In the following chapter, I attempt to undo part of the 'genesis amnesia' that has caused certain swear words to be considered criminally offensive. I trace the historical path of offensive language crimes in Australia from 1849, focusing on the jurisdictions of NSW, Queensland and WA. Once this historical background is established, in Chapter Four, I conduct a doctrinal analysis of offensive language crimes: setting out key legal elements and issues that will be subjected to CDA in the remaining chapters of my thesis.

CHAPTER THREE
THE UNWIELDY PATH OF OFFENSIVE LANGUAGE CRIMES

On 19 October 1863, Police Magistrate Mr M'Lachlan presided over an assortment of lowly charges at Bendigo Municipal Police Court. The final charge heard that day was for obscene language, the accused being Mrs Ann Farrell, one of the Police Magistrate's 'particular acquaintances'. The charge had been brought by the plaintiff, Mrs Ann Hope Thompson, after a rental dispute between the two women had turned sour.

Farrell, 'deaf as a post', was directed to take her stand close to the witness box to hear what the plaintiff had to say. Thompson alleged that Farrell had called her 'the most obscene names'. Thompson had endured this abuse with 'the most Christian charity', not once returning a biting word.

What vile words had the defendant used? Mr Rymer, solicitor for the plaintiff, produced a piece of paper on which the language was written, and handed this to the Bench. 'Who wrote these words?' the Police Magistrate enquired. Thompson refused to answer. Farrell denied that she had used the words contained on the slip of paper. The strongest word she had used in the heated exchange had been calling Mrs Thompson a 'd____ fool'.

The Police Magistrate deliberated on the decision. Meanwhile the defendant 'indulged in sundry winks, nods, and shakes of the head at her opponent', all of which had a prejudicial effect on her case. The Police Magistrate immediately directed Farrell's attention to the Bench. He would 'make her hear'. She was well known to him, a blackguard and 'married to a nigger' who was in Court, and 'if he could not take care of her, he (the Magistrate) would.' Farrell was fined 40s for using obscene and abusive language. The Court adjourned.[1]

3.1 Introduction

In this chapter I examine historical aspects of the past forms, prosecution and commentary surrounding the punishment of offensive language crimes. I do this to situate these crimes in their social and historical context, and unravel present assumptions about the harms caused by swearing. I examine archived, digitised copies of rural, city and suburban Australian

[1] 'Municipal Police Court' *Bendigo Advertiser* (Bendigo), 20 October 1863 2.

newspapers, which provide a vast record of offensive language trials.[2] Although not authorised court reports, newspaper articles provide a rich resource of perspectives, commentary and sometimes almost verbatim accounts of arguments presented at trial, as well as the findings of presiding justices or magistrates. Regularly peppered with salacious remarks and accompanied by sanctimonious, disapproving commentary, these 'reports' influenced societal perceptions of obscene words and rationalised the punishment of the defendants who uttered them. They served as a 'potent instrument of social control' in an era in which 'gossip' and 'ridicule' were often an 'effective deterrent to misbehaviour'.[3] I enrich my analysis of these sources with existing literature on the history of offensive language crimes, including the research of Australian linguist Brian Taylor,[4] and criminal law scholars and historians Michael Sturma, Mark Finnane, Jo Lennan and Enid Russell,[5] who have explored different periods and aspects of this history.

In the first part of the chapter, I provide a condensed statutory backdrop to the operation of offensive language crimes from colonisation to the mid-20th century, focusing on the jurisdictions of NSW, Queensland and WA, in which the case studies that I examine in my thesis were tried. Following this, I analyse in detail a procedural aspect of the historical prosecution of obscene and indecent language crimes in Australia, employed in Farrell's case outlined above: the use of a slip of paper upon which the defendant's allegedly obscene or indecent words were written. I will argue that to modern observers, this slip of paper might seem an unsophisticated product of Victorian-era prudishness. However, such an observation fails to acknowledge our own pollution-avoidance mechanisms: our present day 'scrubbing and cleanings'.[6] As I explicate in Chapter Six, in modern offensive language cases, prudishness continues to regularly trump transparency, with swear words being substituted for indirect expressions such as 'the offending word', 'the part of the female anatomy' or 'the

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[2] National Library of Australia, *Digitised Newspapers* Trove <http://trove.nla.gov.au/newspaper/>.

[3] Michael Sturma, *Vice in a Vicious Society* (University of Queensland Press, 1983) 124.

[4] Brian Taylor, 'Unseemly Language and the Law in New South Wales' (1994) 17 *Journal of the Sydney University Arts Association* 23.

[5] Sturma, above n 3; Michael Sturma, 'Policing the Criminal Frontier' in Mark Finnane (ed), *Policing in Australia Historical Perspectives* (New South Wales University Press, 1987); Mark Finnane, 'The Politics of Police Powers: The Making of Police Offences Acts' in Mark Finnane (ed), *Policing in Australia: Historical Perspectives* (New South Wales University Press, 1987) 88; Mark Finnane, *Police and Government* (Oxford University Press, 1994); Jo Lennan, 'The Development of Offensive Language Laws in Nineteenth-Century New South Wales' (2007) 18 *Current Issues in Criminal Justice* 449; Jo Lennan, 'The "Janus Faces" of Offensive Language Laws: 1970-2005' (2006) 8 *UTS Law Review* 118; Jo Lennan, 'Laws Against Insult: History and Legitimacy in Coleman v Power' (2006) 10 *Legal History* 239; Enid Russell, *A History of the Law in Western Australia and Its Development from 1829 to 1979* (University of Western Australia Press, 1980); see also MO Tubbs, *From Penal Colony to Summary Penalty: An Historical Anatomy of an Offensive Act* (Honours Thesis, Macquarie University, 1979).

[6] Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966) 85.

expletive'. Following my examination of the use of the slip of paper in obscene and indecent language trials, I explore the prevalence and persistence of associations made between 'dirty words' and 'the Other'.[7] I argue that the exaggeration of difference, between the polite and the impolite, was essential to legitimising the punishment of obscene and indecent language. In the final part, focusing particularly on NSW, I show how alongside being characterised as a threat to 'public decency', profanities were increasingly characterised as a threat to *authority*: an authority embodied in the police force. A primary ambition of this chapter is to illuminate the sometimes shifting, but often surprisingly stagnant, discourses on offensiveness, emanating from the judiciary, politicians, the police, the public and the media. In doing so, I aim to undo part of the 'genesis amnesia'[8] that allows us to treat assumptions about swearing and offensiveness that I will examine in the ensuing chapters—ideas about order, authority, people, pollution and space—as common sense or natural.

3.2 The first offensive language crimes in Australia

> The ordeal of a four month's voyage, on board vessels where to their shame, be it spoken, oaths and profane language daily shock the ear, may, in some measure, prepare the minds of persons emigrating to this colony for what they have to encounter on their arrival.[9]

The first comprehensive offensive language crimes were enacted in the colony of NSW in 1849. Section 7 of the *Vagrancy Act 1849* (NSW) ('*1849 Act*') provided that a person could be apprehended by a police officer or a member of the public for using 'any profane indecent or obscene language to the annoyance of the inhabitants or passengers in any public street or place.'[10]

Prior to 1849, discrete crimes, prohibiting the use of abusive or insulting language to military personnel, employers or overseers had applied to select classes of persons (mainly convicts and felons), their purpose being to 'suppress and control the convict population'.[11] As Lennan

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[7] See Edward Said, *Orientalism: Western Conceptions of the Orient* (Penguin, 1st ed 1978, 1995) 25.

[8] Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977) 79; I discuss this concept in Part 2.6.2.2 of Chapter Two.

[9] 'Profane Swearing' *The Colonist* (Sydney), 2 March 1837 6.

[10] If convicted by a Justice of the Peace of such an offence, the defendant was liable to forfeit any sum not exceeding five pounds, and in default of immediate payment, 'committed to the common gaol or house of correction for any period not exceeding three calendar months': *Vagrancy Act 1849* (NSW) s 7; its form was similar to early nineteenth century legislation in the United Kingdom: the *Vagrancy Act 1824* (UK); the *Metropolitan Police Act 1839* (UK); and the *Town Police Clauses Act 1847* (UK).

[11] Lennan, 'The Development of Offensive Language Laws in Nineteenth-Century New South Wales', above n 5, 449.

has observed, 'this was precisely how they were used'. [12] In fact, the very first criminal trial in NSW was of convict Samuel Barsby, sentenced by Judge Advocate David Collins in 1788 to 150 lashes for, inter alia, calling sergeant marines 'bloody buggers'.[13] From 1806, legislation was enacted to prevent convicts from using abusive or insulting language to military personnel.[14] Felons or offenders were also prohibited from using abusive language to their employers or overseers.[15] These crimes were punishable by whipping or other corporal punishment, transportation or hard labour.[16] In 1825, Justices of the Peace were given the power to punish male convicts for 'misbehavior or disorderly conduct', including insolence or the use of improper language.[17] Punishment for such behavior included ten days at the treadmill, fifty lashes, solitary confinement on bread and water for seven days or confinement and hard labour for three months.[18]

When the *1849 Act* was enacted, it was at the height of the Victorian era, a 'cultural climate … in which sex and excrement were very rarely mentioned in polite society, where, in fact, people hesitated even to point vaguely in their direction.'[19] In this period, swear words and explicit references to certain body parts, human excreta and sex, provided a window into the embarrassing, the disgusting and the shameful—'the human body and its embarrassing desires'.[20] The dictates of Victorian society demanded that these tabooed aspects of humanity 'be absolutely hidden away in swaths of fabric and disguised in euphemisms'.[21] It was in this era that, as Sturma has noted, obscene and indecent language charges provided a State-sanctioned means by which citizens could reinforce elastic 'boundaries of respectability and social status which so much preoccupied the community'.[22] Sturma has documented that at Parramatta Court of Petty Sessions alone, there were 55 prosecutions for obscene language

[12] Ibid.

[13] ABC Radio National, 'The Birth of the Anglo Australian Legal System', *The Law Report*, 26 January 2016 <http://www.abc.net.au/radionational/programs/lawreport/the-birth-of-the-anglo-australian-legal-system/7006224>.

[14] Lennan, 'The Development of Offensive Language Laws in Nineteenth-Century New South Wales', above n 5, 449.

[15] Ibid.

[16] Ibid 450.

[17] *Male Convicts Punishment Act 1825* (NSW).

[18] Ibid; as Lennan has noted, in reality, settlers had already taken it upon themselves to punish convicts for insolence before the offence was legislated. The punishments, which the Justices of the Peace were entitled to impose summarily on assigned male convicts was increased in 1830 to 'once, twice or thrice' fifty lashes or other punishments: Lennan, 'The Development of Offensive Language Laws in Nineteenth-Century New South Wales', above n 5; *Offenders' Punishment and Transportation Act 1830* (NSW).

[19] Melissa Mohr, *Holy Shit: A Brief History of Swearing* (Oxford University Press, 2013) 191.

[20] Ibid 177.

[21] Ibid.

[22] Sturma, above n 3, 137.

during 1952, 95 the following year, and over 200 in 1854.[23] Of these cases, half were initiated by private civilians; the courts thereby serving as a public forum in which one could 'assert one's own moral worth and status' while at the same time 'downgrading others before the magistracy.'[24]

Alongside private citizens, the organisation officially charged with maintaining decorous language in public in accordance with the *1849 Act* was a professional police force consisting of the metropolitan force in Sydney and the rural constabulary, adapted from the British Peelian model (the London Metropolitan Police had been formed in 1829).[25] Police, tasked with enforcing inscrutable boundaries of social etiquette, also employed obscene and indecent language laws to maintain control and coerce respect. Police, as the designated guardians of civility among members of the public manipulated these laws to coerce respect for 'their authority'.[26]

The contents and administration of the *1849 Act* were equally informed by a preoccupation of the colony's administrators (as well as British politicians) with its predominantly criminal origins. Although in NSW there were more free citizens than convicts by the mid-19th century, prior to 1840, some 80 000 convicts had been transported to NSW.[27] Colonial elites expressed fears that convicts were 'tainted' by an inclination towards criminality and depravity, and that upon expiration of their sentences, they would become idle, criminal, or both.[28] This taint manifested itself via the convict tongue, said to speak a debased English. As British politician Edward Gibbon Wakefield wrote in his *Letter from Sydney* of 1829:

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[23] Ibid 129.

[24] Ibid 131, 135. Police initially derived their public order powers from English vagrancy statutes, as well as public offences

[25] Adjustments were made to the British model to fit the uniquely Australian context, including the perceived need to 'police the frontier' as well as adapt to ever-growing urban populations: Sturma, above n 5; a unified force was not permanently established in the colony of NSW until 1862: Sturma, above n 3; Police initially derived their public order powers from UK vagrancy statutes, as well as public offences ordinances and statutes, such as the *Vagrancy Act 1824* (UK) and the *Metropolitan Police Act 1839* (UK): Finnane, above n 5, 35.

[26] As I will illustrate in Chapter Nine, police continue to manipulate offensive language penalty notices and charges to maintain authority in public space, supported through strategies of legitimation in criminal justice discourse.

[27] Lennan, 'The Development of Offensive Language Laws in Nineteenth-Century New South Wales', above n 5, 451.

[28] Sturma, above n 3, 1; Andrew McLeod, 'On the Origins of Consorting Laws' (2013) 37 *Melbourne University Law Review* 103.

> Bearing in mind that our lowest class brought with it a peculiar language and is constantly supplied with fresh corruption, you will understand why pure English is not, and is not likely to become, the language of the colony.[29]

Wakefield's statement contained a number of assumptions that endure today: that there is such a thing as 'pure English'; that this pure English is the most desirable standard of English; that deviations from this standard correspond to a 'corruption' of the English language; that corrupted language standards emanate from a lower or 'lowest' class; and finally, that 'bad language' is indicative of deviance.[30]

3.3 NSW and Queensland Vagrancy Acts

3.3.1 Indecent, obscene or profane words

The fear that the colony's inhabitants would succumb to a corrupted form of English; a desire to control those inhabitants and their speech; and a fixation with public politeness, informed the enactment of the crimes of using obscene, indecent or profane words in public, in the *1849 Act* (see above). The *1849 Act* was repealed and replaced only two years later, by the *Vagrancy Act 1851* (NSW) ('*1851 Act*'). The *1851 Act* broadened the scope of language made punishable in NSW.[31] Section 5 added the offences of singing 'any obscene song or ballad' and writing or drawing 'any indecent or obscene word figure or representation' to the offence of using 'any profane or indecent obscene language'. I examine the meaning of the terms 'indecent', 'profane' and 'obscene' in Part 3.6 below. Such conduct or words were made punishable when used 'in any public street thoroughfare or place or within the view or hearing of any person passing therein.' Charges were determined at a summary level by a Justice of the Peace or Police Magistrate. If convicted, the defendant could be punished with a fine of up to five pounds, and in default of such fine, imprisonment for three months.[32]

3.3.2 Threatening, insulting or abusive words

In addition to the proscribed categories of words in s 5, s 6 of the *1851 Act* criminalised the use of 'any threatening abusive or insulting words or behaviour' in any public street,

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[29] Edward Gibbon Wakefield, Letter from Sydney, the Principal Town of Australasia, published in December 1829, quoted in Sidney Baker, *The Australian Language* (Angus and Robertson, 1945) 3.

[30] See especially Chapters Five and Eight.

[31] *Vagrancy Act 1851* (NSW).

[32] Ibid s 5.

thoroughfare or place. Such language was made punishable by a fine of five pounds, and in default, imprisonment for three months. Parallel offences to those contained in the *1851 Act* were enacted in Queensland in ss 5 and 6 of the *Vagrant Act 1851* (Qld). In both NSW and Queensland, an offender could only be convicted for using threatening abusive or insulting words if she or he had 'intent to provoke a breach of the peace', or if the words had been uttered in circumstances 'whereby a breach of the peace may be occasioned'.[33] The breach of the peace element was removed in NSW in 1908.[34]

The adjectives threatening, insulting and abusive were not defined in statute; however they were generally interpreted to apply to speech that undermined a person's dignity or reputation, hurt her feelings, or threatened physical harm or retaliation, such as on 18 July 1875, when Jane Black was charged and convicted at Rockhampton Police Court for having used threatening and abusive words and thereby provoking a breach of the peace. Black had said to Mr J. C. Barber, Inspector of Nuisances, 'I'll knock your ____ off'. I'll watch you until I get you into a public-house, and then I'll smash you. If I could handle a gun I'd shoot you like a dog.'[35] Vague definitions of the adjectives were eventually developed, with 'threatening', 'abusive' and 'insulting' said to represent a descending order of violence, with threatening the most serious, and insulting the least.[36] In 1920, the High Court of Australia defined the term *insult* as 'to assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to, to affront, outrage'.[37] Words were characterised as *abusive* if they employed or contained 'bad language

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[33] Ibid s 6; *Vagrant Act 1851* (Qld) s 6. The importance of the additional breach of the peace element, contained in the offence of using threatening abusive or insulting words or behaviour in any public street thoroughfare or place, was emphasised by Griffith CJ in *R v The Justices of Clifton; Ex parte McGovern* [1903] St R Qd 177. In that case, it was held that an offence was committed if the defendant intended to provoke a breach of the peace or if, without that intention, the defendant's words resulted in a breach of the peace. The Court rejected a construction that would result in a person being convicted for using threatening, abusive, or insulting language, which might possibly, under some circumstances, occasion a breach of the peace. As Griffith CJ stated: 'That, in effect, would mean that any person making use of oral defamation to another in a public place would be guilty of an offence, and would practically make it an offence punishable on summary conviction, to defame a man to his face in the street, even though a breach of the peace was not intended and none, in fact, occurred; and the duty would be cast upon the Bench of deciding whether the particular words might have occasioned a breach of the peace. That would be a very serious responsibility to place upon the magistrates, and we ought not lightly to hold that the Legislature has imposed it in the absence of clear or unambiguous words, apart from the creation of a new form of criminal responsibility.'

[34] *Police Offences (Amendment) Act 1908* (NSW).

[35] 'Rockhampton Police Court: Friday, July, 18' *Rockhampton Bulletin* (Rockhampton), 19 July 1873 2 (omission in original).

[36] Tim McBride, '"The Policeman's Friend" Section 3D and the Police Offences Act, 1927' (1971) 6 *Victoria University of Wellington Law Review* 31, 43; DGT Williams, 'Threats, Abuse, Insults' [1967] *Criminal Law Review* 385.

[37] *Thurley v Hayes* (1920) 27 CLR 548 (Knox CJ, Gavan Duffy and Rich JJ), referring to the Oxford English Dictionary. See also *Annett v Brickell* [1940] VLR 312; *Jordan v Burgoyne* [1963] 2 QB 744.

or insult', were 'scurrilous' or 'reproachful', while *threatening* words conveyed an intention to harm a person or her property.[38]

In NSW, the *1851 Act* was eventually replaced by the *Vagrancy Act 1901* (NSW), and again less than a year later by the *Vagrancy Act 1902* (NSW) ('*1902 Act*'). The *1902 Act* transposed ss 5 and 6 of the *1851 Act* into ss 7 and 8 of the *1902 Act* (with the addition of some punctuation).[39] The legislature opted for a less punitive approach to the use of profane, indecent or obscene language; or threatening, abusive or insulting words in a public place, removing the penalty of imprisonment for both offences and providing a maximum fine of five pounds.

The equivalent provisions in Queensland—ss 5 and 6 of the *Vagrant Act 1951* (Qld)—were not replaced until 1931, with the enactment of the *Vagrants Gaming and Other Offences Act 1931* (Qld) ('*VGOO Act*'). Section 7(1) of the *VGOO Act* omitted the 'breach of the peace' requirement,[40] and stipulated that:

> Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear—
>
> (a) sings any obscene song or ballad;
>
> (b) writes or draws any indecent or obscene word, figure, or representation;
>
> (c) uses any profane, indecent, or obscene language;
>
> (d) uses any threatening, abusive, or insulting words to any person;
>
> (e) behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;
>
> shall be liable to a penalty of $100 or to imprisonment for 6 months.

3.4 Western Australian offensive language crimes from 1849

[38] McBride, above n 36, 43.

[39] Section 7 made it an offence to, in any public street, thoroughfare, or place, or within the view or hearing of a person passing therein, *inter alia*, sing any obscene song or ballad or use any profane, indecent, or obscene language. Section 8 made it an offence to in any public street, thoroughfare, or place, use any threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned.

[40] While there was no express requirement of a 'breach of the peace', s 7 did stipulate that the threatening, abusive or insulting words be used 'to any person'. This factor persuaded Gummow and Hayne JJ to find that the section proscribed insulting words that were directed to hurting an identified person, and that were provocative, in the sense that they either were intended to provoke unlawful physical retaliation, or were reasonably likely to do so: *Coleman v Power* (2004) 220 CLR 1, 54 (Gummow and Hayne JJ).

3.4.1 Police Ordinances of 1849 and 1861

In WA, UK statutes of general application operated from British colonisation—on 1 June 1829[41]—until the *Police Ordinance 1849* (WA) ('*1849 Ordinance*') came into effect.[42] The *1849 Ordinance* was drafted in the context of imminent convict transportation to WA in order 'to make further provision for the maintenance of the public peace and good order'.[43] Section 8 provided that a constable could apprehend without warrant any 'loose, idle, drunken, or disorderly person whom he shall find [in any street or public place] disturbing the public peace'. In 1861, the provisions of the *1849 Ordinance* were deemed insufficient for the purposes of WA, and the Ordinance was repealed and replaced by the *Police Ordinance 1861* (WA) ('*1861 Ordinance*'), which, similar to the early NSW and Queensland vagrancy acts, comprised a 'confused jumble' of Imperial enactments.[44] Sections 11 and 12 of the *1861 Ordinance* loosely resembled those outlined above, in that they made it a crime to use 'any profane, indecent, or obscene language to the annoyance of the inhabitants or passengers' or to use 'threatening, abusive, profane, obscene, indecent or insulting words or behaviour' to another or in the hearing of any person 'in a street, thoroughfare, or public place, or in a private enclosure or ground'. All categories of language were made an offence whether or not they were calculated to lead to a breach of the peace.[45]

3.4.2 *Police Act 1892* (WA)

Three decades later, the 1861 Ordinance was replaced by the *Police Act 1892* (WA) ('*Police Act*'), which remained substantially unchanged for more than a century.[46] The WA legislature took a more punitive approach to the use of profane, indecent or obscene language than its Queensland and NSW counterparts. When passed, s 59—a convoluted provision—provided:

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[41] Governor Stirling and the first colonists from England sailed into Cockburn Sound, south of Fremantle, WA, on 1 June 1829, which was later chosen as WA's 'Foundation Day': Russell, above n 5, 61.

[42] *Police Ordinance 1849* (WA). The term 'Ordinance' was used to signify a rule or body of rules enacted by an authority less than sovereign. Before the *1849 Ordinance*, police constables – appointed individually, rather than as a force – were confined to their common law powers. The Ordinance was limited in its application to Perth and Fremantle, but in 1859 its application was extended throughout the colony: Russell, above n 5, 41, 180.

[43] Russell, above n 5, 186.

[44] Ibid 186. Russell has argued that most of its substantive offences were 'inappropriate to the powers of the police, and to the conditions of the Colony, and were greeted with incredulity in the press'.

[45] *Police Ordinance 1861* (WA) s 12.

[46] Until the introduction of the *Criminal Law Amendment (Simple Offences) Act 2004* (WA); this moved many 'police offences' into the *Criminal Code Act 1913* (WA) ('*Criminal Code* (WA)').

> Every person who in any street or public place or to the annoyance of the inhabitants or passengers, shall sing any obscene song or ballad, or write or draw any indecent or obscene word, figure, or representation, or use any profane, indecent, or obscene language, shall be deemed guilty of disorderly conduct and be punishable accordingly.

The use of profane, indecent or obscene words attracted a considerable penalty of up to ten pounds or six months imprisonment (with or without hard labour).[47] The use of threatening, abusive or insulting words in any public or private place, whether calculated to lead to a breach of the peace or not, attracted a penalty of up to two pounds or imprisonment for one month.[48]

I have so far outlined the various vagrancy and police offences statutes in NSW, Queensland and WA, pursuant to which the use of indecent, obscene, profane, threatening, insulting or abusive words were prosecuted. In the following part, I examine how these statutes—particularly those prohibiting indecent or obscene language—were used to punish swearing. Drawing on newspaper reports of their prosecution and punishment, and a 1896 Circular of the NSW Department of Justice relating to the prosecution of obscene language, I discern historical attitudes towards swear words, pollution and containment.

3.5 Dirty words and their containment

As was the case with threatening, abusive or insulting words, the adjectives 'indecent', 'obscene' or 'profane' were not defined in NSW, Queensland and WA legislation. It was instead left to each individual magistrate or justice of the peace to determine whether a defendant's words should be characterised as indecent, obscene or profane, having regard to the circumstances in which the words were used.[49] Each of these terms—'indecent', 'obscene' and 'profane'—created a distinct charge. But *all* indecent, obscene and profane language charges were used to target words deemed to be 'bad' words, where the use of bad words was equated with bad character, impropriety and immorality.[50]

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[47] *Police Act 1892* (WA) s 54.

[48] Ibid ss 54 and 59.

[49] This continues to be the case, as explicated in Chapter Four, see: *Dalton v Bartlett* (1972) 3 SASR 549; *Hortin v Rowbottom* (1993) 68 A Crim R 381; *E (a child) v The Queen* (1994) 76 A Crim R 343.

[50] See, eg, 'The Vagrancy Act' *The Maitland Mercury* (NSW), 8 December 1849 2; 'Colonial News: Vagrancy Act' *The Goulburn Herald and County of Argyle Advertiser* (Goulburn), 25 December 1849 3.

Newspapers reporting the prosecution of obscene, indecent and profane language dedicated considerable print space to remarking on defendants' disheveled appearances, eccentric habits, immoral livelihoods or roguish demeanors. Two of the earliest obscene language cases prosecuted under the *1849 Act* were reported in the *Bathurst Free Press*. In the first, the accused, Margaret Fowler, had been charged with 'sinning against the Vagrancy Act, by giving utterance to grossly obscene language, in Durham street'.[51] The Police Magistrate found Fowler—an 'old offender' for whom 'prostitution was her only visible mode of obtaining a livelihood'—guilty of the charge, and sentenced her to one month's hard labour.[52] That same year, John Griffiths, 'a shearer, cook, dispenser of blackguardism', was charged with having made use of obscene and indecent language in breach of the *1849 Act*, after 'exhausting all the vocabulary of blackguardism in calling names such as flogger, bully, b_____y wretch, robber, rogue and very many more which could not be pronounced to ears polite'.[53]

Over time, nebulous common law definitions were developed to delineate the meanings of the terms indecent and obscene. Words were held to be obscene or indecent if they were highly offensive or disgusting according to recognised standards of common propriety.[54] The adjectives indecent and obscene were said to convey a different scale of impropriety, with indecency at the lower end of that scale and obscenity at the upper end.[55] Unlike the terms indecent or obscene, which generally alluded to matters of sex and the repulsive, *profane* language encapsulated blasphemous words, 'characterized by disregard or contempt for sacred things, especially, in later use, by taking God's name in vain; irreverent or blasphemous, ribald, impious, irreligious, wicked.'[56] In the late 19th and early 20th centuries, defendants were charged with using profane language for uttering words such as 'Christ', 'Jesus', 'Damn' (usually printed as 'D__n'), 'Surely to God' or 'By God'.[57] In contrast to

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[51] 'Vagrancy' *Bathurst Free Press* (Bathurst), 13 April 1850 5.

[52] Ibid.

[53] The complainant was a civilian, Benjamin Maloy. Griffith's charge was eventually dismissed by the Police Magistrate, who after considering the information, found that the more relevant charge was one of assault. Another information was filed to correct the errors of the first: 'Ruffianly Conduct' *Bathurst Free Press* (Bathurst), 29 December 1849 4 (omission in original).

[54] *Robertson v Samuels* (1973) 4 SASR 465, 473–4; *Romeyko v Samuels* (1972) 2 SASR 529; *Prowse v Bartlett* (1972) 3 SASR 472, 480.

[55] *Pell v Council of the Trustees of the National Gallery of Victoria* [1998] 2 VR 391, 394–5.

[56] Alan Demack, *Allen's Police Offences of Queensland* (The Law Book Company, 1971); see also *Pell v Council of the Trustees of the National Gallery of Victoria* [1998] 2 VR 391, 395 (Harper J).

[57] See, eg, 'A Peppery Constable' *The Empire* (Sydney), 27 July 1863 5; 'Profane Language' *The Maitland Weekly Mercury* (Maitland), 5 November 1910 4; 'Profane Language' *Barrier Miner* (Broken Hill), 4 December 1915 4; 'Profane Language Used' *Barrier Miner* (Broken Hill), 2 July 1917 2.

words the subject of indecent or obscene language proceedings, words considered profane were less likely to be censored in the courtroom and in newspapers: they were not necessarily 'unmentionables'. For example, the *Barrier Miner* in 1915 reported a case in which the Special Magistrate had 'no option' but to convict a man who, after the interval of a picture show, was heard uttering to a companion: 'Oh Jesus, I've lost my ticket!' A policeman overhead the remark, rebuked the user, and 'circumstances arose which … practically compelled the policeman to take action'. The Magistrate found that the language, although deserving of punishment, 'was not filthy' and a light penalty was imposed.[58]

So which words did courts commonly find to be highly offensive or disgusting when used in public space? The exact words that constituted charges of indecent or obscene language in the 19th and early 20th centuries are difficult to ascertain. In Australia, until at least 1959, most swear words were unspeakable in court, especially in the presence of women and children.[59] The vilest expressions were confined to the use of men, and only in the most unsanctified or private of spaces. Deciphering which words were off-limits is a near impossible task. Words considered obscene or indecent were rarely spoken aloud in court, and on rare occasions that they were, newspapers acted as the ultimate censors: providing their readership few meaningful clues as to the substance of the charges. From the few clues that *are* provided in newspaper articles, indecent or obscene words from the mid-19th to early 20th centuries included 'the four Indispensable Bs—*bastard*, *bitch*, *bloody* and *bugger'*,[60] slurs such as 'whore', 'devil' and 'bludger', and given their longevity,[61] undoubtedly (although neither printed nor hinted at) the words 'fuck' and 'cunt'. In the following part of the chapter, I examine a procedural aspect of obscene and indecent language trials, employed in courtrooms to contain the spread of dirty words.

3.6 The slip of paper

> He found she was using very bad language. 'This is a sample of it', he said, handing up the inevitable slip of paper with the inevitable language inscribed thereon.[62]

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[58] 'Disgraceful Language in the Park' *The Hay Standard* (Hay), 2 May 1986 2.

[59] See, eg, 'Used Indecent Language' *The Canberra Times* (Canberra), 4 November 1959 4; 'Slips of Paper Told Story' *The Argus* (Melbourne), 1 August 1956 7.

[60] Baker, above n 29, 256 (emphasis in original); see also Sturma, above n 3, 135–6.

[61] Mohr, above n 19; Geoffrey Hughes, *An Encyclopedia of Swearing: The Social History of Oaths, Profanity, Foul Language, and Ethnic Slurs in the English-Speaking World* (ME Sharpe, 2006).

[62] 'High Noon and High Language' *The Daily News* (Perth), 9 December 1912 3.

Courts across Australia devised a method of prosecuting offensive language charges, favouring decorum over transparency. To avoid speaking the impugned language in court, the prosecuting officer wrote the words on a slip of paper. This slip of paper was handed to the defendant in the dock, to confirm or deny that such words had been used. The paper was then handed to the Bench for adjudication. As expressed in the *South Australian Register* in 1884, the practice avoided 'any mention of obscenity, which in the presence of ladies is, to say the least, objectionable' and ensured that 'the ears of the people are not polluted with language that if used in any bar would ensure the delinquent being expelled therefrom'.[63] As early as 1875, the *Queanbeyan Age* questioned the transparency of this practice: its inconsistency with 'a trial in open court as the law contemplates'.[64] Not all magistrates appreciated the practice, as *The Argus*, a Melbourne newspaper, reported in 1916.[65] At a trial at Prahran Court of two men charged with using obscene language, Constable Seddon had proposed to transcribe the words on a piece of paper. The Magistrate instructed the Constable to instead say the words aloud, adding that any women present could leave. When Inspector Westcott objected, the Magistrate declared 'I am in charge of this court', and instructed the Constable to repeat 'the objectionable words', which he did, 'several women being in court at the time'.[66] From my examination of the newspaper reports on obscene and indecent language trials, this case at Prahran Court was the anomaly: the slip of paper was the norm, even if the defendant argued that she or he were illiterate, or could not read English. This applied to both the cases of Ethel Nelson in 1910 and Visko Duzovich in 1945, whose charges were heard in Fremantle and Perth Police Courts respectively.[67] When presented with a slip of paper upon which their allegedly obscene words were written, both defendants said they could not read. And without being informed of the words they were accused of using, both were convicted: the former fined 20 shillings, and the latter fined 2 pounds, with costs. [68]

The procedure of using the slip of paper was formally endorsed in a Circular of the Department of Justice, dated 19 January 1896.[69] The Circular contained the advice of Edmund Barton QC, then Attorney-General, in relation to the practice adopted in some indecent or

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[63] Thomas Heming, 'The Licensing Bench and Police Court: To the Editor' *South Australian Register* (Adelaide), 18 July 1894.

[64] 'The Benefit of the Doubt' *The Queanbeyan Age* (Queanbeyan), 23 January 1875 4.

[65] 'Bad Language Repeated' *The Argus* (Melbourne), 24 March 1916 8.

[66] Ibid.

[67] 'Unladylike Language, from a Married Woman' *The Daily News* (Perth), 16 April 1910 8; 'Thought He Could Swear In Bush' *The Daily News* (Perth), 17 September 1945 5.

[68] 'Unladylike Language, from a Married Woman', above n 67; 'Thought He Could Swear In Bush', above n 67.

[69] Edmond Barton QC, 'Obscene Language – Procedure Circular – No. 151' in AJ Goran, *Bignold's Police Offences and Vagrancy Acts: And Certain Other Acts* (Law Book Company of Australasia, 8th ed, 1951) 295–6.

obscene language trials of 'allowing the evidence as to the words used to be given by writing the language complained of on a piece of paper, which is then shown to the Bench and to the accused, and afterwards attached to the depositions.'[70] Barton had been asked to give an opinion as to the legality of the practice. He wrote that 'of course the accused is entitled to have all evidence given in his sight and hearing, and the Magistrate is bound to insist that this is done.'[71] However, Barton believed that the most 'sober' course of action would be to prevent the offending words from being repeated aloud in the courtroom:

> If the accused is expressly asked whether he will consent to the words being written down and read by the Magistrate and himself, or whether he insists on their being repeated in the hearing of the whole Court, there can be no doubt what his answer will be in nearly all cases. It is seldom, one would suppose, that people, when brought to Court in their sober senses, are not ashamed of the disgusting language they pour forth while intoxicated; and it is generally under more or less influence of liquor that the offence is committed.[72]

Barton advised that the 'proper course in all cases' would be to firstly ask the accused whether 'he' consented to have the words written down, for if the accused did not consent, and the practice was followed, this would be illegal and could vitiate a conviction.[73] If the accused did consent, the words were to be 'repeated so as to be heard by Magistrate and accused.'[74] Barton advised, however, that if an accused were content to have the 'disgusting language' uttered aloud in court, 'the Bench will often have a valuable guide to the character of the accused, and a means of satisfying itself whether he is a person who thinks little of vile words, drunk or sober.'[75] In this way, a mere procedural choice for the accused—whether to have the words read aloud or written on a slip of paper—not only went towards the accused's character, but also was indicative of her guilt or innocence. In Barton's esteemed opinion, should a defendant choose to air her linguistic transgressions in open court, she was a bad person, likely to use bad language.

The justification provided for the slip of paper was apparently simple: it presented a method of containment in a sanctimonious setting. The slip of paper prevented curse words from 'escaping' one's mouth and poisoning the ears of those who heard them. And the need for

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[70] Edmond Barton QC, 'Obscene Language – Procedure Circular – No. 151' in ibid.

[71] Ibid.

[72] Ibid.

[73] Ibid.

[74] Ibid.

[75] Ibid.

such a procedural barrier makes sense if one were to observe the belief—propagated by the police, the judiciary and the media—that 'bad' words possessed a magical, contaminative and otherworldly quality. Through metaphors and personification, the press bequeathed upon swear words properties of forcefulness and filth. In 1889, the *Fitzroy City Press* reported the case of one 'foul-mouthed' Frank Sheenan, said to have indulged in a '*volley* of disgusting phrases'.[76] In 1916, the *Advertiser* reported proceedings against Annie Ogilive for using insulting words.[77] Ogilive had greeted Constable Connelly with 'a *storm of invective* … too *strong* for repetition in open court.'[78] In these examples, through recontextualisation,[79] swear words were transformed into concrete, albeit entirely imaginary, harms. They became objects that could be hurled, flung about, and could inflict physical harm. Further, swear words were described as 'dirt' or 'filth', warranting removal from those whom they had infected: 'The magistrate remarked that there was plenty of decent words in the English language without having to resort to filthy words. This was not the first time the accused had been punished for the same offence. What people of his calibre wanted was a mouth wash.'[80]

The slip of paper could limit the contagion of swear words to as few persons as was necessary to obtain a successful prosecution: the prosecutor, the defendant and the magistrate. But this method of containment was by no means foolproof. Spectators in the courtroom, and the readership of newspapers, knew the nature of the words on this slip. Such knowledge fuelled journalistic speculation as to what those precise words might be. The clues provided by reporters were mainly indecipherable—a fill-in-the-blanks exercise: 'He kept on repeating "You ___ ___ ___" and continued swearing.'[81] This guessing game was evidently gripping enough for obscene language trials to be recounted devoid of their most essential content: the words that formed the subject of the charge. Through deletion, or replacement with euphemised forms—'she did use what was known as the sanguinary adjective'[82]—a writer could save face by dissociating herself from the taint of taboo, while escalating the condemnation surrounding these undisclosed words through conjecture. But the omissions or euphemised forms could not altogether prevent adulteration of the reader, invited through guesswork into collusion with the swearer, for '[t]o denote an expletive by its initial letter

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[76] 'Obscene Language' *Fitzroy City Press* (Fitzroy), 8 February 1889 2 (emphasis added).

[77] 'A Woman's Tongue' *Advertiser* (Footscray), 1 April 1916 2 (emphasis added).

[78] Ibid.

[79] Theo van Leeuwen, *Discourse and Practice: New Tools for Critical Discourse Analysis* (Oxford University Press, 2008) 13; see also Chapter Two.

[80] 'Obscene Language: Police Court' *Toodyay Herald* (Western Australia), 18 December 1936 6.

[81] 'What Is Indecent Language?' *Northern Standard* (Darwin), 9 October 1936 5.

[82] 'Indecent Language' *Fitzroy City Press* (Fitzroy), 23 February 1884 3.

followed with a dash is really to attract undue attention to that which the writer acknowledges himself ashamed of printing.'[83]

If modern observers were to venture back in time and witness obscene or indecent language trials of the past, the use of the slip of paper might seem a crude and primitive ritual. This abandoned product of Victorian-era prudishness would no doubt be inimical to current notions of open justice, including the values of transparency and accountability, according to which justice must be *seen* (and *heard*) to be done. But 'primitive'[84] though it may seem, as Douglas has recognised, such a seemingly crude, ritualistic practice might give modern society cause to reflect on the 'symbolic meanings' of our own 'scrubbings and cleanings'.[85] Accordingly, in Chapter Six, I consider how the practices of we 'moderns'[86] indicate an attempt to contain, or even eliminate, words perceived as 'offensive to the taste'[87] in offensive language cases. I illustrate how disgust towards swear words is expressed in modern cases by an aversion of police, judges and lawyers to repeating them in a courtroom setting: 'dirty words' are regularly replaced with indirect expressions such as 'the offending word', 'the four-letter word' or 'the expletive'. I argue that alternatives to tabooed expressions have become so naturalised in modern criminal justice discourse that they fail to be recognised as an affront to transparency, and therefore to justice. Disgust and its 'cosmic ordering'[88]—its ranking of people, ideas and language—is still present in offensive language trials. It just manifests (at least to our eyes) in more subtle ways. In the following part of this chapter, I show how from the mid-19th century in obscene and indecent language trials, it was not only swear words that elicited reactions of disgust, but also the people who used them.

3.7 Dirty words, dirty people

The idea that swear words were vile words, used by a lowly, criminal, dirty and/or an uneducated populace, pervaded popular perceptions of swearing in the mid-19th to early 20th centuries. The courts and the press devised categories of people with a proclivity for the vulgar: youths, drunkards, the poor, prostitutes, Indigenous Australians, foreigners, and other

[83] Julian Sharman, *A Cursory History of Swearing* (J. C. Nimmo and Bain, 1884) 176.

[84] Douglas, above n 6, 85.

[85] Ibid.

[86] Ibid.

[87] Charles Darwin, *The Expression of the Emotions in Man and Animals* (D. Appleton, 1886) 257; See also Miller's definition of disgust as a 'strong sense of aversion to something [or someone] perceived as dangerous because of its [or their] power to contaminate, infect, or pollute by proximity, contact, or ingestion': William Ian Miller, *The Anatomy of Disgust* (Harvard University Press, 1997) 2.

[88] Miller, above n 87, 2.

dark or dishevelled characters. As Wakefield's statement extracted earlier in this chapter expressed, the 'lower' classes (commonly Irish emigrants) or 'convict' classes were seen as sources and transmitters of moral depravity through their depraved language. Convicts were said to use their own 'criminal argot' or slang called *flash*, a term defined by Francis Grose in his 1785 *Classical Dictionary of the Vulgar Tongue* as 'the language used by thieves'.[89] Grose noted that the word *bloody* was also 'a favourite word used by the thieves in swearing.'[90] The 'larrikin' (a youth sub-culture of the 19th and early 20th century associated with deviant or nonconforming behaviour)[91] was similarly associated with bad language, with 'larrikin lingo' perceived to collide with the language of the criminal.[92]

The gentility's outward disdain towards dirty words, and their eagerness to associate swearing with the 'lowest classes' (as opposed to 'respectable' people), was manifest in the 1887 entry in the *Oxford English Dictionary* for the word *bloody*: 'In general colloquial use from the Restoration [1660] to about 1750; now constantly in the mouths of the lowest classes, but by respectable people considered "a horrid word" on par with obscene or profane language, and usually printed in the newspapers (in police reports, etc. as "b____y").' Four decades later, critic A G Stephens in *The Sydney Morning Herald* wrote of the 'vileness' of that same word:

> There is a common word often heard in Sydney streets on the lips of men in common talk, and shocking and disgraceful talk it is … This vileness exists in other Australian cities, and in some British and foreign cities, but really we have never heard it as bad as we hear it in Sydney … Thoughtlessness, carelessness and horrible custom allow it to go on without interference and without reproach … The constant use of the word by thousands of Sydney residents is vile.[93]

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[89] Hughes, above n 61, 14; citing Francis Grose, *Classical Dictionary of the Vulgar Tongue* (Scholar Press, 1785).

[90] Hughes, above n 61, 14; citing Grose, above n 89.

[91] See, eg, David Walker, 'Youth on Trial: The Mt Rennie Case' (1986) 50 *Labour History* 28; the term larrikin first appeared in print in the 1860s, and was thought to come from the Irish term 'larracking' or 'larking' about, in other words, making a nuisance of oneself in public: Graham Seal, *The Lingo: Listening to Australian English* (University of New South Wales Press, 1999) 39.

[92] See Seal, above n 91, 44.

[93] Written on 28 March 1927 and cited in: Baker, above n 29, 255. William Kelly in 1859 excused himself by using the word bloody in his book on the basis that it was an accurate portrayal of the language of the middle and lower classes, while at the same time distancing himself from these classes by describing the word as 'odious': 'I must be excused for the frequent use of this odious word in giving colonial dialogues, because general conversation amongst the middle and lower classes at the antipodes is always highly seasoned with it': William Kelly, *Life in Victoria* (Chapman and Hall, 1859); These observations were made even though in 1921, the use of the word bloody was declared indecent, following a High Court decision in which it was so considered. The Presiding Magistrate in convicting the defendant said that it was not commonly understood that the word 'bloody' was considered an indecent word, but due to the High Court decision, would treat the word as such in the future: 'Better Say Sanguinary' *Chronicle and North Coast Advertiser* (Queensland), 2 December 1921 5.

And yet, swear words were not the sole preserve of the lower classes, with members of the British elite observed to swear from the beginnings of colonisation. Governor William Bligh (b.1754—d.1817) was notorious for his swearing, including his utterance 'Damn the Secretary of State. He commands at home. I command here!' which would have been construed as incredibly offensive and capable of amounting to profane language at the time.[94] Associations between swearing, a lack of education and a lack of 'class' continue to this day, despite linguistic research which dispels myths about such associations,[95] and notwithstanding the fact that well-educated and powerful figures swear.[96] In 2012, former Australian Prime Minister Kevin Rudd was infamously caught on camera saying at the Copenhagen Climate Change conference, '[t]hose Chinese fuckers are trying to rat-fuck us.'[97] Responding to Rudd's outburst, then Opposition Leader Tony Abbott offered a gesture of solidarity, acknowledging '[w]ell, he wouldn't be the only politician to use colourful language behind closed doors.'[98]

In newspaper reports from 1850 to 1950, swear words were described not only as 'vile', but also as 'rotten', 'dirty', 'filthy', 'discoloured', 'foul', 'inferior' and 'contaminating'.[99] A number of these adjectives would be combined to accentuate a reporter's, police officer's or magistrate's disgust towards the defendant and her or his words. For example, in the case of Grant Casely, whose charge of indecent language was heard at Windsor Police Court in March 1934, Special Magistrate Hardwick bemoaned the phenomenon of young men at dance halls 'heard using this dirty, disgusting, filthy language. There is no necessity for it.'[100] Media commentators lamented the 'vile contaminating verbosity' overtaking the streets, and praised police officers' efforts 'to put down the foul, obscene language which has become so common in the streets and hotel bars, as to render it unfit for females to walk out of a

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[94] Taylor, above n 4, 38.

[95] Kristin Jay and Timothy Jay, 'Taboo Word Fluency and Knowledge of Slurs and General Pejoratives: Deconstructing the Poverty-of-Vocabulary Myth' (2015) 52 *Language Sciences* 251.

[96] In the United States context, see 'A Brief History of Presidential Profanity' [2012] *Rolling Stone* <http://www.rollingstone.com/politics/lists/a-brief-history-of-presidential-profanity-20121210>.

[97] 'Leaked Video Shows Rudd Swearing' *ABC News* (online), 19 February 2012 <http://www.abc.net.au/news/2012-02-19/kevin-rudd-swearing-video-leaked/3838352>.

[98] 'Abbott Not Innocent of Swearing' *SMH* (online), 23 July 2010 <http://www.smh.com.au//breaking-news-national/abbott-not-innocent-of-swearing-20100723-10nso.html>.

[99] 'Policeman Hears Boy Swear' *The Daily News* (Perth), 30 September 1941 5; 'Woman's Tongue Brings Trouble' *Shepparton Advertiser* (Victoria), 5 March 1917 2; 'Inferior English - Was Quite Understood' *The Daily News* (Perth), 26 July 1910 4; 'Lismore Police Court' *Northern Star* (Lismore), 4 June 1905 5; 'Indecent Language' *Windsor and Richmond Gazette* (NSW), 13 July 1901 6.

[100] 'Language Charge, Trouble at Dance Hall – Magistrate's Warning' *Windsor and Richmond Gazette* (NSW), 16 March 1934 1.

night.'[101] The media, the courts and the police presented a united front, advocating harsh criminal punishment as the only means by which to rid the streets of this pollution:

> These the Chairman of the Bench described as appalling in their filthiness and the quintessence of obscenity, indecency and insult. Personally he was of opinion that imprisonment without the option of a fine should have been imposed, but considering the fact that accused had pleaded guilty and had in a measure received provocation [the accused was refused a drink by Mr. Masou of the Chateau Mildura winery], a fined of £7 was inflicted—or in default two months' imprisonment.[102]

The impression that prevailed was one of dirty words being used by dirty or disorderly people, who threatened to contaminate, and thereby upset the order of, public space. Harsh criminal punishment was presented as the appropriate means with which to clean up, and maintain the order of, this space. But not *all* persons who used dirty words deserved harsh punishments, such as persons whose use of bad words was uncharacteristic, as I detail in the following part.

3.8 Separation and purification

The exaggeration of difference, between the polite and the impolite, was essential to legitimising the criminal punishment of obscene and indecent language. To fortify this boundary, magistrates, police officers and lawyers professed their ignorance at the 'filthy language' used by defendants.[103] As Minnie Watson's defence lawyer stated at Fitzroy Court on 21 February 1884, in relation to her charge of using indecent language: 'she did use what was known as the sanguinary adjective. Unfortunately the use of that adjective was too general, not amongst magistrates or lawyers perhaps, but amongst the general public.'[104] Another means by which to reinforce one's own refined status, and an accused's lowly one, was to infantilise or mock defendants, as Magistrate Stonham did at Richmond Court in 1949, when reprimanding two Royal Australian Airforce officers for their use of indecent language: 'I can't understand a man using filthy language. It doesn't make you a man; it only degrades yourself. Your parents would be very pleased to see the language you were using, wouldn't they!'[105]

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[101] 'The Police and Obscene Language' *Wellington Times and Agricultural and Mining Gazette* (Tasmania), 2 July 1896 3.

[102] 'Indecent Language' *The Mildura Cultivator* (Mildura), 11 March 1899 3.

[103] See, eg, 'Worst He's Heard: Woman's Filthy Language' *The Cumberland Argus and Fruitgrowers Advocate* (Parramatta), 5 January 1931 2.

[104] 'Indecent Language', above n 82.

[105] S.M.'s Warning' *Windsor and Richmond Gazette* (NSW), 28 September 1949 4.

Swearing was not only attributed to a poverty of income, it was also linked to its ensuing poverty of linguistic resources: 'The average 'swear-word' was merely an indication of neglected education and poverty of language and taste … It was weak and stupid.'[106] Obscene or indecent language charges delineated the educated from the uneducated. While a civilised man would blush at the utterance of swear words, a fool would remain unfazed, or might even take pleasure from such utterance. Such was the case of 'grey-haired and dark skinned' Jimmy Egan, who in 1955, appeared at Perth Police Court on a charge of having used obscene language. When shown the slip of paper, upon which was written the words he had allegedly uttered, Egan 'shook his head and said he couldn't read'. Blushing 'because there were a number of women seated at the rear of the court, the orderly read the script out to the man in the dock in very soft tones. Jimmy just grinned.'[107]

Respectable offenders were characterised as the anomaly. Such was the case of William Yates, 'a man of fine soldierly appearance', where it was observed that a person of his 'age and respectable appearance should have known better',[108] or the 'young lad named Dawson', told that it was 'disgraceful to see a decent looking lad like you charged with such an offence'.[109] For these men, swearing was not their expected mode of communication, but a temporary affliction caught as a result of inebriation: 'There was no doubt the defendant was worse for liquor or he never would have behaved as he did, as he was as a rule a most respectable lad.'[110]

While swearing was not fitting for 'fine men' or 'decent lads', it was to be expected of criminal Others, deviants and strangers. Reporters used an 'exclusionary discourse',[111] where the norm was anything other than a middle-upper class white, English speaking Christian male, who was both physically and mentally-able. Reports were peppered with details of a defendant's odd mannerisms, dishonourable occupations, dishevelled appearances, skin colours (where not 'white') and the disreputable company they kept. There was Peter Martin, 'a stranger … of no fixed abode' whose 'loathsome' language disturbed the peace of the township of Epping; James Silva, 'a colored laundryman', charged with indulging in vile expressions at a church by which a number of women were passing; Ethel Nelson, 'adorned with a black eye, and a black framed hat'; Ms Annie Wells, 'a woman of ill-fame' living

[106] '"Damn" and "Dash". Is Swearing Permissible?' *News* (Adelaide), 27 September 1928 5.

[107] 'One For A Circus' *Mirror* (Perth), 15 January 1955 4.

[108] 'Blamed the Drink' *Shepparton Advertiser* (Shepparton), 28 October 1918 2.

[109] 'Young Australia' *North Melbourne Advertiser* (North Melbourne), 19 February 1874 2.

[110] 'Under the Influence – He Fell from Grace' *The Coburg Leader* (Coburg), 23 February 1912 4.

[111] David Sibley, *Geographies of Exclusion: Society and Difference in the West* (Routledge, 1995) 14.

'amongst bad characters'; George Hurry, 'a man of color' who 'for two years … ha[d] been knocking about the town in the company of thieves and vagabonds'; Charlie Nundah, 'a Hindu'; 'Abrosina', whose 'rough fingers' stroked her 'battered brown rabbit-skin coat' with a 'bald spot on the collar'; James Gordon, 'a smiling gentleman of colour'; Mary Paltridge, 'a little, old woman, she seemed bowed with the weight of years … [s]habby, wrinkled and frail'; Thomas Gilbert, 'a dark-skinned son of the soil'; and Harry William Hebble, 'a one-legged pensioner' who 'suffered badly from nervous trouble'.[112] These were the persons alluded to in Barton's circular, who thought 'little of vile words, drunk or sober'.[113] For these 'unhappy possessors of a foul tongue',[114] the use of dirty language was an extension of their dirty selves. As this exclusionary discourse reveals, the policing and punishment of swearing was driven by a need to separate the dirty from the clean, and to punish those perceived as sources of moral pollution, in order to promote a vision of the ideal Australian community. In the following Chapters, I show how offensive language crimes are still informed by these goals, of 'separating, purifying, demarcating and punishing'[115] those deemed disorderly. In the following part I consider another central theme of my thesis: how criminal justice discourse on offensive language sought (and as I will subsequently show, still seeks) to uphold a 'public order' in which women and children remain unspoiled by vulgarity.

3.9 'Unladylike' language

> I don't like rotten, dirty language being hurled around … There were women in that tram, and it's not language fit for them to hear.[116]

At the start of this Chapter, I recounted the case of Margaret Fowler—an 'old offender' and 'prostitute'—found guilty in 1849 of having used obscene language under the *1849 Act*. Fowler's case attests to the fact that women have long been the subject of obscene language charges. Indeed, Sturma found in his survey of obscene language charges in the mid-

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[112] 'Bad Language in Epping' *Advertiser* (Hurstbridge), 18 February 1938 8; 'A Colored Linguist—Uses Obscene Expressions' *Williamstown Chronicle* (Williamstown), 10 July 1909 3; 'Unladylike Language, from a Married Woman', above n 67; 'Obscene Language' *Independent* (Footscray), 6 September 1890 2; 'Police Court. Thursday, April 24. Profanity and Vagrancy' *Bathurst Free Press and Mining Journal*, 24 April 1902 2; '"Bloody" an "Indecent Word"' *The Sydney Morning Herald* (Sydney), 20 December 1944 4; 'The Fading Smile' *The Daily News* (Perth), 7 July 1897 3; 'Cop Copped the Lot' *Mirror* (Perth), 13 November 1943 18; 'Bad Language and Its Sequel' *Singleton Argus* (Singleton), 7 February 1901 2; 'Obscene Language. Four Men Gaoled' *The West Australian* (Perth), 19 September 1933 12.

[113] Goran, above n 69.

[114] 'Bad Language and Its Sequel', above n 112.

[115] Douglas, above n 6, 5.

[116] 'Policeman Hears Boy Swear', above n 99.

eighteenth century that the number of men and women involved in obscene language cases (both as prosecutors and defendants) was 'fairly evenly divided'.[117]

Despite evidence that both men and women swore, the courts and the press deemed cursing 'unladylike'. Headlines such as 'Unladylike Language'[118] or 'Unladylike Language From a Married Woman'[119] portrayed a view that it was unnatural for a woman (especially a *married* woman) to utter a 'manly oath'[120]. In a society in which a woman was to endeavour, in her appearance, manner and speech, to be a 'lady', a woman who possessed 'a woman's tongue'[121] was 'anything but a lady'. [122] Just as a woman was expected to keep her house neat and tidy, and her appearance immaculate, she was expected to be pure of speech. Like women, children were at significant risk of being polluted by the filth of foul words. The censoring of curse words was advocated on the basis that children might catch the habit of swearing like one acquires a bad cold. Such fears were expressed in a letter to the *Hobart Town Mercury*, published on 11 December 1857:

> We know of nothing more likely to corrupt the rising generation than to subject them to such language till it becomes familiar to them …We all know how easily these bad habits are picked up by children; and we do think that a little more energy might be displayed by the police in putting down so contaminating and licentious practice, and one which seems to run riot unchecked and unpunished in the streets and thoroughfares in the city.[123]

The fear that this 'rising generation' would acquire the habit of cussing until bad language 'ran riot' on the streets, justified the goal of preventing the spread of swear words by way of criminal punishment. The vilest of expressions were confined to the use of men in masculine spaces, where a man could speak without moderation: a bar-room, a business meeting or a sporting contest. And we have far from shirked this idea that swearing is a predominantly male pursuit, to be conducted in masculine spaces, as I explain in Chapter Seven.

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[117] Sturma, above n 3, 132.

[118] 'Unladylike Language' *The Daily News* (Perth), 7 November 1904 1.

[119] 'Unladylike Language, from a Married Woman', above n 67.

[120] 'Profane Swearing', above n 9.

[121] 'A Woman's Tongue', above n 77.

[122] 'High Noon and High Language', above n 62.

[123] 'Drunkenness v Obscenity' *The Hobart Town Mercury* (Hobart), 11 December 1857 2.

3.10 Enforcing authority

I have so far argued that from the mid-19th century until the mid-20th century, the chief justification for punishing dirty words was that being dirty, they should be confined to private places where these acts were permissible. We can discern from this historical criminal justice discourse in relation to offensive language crimes that the punishment of swearing was part of a larger effort to tidy up public space and promote a clean, dignified vision of 'the community'. If disorderly or dirty persons used bad words 'out of place', this warranted chastisement and punishment. Judicial and media responses to those who used 'four-letter words' were largely negative; they were ridiculed, scolded and condemned. If 'ladies' or 'gentlemen' were found to have used bad language, their linguistic transgressions were deemed a 'one off' or 'out of character'. Those persons charged with dispensing, administering and critiquing the administration of criminal justice accounted for these 'ambiguous'[124] cases by depicting them as the anomaly. In sum, although the criminal law could not eradicate swear words altogether (even if proponents of obscene and indecent language crimes declared such an aim), it could aim to preserve the stratification of society by controlling the spaces and positions of people within society: labelling them either as a threat to public order, or neatly slotting them within that order.[125]

The historical discourse that I have so far set out, where attitudes of disgust are expressed towards bad words, used by bad language, as well as ignorance professed by the magistracy and constabulary of the content of foul words, continues in modern criminal justice discourse on offensive language. Alongside this discourse, in the second half of the 20th century, academics, legal practitioners and government bodies increasingly remarked how the public utterance of swear words rarely attracted criminal charges except where a police officer was present and often, the addressee (or 'victim') of the language used.[126] Profanities were not just a threat to public decorum, they were also characterised as a threat to *authority*: an affront to an order in which the public must show deference to the police. Swear words attracted criminal sanction because they threatened the order of a space by subverting the exercise of authority in that space. The content of obscene and indecent language charges also changed,

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[124] Douglas, above n 6, 45.

[125] Ibid.

[126] See, eg, Ken Buckley, *Offensive and Obscene: A Civil Liberties Casebook* (Ure Smith, 1970); Ken Buckley, *Paranoia, Police and Prostitution: The Operation of the Offences in Public Places Act, 1979* (Council for Civil Liberties, 1981); McBride, above n 36; Paul Wilson, 'What Is Deviant Language?' in Paul Wilson and John Braithwaite (eds), *Two Faces of Deviance: Crimes of the Powerless and the Powerful* (University of Queensland Press, 1978); NSW Anti-Discrimination Board, 'Study of Street Offences by Aborigines' (Report, 1982).

as the great 'sanguinary adjective' or 'Australian adjective'—'bloody'—began to lose its stigma and thus its sting.[127] Instead, by the second half of the 20th century, police overwhelmingly targeted swear words such as 'shit' and 'wanker' and increasingly, the use of the swear words 'fuck' and 'cunt'.[128]

Many aspects of the punishment of swearing documented above continued. Those administering the prosecution and punishment of swearing still targeted perceived defiling elements, those whose bad language was at odds with, or threatened, the so-called 'decorum'[129] of a public place; and was deemed inconsistent with 'community standards'. The police exhibited 'excessive vigour'[130] in charging Indigenous Australians for using 'unseemly' words under s 7 of the *Summary Offences Act 1970* (NSW), a vigour encouraged by some members of the judiciary. In 1982, the NSW Anti-Discrimination Board conducted a study of court appearances for street offences in 1978 and 1980 in ten rural NSW 'Aboriginal towns'.[131] The Board found that the unseemly words provision (which, as the equivalent provision does today, overwhelmingly targeted the words 'fuck' and 'cunt')[132] was being used to maintain a social and political order, in which Indigenous Australians had to accept and adopt 'community standards' of the white majority. Meanwhile, for Indigenous Australians, swearing was (and continues to be) a readily available, direct, verbal means of resistance to, and rejection of, 'neo-colonial control'.[133] According to Langton, Aboriginal people swore at police to demonstrate a view that police had 'no right or authority' over Aboriginal lives; to voice a belief that the criminal justice system was 'illegitimate and oppressive'; and to challenge the authority of those who dispensed its 'justice'.[134] Through this 'linguistic code', Aboriginal people could 'overcome fear of police brutality at the time of confrontation, laugh

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[127] Baker, above n 29, 256–7 (at least in Australia; the British have quite recently taken offence to its use, as demonstrated by the outcry when the 'Where the bloody hell are you?' tourism advertising campaign was aired on British television).

[128] See, eg, 'Father on Bond for Bad Language' *The Canberra Times* (Canberra), 19 August 1989 12; Buckley, above n 126; NSW Anti-Discrimination Board, above n 126.

[129] See, eg, *Melser v Police* [1967] NZLR 437, 443 (North P).

[130] Lennan, 'The "Janus Faces" of Offensive Language Laws: 1970-2005', above n 5, 120.

[131] Aboriginal Towns were those towns with a comparatively high proportion of Aboriginal people compared to the average in NSW, which was then 1 per cent. The Board found that 43.2 per cent of unseemly words used in 1978 and 75.4 per cent in 1980 were addressed to a police officer, and stated this to be evidence of 'a deteriorating relationship between the police and Aborigines': NSW Anti-Discrimination Board, above n 126.

[132] The words fuck and cunt (or the combination of both) made up over 90 per cent of unseemly words charges: Ibid.

[133] Marcia Langton, 'Medicine Square' in Ian Keen (ed), *Being Black: Aboriginal Cultures in 'Settled' Australia* (Aboriginal Studies Press, 1988) 201; Diana Eades, *Courtroom Talk and Neocolonial Control* (Mouton de Gruyter, 2008).

[134] Langton has further argued that swear words, although English in origin, developed a unique 'polysemous' meaning for Aboriginal persons 'relying for much of their cultural content on traditional Aboriginal ways of looking at the world': Langton, above n 133, 221.

at their oppressors and exercise their own legal method by using swear words which portray the police and their legal culture as grotesque'.[135]

Although swearing was a tool of resistance, it did not match the might of the criminal justice system. Indigenous Australians who used swear words to reject authority, or dictate their 'place' in the social order, were regarded as a 'problem' for the criminal law.[136] As Magistrate Kenneth Quinn expressed in 1979, after handing down harsh prison sentences to three Aboriginal defendants for using unseemly words at Wilcannia's Court of Petty Sessions (a rural town in north-west NSW with a high Aboriginal population): 'Your race of people must be the most interfering race of people I have heard of. You are becoming a pest race in Wilcannia, wanting to interfere in the job of the police. There is only one end to pests.'[137] Aboriginal Australians became the target of laws the purposes of which were both to enforce a white-imposed idea of stratified public order, and to stifle resistance to that order.[138]

When in 1979, the NSW Labor government introduced a narrower offensive behaviour provision than the unseemly words one, and removed the term of imprisonment (but retained the fine of $200),[139] its 'softer' approach attracted considerable criticism from the NSW Police Association, senior NSW police figures, and the NSW National and Liberal parties,[140] who claimed that police had been 'hamstrung' in dealing with street offences'.[141] The NSW Police Force and Police Association claimed that the narrowness of the amended s 5, which made it an offence to cause reasonable persons to be *seriously* alarmed or *seriously* affronted by language, placed excessive limitations on police discretion, preventing them from dealing with 'foul language'.[142] The Police Association led a fear campaign, publishing a full-page newspaper advertisement in Sydney's *Daily Telegraph* stating: 'You can still walk the streets of NSW, but we can no longer guarantee your safety from harassment.'[143] The president of

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[135] Ibid 130.

[136] Chris Ronalds, Murray Chapman and Kevin Kitchener, 'Policing Aborigines' in Mark Findlay, Sandra Egger and Jeff Sutton (eds), *Issues in Criminal Justice Administration* (Allen & Unwin, 1983) 168, 172.

[137] Colin Tatz, 'Aborigines, Law and Race Relations' (1980) 3(3) *Ethnic and Racial Studies* 281, 286.

[138] As I explain in Chapter Eight, judicial officers continue to construct Indigenous Australians as the racialised 'Other' through criminal justice discourse, thereby pushing Indigenous Australians outside the imagined 'community'.

[139] *Offences in Public Places Act 1979* (NSW) s 5.

[140] Note that the 'Liberal' party in Australia is largely a conservative party, as opposed to 'liberal' in the progressive sense of the word (although some members claim to be 'small l' liberals).

[141] Buckley, above n 126, 6–7.

[142] Alvhh Lauer, 'The Offences in Public Places Act - A Policeman's Viewpoint' (1980); Peter Kennedy, 'Mr Wran and His Angry Police' *The Sydney Morning Herald* (Sydney), 20 September 1979 4.

[143] The advertisement was placed in the *Daily Telegraph* on 20 August 1979: Kennedy, above n 142.

the Police Association called upon the NSW Attorney-General to resign for his 'failure' to 'appreciate the criminal justice system.'[144] These concerns were echoed by members of the media and judiciary,[145] as well as a prominent clergyman who argued the narrower law would precipitate 'moral and social breakdown'.[146]

In 1988, the NSW Liberal-National Coalition, led by Premier Nick Greiner, came into power after promising to introduce law and order reforms to 'prevent widespread obnoxious behaviour before it's too late'.[147] The Coalition's *Summary Offences Act 1988* (NSW) ('*SO Act* (NSW)') extended the criminal law's reach beyond 'the criminal elements' to the 'dishonest', 'rude' and 'selfish'.[148] Greiner's broader offensive language provision reinstated a three-month term of imprisonment, and was aimed squarely at commanding respect for police, as NSW Attorney-General John Dowd 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.' [149] The broader offensive language provision then contained in s 4 (now in s 4A) of the *SO Act* (NSW) was introduced despite mounting evidence that increased police discretion, combined with arrest powers and prison sentences for offensive language, would result in more Indigenous deaths in custody. No measures were put in place to prevent this end. NSW Attorney General John Dowd MP merely issued an appeal for police to use arrest and imprisonment of Indigenous Australians as a 'last resort'.[150] Further, the 1988 reforms generated little resistance from the NSW Labor opposition, save for the Party's criticism that they did not go far enough. Labor members

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[144] Paul Molloy, 'Police Cheer as Attorney-General Is Condemned: Walker Urged to Resign' *The Sydney Morning Herald*, 14 April 1980 2. Detective Inspector Anthony Lauer stated: 'I accept that what I have said is tantamount to a vote of no confidence in him'; see also David Brown, 'Post Election Blues: Law and Order in NSW Inc.' (1999) 13 *Legal Services Bulletin* 99.

[145] See *Appeal of Van Den Hende* [1980] 1 NSWLR 167, 170 (Newton DCJ). In that case, the defendant had used his vehicle to block the passage of his neighbour's truck, said 'You [im]pounded my cattle you bastard', and beat his fists on the bonnet and windscreen of his neighbour's truck. After setting aside the defendant's conviction, Newton DCJ stated 'regretfully' that, while he felt that the appellant's conduct warranted punishment and 'would certainly have constituted an offence' under the repealed, broader s 7 of the *Summary Offences Act 1970* (NSW)' (which provided: 'A person who in or within view from a public place or a school behaves in a riotous, indecent, offensive, threatening or insulting manner is guilty of an offence'), it fell outside s 5 of the *Offences in Public Places Act 1979* (NSW): 'By the repeal of this section, it is apparent that Parliament intended that riotous, indecent, offensive, threatening or insulting behaviour is permissible, as long as it does not create that state of mind in a reasonable person which would justifiably cause such person to be seriously alarmed or seriously affronted.'

[146] Buckley, above n 126, 6 citing 'Letter to Editor' *The Sydney Morning Herald* (Sydney), 26 January 1981.

[147] New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 1988 1155 (Bruce Leslie Jeffery).

[148] Ibid 1154–5 (Bruce Leslie Jeffery).

[149] Ibid 1178 (John Dowd, A-G).

[150] Ibid 1176 (John Dowd, A-G). The A-G stated: 'Until our community comes up with something to deal with the problems of a section of the Aboriginal community that is more meaningful than sending them to gaol, we have a responsibility to exercise extreme care and caution'.

accused the government of 'go[ing] soft on crime'[151] and labelled the *SO Act* (NSW) 'a pussy-cat Act'.[152] Neither the police nor the judiciary heeded the Attorney-General's call to exercise caution, and in 1993, following a review of the legislation, the three-month custodial penalty was removed.[153] The review has been prompted in part by the Royal Commission into Aboriginal Deaths in Custody,[154] and also by reactions to the 1992 ABC documentary *Cop it Sweet*[155] both of which highlighted the harsh operation of the legislation on Indigenous Australians. The substance of the broad offensive language provision then contained in s 4 of the *SO Act* (NSW) (now in s 4A) remains unchanged to this day, and will be examined in the following chapter.

3.11 *Plus ça change*

When Magistrate Robbie Williams at Waverley Local Court dismissed an offensive language charge in 2005, after a young man, Henry Grech, had called a police officer a 'prick',[156] media commentators reacted by reproaching the magistrate.[157] Many called for a tougher approach to an increasingly disrespectful youth. *Gold Coast Bulletin* columnist Ross Eastgate asked readers: 'Whatever happened to good manners? You know what I mean, the days when people were temperate in their language, were deferential to their elders and had respect for the law and proper authority?'[158] One can discern in Eastgate's lamentations nostalgia for an orderly society, where each person kept to 'their place': the young respected the old; men acted as men, while women were 'ladies'; and no one dared disrespect 'proper authority'. The findings of this chapter suggest, however, that such a society is truly a creation of Eastgate's imagination.

The fact that Australians cannot, and will not, eliminate taboo words from their vocabulary has not stopped people like Eastgate dreaming up another time and place, envisaged as more

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[151] Ibid 1151 (Paul Whelan).

[152] Ibid 1173 (John Newman).

[153] New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 November 1993 5264; *Summary Offences (Amendment) Act 1993* (NSW). Section 4A(3) further provided that a court may, 'in respect of a person convicted of an offence under this section, make an order requiring the person to perform community service work instead of imposing a fine'.

[154] Hal Wootten, *Royal Commission into Aboriginal Deaths in Custody* (AGPS, 1991).

[155] Jenny Brockie, *Cop It Sweet* (ABC Television, 1992).

[156] *Police v Grech* (Unreported, Waverley Local Court, 94/10, Magistrate Williams, 3 May 2010). I examine this case, and the reaction to it, in further detail in Chapter Nine.

[157] See, eg, Andrew Bolt, 'Judging by Magistrate's Words, This Is a Swearing-in Ceremony' *Herald Sun* (Melbourne), 5 May 2010.

[158] Ross Eastgate, 'A Manner of Speaking' *The Gold Coast Bulletin* (Gold Coast), 26 October 2005 23.

orderly than their own. One could venture back in time, to 1837, when *The Colonist* deplored 'that false idea, that there is something valorous or fine in rapping out a manly oath … that has caused this vice to disgrace Australia, and to give to her sons their present bad pre-eminence in the rank of profane swearers and blasphemers.'[159] Half a century later, in 1883, a Sydney resident noted 'the disgusting habit, so prevalent in this city, of cursing and swearing in the streets' to be 'the worst … of any place that I have visited.'[160] It was remarked in 1910 that in Perth one hears 'children of three and four years old using filthy obscene words, and their parents taking not the slightest notice.'[161] Just a few years later, in Albury, it was noted that 'bad language has become so common, even amongst women and children.'[162] In 1920, a Queenslander blamed a rise in profanity on 'a rapidly growing body of young hoodlums in the state' who 'cannot converse on the most ordinary topic without an obscene expression to every second word'.[163] In 1939, a South Australian magistrate singled out the inhabitants of that state as swearing in proportions 'unequalled anywhere else in the world'.[164]

These statements share a number of assumptions. First, swearing is becoming more prevalent, and that the swear words used today are more disgusting than those of the past. Second, certain audiences who should not, ideally, be exposed to swear words (such as women and children) are 'now' not only privy to, but also using, these words. Third, cursing is reaching epidemic proportions: 'It runs rampant in public, in private, in executive boardrooms, suburban streets and the hallowed halls of Parliament, not to mention our schoolyards.'[165] A key problem with these language ideologies (a term introduced in Chapter Two, and examined further in Chapters Five and Six) is that they are regularly couched as objective facts, as when 'journalist' Margaret Jones 'observed' in 1985 in *The Sydney Morning Herald* that: 'A large section of the population—say, anybody over 35—can remember when it was possible to go from one week's end to another without hearing an obscenity spoken in

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[159] 'Profane Swearing', above n 9.

[160] 'Use of Bad Language: To the Editor of the Herald'' *The Sydney Morning Herald* (Sydney), 14 June 1883 5; see also 'The Curse of Cursing' *Sunday Times* (Sydney), 4 October 1896 4: 'The habit is partly hereditary perhaps, but, like other pests, it has flourished abundantly in a new land. It would be hard to account reasonably for the volume of ear-splitting oaths with which one is assailed from morning to night in the street, hotel, public conveyance, and, in fact, almost everywhere'.

[161] 'The Great Australian Curse: To the Editor' *The West Australian* (Perth), 16 August 1910 7.

[162] 'Bad Language' *Albury Banner and Wodonga Express* (Albury and Wodonga), 19 July 1918 12; see also 'How Can Foul Language and Swearing Be Stopped?' *Geelong Advertiser* (Geelong), 10 June 1919 2, where a Magistrate expressed that 'the practice of foul language' was on the rise, with 'disgusting terms … used quite frequently before women, even mothers – a thing undreamt of a few years ago'.

[163] 'Filthy Language' *Cairns Post* (Cairns), 16 November 1920 2.

[164] 'World's Worst Swearers' *The Horsham Times* (Horsham), 19 September 1939 3.

[165] See ''*#+!>Ø Language' *The Sydney Morning Herald* (Sydney), 19 November 1992 16.

public.'[166] Layer upon layer, these popular 'common sense' ideas about swearing have assumed the status of truth—a *fait accompli*[167]—and we forget that a disorderly past, in which swear words were used by all classes, genders and ages, might have existed, just as in the present.

3.12 Conclusion

In this chapter, I have traced language ideologies about swearing since the creation of comprehensive offensive language crimes in Australia. I explained that the courts devised a method to contain dirty words, preventing them from contaminating the courtroom and polluting those therein—the slip of paper. Further, I identified in historical news reports of obscene and indecent language trials an 'exclusionary discourse' that accentuated the otherness of defendants: relishing in details of their peculiarities, their unkempt appearances, their 'coloured' skins or dishonourable professions. This discourse played a key role in defining boundaries between the polite and impolite, and ensured that those dirtier or disorderly sections kept to, or were put back in, their place. In the second half of the 20th century, swearing in public continued to be portrayed as an affront to public decency. But the magistracy, the press, parliamentarians and the police increasingly invoked the notion that cursing was not only an affront to moral order, but also to law and order. They were upholding an order in which impoverished people and Indigenous Australians were kept 'in their place': on the bottom rungs of that order.

This chapter has therefore started to unravel part of the 'knowledge' that has been fashioned in the criminal law in relation to offensive language crimes. I will show how language ideologies still thrive in criminal justice discourse in the following chapters: swear words continue to be depicted as inherently dirty, sexual, infectious or violent. Before I do this, the following chapter outlines and critiques the legal doctrine on offensive language crimes in Australia, providing a legal backdrop to inform my CDA of ideas about offensiveness, context, community standards, the reasonable person, authority and (dis)order.

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[166] Margaret Jones, 'The Curse of OK Obscenity' *The Sydney Morning Herald* (Sydney), 26 April 1985 8.

[167] Bourdieu, above n 8, 79; see also van Leeuwen, above n 79, 20–1.

CHAPTER FOUR
LEGAL ANALYSIS OF OFFENSIVE LANGUAGE CRIMES

4.1 Introduction

Having explored historical forms of, and past discourses on, the criminal punishment of obscene and indecent language in Australia, in this chapter, I examine the legal doctrine on contemporary offensive language crimes: laws that criminalise the use of indecent, insulting, obscene, or offensive words in or near a public place.[1] While there are a number of common elements among offensive language crimes, their forms and attendant punishments differ remarkably. I focus on the relevant offences in NSW, Queensland and WA, the jurisdictions in which my case studies were heard. After providing an overview of the legislation in these three states, I examine judicial interpretations of core elements of, and issues relating to, offensive language crimes: the meaning of 'offensive' (as well as 'obscene', 'indecent', 'profane', 'insulting', 'abusive' and 'threatening'); the perspective of the reasonable person; the assessment of community standards; the context in which the words were used; the meaning of 'public place'; the defence of 'reasonable excuse'; and the constitutionality of offensive language crimes. Following this, I examine the prosecution and punishment of offensive language crimes, including the use of 'on the spot' fines (or criminal infringement notices). The main issues presented in this chapter—representations of offensiveness, including swearing; the exclusion of expert linguistic evidence; constructions of context; the repetition of stereotypes about appropriate language and place; and police and judicial power and discretion—will be further interrogated when I draw on CDA to critique criminal justice discourse in the ensuing chapters.

4.2 The NSW crime of using offensive language

In NSW, the crime of using offensive language in public is contained in s 4A(1) of the *Summary Offences Act 1988* (NSW) ('*SO Act* (NSW)'), which provides: 'A person must not use offensive language in or near, or within hearing from, a public place or a school.' Section 4A(2) contains a defence of 'reasonable excuse', examined in detail below. The maximum

[1] These offences target spoken, not written words. Courts and police tend to use offensive conduct or behaviour (as opposed to language) provisions (for example, *SO Act* (NSW) s 4) to target the written word, as well as public nuisance or disorderly conduct provisions. For provisions prohibiting offensive speech conveyed over other mediums (such as by post or on the internet), see *Criminal Code Act 1995* (Cth), ('*Criminal Code* (Cth)') ss 471.12 and 474.17.

penalty for an offence under s 4A(1) is six penalty units—currently $660.[2] As an alternative to charging a person, police have the discretion to issue a penalty notice for offensive language amounting to $500.[3] I examine the use of penalty notices for offensive language in the final part of this chapter.

4.3 The Queensland offence of public nuisance

The offence of public nuisance is contained in s 6 of the *Summary Offences Act 2005* (Qld) ('*SO Act* (Qld)'). The offence commenced on 1 April 2004, replacing the longstanding crime of using 'obscene, abusive language etc' in s 7 of the *VGOO Act*.[4] The changes followed the decision in *Coleman v Power*,[5] in which the High Court of Australia set aside a conviction for using insulting words (discussed below). The object of the provision is to ensure 'as far as practicable' that 'members of the public may lawfully use and pass through public places without interference from acts of nuisance committed by others'.[6]

Section 6(2) of the *SO Act* (Qld) provides that a person commits a public nuisance offence if:

(a) the person behaves in—
  (i) a disorderly way; or
  (ii) an offensive way; or
  (iii) a threatening way; or
  (iv) a violent way; and
(b) the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.

Subsection 3 defines behaving in 'an offensive way' as using offensive, obscene, indecent or abusive language; and behaving in a 'threatening way' as using threatening language.[7] The offence attracts a maximum penalty of 10 penalty units ($1 100) or six months imprisonment.[8]

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[2] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17 provides that one penalty unit is $110; instead of imposing a fine, a court may make an order requiring the person to perform community service work *SO Act* (NSW) s 4A(3).

[3] *Criminal Procedure Act 1986* (NSW) s 333 ('*CP Act* (NSW)'); *Criminal Procedure Regulation 2010* (NSW) reg 106 and sch 3 ('*CP Reg* (NSW)').

[4] See Chapter Three for discussion of the *VGOO Act*. The new public nuisance offence, which commenced in 2004, was originally contained in s 7AA of the *VGOO Act*. In 2005, the *VGOO Act* was repealed and replaced by the *SO Act* (Qld), and the offence of public nuisance in s 7AA was transferred to s 6 of the *SO Act* (Qld).

[5] *Coleman v Power* (2004) 220 CLR 1.

[6] *SO Act* (Qld) s 5; the Explanatory Note, Summary Offences Bill (Qld) provides a number of 'examples' that a court should take into account in 'determining what is a 'public nuisance': Explanatory Note, Summary Offences Bill 2004 (Qld) 3–4.

[7] These are inclusive definitions: *SO Act* (Qld) s 6(3).

[8] One penalty unit is currently $110: *Penalties and Sentences Act 1992* (Qld) s 5 ('*Penalties and Sentences Act*').

4.4 The WA crime of disorderly behaviour

The crime of disorderly behaviour in public is contained in s 74A of the *Criminal Code Act 1913* (WA) ('*Criminal Code* (WA)'). The offence commenced on 31 May 2005, following recommendations made by the Law Reform Commission of WA, and replaced ss 44, 54 and 59 of the *Police Act 1982* (WA).[9] Section 74A(1) defines behaving in a disorderly manner as:

(a) to use insulting, offensive or threatening language; and

(b) to behave in an insulting, offensive or threatening manner.

The behaviour must take place 'in a public place or in the sight or hearing of any person who is in a public place' or 'in a police station or lock-up' to be punishable with a fine of up to $6 000.[10]

4.5 Elements of offensive language crimes

In this part, I examine the elements of offensive language crimes, drawing out key similarities and differences between jurisdictions and focusing on Queensland, WA and NSW.

4.5.1 Voluntariness

As established in *Jeffs v Graham*, the first element of the actus reus the prosecution must establish beyond reasonable doubt is that the use of the offensive, obscene, indecent, abusive, etc, language was voluntary.[11] In NSW, that case, which involved a defendant whose intoxication was self-induced, must now be read in light of pt 11A of the *Crimes Act 1900* (NSW), in particular s 428G(1), which provides that evidence of self-induced intoxication cannot be taken into account in determining whether the relevant conduct of an offence was

[9] Law Reform Commission of Western Australia, 'Project No 85 - Police Legislation in Western Australia' [6.10]–[6.15]; The Criminal Law Amendment (Simple Offences) Bill 2004 (WA) implemented many of the recommendations of: Michael Murray, *The Criminal Code : A General Review* (WA Crown Law Department, 1983).

[10] *Criminal Code Act 1913* (WA) s 74A(2) ('*Criminal Code* (WA)'). Section 74A(3) provides an additional offence where a person who has the control or management of a place where food or refreshments are sold to or consumed by the public 'permits' a person to behave in a disorderly manner in that place. Such a person is liable to a fine of $4 000.

[11] (1987) 8 NSWLR 292, 296; for discussion see: Luke McNamara and Julia Quilter, 'Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)' (2013) 36 *University of New South Wales Law Journal* 534, 555–6.

voluntary.[12] In light of *Jeffs v Graham* (the facts of which are outlined below), an accused with a condition such as Tourette's Syndrome might be able to raise evidence that their language was not voluntary, and thereby avoid liability.[13]

4.5.2 Offensive, obscene, insulting etc, language

The second element the prosecution must prove is that the language used was—depending on the relevant jurisdiction—offensive, indecent, obscene, insulting, threatening or abusive. These adjectives are not defined in statute, but each has been broadly defined in case law. Both WA and Queensland statutes contain omnibus provisions prohibiting numerous categories of language: the use of insulting, offensive and threatening language is prohibited in WA, while the use of offensive, obscene, indecent, abusive and threatening language is prohibited in Queensland.[14] NSW stands alone in prohibiting only offensive language, offensive being the most expansively defined of these adjectives.

4.5.2.1 Offensive language

All jurisdictions, excluding the NT and Victoria, prohibit the use of offensive language in a public place (see Table 4.1 below).[15] The word 'offensive' is not defined in statute but at common law; the commonly cited definition is that provided in *Worcester v Smith,* in which O'Bryan J in the Supreme Court of Victoria defined offensive as 'such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person'.[16] In that case, the appellant was one of a group carrying banners outside the United States Consulate in Melbourne to protest US military involvement in Korea. The appellant's banner displayed the inscription: 'Stop Yank Intervention in Korea'. After failing to comply with a uniformed constable's move-on request, a plain-clothes officer seized the

[12] Justice Yeldham applied the common law as it was articulated in *R v O'Connor* (1980) 146 CLR 64; s 428G(2) now provides that a person is not criminally responsible for an offence if the relevant conduct resulted from intoxication that was not self-induced. See also definition of 'self-induced intoxication': *Crimes Act 1900* (NSW) ss 428A and 428G.

[13] For a critical examination of perceptions of those with Tourette's Syndrome in public space, see Kat Davis, Jeffrey Davis and Lorraine Dowler, 'In Motion, Out of Place: The Public Space(s) of Tourette Syndrome' (2004) 59 *Social Science and Medicine* 103 See also Chapter Two.

[14] *Criminal Code* (WA) s 74A; *SO Act* (Qld) s 6. The use of 'insulting' language is no longer punishable in Queensland, after the relevant provision in s 7 of the *Vagrants Gaming and Other Offences Act 1931* (Qld) ('*VGOO Act*') was repealed. For other jurisdictions see Table 4.1 at the end of this chapter.

[15] Although the adjectives obscene and indecent are generally regarded as encapsulating offensive words: Alan Demack, *Allen's Police Offences of Queensland* (The Law Book Company, 1971); the Northern Territory also criminalises the use of 'objectionable' words in a public place: *Summary Offences Act 1978* (NT) s 53(7) ('*SO Act* (NT)').

[16] [1951] VLR 316, 318.

appellant's banner. The appellant grabbed the officer by the wrists and tried to recapture the banner. The appellant was charged with behaving in an offensive manner contrary to s 25 of the (since-repealed) *Police Offences Act 1928* (Vic)[17]. His conviction was set aside on the basis that peaceful inoffensive statements, even if contrary to the views of the majority in the community, were not offensive within the meaning of the section.[18]

Worcester v Smith was considered by Kerr J in the Supreme Court of the Australian Capital Territory ('ACT') in *Ball v McIntyre* – a case whose facts and outcome are not dissimilar to *Worcester v Smith*.[19] In that case the appellant, Desmond Ball, had climbed a statue of George V and hung a placard on it that read 'I will not fight in Vietnam', as part of a larger anti-Vietnam war demonstration. A police officer requested that Ball climb down from the statue, but he refused to do so. When he eventually came down, Ball was arrested and charged with behaving in an offensive manner contrary to s 17(d) of the (since-repealed) *Police Offences Ordinance 1930* (ACT). [20] The critical issue was whether Ball's conduct could be characterised as offensive, given that the term was not defined in statute. Justice Kerr supplemented O'Bryan J's characterisation of offensiveness in *Worcester v Smith*, stating:

> some conduct which is hurtful or blameworthy or improper is not offensive within the meaning of the section …
>
> Conduct which offends against the standards of good taste or good manners, which is a breach of the rules of courtesy or runs contrary to commonly accepted social rules, may well be ill-advised, hurtful, not proper conduct. People may be offended by such conduct, but it may well not be offensive conduct within the meaning of the section. 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.
>
> This charge is not available to ensure punishment of those who differ from the majority. What has to be done in each case is to see whether the conduct is in truth offensive.[21]

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[17] Now see *Summary Offences Act 1966* (Vic) s 17 ('*SO Act* (Vic)').

[18] *Worcester v Smith* [1951] VLR 316, 318.

[19] *Ball v McIntyre* (1966) 9 FLR 237.

[20] The police officers who gave evidence at the trial appeared to take greater offence at the fact that the appellant had climbed the statue of a deceased monarch (as opposed to the appellant's participation in an anti-Vietnam war protest, or his refusal to comply with the police officer's request). Justice Kerr stated in response to this that 'King George V now belongs to history, and I do not think that the average or reasonable man would have the reaction that his statue "tends to be sacred"': ibid 239.

[21] Ibid 241.

While these decisions indicate a degree of judicial tolerance for words or conduct that might offend majoritarian views or political policies, the judicial officers, through their tentative language, did not rigidly restrict judicial discretion when determining criminally offensiveness. Using CDA in Chapter Eight, I examine the prevalence and ideological effect of low modality phrases in this and other judicial statements on offensive language and conduct.[22] I argue that legal statements about the reasonable person, such as that of Kerr J in *Ball v McIntyre* outlined above, convey the impression that they assist a judicial officer ascertaining the perspective of 'the reasonable person'.[23] However the use of *hedges*, including *modal auxiliary verbs* (such as 'may')[24] in this and similar extracts from offensive language or conduct cases indicate that the propositions contained therein are highly tentative, offering legal decision-makers considerable discretion when ascertaining offensiveness.

In considering the perspective of the reasonable person, a magistrate (or police officer) must also have regard to contemporary community standards and must consider the context or circumstances in which the words were used.[25] I examine these aspects below. It is therefore an error of law to hold that swear words (such as 'fuck') are necessarily offensive.[26] Further, an important 'gloss' on the test of offensiveness is that the impugned language must warrant the interference of the criminal law.[27]

Beyond the cases of *Ball v McIntyre* and *Worcerster v Smith* there is a judicial reluctance to further circumscribe the meaning of 'offensive'. This is exemplified in the NSW Court of Criminal Appeal case *R v Smith*, where Street CJ labelled it 'dangerous' to 'substitute glosses

[22] See Norman Fairclough, *Discourse and Social Change* (Polity Press, 1992) 121–2, 158–62 for discussion of modality. As I explain in Chapter Eight, Hedging, a form of modality, is one way in which producers of a text indicate their affinity to a proposition—their commitment to, or distance from, a proposition (see Chapter Eight, Part 8.2.1).

[23] Note that a police officer must similarly be guided by these legal principles when ascertaining this perspective for the purpose of deciding whether or not to issue a penalty notice for offensive language in public; see Chapter Four.

[24] Norman Fairclough, *Language and Power* (Longman, 1989) 127. Modality can also be expressed by other formal features including adverbs and tense.

[25] See *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991) 6 in which Studdert J rejected the proposition that the words 'fucking poofter' were not offensive, stating 'I reject the contention that community standards have slipped to such an extent that the utterances attributed to the respondent in the present case could not, as a matter of law constitute an offence.'; see also *Police v Butler* [2003] NSWLC 2, [22]-[34]; *Heanes v Herangi* (2007) 175 A Crim R 175, 218[198]; *Saunders v Herold* (1991) 105 FLR 1, 6. Justice Higgins stated: 'It is, in my opinion, relying on my knowledge of the standards of the community and the reasonable expectations of the community, quite unlikely that the reasonable person to be postulated as hypothetically present in the circumstances of this case would have been offended by any of the various versions of what the appellant allegedly said'.

[26] *Hortin v Rowbottom* (1993) 68 A Crim R 381, 389 (Mullighan J); *Bradbury v Staines; Ex parte Staines* [1970] Qd R 76; *Dalton v Bartlett* (1972) 3 SASR 549.

[27] *Melser v Police* [1967] NZLR 437, 444 (Turner J); see also *Spence v Loguch* (Unreported, Supreme Court of NSW, Sully J, 12 November 1991).

put upon this section in other judgments for the words of the section itself'.[28] Chief Justice Street concluded that the phrase 'behaves in an offensive manner'

> means behaviour of the character generally described within the third of the *Oxford English Dictionary*'s meanings, that is to say, offensive in the sense of giving, or of a nature to give, offence; displeasing; annoying; insulting. No one of these words in the dictionary is a precise alternative to the word 'offensive'. The word has its own meaning, and its own meaning is to be determined by reference to this context in the section.[29]

From the case law examined so far, one might assume a court could find *any* words that aroused disgust, outrage or resentment to be offensive. There is no express statement in these excerpts that 'dirty words'—swearing and cursing—has informed (see Chapter Three), and continues to inform, what is offensive at law. Swear words are practically a *sine qua non* for an offensive language charge.[30] This is despite Bray CJ's acknowledgement in *Romeyko v Samuels* that there are more obscene and harmful things (or words) than 'four-letter words': 'As far as the young are concerned the obscenities of this life are not four-letter words. They are such things as war, racial discrimination, the imbalance of wealth and poverty and the destruction of the ecological system.'[31]

In the following chapters, I critique the assumption that swear words are the natural and legitimate target of offensive language crimes. I use CDA to interrogate how politicians and judges ascribe material harms to swear words through the use of certain grammatical forms metaphors, circumlocutions and euphemisms, to augment their taboo value. I argue that, like the historical discourse analysed in Chapter Three, judicial officers still invest in swear words a magically contaminative power, as if their 'potency' were lodged in the sign itself.[32]

4.5.2.2 Indecent or Obscene Language

In Queensland, the Northern Territory ('NT'), South Australia ('SA'), Tasmania and Victoria, it is an offence to use obscene or indecent language in a public place (see Table 4.1 below). The threshold for what constitutes indecent or obscene language is higher than for offensive

[28] [1974] 2 NSWLR 586, 588 (Street CJ).

[29] Ibid (Street CJ).

[30] This is further confirmed by the findings in the reports: NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities' (2009); NSW Anti-Discrimination Board, 'Study of Street Offences by Aborigines' (Report, 1982).

[31] (1972) 2 SASR 529, 562–3 (Bray CJ).

[32] See Luke Fleming and Michael Lempert, 'Introduction: Beyond Bad Words' (2011) 84(1) *Anthropological Quarterly* 5, 9.

language: language is obscene or indecent if it is *highly* offensive to recognised standards of common propriety or contemporary community standards.[33] Matters described as indecent and obscene have been associated with sex, violence, and concepts or activities that evoke reactions of disgust or repulsion.[34] The epithets 'obscene' and 'indecent' convey a scale of impropriety, with indecency at the lower end and obscenity at the upper.[35] As with offensive language, the words complained of must be considered in the context in which they were said.[36]

4.5.2.3 Insulting Language

The jurisdictions of the ACT, Tasmania, Victoria and WA prohibit the use of insulting words in public.[37] The expression 'insulting words' is not limited to words disparaging a person's moral character, and includes scornful abuse or the offering of any personal indignity or affront.[38] To constitute insulting words, words must be deeply or seriously insulting,[39] and must convey a sense of being 'hit by words', rather than being displeasing or annoying.[40] The use of insulting words is adjudged by 'contemporary standards' of good public order and must be serious enough 'to warrant the interference of the criminal law'.[41]

In *Coleman v Power*, the High Court of Australia considered the meaning of 'insulting' within s 7(1)(d) of the (since-repealed) *VGOO Act*.[42] In that case, the High Court considered the appeal of Patrick Coleman, arrested on 26 March 2000 for using insulting words in a public place. Coleman had been distributing pamphlets headed 'Get to Know Your Local

[33] *Pell v Council of the Trustees of the National Gallery of Victoria* [1998] 2 VR 391, 394–5 (Harper J) ('*Pell*'); see also *Gul v Creed* [2010] VSC 185, [15] where Beach J in the Supreme Court of Victoria held that the term 'fucking bitch' was indecent pursuant to s 17 of the *SO Act* (Vic).

[34] *Prowse v Bartlett* (1972) 3 SASR 472, 480.

[35] *Pell* [1998] 2 VR 391, 394–5 (Harper J); obscene has been held to mean offensive or disgusting to ordinary people, and of necessity must also be indecent: *Phillips v SA Police* (1994) 75 A Crim R 80.

[36] *Gul v Creed* [2010] VSC 185, 5 (Beach J).

[37] See Table 4.1 below. 'Policing Public Order: A Review of the Public Nuisance Offence' (Report, Queensland Crime and Misconduct Commission, 2008) 5–6 the Queensland Parliament removed the adjective 'insulting' from the list of words comprising a public nuisance while the High Court of Australia was considering whether the prohibition of 'insulting' words to a person infringed the implied freedom of political communication in Coleman v Power.

[38] *Annett v Brickell* [1940] VLR 312, 315 (O'Bryan J); cited in *Coleman v Power* (2004) 220 CLR 1, 18 (McHugh J); see also *Thurley v Hayes* (1920) 27 CLR 548 where insulting was defined by the High Court of Australia as 'to assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to, to affront, outrage' (Knox CJ, Gavan Duffy and Rich JJ); *Cozens v Brutus* [1973] AC 854; *Ex parte Breen* (1918) 18 SR (NSW) 1.

[39] *Ferguson v Walkley* (2008) 17 VR 647, [32] (Harper J); *Melser v Police* [1967] NZLR 437, 444.

[40] *Jordan v Burgoyne* [1963] 2 QB 744, 749 (Lord Parker CJ).

[41] *Ferguson v Walkley* (2008) 17 VR 647, [42] (Harper J).

[42] (2004) 220 CLR 1.

Corrupt Type Cops' to passers-by in Townsville Mall. The respondent, Constable Brendan Power, had been named in the leaflets as one such 'cop'. When Constable Power approached Coleman and requested a leaflet, Coleman announced: 'This is Constable Brendan Power, a corrupt police officer'. Power arrested Coleman and charged him with a number of offences, including using insulting words to a person in a public place. Three members of the High Court (Gummow and Hayne JJ, and Kirby J) held that s 7(1)(d) should be interpreted as prohibiting the utterance in public places of words designed to hurt another individual such that the individual would be, or would most likely be, provoked to violent retaliation.[43] The other High Court Justices (Gleeson CJ, Callinan J, McHugh J and Heydon J) interpreted the provision more broadly: McHugh J stated there was no 'reason for otherwise limiting the natural and ordinary meaning of "insulting" … Accordingly, if the words were used in or near a public place and were calculated to hurt the personal feelings of a person and did affect the feelings of that person, they were "insulting words"';[44] Callinan J stated that insulting words included words that were 'unnecessarily potentially provocative, or so incompatible with civilized discourse and passage, that they should be proscribed';[45] and Gleeson CJ found that s 7(1)(d) was not limited to words intended or likely to provoke a forceful response, whether lawful or unlawful.[46] Chief Justice Gleeson held that, to be insulting, the language in question must not be 'merely derogatory of the person to whom it is addressed; it must be of such a nature that the use of the language, in the place where it is spoken, to a person of that kind, is contrary to contemporary standards of public good order, and goes beyond what, by those standards, is simply an exercise of freedom to express opinions on controversial issues.'[47] Justice Heydon stated:

> it may be said as a general matter that s 7(1)(d) prohibits the use of language to a person in or near a public place, being language which is insulting in the ordinary meaning of the word and so is liable 'to hurt the personal feelings of individuals, whether the words are addressed directly to themselves, or used in their hearing, and whether regarding their own character or that of persons closely associated with them' … Hence the conclusion of the magistrate was sound … in concluding: 'There is no doubt that to suggest to a police officer whose duty it is to uphold the law that he or she has engaged in criminal or corrupt activity is to insult'.[48]

[43] Ibid 54 (Gummow and Hayne JJ), 67 (Kirby J).

[44] Ibid 20 (McHugh J).

[45] Ibid 87 (Callinan J).

[46] Ibid 6 (Gleeson CJ).

[47] Ibid (Gleeson CJ).

[48] Ibid 96–7 (Heydon J).

In *Coleman v Power* and in other cases that consider the meaning of 'insulting words', there is a prevalence of metaphors of physical harm and violence: insulting words 'hurt' a person's feelings, a person is 'hit by words' or they are 'assailed'. In Chapter Six, I question the ideological effect of these metaphors and ask whether it is inappropriate or misleading for lawyers, police officers and judicial officers to describe insulting language in these ways. I examine the constitutional implications of the High Court's decision towards the end of the chapter.

4.5.2.3 Abusive Language

The use of 'abusive' language in public is an offence in Queensland, the NT, SA, Tasmania and Victoria. Words are abusive if they revile or upbraid in an unjustified and unnecessarily rude manner or tone.[49] The epithet 'abusive' is said to be the least serious of the terms 'threatening', 'abusive' and 'insulting', which thus represent a descending order of verbal 'violence'.[50]

4.5.2.4 Threatening Language

The NT, Queensland, SA, Tasmania, Victoria and WA prohibit the use of 'threatening' language.[51] The adjective threatening describes words that convey harm to a person or her or his property.[52] In *Lipman v McKenzie*, the Supreme Court of WA held that the words, 'If you want to fight you can have it as much as you like. I will give you all the fight that you want', did not constitute threatening language.[53] The words were construed as an invitation or a challenge to fight, as opposed to a threat. By way of contrast, in *Beutal v Turner; Ex parte Turner*,[54] the appellant had offered to fight the complainant and twice used the words 'Here's into you', while standing before the complainant in a fighting attitude. Nothing more was done and the parties separated, saying 'Good night'. The Queensland Supreme Court upheld the appellant's conviction of having used threatening words with intent to provoke a breach of the peace.[55]

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[49] Tim McBride, '"The Policeman's Friend" Section 3D and the Police Offences Act, 1927' (1971) 6 *Victoria University of Wellington Law Review* 31, 43.

[50] Ibid 43 n 67; citing DGT Williams, 'Threats, Abuse, Insults' [1967] *Criminal Law Review* 385.

[51] See Table 4.1.

[52] McBride, above n 49, 43.

[53] (1903) 5 WALR 17 (Stone CJ).

[54] (1910) 4 QJPR 122.

[55] Ibid.

4.5.2.5 Profane or Blasphemous Language

The use of profane words is an offence in the NT, SA, Tasmania and Victoria.[56] Tasmania also prohibits the use of 'blasphemous language' (a redundant addition given that profane language captures blasphemous language or conduct).[57] Scholar in human rights and political theory, Helen Pringle, has argued that, given the historical development of laws against profane or blasphemous language and conduct in Australia, it is likely that these laws only 'protect' Christian beliefs, a limit that has not been tested in Australia.[58] It could be argued that prohibitions on such categories of words are practically redundant, as Pringle has observed: 'in both legal and cultural terms, blasphemy has generally been absorbed into the category of obscenity or offensiveness' and, accordingly, where ostensibly blasphemous acts are the subject of prosecution in Australia, they are charged not as blasphemy but, instead, as offensive or obscene conduct or language.[59]

4.6 Community standards and the reasonable person test

While all state and territory jurisdictions apply an objective test to the question of whether words are insulting, offensive, indecent, obscene etc, they vary (depending on the jurisdiction or the adjective in question) on whether to refer to the perspective of the reasonable person, to the standards of the community, or to an amalgamation of both. The *offensiveness* of language or behaviour is generally assessed from the perspective of the reasonable person, with regard to contemporary community standards (with the exception of Queensland and WA, where the 'community standards' test is employed for offensive language).[60] This general approach aligns with the definition of 'offensive' articulated by O'Bryan J in *Worcester v Smith*, being 'such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person'.[61] Despite the ostensibly objective nature of the

[56] See Table 4.1; see also Helen Pringle, 'Regulating Offence to the Godly: Blasphemy and the Future of Religious Vilification Laws' (2011) 34(1) *University of New South Wales Law Journal* 316, 320. Pringle has argued that the prohibition of blasphemous conduct is retained at common law in NSW and Victoria.

[57] Ibid; see also Table 4.1.

[58] Ibid 316.

[59] Ibid 321.

[60] *Worcester v Smith* [1951] VLR 316, 318 (O'Bryan J); see also *Ball v McIntyre* (1966) 9 FLR 237; *Police v Butler* [2003] NSWLC 2; *DPP v Carr* (2002) 127 A Crim R 151; that being the case, some judges have relied solely on the reasonable person test: *Evans v Frances* (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990) 3–4; whereas others refer only to contemporary community standards: *McNamara v Freeburn* (Unreported, Supreme Court of NSW, Yeldham J, 5 August 1988) 2.

[61] [1951] VLR 316, 318; (O'Bryan J); see Part 4.5.2.1 above.

reasonable person test, courts considering offensive language charges typically admit evidence of the reactions of bystanders (usually police officers) to the language used.[62]

For offences involving the use of indecent, obscene, insulting or abusive words in public outside of NSW, as well as those involving offensive language in WA and Queensland, judicial officers usually determine whether the language in question has breached contemporary community standards. As Chambers J stated in *Bills v Brown*: 'The standard which must be taken is the current standard of the community … the use of obscene or indecent language [is] a breach of decorum when that language offends against the contemporary standards of propriety in the community.'[63]

In *Heanes v Herangi*, concerning a charge of disorderly conduct by way of using offensive language under s 74A of the *Criminal Code* (WA), Johnson J in the Supreme Court of WA ascertained the offensiveness of the appellant's language with regard to the standards of a community made up of 'ordinary decent-minded people'[64] or 'well-conducted and reasonable men and woman'.[65] I will frequently return to this case in this thesis, as it relates to a number of themes that I examine, namely language ideologies about swearing, 'four-letter' threats to police authority in public space, and constructions of context in offensive language cases. In Queensland, the question of whether someone has caused a public nuisance by behaving in an offensive or threatening way, contrary to s 7 of the *SO Act* (Qld), is assessed with regard to contemporary community expectations.[66] I use CDA to provide original insight into how these standards are constructed through criminal justice discourse in Chapter Eight. For the purposes of this chapter, I outline judicial flourishes added to, and existing criticisms of, these tests in the context of offensive language crimes, and indicate how my original research contributes to these criticisms.

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[62] In *R v Connolly and Willis* (1984) 1 NSWLR 373, 384, Wood J held that the trial magistrate had erred in law in excluding the evidence of a police officer. Justice Wood noted that the evidence of bystanders or observers is relevant and admissible, although not strictly essential to the prosecution because of the objective nature of the test posed.

[63] [1974] Tas SR (NC) N13 (Chambers J); adopting the test articulated in *Police v Drummond* [1973] 2 NZLR 263; see also *Robertson v Samuels* (1973) 4 SASR 465, 471 where Hogarth J stated in the Supreme Court of SA that where the relevant charge was one of using indecent language in a public place, 'the language is to be categorized objectively, according to the standards prevailing among the community at large'. In the Supreme Court of WA case *E (a child) v The Queen* (1994) 76 A Crim R 343, 347, concerning a charge of disorderly conduct by using obscene language, White J referred to 'the standards of the community, not of a particular witness'; in *Gul v Creed* [2010] VSC 185, 5 concerning a charge of indecent language, Beach J in the Supreme Court of Victoria held that 'in determining whether something is indecent, it is contemporary standards which must be applied'.

[64] (2007) 175 A Crim R 175, 218 (Johnson J); citing *Crowe v Graham* (1969) 121 CLR 375, 399 (Windeyer J).

[65] (2007) 175 A Crim R 175, 218 (Johnson J); citing *Melser v Police* [1967] NZLR 437 (Turner J).

[66] *Del Vecchio v Couchy* [2002] QCA 9 (de Jersey CJ, McPherson JA and Douglas J agreeing); *Couchy v Birchley* [2005] QDC 334, [36] (McGill DCJ).

4.6.1 Who is 'the reasonable person'?

Judges have bestowed certain qualities on the hypothetical reasonable person (referred to interchangeably as 'the reasonable man' or 'the reasonably tolerant bystander').[67] A reasonable person is neither thin-skinned nor overly thick-skinned.[68] He or she is reasonably tolerant and understanding and reasonably contemporary in his or her reactions.[69] However, the reasonable person has some sensitivity to social behaviour and social expectations in public places.[70] A reasonable person is neither a social anarchist nor a social cynic, whose view of changes in social standards is that they are all in one direction—the direction of irresponsible self-indulgence, laxity and permissiveness.[71]

Not all commentators or judges uncritically accept and apply these descriptions of the reasonable person in offensive language cases. In *White v Edwards*, Yeldham J reflected on the difficult task of determining the character of a reasonable person early in the morning at Kings Cross, Sydney, asking whether the 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".'[72] Alluding to the likelihood that the reasonable person is ascertained from the perspective of, and envisaged as, a 'reasonable' *white* Australian, barrister Mark Dennis has noted that 'the Clapham omnibus has not been sighted in Wilcannia, Bourke or Walgett [towns with high Aboriginal populations] in recent times'.[73]

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[67] See, eg, *Ball v McIntyre* (1966) 9 FLR 237, 243; *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991); *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993).

[68] *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991) 5; quoting *Evans v Frances* (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990) where Lusher AJ stated: 'To convert the reasonable man into one who is not so thin skinned as not to be distressed or offended by such language [as the magistrate had found] in my submission is not to apply the test of the reasonable man'; *Re Marland* [1963] 1 DCR 224.

[69] *Ball v McIntyre* (1966) 9 FLR 237, 245 (Kerr J).

[70] *Evans v Frances* (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990).

[71] *Spence v Loguch* (Unreported, Supreme Court of NSW, Sully J, 12 November 1991) 10.

[72] (Unreported, Supreme Court of NSW, Yeldham J, 5 March 1982) 5–6; similarly Bray CJ noted in *Romeyko v Samuels* (1972) 2 SASR 529, 563: 'With respect, I deprecate references to the right-minded man. Phrases like this conceal value judgments, which, in effect, prejudge the issue'.

[73] These are all towns with a higher than average (for NSW) population of Indigenous Australians. See Roseanne Bonney, 'NSW Summary Offences Act 1988' (NSW Bureau of Crime Statistics and Research, 1989); Mark Dennis, '"Dog Arse Cunts": A Discussion Paper on the Law of Offensive Language and Offensive Manner' <http://criminalcle.net.au/attachments/Offensive_Language_and_Offensive_Manner_Discussion_Paper__Dog_Arse_Cunts.pdf>.

In Chapter Eight I go beyond these critiques by using CDA to interrogate how the reasonable person's perspective is described and applied through criminal justice discourse, and exploited to include some categories of people, while excluding 'Others'. I show how linguistic features, including the use of the definite article, negative clauses and low-modality phrases, enable individual police and judicial officers to presuppose that 'the reasonable person' exists', and mask the influence of the officers' unique upbringings, language backgrounds, educations, culture and values on their assessment of what is reasonable. I reveal how judicial officers variously allow or deny the reasonable person a sensitivity to, and awareness of, history, cultural differences, social/class tensions and racism.

4.6.2 What are 'community standards'?

It is generally recognised that community standards are not immutable or 'fixed from a past era' but change over time; the standard to be applied by a court is that existing at the time the words were used.[74] As Nathan J said in *Nelson v Mathieson*, the categories of offensive behaviour are 'never closed and that which may be offensive to one generation may be regarded as a matter of hilarity by the next'.[75] The assessment of community standards is a question to be assessed by the presiding judicial officer, not by reproducing the views of a particular witness.[76] However, in cases where a police officer has issued an infringement notice for the use of offensive language (see below), the assessment of community standards falls to the witness and sometimes also the 'victim' of the language used—the issuing police officer.[77]

Significantly for the enquiry of my thesis, the relevant decision-maker cannot have recourse to expert evidence on current community standards; they must use their 'common sense' to determine what those standards are.[78] Thus, offensive language is deemed a matter of 'judicial notice'.[79] As Johnson J stated in *Heanes v Herangi,* in relation to a charge of disorderly conduct by using offensive language in public: 'Magistrates with a wide experience of life

[74] *Edbrooke v Hartman* [1991] QDC 15 where Wylie DCJ stated 'The community standard is not an immutable one, fixed from a past era; it is the standard at the time the language is used'.

[75] [2003] VSC 451 (Nathan J), [10].

[76] *E (a child) v The Queen* (1994) 76 A Crim R 343.

[77] This aspect was criticised by the NSWLRC in NSW Law Reform Commission, 'Penalty Notices' (Report, 2012) 298.

[78] *Prowse v Bartlett* (1972) 3 SASR 472.

[79] Transcript of Proceedings, *Del Vecchio v Couchy* (Queensland Court of Appeal, 245/2001, de Jersey CJ, McPherson JA and Douglas J, 4 February 2002) 3 (McPherson JA); see also *Romeyko v Samuels* (1972) 2 SASR 529, 563; *Crowe v Graham* (1969) 121 CLR 375, 411 (Windeyer J); *Dalton v Bartlett* (1972) 3 SASR 549, 561 (Walters J); *Hortin v Rowbottom* (1993) 68 A Crim R 381.

and human foibles are generally in the best position to judge whether conduct should be categorised as disorderly.'[80]

Community standards are thus determined by what the individual judicial officer deems to be commonly held prejudices, beliefs and sensibilities regarding acceptable language in particular places. In such cases it is inevitable, as Bray CJ recognised in *Romeyko v Samuels*, that 'a large subjective element must enter into the decision … The judge must struggle against the bland assumption that his own views on these delicate matters necessarily reflect the current community attitude.'[81]

While, as stated above, all jurisdictions refer to the community standards test, there is no consistent statement as to whether these are standards of 'good public order'; standards of 'decency'; standards of 'propriety'; or the community's expectations as to whether the language should be characterised as offensive, obscene or indecent with regard to the application of the criminal law.[82] An attempt to resolve this issue was made in *Police v Bubbles*, where Magistrate Payne considered whether the expression 'community standards' required a decision-maker to consider more than 'popular opinion or vulgar prejudice' and extended to 'the expression of standards that reflect the fundamental values of our society so far as the application of the criminal law is concerned'.[83] There is also neither a clear nor a consistent statement in the case law regarding who or what this abstract entity—the community—encompasses, an issue that I examine in Chapter Eight. Does the term refer to a local community (such as Redfern) or the wider Australian community? Is the community defined by geographical, cultural, citizenship or linguistic characteristics, or something more intangible? And when considering 'prevailing' community standards, how might a court take changing socio-economic, education, linguistic, cultural, religious and other factors into account?

In Chapter Eight, I draw on CDA to critique how decision-makers construct and apply the community standards test. I argue that magistrates and judges give little to no consideration to the boundaries that might enclose the community, and I question exactly *who* the community includes and excludes. I argue that rarely is this phrase—'contemporary community standards'—critically examined or transparently applied. I consider the exception of Magistrate Heilpern in *Police v Butler* who, alongside citing experts in language when

[80] (2007) 175 A Crim R 175, 218 (Johnson J); citing *Mogridge v Foster* [1999] WASCA 177, [7-8] (McKechnie J).

[81] (1972) 2 SASR 529, 563 (Bray CJ).

[82] See, eg, *Del Vecchio v Couchy* [2002] QCA 9; *Police v Bubbles* [2006] QMC 6; *Heanes v Herangi* (2007) 175 A Crim R 175.

[83] [2006] QMC 6, [43] (Magistrate Payne); quoting *R v Suckling* (1999) 116 A Crim R 198 (Adams J).

assessing whether the word 'fuck' offended community standards, referred to the contemporary regularity of swear words in everyday conversations, in popular media, and in statements made by members of parliament and public figures.[84]

4.7 Context

Whether language is to be characterised as obscene, indecent, offensive or insulting is a question of fact, to be assessed in light of the context in which the language was used.[85] It is therefore an error of law to hold that a word is necessarily indecent regardless of context.[86] In considering the context, a decision-maker might take into account a number of factors, including: the location or time at which the language was used; who was in the vicinity; whether the defendant was intoxicated; whether the language was said to a person in a position of 'authority'; whether the utterance may have had special relevance to the recipient; the tone, volume or 'vehemence' of the utterance; and any accompanying mannerisms.[87] As offensive language crimes target offence occasioned to the reasonable person, in addition to considering the people in the vicinity when the language was used, courts may also consider the *potential* audience of the words: categories of people likely to be in the vicinity at the time.[88] As Loveday J observed in *Stutsel v Reid*, which reflects judicial interpretation across Australia, the test for a charge of offensive language is an objective one; it is concerned with how offensive language *might* have affected someone in a public place or someone who *might* have contemplated using the public place.[89]

Although these statements might indicate otherwise, the determination of context is no straightforward task. In Chapter Seven, I examine the language choices made in describing the relevant context in which the words were used, and question how these might affect the

[84] [2003] NSWLC 2 (Magistrate Heilpern).

[85] *Hortin v Rowbottom* (1993) 68 A Crim R 381, 389 (Mullighan J); *Gul v Creed* [2010] VSC 185, [15] (Beach J).

[86] *Hortin v Rowbottom* (1993) 68 A Crim R 381, 389 (Mullighan J); *Bills v Brown* [1974] Tas SR (NC) N13 (Chambers J); *Romeyko v Samuels* (1972) 2 SASR 529, 563 (Bray CJ).

[87] See, eg, *Green v Ashton* [2006] QDC 8; *Spence v Loguch* (Unreported, Supreme Court of NSW, Sully J, 12 November 1991); *Heanes v Herangi* (2007) 175 A Crim R 175; *Hortin v Rowbottom* (1993) 68 A Crim R 381; *Melser v Police* [1967] NZLR 437; *Wainwright v Police* [1968] NZLR 101; *Dillon v Byrne* (1972) 66 QJPR 112.

[88] *Spence v Loguch* (Unreported, Supreme Court of NSW, Sully J, 12 November 1991).

[89] (1990) 20 NSWLR 661, 663 (Loveday J). *Stutsel v Reid* concerned a charge of offensive language brought under s 4(1)(b) (the predecessor to s 4A[1]) of the SO Act (NSW). The facts giving rise to the charge were that, at about 1.15am on 10 February 1990, two police officers attended 141 Anson Street, Bourke, NSW. The police officers proceeded onto the front lawn of an unfenced yard, on which a man was said to be then involved in a 'wrestle-type affair'. The respondent walked towards the police officers and called out in a loud voice the offending words: 'Why don't you fuck off you dog arse cunts.' At trial, the magistrate held that the prosecutor had failed to establish a prima facie case since no evidence had been called to prove that there was present in the public place at the time a person who could have heard the words the subject of the charge.

outcome in a particular offensive language case. I argue that the construction of contexts in criminal justice discourse, through transformation, repetition, emphasis, categorisation, differentiation and exclusion,[90] plays an important and little-acknowledged ideological role in offensive language cases.

In determining whether language is offensive in the context in which it was used, judicial officers commonly resort to bland stereotypes about appropriate and inappropriate places in which one might use 'bad words'. For example, in *McCormack v Langham*,[91] the respondent, Geoffrey Langham, was lunching 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 heard Langham say, in a loud voice: 'Watch these two fucking poofters here, how they fuckin' persecute me'. The officers arrested the respondent and charged him with using offensive language.[92] In the Supreme Court of NSW, Studdert J gave the following example of circumstances in which the words may, or may not, constitute offensive language: '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.'[93] A similar designation of acceptable or unacceptable places in which one might swear was proffered in *Wainwright v Police*: 'Conduct that is acceptable at a football match or boxing match may well be disorderly at a musical or dramatic performance. Behaviour that is permissible at a political meeting may deeply offend at a religious gathering.'[94]

In Chapter Seven, I demonstrate the prevalence, and question the desirability, of such hypothetical scenarios. I argue that these statements, when mimicked by police and judicial officers, lawyers, politicians, and even academics,[95] naturalise (whether intentionally or unintentionally) ill-informed stereotypes about language, gender, age and place, leaving little room for diversity in how people use and interact in public space. They construct spaces into binaries of either clean or dirty, naturalising the idea that swear words belong in 'dirty' spaces—a bar, a football match, a male change-room or on the battlefield. Meanwhile, swear

[90] See Theo van Leeuwen, *Discourse and Practice: New Tools for Critical Discourse Analysis* (Oxford University Press, 2008).

[91] (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991).

[92] Then charged under the since-amended *SO Act* (NSW) s 4(1)(b).

[93] *McCormack v Langham* (Unreported, Supreme Court of NSW, 5 September 1991, Studdert J).

[94] [1968] NZLR 101, 103.

[95] For example, McNamara and Quilter provide the following example: 'Something done or said in one context (such as a pub) may not be offensive, but if done in another may well be so (such as a playground with young children about)' McNamara and Quilter, above n 11, 554.

words do not belong in 'clean' spaces—church services, shopping malls, main streets and musical performances.[96]

4.8 Location of the offence

An additional element of the actus reus is that the words must have been used in or near a public place. This location element varies between jurisdictions. In NSW, offensive language is only punishable if used 'in or near, or within hearing from, a public place or a school'.[97] The offence is made out in the absence of proof that there was anyone in the public place to be offended, provided that it might reasonably be found that some reasonable person might be expected to come upon the place where the language was used and hear it.[98] In WA, disorderly conduct is punishable if it occurs in a public place, in a police station, a lock-up or in the hearing of any person who is in a public place.[99] The Queensland public nuisance offence is unique in that it does not stipulate that words must be used in or near a designated place. Instead, s 6 of the *SO Act* (Qld) provides that the language must interfere, or be likely to interfere, with 'the peaceful passage through, or enjoyment of, a public place by a member of the public'.[100]

4.8.1 What is a public place?

In NSW, 'public place' is defined as a place (whether or not covered by water), or a part of premises that

> is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the

[96] Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966) 44–5.

[97] *SO Act* (NSW) s 4A(1).

[98] Justice Loveday provided the rationale that: 'Members of the public who use or may use public places should know that they are protected from offensive language used in the public place or within hearing distance of the public place. In the absence of such protection they might well avoid the public place' *Stutsel v Reid* (1990) 20 NSWLR 661, 663–664.

[99] *Criminal Code* (WA) s 74A; The WA legislature added the specific locations of a 'police station or lock-up' to the disorderly conduct provision in order to overcome an obstacle to conviction that arose in *E (a child) v The Queen* (1994) 76 A Crim R 343 The relevant NT provisions similarly criminalise behaviour in a police station or lock-up, see Table 4.1.

[100] *SO Act* (Qld) s 6(2)(b). Section 6(1)(a) also provides that if such an offence takes place within or in the vicinity of 'licensed premises', the defendant might be liable to an increased fine of 25 penalty units (instead of 10 penalty units) or six months imprisonment.

public to whom it is open consists only of a limited class of persons, but does not include a school.[101]

This broad statutory definition reflects general common law and statutory definitions of a public place, which have regard to whether members of the public use or access the place, as opposed to a private proprietary or a legal right to use the space.[102] The definition therefore includes what some might regard as private or semi-private places.[103] Places deemed to be public have included a public lavatory (even where the toilet cubicle was locked by the user); a club; a commercial shopping mall; a car parked in a street; a taxi in a carpark; a railway station or carriage; a tram; a private house where an auction is being conducted; a theatre; unfenced privately owned land where the public has free access; a room in a hotel where a public meeting was being held; and the grounds Parliament House when occupied by demonstrators.[104] The question of what constitutes a public place arose in the *Appeal of Camp*, where the NSW Court of Criminal Appeal considered whether a passageway on the seventh floor of an apartment block was a public place.[105] The passageway was used by a milk vendor, baker and other tradespersons, and by persons visiting residents on the seventh floor. The Court of Appeal held that the passageway was a public place, stating that public place had a 'wide definition' and that:

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[101] This is an exhaustive definition: *SO Act* (NSW) s 3(1) (definition of 'public place'). Note that s 3(1) also defines a 'school' for the purpose of s 4A as meaning '(a) a government school or a registered non-government school within the meaning of the Education Reform Act 1990, and (b) a school providing education (whether secular or religious) at a pre-school or infants' school level or at a primary or secondary level, and (c) a place used for the purposes of an establishment commonly known as a child-minding centre or for similar purposes, and (d) the land, and any building, occupied by or in connection with the conduct of such a school or place, and includes any part of such a school or place, but does not include any building that is occupied or used solely as a residence or solely for a purpose unconnected with the conduct of such a school or place'.

[102] *Appeal of Camp* [1975] 1 NSWLR 172; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co., 2nd ed, 2005) 715; in *SO Act* (Qld) sch 2 (definition of 'public place') a public place is similarly defined as 'a place that is open to or used by the public, whether or not on payment of a fee'.

[103] *Appeal of Camp* [1975] 1 NSWLR 172.

[104] Examples extracted from case law are in Donna Spears, Julia Quilter and Clive Harfield, *Criminal Law for Common Law States* (LexisNexis Butterworths, 2011) 164–5; see *Appeal of Camp* [1975] 1 NSWLR 172; *Mansfield v Kelly* [1972] VR 744 (cars parked in a street); *Reid v Nominal Defendant* (1968) 88 WN (Pt 1) (NSW) 601; *Davidson v Darlington* (1899) 24 VLR 667; *Milne v Mutch* [1927] VLR 190 (a tram); *Langrish v Archer* (1882) 10 QBD 44; *Sawtell v Regan* (1882) 3 LR (NSW) 362; *Melser v Police* [1967] NZLR 437; see also *Walker v Crawshaw* [1924] NZLR 93; however, the lavatory in an office building for the use of female staff, where the general public had no permission to go, was held not to constitute a public place: *O'Sullivan v Brady* [1954] SASR 140; *McKenzie v Stratton* [1971] VicRp 104 (a taxi parked in the car park of a police station).

[105] [1975] 1 NSWLR 172. Section 4(1) of the *Summary Offences Act 1970* (NSW) contained a similar definition of 'public place' to s 3(1) of the SO Act (NSW), extracted above. Section 4(1) defined 'public place' as '(a) a place (whether or not covered by water); or (b) a part of premises that is open to the public, or is used by the public, whether or not on payment of money or other consideration whether or not the place or part is ordinarily so open or used, and whether or not the place to whom it is so open consists of a limited class of persons, but does not include a school.'

> It is sufficient if the place, or a part of premises, is open to or used by the public. It matters not whether they pay money to use it or whether it is ordinarily so open or used, and it is sufficient if the public to whom it is open consists only of a limited class of persons. So it would appear that any place, or part of any premises, which the public use, or which is open to the public, whether they are private premises or a place surrounded by private lands, whether the people who use the place or premises do so not as of right but even as trespassers, is within the definition.[106]

4.8.2 Public/private dichotomy

Offensive language crimes evidently create a dichotomy between public and private places; the former, unlike the latter, are places within or near which the use of offensive words is deemed criminal. As Page J stated in *Inglis v Fish*:

> Conduct which might undoubtedly be described as offensive if it took place on a public street or footpath could hardly be said to be 'offensive' if it took place in the privacy of the front room of a house which abutted on to that street or footpath if the blinds were drawn so that it was not possible to see what was going on.[107]

There is nothing natural or logical about maintaining a legal distinction between public and private spaces—including the designation of particular spaces as 'private' or 'public'. Also contestable is the view that certain words uttered in private are less offensive than those same words uttered in public.[108] This division can largely be traced back to changing perceptions of appropriate behaviour in the Western world: how with the rise of the notion of 'civility' in the Renaissance, and then in the Victorian Era, conduct and language that was acceptable in the Middle Ages became unacceptable; bodily functions, sexual activities and naked flesh—and words that hinted at such things—were increasingly banished from what was deemed public space.[109] In Chapter Seven I show how criminal justice discourse constructs and entrenches the public/private dichotomy. I recognise that this dichotomy privileges certain users of space over others. As established in Chapter Three, when crimes of using obscene, indecent or profane language were introduced in Australia, they were created in the minds—and followed the habits—of the most privileged members of the European colonisers, and subjugated non-dominant users of space: including Indigenous Australians and those labelled as foreigners, deviants, larrikins, vagrants or vagabonds. The arbitrary division between public and private

[106] Ibid 454 (Taylor CJ at CL, Begg and Meares JJ).

[107] [1961] VR 607, 609 (Page J).

[108] See generally Margaret Thornton, *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995).

[109] Melissa Mohr, *Holy Shit: A Brief History of Swearing* (Oxford University Press, 2013); William Ian Miller, *The Anatomy of Disgust* (Harvard University Press, 1997).

space, and the legal regulation of so-called public places, continues to have a criminogenic effect on Indigenous persons, youth and homeless people—groups typically likely to conduct a greater array of everyday activities in 'public'—rendering them more visible to police and for that reason, a more likely target of state intervention.[110]

4.8.3 Breach of the peace

Unlike the jurisdictions of WA and NSW, s 6 of the *SO Act* (Qld) does not stipulate that the language must occur in or near a public place. Instead s 6 provides that, to be convicted, a defendant's language must interfere or be likely to interfere with 'the peaceful passage through, or enjoyment of, a public place by a member of the public'. This element can be traced back to (although its interpretation now differs from), 19th and early 20th century Vagrancy and Police Acts provisions that attached to the offences of using threatening, abusive or insulting words a requirement that such words were likely, or were intended to, provoke a breach of the peace (see Chapter Three). The expression 'breach of the peace' does not envisage peace as in 'peace and quiet' or tranquillity, but is allied to harm, actual or prospective, against persons or property.[111] The courts have not applied this definition of breach of the peace to s 6. Rather, since the new public nuisance offence was introduced in Queensland in 2004, judicial officers have interpreted 'the peaceful passage through, or enjoyment of, a public place by a member of the public' broadly, as allowing members of the public to be 'free of unpleasantness' or 'free of unacceptable annoyance'.[112]

4.8.4 Who is a member of the public?

In *Kris v Tramacchi*, Forde DCJ held that, for the purposes of the crime of public nuisance, the term 'member of the public' included a police officer.[113] His Honour reasoned that the second reading speech points to an interpretation that includes 'the protection of police officers acting in the course of their duties from being the subject of disorderly or offensive or

[110] See Jarrod White, 'Power/Knowledge and Public Space: Policing the "Aboriginal Towns"' (1997) 30 *The Australian and New Zealand Journal of Criminology* 275; Rob White, 'Indigenous Young Australians, Criminal Justice and Offensive Language' (2002) 5 *Journal of Youth Studies* 21; Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen and Unwin, 2001); Marcia Langton, 'Medicine Square' in Ian Keen (ed), *Being Black: Aboriginal Cultures in 'Settled' Australia* (Aboriginal Studies Press, 1988) 201; Tamara Walsh, 'Who is "Public" in a "Public Space"?' (2004) 29 *Alternative Law Journal* 81.

[111] Legal Policy Division, 'Review of the Summary Offences Act' (Issues Paper, Northern Territory Department of Justice, 2010) 20 n 56.

[112] See *Green v Ashton* [2006] QDC 8, [17] (Skoien SJDC); referring to the Second Reading Speech to the Police Powers and Responsibilities and Other Legislation Amendment Bill 2003 (Qld).

[113] [2006] QDC 35 (Forde DCJ).

threatening conduct which is likely to interfere with their peaceful passage through a public place'.[114] Similarly, in *Atkinson v Gibson*, Fraser JA held that there was 'no reason' as to 'why police officers should be excluded from those "members of the public" who that Act was designed to protect'.[115]

By way of contrast, it has been suggested that because police officers occupy a special position of authority—a position distinct to, and above that, of 'civilian' members of the public—they warrant greater 'protection' from offensive language. In *Heanes v Herangi*, Johnson J found that language is capable of being offensive where it 'challenges' police authority.[116] Justice Johnson stated that an appropriate end of the crime of disorderly conduct was to prevent language from 'incit[ing] others to involve themselves in challenging the authority of the officers.'[117]

Other judges and commentators have reasoned that police should be less sensitive or reactive to swear words used towards them or in their presence vis-à-vis members of the public.[118] The English Divisional Court in *DPP v Orum* found that police officers should have 'thicker skins' than members of the public, stating that 'words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom'.[119] In *Coleman v Power*, Gummow and Hayne JJ similarly suggested that 'the bare use of words to a police officer which the user intends should hurt that officer will not constitute an offence. By their training and temperament, police officers must be expected to resist that sting of insults directed to them.'[120] Justice Kirby argued that police officers 'like other public officials are expected to be thick skinned and broad shouldered in the performance of their duties'.[121]

There are, therefore, diverging authorities on the question of whether police officers should

[114] Ibid [17] (Forde DCJ).

[115] [2010] QCA 279, [32] (Fraser JA); see also *Green v Ashton* [2006] QDC 8, [6]-[7] where Skoien SJDC held that members of the Queensland Police Service—a civil (and not a military) force—are entrusted with the duty and power to assist in the enforcement of the criminal and quasi-criminal law and to maintain public order; Skoeien SJDC noted that in *Coleman v Power* (2004) 220 CLR 1, Gummow and Hayne JJ, after referring to police officers, referred to 'other civilians', and the use of 'other' demonstrated their Honours' view that police officers are also civilian.

[116] (2007) 175 A Crim R 175, 177.

[117] Ibid.

[118] See, eg, Hal Wootten, 'Aborigines and Police' (1993) 16 *University of New South Wales Law Journal* 265; White, 'Indigenous Young Australians, Criminal Justice and Offensive Language', above n 110, 30.

[119] [1989] 1 WLR 88, 93 (Glidewell LJ); quoted in *Coleman v Power* (2004) 220 CLR 1, 7 (Gleeson CJ).

[120] (2004) 220 CLR 1, 59 (Gummow and Hayne JJ).

[121] Ibid 78 (Kirby J).

be treated just like any other member of the public, or in a discrete category, and additionally, whether swearing at police officers should increase or decrease the likelihood that such language is criminally offensive. I return to these questions in Chapter Nine, in which I use CDA to analyse discursive constructions of police, power and (dis)order in offensive language cases and media commentary regarding those cases, particularly the notion that swearing at police equates to disrespecting authority.

4.9 Mens Rea

It is a recognised principle, indeed a presumption, of criminal liability that offences contain conduct elements (the actus reus) and a mental or fault element (mens rea).[122] As Brennan J said in *He Kaw Teh v The Queen* ('*He Kaw Teh*'): 'It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication.'[123]A number of crimes, however, deviate from this general principle, some by discarding the requirement to prove subjective fault, others by requiring no proof of mens rea at all. Such offences tend to be found in the 'regulatory' areas (of licensing, industrial safety or environmental health) and, significantly, in the area of public order.[124]

As offensive language crimes are generally defined by reference to their external elements,[125] a question arises as to whether the prosecution must also prove a mental element and, if so, what that mental element entails. The question remains unresolved, at least in NSW, where McNamara and Quilter have recognised that there is no clear judicial statement as to whether s 4A incorporates a mental element.[126] This issue was considered in *Jeffs v Graham*.[127] In that case, the appellant had been charged with offensive conduct under s 5 of the (since-repealed) *Offences in Public Places Act 1979* (NSW). As stated above, Yeldham J held that the Crown

[122] *He Kaw Teh v The Queen* (1985) 157 CLR 523, 566 ('*He Kaw Teh*') (Brennan J); as Wright J stated in *Sherras v De Rutzen* [1895] 1 QB 918: 'There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered'; for discussion, see Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 *The Modern Law Review* 350, 353.

[123] (1985) 157 CLR 523, 566 (Brennan J).

[124] Lacey, above n 122, 355.

[125] See, eg, *SO Act* (NSW) s 4A(1): 'A person must not use offensive language in or near, or within hearing from, a public place or a school'.

[126] McNamara and Quilter, above n 11, 555 McNamara and Quuilter have also pointed out that any authorities on the issue tend to embark on a global inquiry as to whether a single mens rea state must be proven for offensive language and conduct charges, as opposed to asking whether a fault element attaches to each of the actus reus components.

[127] (1987) 8 NSWLR 292 (Yeldham J).

was required at least to prove beyond reasonable doubt that the person charged had *voluntarily* engaged in the conduct which was the basis for the complaint. Justice Yeldham reasoned that the crime of offensive behaviour is truly criminal in nature, and 'clearly causes a stigma to attach to any person convicted of it'.[128] Justice Yeldham also considered that the penalty, 'whilst not heavy', was not 'insubstantial' (at least to those who tend to be caught be the offence), and that its subject matter did not involve potential danger to public health, safety or morals.[129] But, as McNamara and Quilter have observed, what Yeldham J meant by the term 'voluntarily' is ambiguous.[130] Although voluntariness is usually used in relation to the actus reus of an offence (see above),[131] McNamara and Quilter have argued that Yeldham J used the word voluntary as 'a synonym for intention', albeit only in relation to the somewhat minimal requirement that the accused intended to speak or act, a requirement that would 'rarely be in issue'.[132] The NSW Court of Criminal Appeal has not yet considered Yeldham J's equivocal statement with regards to mens rea, and we must await an appellate decision which clarifies the issue of whether the crime of using offensive language requires the prosecution to prove a mental element beyond a reasonable doubt, and addresses what that mental element includes.

Outside NSW, two key cases have explored the question of whether offensive behaviour crimes involve a mental element, with diverging outcomes: the NT Court of Criminal Appeal case *Pregelj v Manison*,[133] and the Supreme Court of SA case *Police v Pfeifer*.[134] In *Pregelj v Manison*, the Court considered whether mens rea is an element of the statutory offence of offensive behaviour.[135] In the case, Constable Anthony Dyer, passing in an adjacent laneway, had noticed through a bedroom window (without curtains), a 'white male who was naked lying on top of an Aboriginal female who too was naked … going through the motions of sexual intercourse'.[136] The constable was 'a bit annoyed'[137] by what he saw and reported the couple to his colleagues, who had them charged with offensive behaviour.[138] The appellants

[128] Ibid 296 (Yeldham J).

[129] Ibid (Yeldham J).

[130] McNamara and Quilter, above n 11, 555.

[131] See *Ryan v The Queen* (1967) 121 CLR 205; *Ugle v The Queen* (2002) 211 CLR 171; *Murray v The Queen* (2002) 211 CLR 193.

[132] McNamara and Quilter, above n 11, 556.

[133] (1987) 51 NTR 1 (Nader, Kearney and Rice JJ).

[134] (1997) 68 SASR 285 (Doyle CJ, Debelle and Lander JJ agreeing).

[135] The *SO Act* (NT) s 47(a) criminalises any riotous, offensive, disorderly or indecent behaviour, fighting, or using obscene language, in or within the hearing or view of any person in any road, street, thoroughfare, or public place.

[136] (1987) 51 NTR 1, 3 (Nader J) quoting Constable Dyer, the complainant and sole eyewitness.

[137] Ibid (Nader J) quoting Constable Dyer, the complainant and sole eyewitness.

[138] *Pregelj v Manison* (1988) 31 A Crim R 383.

gave evidence that they did not think their activities could be seen from outside the room.[139] Applying Brennan J's reasoning in *He Kaw Teh*, the NT Court of Criminal Appeal held that mens rea is an element of the statutory offence of offensive behaviour, there being nothing in s 47 of the *Summary Offences Act 1978* (NT) ('*SO Act* (NT)') to exclude it.[140] Although the justices agreed that s 47 incorporated a mental element, they could not agree on its content. While Rice J supported a narrow proposition, that the prosecution must prove beyond reasonable doubt that the defendant has an intention to commit the behaviour in or within the view of any public place,[141] Nader J required the prosecution to prove that the defendant intended to offend a person, or foresaw that a person would be offended as a possible consequence of his or her conduct.[142] Justice Kearney, who wrote a separate judgment agreeing with Nader J, argued that the prosecution had to prove the appellants intended the punishable act—that is, both external elements—or foresee it as a possible consequence of their conduct.[143]

In contrast, the Supreme Court of SA held in *Police v Pfeifer* that the crime of offensive behaviour was one of strict liability and that, therefore, the prosecution was not required to prove any mens rea beyond reasonable doubt.[144] In that case, the respondent was arrested for wearing, in a busy Adelaide shopping mall during the Christmas shopping season, a T-shirt given to him by his mother. On the front of the T-shirt was written the name of the band *Dead Kennedys* with the words 'Too Drunk to Fuck'. The respondent was charged with behaving in an offensive manner contrary to s 7(1)(a) of the *Summary Offences Act 1953* (SA) ('*SO Act* (SA)). Chief Justice Doyle (Debelle and Lander JJ agreeing), applying Brennan J's reasoning in *He Kaw Teh* and distinguishing *Pregelj v Manison*, held that the presumption of mens rea had been rebutted, so that the offence was one of strict liability. A central aspect of Doyle CJ's reasoning was that the offence required members of society to take preventative measures to ensure they did not breach generally acceptable standards of behaviour. His Honour stated: 'most people in Australian society have a fair idea of the generally accepted

[139] *Pregelj v Manison* (1987) 51 NTR 1, 5 The male appellant also gave evidence that the inspector had told him it was a crime to have sex with an Aboriginal woman.

[140] For discussion see McNamara and Quilter, above n 11, 556–9.

[141] *Pregelj v Manison* (1987) 51 NTR 1, 24 (Rice J). Justice Rice focused on the question as to whether the appellants had an intention that their intercourse take place 'in or within the view of any person in any … public place'. His Honour found that the appellants had no prurient intention to have intercourse as 'some sort of wide screen entertainment to the public'.

[142] Ibid 16–17. Justice Nader (Kearney J agreeing) held that the gravamen of offensive behaviour is the offending of another person, and that that offending must be intended.

[143] Ibid 19–20.

[144] (1997) 68 SASR 285 (Doyle CJ, Debelle and Lander JJ agreeing); see *Summary Offences Act 1953* (SA) s 7 ('*SO Act* (SA)').

standards of behaviour in our society. It makes sense to say that people must, in certain areas of their life, take care not to give offence to others by their conduct.'[145]

In light of these divergent judicial conclusions, and in the absence of clear judicial guidance from NSW appellate courts, McNamara and Quilter have contended that, in NSW, the prosecution should at least prove that a defendant intended to perform the offensive act or language. They have further argued, again applying Brennan J's reasoning in *He Kaw Teh*, that the presumption of *mens rea* applies to ss 4 and 4A offences, so that the prosecution should prove that the accused knew, or foresaw the possibility (was reckless), that their conduct or language was offensive.[146] In reaching these conclusions, McNamara and Quilter reasoned that the word 'calculated' in the common law definition of offensive in *Worcester v Smith* imports the notion of intention.[147] They have also argued—unlike Doyle CJ—that so-called luckless persons could be caught for unwittingly engaging in offensive conduct.[148]

While the majority of NSW courts have appeared to proceed on the assumption that it is irrelevant whether the defendant intends her or his words to be offensive, so long as they are deemed so by the reasonable person, in accordance with contemporary community standards[149]—McNamara and Quilter mount a strong argument for incorporating intention to offend as an element of offensive language crimes. I return to and critique this argument further in my conclusion, where I consider reasons to amend, or abolish, offensive language crimes. For the purposes of this chapter, I note how it is surprising that, despite the high number of offensive language and conduct cases in NSW, there is still no higher court decision on this issue since *Jeffs v Graham*. Elsewhere, including in Queensland, Tasmania, WA, Victoria and the ACT, the question of whether offensive language crimes contain a mens rea element, and the content of any such element, remains unresolved. It has been suggested that the offences created by s 17 of the *Summary Offences Act 1966* (Vic) require proof of *mens rea*, although again, little guidance can be obtained from previous authorities.[150]

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[145] *Police v Pfeifer* (1997) 68 SASR 285, 292.

[146] McNamara and Quilter, above n 11, 559.

[147] Ibid.

[148] Ibid 560.

[149] See, eg, *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993); *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991); *Jolly v The Queen* [2009] NSWDC 212; *Stutsel v Reid* (1990) 20 NSWLR 661.

[150] LexisNexis, *Bourke's Criminal Law Victoria* (2016) [28,180.5].

4.10 Defences, including reasonable excuse

For jurisdictions where offensive conduct or language has been held to be a crime of strict liability, such as SA, (or those where the question as to mens rea remains unresolved), the defence of honest and reasonable mistake of fact applies. In other words, the defendant must raise evidence to a reasonable possibility that he or she honestly and reasonably believed the language was not offensive.[151]

In NSW, s 4A(2) provides a statutory defence of 'reasonable excuse', which states that it is a defence to a charge under s 4A if the defendant satisfies the court (to the balance of probabilities)[152] that they had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.[153] Examples of what might constitute a reasonable excuse were given in *Karpik v Zisis* (where a profanity was used in a public place), including 'where the behaviour is almost a reflex action … a heavy implement falling on one's foot, suddenly being hurt or angered by a sudden outrageous outburst or provocation'.[154]

In *Conners v Craigie*, Dunford J stated that the defence of reasonable excuse involves both subjective and objective considerations, and that these considerations must be 'related to the immediately prevailing circumstances' in which the words were used.[155] Justice Dunford held that in an 'appropriate case' a court might consider the immediate surrounding circumstances against the background of the defendant's antecedents, prior experiences (both recent and less recent), and other related events, but that 'there must, in my view, always be something involved in the immediate particular circumstances before there can be reasonable excuse'.[156] There is, however, a limit to the words a court will permit a person to utter in 'reasonable excuse' to their being injured or provoked. In *Jolly v The Queen*, the defendant, who had suffered a serious injury to his neck from a police dog and was concerned for his injured fiancée, told police officers: 'You are fucking dog cunts. You fucked his mum and he fucked

[151] *Police v Pfeifer* (1997) 68 SASR 285, 293 (Doyle CJ, Debelle and Lander JJ concurring).

[152] *Jeffs v Graham* (1987) 8 NSWLR 292, 295.

[153] It is also a defence if the accused satisfies the court that the act complained of in the information for the offence was done with lawful authority: *SO Act* (NSW) s 12.

[154] (1979) 5 Petty Sessions Review 2055, 2056 (Magistrate Pike).

[155] (1994) 76 A Crim R 502 (Dunford J).

[156] Ibid 507 (Dunford J); The case was a second appeal following the matter being remitted back to the magistrate by McInerney J in *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993) The matter was ultimately remitted back to the Local Court to be 'dealt with according to the law', and the defendant Craigie was convicted and fined $80; see David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (The Federation Press, 6th ed, 2015) 536.

your mum and he fucked his mum and sister and your brother and son'.[157] Judge Cogswell held that the defendant might reasonably have said words such as 'Get the fucking dog off me'.[158] But the language that the defendant used, which made 'references to members of the police officers' families having sexual relations with each other', did not allow the defendant a defence of reasonable excuse.[159]

4.11 Constitutional implications: the implied freedom of political communication

While an extensive investigation of the relationship between criminal prohibitions on offensive or insulting language and the constitutional implied freedom of political communication ('implied freedom') is beyond the scope of my thesis, it is important to canvass how offensive language crimes potentially infringe the implied freedom. This is because swear words have the capacity to, and are often used to, voice resistance to political policies (see Chapter Nine). The Constitution of the Commonwealth of Australia ('Constitution') contains no comprehensive statement of rights, and no explicit right to freedom of speech.[160] Instead, the High Court of Australia has identified that the system of representative democracy, in ss 7 and 24 of the Constitution, implies a freedom of political expression.[161] The two-step test ('the *Lange* test') to determine whether a law is invalid due to infringing the implied freedom is:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
> Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[162]

If the first question is answered 'yes' and the second 'no', the law is invalid.

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[157] [2009] NSWDC 212, [14].

[158] *Jolly v The Queen* [2009] NSWDC 212, [21] (Cogswell DCJ).

[159] Ibid [20]-[21] (Cogswell DCJ).

[160] See *Commonwealth of Australia Constitution Act 1901* (Cth).

[161] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[162] Ibid 567–8; adapted in *Coleman v Power* (2004) 220 CLR 1, 50, 77–8, 82 where four members of the High Court i(McHugh J, Gummow and Hayne JJ and Kirby J) agreed that the phrase 'in a manner' should be substituted for the phrase 'the fulfilment of' in the second limb; and adopted by all High Court justices in *Monis v The Queen* (2013) 249 CLR 92; see Adrienne Stone, *Free Speech Balanced on a Knife's Edge: Monis v The Queen; Droudis v The Queen'* (26 April 2013) Opinions on High <http://blogs.unimelb.edu.au/opinionsonhigh/2013/04/26/stone-monis/>.

The question of whether the crime of using insulting words in a public place contrary to s 7(1)(d) of the (since-repealed) *VGOO Act* infringed the implied freedom was examined in *Coleman v Power* (see above). The High Court considered whether the application of s 7(1)(d) to the words used by Coleman was valid. As the Queensland Court of Appeal had already decided that s 7(1)(d) did burden the implied freedom,[163] and as the respondents had conceded this to be correct, the constitutional issue was confined to whether the law satisfied the second limb of the test: whether the law was reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

The majority of the High Court (McHugh, Gummow, Kirby and Hayne JJ and Gleeson CJ; with Callinan and Heydon JJ dissenting) held that Coleman's conviction of using insulting words should be set aside, but based on disparate reasoning. Justice McHugh construed s 7(1)(d) broadly,[164] and accordingly held the law was constitutionally invalid, as it was capable of capturing language that involved political communication, and also fell foul of the second limb. The other three members of the majority (Gummow and Hayne JJ, and Kirby J) disagreed with McHugh J on how the provision should be interpreted, and construed it narrowly, reading into s 7(1)(d) a requirement that insulting, abusive or threatening words amount to 'fighting words', in that they must be intended or be likely to provoke a physical response, or a breach of the peace.[165] Based on this restricted construction, the three justices concluded that the section was not invalid as it was 'reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of representative and responsible government.'[166] As Coleman's words did not fall within this section, in that they were not 'fighting words', his conviction for using insulting words was set aside. Thus, for Gummow, Hayne and Kirby JJ, the question of the operation of the implied freedom of political expression did not arise.

In separate judgments, the minority judges in *Coleman v Power* (Gleeson CJ, Heydon and Callinan JJ) held that the implied freedom to discuss governmental and political affairs did

[163] *Power v Coleman* [2001] QCA 539.

[164] *Coleman v Power* (2004) 220 CLR 1, 20 (McHugh J).

[165] Ibid 75 (Gummow and Hayne JJ, Kirby J) Justice Kirby based his decision on Art 19 of the International Covenant on Civil and Political Rights, and the important role of insult in Australian political culture.

[166] *Coleman v Power* (2004) 220 CLR 1; see also Anthony Gray, 'Racial Vilification and Freedom of Speech in Australia and Elsewhere' (2012) 41 *Common Law Review* 167; Anthony Gray, 'Bloody Censorship: Swearing and Freedom of Speech' (2012) 37(1) *Alternative Law Journal* 37; Roger Douglas, 'The Constitutional Freedom to Insult: The Insignificance of Coleman v Power' (2005) 16 *Public Law Review* 23; Tamara Walsh, 'The Impact of Coleman v Power on the Policing, Defence and Sentences of Police Nuisance Cases in Queensland' (2006) 30 *Melbourne University Law Review* 191.

not extend to insults. The judges rejected the construction of s 7(1)(d) taken by Gummow, Hayne and Kirby JJ, which limited the offence of using insulting words to words intended to provoke physical retaliation or a breach of the peace.[167] Their Honours also stated that, irrespective of whether a breach of the peace was intended or in fact occurred, the offence contained in s 7(1)(d) satisfied the second limb of the *Lange* test,[168] in that it was directed to a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[169] Chief Justice Gleeson's reasoning differed somewhat from the reasons provided by Callinan and Heydon JJ: his Honour argued that the offence should be read narrowly in cases where the use of insulting words involved a form of political expression.[170] Nonetheless, Gleeson CJ found Coleman's words to constitute insulting language under s 7(1)(d).

In *Monis v The Queen*,[171] the High Court considered the validity of the offence under s 471.12 of the *Criminal Code* (Cth) of using a postal service in a way that is, inter alia, offensive.[172] The appellants had allegedly sent letters (and in one case a recorded message) to the relatives of Australian soldiers killed in action in Afghanistan and to the mother of an Austrade official killed in Indonesia. Their communications criticised Australia's military involvement in Afghanistan and, although they opened with expressions of sympathy for the grieving relatives, they proceeded to criticise and condemn the deceased persons. Monis was charged with a number of counts of using a postal service in an offensive and a harassing way. [173]

The High Court unanimously held that s 471.12 restricted political communication, but were divided in their assessments of the purpose of s 471.12. All members of the Court construed the word 'offensive' in s 417.12 narrowly, finding that the provision only makes the use of postal services illegal if such uses are 'very', 'seriously' or 'significantly' offensive or, following *Worcester v Smith*, are 'calculated or likely to arouse significant anger, significant

[167] Their Honours pointed out that the requirement that such words provoke a breach of the peace had expressly existed in previous versions of the offence, and had been removed when s 7(1)(d) was enacted.

[168] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[169] *Coleman v Power* (2004) 220 CLR 1 (Gleeson CJ, Heydon and Callinan JJ).

[170] Ibid 15 Gleeson CJ stated: 'But where there is no threat to the peace, and no victimization, then the use of personally offensive language in the course of a public statement of opinions of political and government issues would not of itself contravene the statute'.

[171] (2013) 249 CLR 92.

[172] *Criminal Code* (Cth) s 471.12 makes it a crime for a person to use a postal or similar service 'in a way ... that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'.

[173] The other appellant, Droudis, was charged with aiding and abetting in the commission of some of those offences: *Monis v The Queen* (2013) 249 CLR 92.

outrage, disgust or hatred in the mind of a reasonable person in all the circumstances'.[174] Justices Crennan, Kiefel and Bell dismissed the appeal, holding that the section protects against the misuse of the postal service to deliver seriously offensive material into a person's home or workplace in a manner that is compatible with the system of representative and responsible government established by the Constitution. Chief Justice French, and Hayne and Heydon JJ allowed the appeal, holding that the end pursued by the section is neither legitimate nor implemented in a manner that is compatible with the constitutional system of government. Justice Heydon characterised the implied freedom of political communication as a 'noble and idealistic enterprise which has failed, is failing, and will go on failing', but, due to the weight of precedent, begrudgingly applied the freedom and allowed the appeal.[175] As the High Court justices were equally divided, the appeal was dismissed.[176]

The cases *Coleman v Power* and *Monis v The Queen* have not conclusively answered the question of when potentially insulting, offensive or obscene speech should be characterised as 'political', and which 'legitimate' ends a state can adduce to justify stifling such speech. Constitutional law academics have discerned from *Coleman v Power* the proposition that, where insults are a form of political communication, they should enjoy constitutional protection so long as they do not have the potential to provoke a breach of the peace.[177] In other words, where laws criminalise the use of insulting words in public, such laws should be limited to circumstances where a violent response is either intended or is a reasonably likely result.[178] On the other hand, a law prohibiting political communication for the purpose of promoting 'civility' is not compatible with the constitutionally prescribed system of representative and responsible government, and is thus precluded by the implied freedom.[179]

Thus, as Douglas has argued, *Coleman v Power* may have implications for insulting or offensive language legislation in other jurisdictions, in that such legislation should be read

[174] Ibid 126-7 (French CJ, with Heydon J agreeing as to this point), 138 (Hayne J), 210-11 (Crennan, Keifel and Bell JJ).

[175] Ibid184 (Heydon J); discussed in Madeleine Figg, '*Monis v the Queen; Droudis v the Queen* (2013) 295 ALR 259' (2013) 32(1) *University of Tasmania Law Review* 125.

[176] *Judiciary Act 1903* (Cth) s 23(2)(a) provides that the decision appealed from shall be affirmed where the Court is equally divided. Thus, as a result of the 3:3 split, the decision of the New South Wales Court of Appeal, that the provision was valid, was affirmed.

[177] Douglas has also argued that the High Court's decision in Coleman v Power is of limited relevance to the constitutional interpretation of the implied freedom. Douglas, above n 166, 26.

[178] See also Adrienne Stone and Simon Evans, 'Freedom of Speech and Insult in the High Court of Australia' (2006) 4(4) *International Journal of Constitutional Law* 677, 679; Walsh, 'The Impact of Coleman v Power on the Policing, Defence and Sentences of Police Nuisance Cases in Queensland', above n 166, 151.

[179] Stone and Evans, above n 178, 681.

down so as not to apply to political insults which do not threaten a breach of the peace.[180] However, Douglas has posited, citing *Ball v McIntyre*, that offensive behavior (and presumably language) crimes may survive constitutional scrutiny as they have been held at common law not to apply to behaviour that is hurtful or offensive because of its political nature. I would instead argue that the common law is equivocal on this point, as demonstrated by the wording of Kerr J's propositions, which are consistently qualified by the modal auxiliary verb 'may':

> 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*.[181]

McNamara and Quilter have suggested that, after *Monis v The Queen*, it may not be much longer before the validity of public order laws which use an offensiveness standard is subjected to constitutional scrutiny.[182] We thus await a High Court determination of whether the criminal punishment of swear words such as 'fuck' or 'cunt', where used in circumstances unlikely to provoke physical retaliation or a breach of the peace, is inconsistent with the implied freedom. We also await a case determining the issues of whether, and in which circumstances, swearing might be characterised as 'political' speech. For example, might T-shirts or signs displaying messages such as 'Fuck Abbott' (as worn in 2013 and 2014 student protests),[183] or words such as those uttered by an Aboriginal defendant, William David Craigie, to police officers and a bystander, including: 'You fucking white bastard, I want to see you dead. You don't belong here' and 'Youse are all just fucking white cunts. Get out of the area', be characterised as communication about government or political matters?[184] I return to these examples and the issues raised here in Chapter Nine, where I consider whether challenging power structures and government policies, by way of swearing, warrants criminal censure. In Chapter Ten I return to this issue, considering whether the stated objectives of offensive language crimes, including preserving the 'civility of public discourse' and maintaining 'public order', are legitimate ends warranting criminal punishment of swear

[180] Douglas, above n 166.

[181] *Ball v McIntyre* (1966) 9 FLR 237, 241 (emphasis added, see above).

[182] Luke McNamara and Julia Quilter, 'Turning the Spotlight on "Offensiveness" as a Basis for Criminal Liability' (2014) 39 *Alternative Law Journal* 36, 38.

[183] Elyse Methven, 'Section 18C and Unravelling the Government's "Freedom Agenda"' *The Conversation* (online), 1 April 2014 <http://theconversation.com/section-18c-and-unravelling-the-governments-freedom-agenda-25021>.

[184] *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993).

words, and whether 'transient emotional responses'[185]—reactions of anger, significant resentment, outrage, disgust or hatred—should constitute a form of '*legally cognisable* harm'.[186]

4.12 Prosecution and Punishment of offensive language crimes

There are stark disparities in the punishments for offensive language crimes across Australia. Some jurisdictions maintain a separate offence for the use of language, as distinct from behaviour, taking a less punitive approach to the former. Thus in NSW, offensive language is made punishable by a fine of up to $660;[187] in SA, the crime of indecent or obscene language is punishable with a fine of up to $250;[188] while s 7 of the *SO Act* (SA), which contains the crimes of both offensive language *and* offensive conduct, provides a maximum penalty of $1250 or three months imprisonment.[189]

The ACT and WA are the only other Australian jurisdictions in which imprisonment cannot be imposed as punishment for offensive language: offensive language and conduct are punishable in the ACT with a maximum fine of $1000,[190] and disorderly behaviour is punishable in WA by a fine of up to $6000.[191] Queensland and the NT take the most punitive approach to obscene or indecent language, providing maximum penalties of $1100 or six months imprisonment,[192] and $2000 or six months imprisonment (or both) respectively.[193] In SA, Victoria and Tasmania, the fines and terms of imprisonment increase depending on whether it is the defendant's first, second or third offence (see Table 4.1).

4.12.1 Criminal infringement notices

In addition to the abovementioned punishments, police officers in NSW, the NT, Queensland, Tasmania, Victoria and WA have the ability to issue criminal infringement notices ('CINs', also referred to variously as 'infringement notices', 'penalty notices' or 'on-the-spot fines')

[185] *Monis v The Queen* (2013) 249 CLR 92, 163 (Hayne J).

[186] Ibid 162–3 (Hayne J).

[187] *SO Act* (NSW) s 4(1).

[188] *SO Act* (SA) s 22.

[189] Ibid s 7.

[190] *Crimes Act 1900* (ACT) s 392.

[191] *Criminal Code* (WA) s 74A.

[192] *SO Act* (Qld) s 6; *Penalties and Sentences Act* s 5 provides that one penalty unit is $110.

[193] *SO Act* (NT) ss 47 and 53(9).

for offensive language crimes.[194] CINs are notices to the effect that, if the person served does not elect to have the matter determined by a court ('court-elect'), that person must pay the amount prescribed for the offence within a fixed time period.[195] Recipients who court-elect risk incurring a criminal record, harsher penalties, additional costs, and the expended time and stresses associated with the process of criminal prosecution.[196] In NSW, CINs may only be issued to persons over the age of 18 and must be issued by a police officer, while in WA the offender must be 17 years of age or older.[197] The primary justifications given for using CINs in place of ordinary criminal justice processes, include easing congestion in overstretched courts, and saving police officers time and money when processing minor offences.[198] It is questionable whether these goals are achieved in the long term, or whether they offset the potential for CINs to result in 'net-widening'.[199]

In NSW, the CIN amount was increased from $150 to $500 in March 2014, as part of a package of laws introduced to combat drunken and anti-social behaviour.[200] The fines were hastily increased without consultation with criminal justice experts, and the government provided no evidence that the fine increases could achieve their stated aims.[201] In Victoria, the CIN amount for using profane, indecent or obscene language, or threatening, abusive or insulting words, in or within hearing from a public place is two penalty units (currently $295.22).[202] In Queensland, police may serve an infringement notice of $110 on a person who

[194] *CP Reg* (NSW) reg 106 and sch 3; *CP Act* (NSW) ss 333-7; *Summary Offences Regulations 1994* (NT) regs 3-4A; *Police Powers and Responsibilities Act 2000* (Qld) s 394; *Penalties and Sentences Act* s 5; *State Penalties Enforcement Act 1999* (Qld) sch 2; *Police Offences Act 1935* (Tas) s 61; *Monetary Penalties Enforcement Act 2005* (Tas) s 14; *SO Act* (Vic) ss 60AA and 60AB(2); *Criminal Code* (WA) ss 730-3; *Criminal Code (Infringement Notices) Regulation 2015* (WA) sch 1; for discussion of the use of penalty notices for offensive language in NSW see: Elyse Methven, 'Should Penalty Notices Be Issued for Using Offensive Language?' (2012) 37 *Alternative Law Journal* 63; Elyse Methven, 'A Very Expensive Lesson: Counting the Costs of Penalty Notice for Anti-Social Behaviour' (2014) 26 *Current Issues in Criminal Justice* 249.

[195] See, eg, *CP Act* (NSW) s 334.

[196] NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities', above n 30, 'Foreword'.

[197] *CP Act* (NSW) s 335; *Criminal Code (Infringement Notices) Regulation 2015* (WA) reg 5.

[198] See NSW Law Reform Commission, above n 77.

[199] While these goals may be achieved in the short term, significant costs and resources can be incurred later, if enforcement measures are commenced due to non-payment of fines: Ibid; Tamara Walsh, 'Won't Pay or Can't Pay-Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland' (2005) 17 *Current Issues in Criminal Justice* 217; Methven, 'A Very Expensive Lesson', above n 194.

[200] *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) sch 5; amending *CP Act* (NSW) sch 3.

[201] See generally Methven, 'A Very Expensive Lesson', above n 194.

[202] *SO Act* (Vic) ss 60AA and 60AB(2); One penalty unit equates to $151.67 from 1 July 2015 to 30 June 2016. Penalty unit rates are fixed each year by the Treasurer of Victoria under *Monetary Units Act 2004* (Vic) s 6.

uses offensive, obscene, indecent, threatening or abusive language.[203] In WA, police can issue a fine of $500 for disorderly conduct.[204]

The NT has the broadest powers in the country in relation to the restraint and punishment of persons using offensive, obscene, indecent or 'objectionable' language. Police may issue a penalty notice amounting to $432 for any riotous, offensive, disorderly or indecent behaviour or using obscene language in, or within the hearing of, any person in any public place (s 47 of the *SO Act* (NT)); $144 for using any profane, indecent or obscene language in a public place, or within hearing of any person passing therein (s 53(1)(a)); and $288 for threatening, abusive or objectionable words or behaviour, or offending or causing substantial annoyance to another person, in a public place or in licensed premises (s 53(7)).[205] The NT Country Liberal Government has ignored the NT Department of Justice's recommendations, made in 2010, to streamline and remove duplication in these offences.[206] As a result, police have the discretion to fine a person either $432 or $144 for using obscene language.[207]

In 2014, the NT Government introduced a new arrest, detain and fine regime, contained in the *Police Administration Act* (NT).[208] The laws allow police to arrest a person for profane, indecent or obscene language in public, without a warrant, and hold that person for up to four hours in custody without charge.[209] The NT Government has labelled these provisions

[203] Queensland police may serve an infringement notice on a person for a prescribed public nuisance offence where a person has already been arrested for a prescribed public nuisance offence. *State Penalties Enforcement Act 1999* (Qld) ss 5 and 394 and sch 2; see also Paul Mazeroll et al, 'Ticketing for Public Nuisance Offences in Queensland: An Evaluation of the 12-Month Trial' (Griffith University, 2010) <http://rti.cabinet.qld.gov.au/documents/2010/oct/police%20legislation%20amend%20bill%2010/Attachments/Griffith%20Report.pdf>.

[204] *Criminal Code (Infringement Notices) Regulation 2015* (WA) sch 1; *Criminal Procedure Act 2004* (WA) ss 8 and 9; *Criminal Code* (WA) ss 74A, 720-3.

[205] *SO Act* (NT) s 53(1) and (7); *Summary Offences Regulations 1994* (NT) regs 3-4A.

[206] The issues paper recommended that the convoluted, and in many cases overly punitive provisions in s 47 be substantially revised and that s 53 be repealed: Legal Policy Division, above n 111, 23–26, 63.

[207] Although it was noted that obscene language is not in practice charged under s 47, but instead under s 53(1)(a): 'The figures show "obscene language" has not been charged in the last ten years under this subsection but has been charged instead under section 53(1)(a)(i) for total of 527 times' ibid 23.

[208] *Police Administration Act 1978* (NT) div 4AA of pt VII.

[209] Ibid ss 123 and 133AB; *Police Administration Regulations* (NT) reg 19A. Section 133AB provides that where a member of the police force has arrested a person without and the member believed, on reasonable grounds, that the person had committed, was committing or was about to commit, an infringement notice offence, that in these circumstances, the member may take the person into custody for a period of up to four hours (and can be held for a longer period where the person is intoxicated). Following this period, the member may then issue the person with an infringement notice, release the person on bail, or bring the person before a justice or court for the infringement notice offence or another offence, or, release the person unconditionally.

'paperless arrest' laws, although they are not always paperless.[210] The laws were subjected to constitutional challenge after Miranda Bowden was arrested, detained and fined under ss 123 and 133AB for a number of minor offences, including using obscene language in public. The High Court of Australia, in a 6:1 decision, upheld the validity of div 4AA, finding that it did not confer on the executive a power to detain which is penal or punitive in character.[211] The paperless arrest laws have been utilised extensively since they first came into operation, with over 80 per cent of people detained under the laws being Indigenous Australians.[212]

The use of CINs for offensive language crimes has been the subject of recent legal analysis in an inquiry by the NSW Law Reform Commission ('the NSWLRC') into the use of penalty notices in NSW. The NSWLRC highlighted the potential for CINs to substantially widen police discretion. When faced with behaviour that might amount to a penalty notice offence, a police officer need not issue a CIN; they can instead choose to ignore the behaviour, use their common law power to issue an informal warning, issue a caution, or serve a court attendance notice (CAN). This choice is rarely the subject of independent scrutiny.[213] In 2005 and in 2009, the NSW Ombudsman reported evidence of 'net-widening' in the use of CINs for offensive language, with police issuing CINs in circumstances where a warning or caution would have been more appropriate or where a court would likely have acquitted the defendant.[214] Given the many disincentives to do so (named above), few recipients challenge penalty notices, through either internal review or court election. Accordingly, many CIN recipients are paying fines in circumstances where they would likely have been acquitted by a court.[215] As I have argued elsewhere, such broad, unexaminable police discretion offered by CINs is all the more problematic, given the extensive academic literature and government-commissioned reports that have established the fact that 'Aboriginal Australians, those who are homeless or poor, and those with a mental illness or a cognitive impairment, have historically been, and continue to be, systematically disadvantaged in the face of broad police

[210] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 October 2014 12th Assembly (John Elferink, A-G and Minister for Justice). They are not always paperless in that police may still issue a criminal infringement notice to the fine recipient.

[211] *North Australian Aboriginal Justice Agency Ltd & Another v Northern Territory* (2015) 326 ALR 16, 75.

[212] Human Rights Law Centre, *High Court Upholds but Curtails Northern Territory's Paperless Arrest Laws* (11 November 2015) <http://hrlc.org.au/high-court-upholds-but-curtails-northern-territorys-paperless-arrest-laws/>; ABC, 'High Court Rules on NT Paperless Arrest Powers', *The Law Report*, 17 November 2015 <http://www.abc.net.au/radionational/programs/lawreport/high-court-rules-on-nt-paperless-arrest-powers/6943296#transcript>.

[213] *CP Act* (NSW) s 342(3); See Methven, 'A Very Expensive Lesson', above n 194, 252; NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities', above n 30, 55.

[214] NSW Ombudsman, 'On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police' (2005) 76; NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities', above n 30, 49.

[215] NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities', above n 30, v–vi.

powers'.[216] Indigenous Australians are even less likely than non-Indigenous Australians to request an internal review or to court-elect.[217] Further, the NSW Ombudsman found that nine out of every 10 Indigenous Australians issued with a CIN failed to pay within the time allowed.[218] In Chapter Nine, I locate the role of criminal justice discourse in legitimising extensive police powers to punish 'four-letter threats to authority'.[219] I illustrate how the language of police, as well as that of politicians, judicial officers and media commentators, buttresses their relative positions of power vis-à-vis members of the public in public space.[220]

4.13 Conclusion

In this chapter I have outlined offensive language, public nuisance and disorderly behaviour crimes in NSW, Queensland and WA. I have examined core elements of these offences, including the legal meaning of the adjective 'offensive' (as well as the adjectives 'indecent', 'obscene', 'profane', 'abusive', 'threatening' and 'insulting'); the perspective of the reasonable person; the assessment of community standards; the interpretation of place and context; the location element of 'public place'; the question of mens rea; and the defence of reasonable excuse. I have canvassed the range of procedures for policing and punishing offensive language, including the use of CINs. Further, I have examined issues relating to the constitutionality of such provisions in relation to the implied freedom of political communication. The chapter has raised initial questions and identified gaps that will be subjected to further interrogation, and indicated how my application of CDA to criminal justice discourse in relation to offensive language, which I undertake in the following chapters, will provide crucial, critical insight on the representation and legitimacy of offensive language crimes. I use the elements of, and issues raised in relation to, offensive language crimes in this chapter to frame the following chapters. I will bring to the fore questions about *whose* moral order is being enforced through the punishment of offensive language, and how unequal power relations are created, reproduced or contested through the interpretation and application of these laws. My innovative critique of the contemporary

[216] Methven, 'A Very Expensive Lesson', above n 194, 252; see Cunneen, above n 110; Chris Cunneen, 'Changing the Neo-Colonial Impacts of Juvenile Justice' (2008) 20 *Current Issues in Criminal Justice* 43; Tamara Walsh, 'Poverty, Police and the Offence of Public Nuisance' (2008) 20 *Bond Law Review* 7; Chris Ronalds, Murray Chapman and Kevin Kitchener, 'Policing Aborigines' in Mark Findlay, Sandra Egger and Jeff Sutton (eds), *Issues in Criminal Justice Administration* (Allen & Unwin, 1983) 168; White, 'Power/Knowledge and Public Space: Policing the "Aboriginal Towns"', above n 110; NSW Ombudsman, 'Policing Intoxicated and Disorderly Conduct: Review of Section 9 of the Summary Offences Act 1988' (2014); NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities', above n 30.

[217] NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities', above n 30, vii.

[218] Ibid 117.

[219] David Paletz and William Harris, 'Four-Letter Threats to Authority' (1975) 37 *The Journal of Politics* 955.

[220] NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities', above n 30.

interpretation and punishment of offensive language crimes using CDA begins in the next chapter, where I interrogate the implications of the legal principle that offensive language is a matter for 'judicial notice', meaning that a judicial officer must rely on her 'common sense' and 'everyday experience' in determining matters of offensiveness, obscenity or indecency (see above). I employ the concept of 'language ideologies' to examine how legal decision-makers produce and maintain tacit 'common sense' assumptions in relation to swearing in offensive language cases. I argue that the prevailing criminal justice discourse on offensive language crimes reinforces myths about swearing that serve to maintain prevailing linguistic habits and uphold unequal social structures and power relationships.

Table 4.1 Offensive language crimes across Australia

Jurisdiction	Words punishable	Location	Punishment
ACT	Riotous, indecent, offensive or insulting behaviour	In, near, or within the view or hearing of a person in, a public place	$1 000[221]
NSW	Offensive language	In or near, or within hearing from, a public place or a school	$660 fine or a $500 CIN[222]
NT	Profane, indecent, obscene, threatening, abusive or objectionable words, offending, or causing substantial annoyance to a person	In or within the hearing or view of any person in any road, street, thoroughfare or public place	$2 000, six months imprisonment, or CINs of $144 (profane, indecent or obscene words); $288 (threatening, abusive or objectionable words, offending or causing substantial annoyance); or $432 (obscene language)[223]
Queensland	Offensive, obscene, indecent or abusive language	The person's behaviour must interfere, or be likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public	$1 100, six months imprisonment, or police may issue a CIN of $110[224]
SA	Offensive, threatening, abusive or insulting, indecent or profane language	In a public place or a police station (profane or indecent words are punishable if audible from such a place, which is audible from a public place or neighboring or adjoining occupied premises, or the person intends to offend or insult any person)	$1 250 or three months imprisonment (for offensive, threatening, abusive or insulting language) or $250 (indecent or profane language)[225]
Tasmania	Profane, indecent, obscene, offensive, or blasphemous language; or threatening, abusive, or insulting words	In any public place, or within the hearing of any person in that place	Three penalty units or three months imprisonment[226]
Victoria	Profane, indecent or obscene language; or threatening, abusive or insulting words	In or near a public place or within the view or hearing of any person being or passing therein or thereon	1st offence: 10 penalty units or two months imprisonment; 2nd offence: 15 penalty units or three months imprisonment; 3rd or subsequent offence: 25 penalty units or six months imprisonment. Police may also issue a CIN of $295.22[227]
WA	Insulting, offensive or threatening language	In a public place; or in the sight or hearing of any person in a public place; or in a police station or lock-up	$6 000 or a CIN of $500[228]

[221] *Crimes Act 1900* (ACT) s 392: 'A person shall not in, near, or within the view or hearing of a person in, a public place behave in a riotous, indecent, offensive or insulting manner'.

[222] *SO Act* (NSW) s 4A(1): 'A person must not use offensive language in or near, or within hearing from, a public place or a school.' Section 4A(2) provides a defence where the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence. Instead of imposing a fine, a court may make an order directing the person to perform community service work (up to 100 hours), s 4A(3)-(6); there are also specific provisions that prohibit offensive language in more specific places, and provide different penalties. See, eg, *Parramatta Park Trust Regulation 2007* (NSW) reg 49 and sch 3 pt 2; *Rail Safety (Offences) Regulation 2008* (NSW) reg 12(1) and sch 1 pt 3.

[223] *SO Act* (NT) ss 47 and 53; *Summary Offences Regulations 1994* (NT) reg 4A. Note that the location depends on the words used, for example, indecent, obscene or profane language is punishable in a public place, or within the view or hearing of any person passing therein.

[224] *SO Act* (Qld) s 6; *State Penalties Enforcement Act 1999* (Qld).

[225] *SO Act* (SA) ss 7 and 22. Remarkably, the use of either indecent or profane language has a substantially lesser penalty attached to them than offensive, threatening, abusive or insulting language.

[226] *Police Offences Act 1935* (Tas) s 12. If a person is convicted within six months after another offence under s 12(1), the person is liable to double the prescribed penalty. Note also that the use any threatening, abusive, or insulting words or behaviour is only punishable where there is intent or calculated to provoke a breach of the peace or whereby a breach of the peace may be occasioned.

[227] *SO Act* (Vic) ss 17, 60AA and 60AB.

[228] *Criminal Code (Infringement Notices) Regulation 2015* (WA) sch 1; *Criminal Procedure Act 2004* (WA) ss 8 and 9; *Criminal Code* (WA) ss 74A, 720-3.

CHAPTER FIVE
JUDGES MASQUERADING AS LINGUISTS

In the early hours of 9 December 2007, police arrived at Schiller Place, Emerton, NSW, where a large street brawl was taking place. Rebecca Smith, the fiancée of Sean Graham Jolly, had been injured in the brawl and was lying on the roadway. After police made various attempts to control the situation and to attend to Smith, Jolly—concerned about the welfare of his fiancée, intoxicated and affected by capsicum spray—approached the officers in an aggressive manner. Jolly said to Constable Giles, 'Take your gun off, you low fuck, before I belt the fuck out of you'. In response to a police command, a police dog bit Jolly, causing him significant injury to his neck. While waiting for an ambulance, Jolly told the police officers, 'You are fucking dog cunts. You fucked his mum and he fucked your mum and he fucked his mum and his sister and your brother and son' and 'Fuck off you dog cunts. You fucked his mum and he fucked yours'.

Jolly was charged and convicted of a number of offences, including using offensive language in a public place contrary to s 4A(1) of the SO Act (NSW). When Jolly appealed his convictions to the District Court of NSW, Cogswell DCJ considered whether Jolly's words amounted to offensive language or whether he had a 'reasonable excuse' for their use. Judge Cogswell stated:

> to my mind the language when it went on to make references to members of the police officers' families having sexual relations with each other was no longer such that it allowed Mr Jolly a defence under the section. I have the same view about the reference to animals in the expression 'Dog cunts'. The images conjured up by such language are obviously—in my opinion—very offensive to anyone who might overhear them.

Judge Cogswell ultimately dismissed the appeal, stating, 'Parliament has elected to keep this particular offence on the statute book and I regard the words used by Mr. Jolly as amounting to offensive language both before and after he was bitten by the dog'.[1]

[1] *Jolly v The Queen* [2009] NSWDC 212. Constable Hauver gave evidence that after he had admonished Jolly, Jolly replied, 'Get fucked. You, I'm going to sue you, you cunt. You let the fucking dog bite me and didn't pull it off. You can get fucked'. The defence of 'reasonable excuse' is discussed in Chapter Four.

5.1 Introduction

In the previous chapter, I examined the legal elements of offensive language crimes in Australian states and territories, focusing on NSW, WA and Queensland. My analysis in that chapter informs the CDA of judicial interpretations of offensive language crimes that I conduct in this and ensuing chapters. As I established in Chapter Four, expert evidence on questions of language and linguistics is deemed irrelevant and inadmissible to judicial assessments of community standards in relation to offensive language.[2] Offensive language is a matter for 'judicial notice', meaning a judicial officer must rely on her or his 'common sense' and 'everyday experience' in determining matters of offensiveness, obscenity or indecency.[3] In offensive language cases, the task of assessing offensiveness is determined in the first instance by police officers (exercising their discretion to ignore the language or to respond in various ways, such as an informal warning, a formal caution, a charge or, in some jurisdictions, a penalty notice).[4] If a police officer chooses to proceed by way of criminal charge, it then falls to a magistrate sitting in a local or magistrate's court to determine whether that language is offensive. If the magistrate's decision in the local (or magistrates') court is appealed, the task of (re-)assessing offensiveness falls to the relevant appellate judge(s).[5]

The law thus enables, indeed it encourages, judicial officers (and also police officers) to adopt the positions of both *pseudo-linguist* (in occupying the role of expert in linguistics) and *anti-linguist* (in rejecting the proposition that linguistics is a specialised field of knowledge worthy of judicial consideration). As Walters J said in *Dalton v Bartlett*:

> I have little doubt that any argument in support of the admissibility of this sort of [expert] evidence would be untenable. What constitutes 'indecent' language and what are contemporary community

[2] The preponderance of opinion holds that experts on language have no role to play in assessing whether language is indecent or obscene: *Romeyko v Samuels* (1972) 2 SASR 529, 563 (Bray CJ); see also *Crowe v Graham* (1969) 121 CLR 375, 411 (Windeyer J); *Dalton v Bartlett* (1972) 3 SASR 549, 561 (Walters J); *Hortin v Rowbottom* (1993) 68 Crim R 381 (Mullighan J).

[3] See Transcript of Proceedings, *Del Vecchio v Couchy* (Queensland Court of Appeal, 245/2001, de Jersey CJ, McPherson JA and Douglas J, 4 February 2002) 3 (McPherson JA); *Romeyko v Samuels* (1972) 2 SASR 529, 563 (Bray CJ); see also *Crowe v Graham* (1969) 121 CLR 375, 411 (Windeyer J); *Dalton v Bartlett* (1972) 3 SASR 549; *Hortin v Rowbottom* (1993) 68 Crim R 381 (Mullighan J); In addition to considering any evidence of relevant witnesses or bystanders (although such evidence is not strictly essential to the prosecution, as the perspective that must be assessed by the court is that of the 'reasonable person'): *R v Connolly and Willis* (1984) 1 NSWLR 373.

[4] See Chapter Four.

[5] Sitting, as the case may be, in the District Court of Supreme Court. Again, such decisions may be further appealed to the relevant Court of Appeal, and following that, the High Court of Australia, see Australian Bureau of Statistics, *Hierarchy of Courts* (2012) 1301.0 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Courts~67>.

standards are questions of fact for the decision of the magistrate, upon which 'evidence is neither needed nor permitted'.[6]

Justice Walter's position was adopted in *E (A Child) v The Queen*, where White J said 'the ascertainment of the contemporary standard of propriety is entirely a matter for the tribunal itself and no evidence on it would be admissible'.[7] And so it has become the accepted practice in obscene and offensive language cases for magistrates and judges to determine what is obscene, offensive etc. by drawing on their own experience, despite the inevitability that 'a large subjective element must enter into the decision'.[8]

In the present chapter, I draw on CDA to analyse instances where judicial officers act as pseudo-linguists or anti-linguists in offensive language crimes.[9] I argue that judicial officers have extraordinary latitude to pick and choose from numerous linguistic or folk-linguistic theories about swearing, without subjecting their statements to the kinds of rigorous critique to which many linguists are themselves exposed. Judicial officers therefore play a central role in creating and reproducing *language ideologies* about swearing, a phrase I introduced in Chapter Two and theorise in further detail in this chapter. There is a dearth of analysis of how judges create language ideologies about swearing, how these ideologies become naturalised in the criminal law, and the content of these ideologies, which is indicative of a broader gap in the study of legal language.[10] In the present chapter, I query 'common sense' conceptions of offensiveness in the criminal law. I employ CDA to illuminate discursive techniques employed by judicial officers to lend supposed legitimacy to their ability to objectively and fairly ascertain offensive language, and show how judicial officers use tacit judgments and assumptions about swearing to inform their views on what is offensive. I critique the content

[6] (1972) 3 SASR 549, 561 (Walters J).

[7] (1994) 76 Crim R 343, 347 (White J); citing *Prowse v Bartlett* (1972) 3 SASR 472 (Bray CJ).

[8] *Romeyko v Samuels* (1972) 2 SASR 529, 563 (Bray CJ); *Gul v Creed* [2010] VSC 185; contra *Couchy v Birchley* [2005] QDC 334, [42] where McGill DCJ stated (in *obiter*): 'I expect that opinion evidence on this subject would be admissible under ordinary principles, by a person who was appropriately qualified as an expert on this subject. But the opinion of someone who is not so qualified as an expert is in my opinion irrelevant and inadmissible. The security guard, and a number of the police witnesses, were cross-examined as to the use of certain expressions, and as to their personal reactions to their use, and even in some cases as to the extent to which they might use such expressions themselves. This cross-examination should not have been allowed'. Judge McGill noted that this was because 'None of these people were properly qualified as experts, and accordingly their views on the subject were irrelevant and inadmissible'; The Queensland Court of Appeal judges in *Del Vecchio v Couchy* [2002] QCA 9 came to the conclusion that what is insulting according to contemporary community standards is a question for 'judicial notice'; see Transcript of Proceedings, above n 3.

[9] Parts of this chapter are published in: Elyse Methven, '"Weeds of Our Own Making": Language Ideologies, Swearing and the Criminal Law' (2016) 34(2) *Law in Context* 117.

[10] See Diana Eades, 'The Social Consequences of Language Ideologies in Courtroom Cross-Examination' (2012) 41 *Language in Society* 471.

of these views through analysis of relevant sociolinguistic literature on swearing. My analysis in this chapter contributes to a key argument in my thesis: that it is essential to understand how *discourse* rationalises the claimed ability of legal decision-makers to fairly and objectively ascertain offensiveness in the criminal law.

5.2 Language ideologies

Language ideologies are tacit judgments about how language works.[11] Despite often being represented as natural or common sense, language ideologies are socially, culturally and historically conditioned.[12] The impact of language ideologies extends beyond language; they also 'serve to rationalise existing social structures, relationships and dominant linguistic habits'. These 'common sense' ideas are harboured prior to, or in spite of, evidence being gathered.[13] They are not developed through empirical evaluation, thoughtful research or intellectual debate, but are instead built 'layer upon layer, through constant repetition by popular and authoritative sources of a number of questionable views and assumptions which have assumed the status of a set of givens'.[14] These ideologies thrive through repetition, making it difficult to undo the 'truth' they create. Importantly, people do not have equal access to creating and naturalising common sense ideas about offensive language in the criminal law. Instead, 'primary definers'[15] in criminal justice debates, including judges, magistrates, attorneys-general, lawyers, academics, media commentators, police, police commissioners, police ministers and police union leaders, play a critical role in constructing and reproducing ideas about offensive language.[16]

5.3 Language ideologies and swearing

Language ideologies about swearing not only flourish in the law; they also pervade media, political and everyday discourse on swearing. Linguist Ruth Wanjryb has written that in public debate there is 'no shortage of interest' in the topic of offensive language for which

[11] Diana Eades, *Sociolinguistics and the Legal Process* (Channel View Books, 2010) 241; see also Eades, 'The Social Consequences of Language Ideologies in Courtroom Cross-Examination', above n 10.

[12] Jan Blommaert, *Discourse: A Critical Introduction* (Cambridge University Press, 2005) 253.

[13] Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 19 criminologists and criminal law scholars have also recognised that the language of 'common sense' is part of the persuasive rhetorical arsenal of the 'uncivil politics of law and order'.

[14] Ibid 18.

[15] Ibid 18–19.

[16] See also Diana Eades, *Courtroom Talk and Neocolonial Control* (Mouton de Gruyter, 2008) 35 who emphasises the importance of taking into account power relations and power struggles when considering language ideologies and their reproduction.

'everyone seems to have a viewpoint'.[17] Language ideologies about swearing are typically negative and sometimes inflammatory, carry strong moral undertones, are aesthetically judgmental, create or presuppose harms caused by swear words, and draw on concepts of pollution, danger and disgust.[18] In my historical analysis of attitudes about offensive language in Chapter Three, I incorporated language ideologies from media commentators, the judiciary, police, politicians and the public that viewed curse words as vile words used by a selection of the population: a low class, uneducated and deviant populace. Some of these views continue to be pronounced in modern offensive language cases, as this and the following chapters demonstrate. Popular views include that swear words:

- are becoming increasingly pervasive in society;
- are indicative of 'slipping' standards;
- are more disgusting than those used in the past;
- are 'the linguistic crutch' of people with a lazy mind;
- are used by those who have 'loose' morals, particularly in relation to sex;
- demonstrate a lack of control; and
- challenge or disrespect authority.[19]

These theories thrive through repetition (something at which judicial officers, who draw on precedent, are adept) and denial, making it hard to bring their version of truth undone. Despite the lack of empirical foundation, language ideologies on swearing have informed policy-makers, legal judgments, education and parenting practices, and what is broadcast on television and cinema screens.[20] A tactic used by campaigners against 'bad language' (and by judges, as I demonstrate below) is to dismiss the relevance of empirical research on such a 'lowly' topic.[21] Mary Whitehouse, for example, in her campaigns against the 'moral pollution' promoted by broadcasting swearing on the BBC, argued that the answers to dealing with bad language rest directly with 'people like teachers, doctors and the rest … for pity's

[17] Ruth Wajnryb, *Expletive Deleted: A Good Look at Bad Language* (Simon and Schuster, 2005) 7.

[18] Wajnryb, above n 17; Timothy Jay, *Why We Curse: A Neuro-Psycho-Social Theory of Speech* (John Benjamins, 1999); Melissa Mohr, *Holy Shit: A Brief History of Swearing* (Oxford University Press, 2013); Tony McEnery, *Swearing in English: Bad Language, Purity and Power from 1586 to the Present* (Routledge, 2006).

[19] Mohr has pointed out that James O'Connor, *Cuss Control: The Complete Book on How to Curb Your Cursing* (Three Rivers Press, 2000) encapsulates this common sense attitude towards swearing, including that swearing is wrong because 'it shows you don't have control', 'it discloses a lack of character', 'it's abrasive, lazy language' and 'it lacks imagination'; Mohr, above n 18, 13, 18; see also Luke Fleming and Michael Lempert, 'Introduction: Beyond Bad Words' (2011) 84(1) *Anthropological Quarterly* 5; Kristin Jay and Timothy Jay, 'Taboo Word Fluency and Knowledge of Slurs and General Pejoratives: Deconstructing the Poverty-of-Vocabulary Myth' (2015) 52 *Language Sciences* 251; Edwin Battistella, *Bad Language: Are Some Words Better Than Others?* (Oxford University Press, 2005).

[20] Jay, above n 18.

[21] McEnery, above n 18, 124–9.

sake don't let's have … sociologists who will start interpreting it [data] so that it doesn't prove anything'.[22]

A central reason why opponents of swearing appeal to common sense, as opposed to evidence-based reasoning, is that common sense is extraordinarily difficult to challenge. As criminal law scholars Russell Hogg and David Brown have argued, those who resist or confront common sense logic are challenging the 'obvious' or what we already know—a 'forbidding task':[23]

> By its very nature it resists engagement with other, more systematic bodies of knowledge where these contradict commonsense assumptions … It embodies tacit judgments and assumptions about the world that are harboured prior to the evidence being gathered. This is what makes it so resistant to debate or dialogue which questions, rather than shares, its starting points.[24]

Another reason folk-linguistic views on swearing flourish in everyday discourse, and in the law, is that swearing has long been considered so taboo that it has historically been, and for many people continues to be, considered an inappropriate or illegitimate subject for scholarly examination.[25] Swear words are simply too dirty for academics to sully their hands with. English dictionaries did not provide entries for swear words such as 'fuck' until 1965.[26] Many core English language texts fail to address swearing, and the few that do give it only a cursory glance.[27] Books and dictionaries on swearing tend to be perceived as amusing, nonsense or novelty texts. Dictionaries such as the *Anatomy of Dirty Words* (1962) or *Wicked Words* (1989) foster this perception, positioning themselves amongst the 'entertainment' genre of non-fiction, while sectioning off offensive language from other forms of language.[28] This all betrays the impression that swear words sit *outside* the English language, that swearing does not occur in a society functioning as it should.

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[22] Quoted in ibid 129.

[23] Hogg and Brown, above n 13, 18.

[24] Ibid 19.

[25] Jay, above n 18, 10; see also Mohr, above n 18, 251.

[26] In 1965 an entry for the word 'fuck' was provided in the Penguin English Dictionary. Hitchings writes that Allen Walker Read wrote an article on the word 'fuck' in 1934 titled 'An Obscenity Symbol' where he 'managed by various circumlocutions not once to use the offending term' Henry Hitchings, *The Language Wars: A History of Proper English* (Farrar, Straus and Giroux, 2011) 244.

[27] Jay, above n 18, 10.

[28] Ibid 15–16 Jay has also argued that a comprehensive approach to swearing must focus on oral materials, not on written ones (for example, a survey of swearing in Shakespeare), as swearing is predominantly an oral practice.

Psycholinguist Timothy Jay has compellingly argued that although linguistic theories that overlook or ostracise cursing might come across as 'polite', they are ultimately invalid in ignoring a central component of human speech and expression.[29] Swear words—a pervasive and fundamental occurrence in everyday language, with connotative or emotional functions that are essential for speech—should be included in any theory of language.[30] Every person has the equipment to swear, it just depends on how they choose to use this equipment and in which contexts.[31] Importantly, a small number of linguists, psychologists and English language historians have 'dirtied' their hands to help us understand the history, semantics, pragmatics and pervasiveness of swear words,[32] whose research I use to critique assumptions about swear words in criminal justice discourse. Prior to undertaking this analysis, in the following part, I use CDA to show how judges cultivate the belief that they and their fellow judicial officers are able to ascertain offensiveness legitimately.

5.4 Discursive legitimation in judicial discourse on offensive language

5.4.1 Functionalisation, assimilation and individualisation

In this part, I show how magistrates and judges justify their occupation of the role of 'pseudo-linguist' when determining offensiveness through a number of discursive techniques, including assimilation, functionalisation, theoretical rationalisation, passivation, abstraction and categorisation.[33] Drawing predominantly on the work of linguist and scholar in discourse analysis and social semiotics, Theo van Leeuwen,[34] I explain and analyse the use of these discursive techniques in the appellate court hearings and judgments of two of my case studies: *Del Vecchio v Couchy* (in the Queensland Court of Appeal) and *Heanes v Herangi* (in the

[29] Ibid 11.

[30] Ibid.

[31] Ibid 26; see also Keith Allan and Kate Burridge, *Forbidden Words: Taboo and the Censoring of Language* (Cambridge University Press, 2006) 364.

[32] See especially Allan and Burridge, above n 31; Jay, above n 18; Mohr, above n 18; McEnery, above n 18; Ashley Montagu, *The Anatomy of Swearing* (Collier Books, 1967); Geoffrey Hughes, *An Encyclopedia of Swearing: The Social History of Oaths, Profanity, Foul Language, and Ethnic Slurs in the English-Speaking World* (ME Sharpe, 2006); Brian Taylor, 'Offensive Language: A Linguistic and Sociolinguistic Perspective' in Diana Eades (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (University of New South Wales Press, 1995) 219; Steven Pinker, *The Stuff of Thought: Language as a Window into Human Nature* (Penguin, 2007); Hitchings, above n 26; Wajnryb, above n 17.

[33] These categories are examined in Theo van Leeuwen, *Discourse and Practice: New Tools for Critical Discourse Analysis* (Oxford University Press, 2008).

[34] Ibid.

Supreme Court of WA).[35] In both cases the appellants had their convictions for using insulting words and for disorderly conduct by using offensive language respectively upheld, after each appellant had sworn at police officers in a public place.[36] I draw extensively on these case studies, and outline the facts of both in more detail in Chapters Six to Eight.

In *Del Vecchio v Couchy* (the facts of which are detailed in Chapter Seven), de Jersey CJ, McPherson JA and Douglas J pondered the question of how one might challenge a decision taken on 'judicial notice'.[37] Magistrate James Herlihy in Brisbane Magistrates' Court, applying his judicial 'common sense' and everyday experience, had concluded that Couchy had used insulting words in public contrary to contemporary community standards, and sentenced her to three weeks imprisonment.[38] In the Queensland Court of Appeal hearing, McPherson JA defended Magistrate Herlihy's capacity to determine what constitutes insulting language, stating 'after all, they must see a lot more of these complaints of offences than any of us ever do or anyone else in the community every sees'.[39] Chief Justice de Jersey added:

> Magistrates have an enormously wide exposure to the colour of daily life through their work every day, much broader than Judges in this Court for example. We see masses of it in the Criminal Court but Magistrates who see the hurly burly of daily life couldn't help but distil some sort of perception of community expectations.[40]

In the Court of Appeal judgment, de Jersey CJ found that '[i]n this case, it fell to the Magistrate to reach a view on contemporary community expectations, and to that exercise he may be taken to have brought to bear a wide experience of life, including substantial regular contact with many members of the community'.[41] Similarly, in the Supreme Court of WA judgment *Heanes v Herangi*, Johnson J quoted with approval the idea that '[m]agistrates with a wide experience of life and human foibles are generally in the best position to judge whether conduct should be categorised as disorderly'.[42]

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[35] *Del Vecchio v Couchy* [2002] QCA 9; Transcript of Proceedings, above n 3; *Heanes v Herangi* (2007) 175 Crim R 175; Transcript of Proceedings, *Jonathan Stephen Heanes v Western Australia Police Force* (Supreme Court of Western Australia, SJA 1111 of 2006, Johnson J, 27 March 2007).

[36] Under the repealed *Vagrants Gaming and Other Offences Act 1931* (Qld) s 7(1)(d) ('*VGOO Act*') replaced by the; *Summary Offences Act 2005* (Qld) s 6 ('*SO Act*'); and the *Criminal Code Act 1913* (WA) s 74A ('*Criminal Code*').

[37] Transcript of Proceedings, above n 3, 3.

[38] *Del Vecchio v Couchy* (Unreported, Brisbane Magistrates' Court, Magistrate Herlihy, 7 December 2000).

[39] Transcript of Proceedings, above n 3, 11.

[40] Ibid.

[41] *Del Vecchio v Couchy* [2002] QCA 9, 2 (De Jersey CJ, McPherson JA and Douglas J agreeing).

[42] (2007) 175 Crim R 175, 218 (Johnson J); quoting *Mogridge v Foster* [1999] WASCA 177, [7]-[8] (McKechnie J).

In each of the above extracts, the judicial officers use similar discursive techniques to rationalise a magistrate's ability to determine contemporary community standards on insulting or offensive language. The category of 'magistrates' is mainly *assimilated* by *plurality*: they are linguistically categorised as a homogeneous group—'magistrates'.[43] Van Leeuwen has argued that the choice between representing social actors as individuals (*individualisation*) or as groups (*assimilation*) is of 'primary significance in critical discourse analysis', particularly in a society that regularly justifies policy decisions on views that are attributed to the majority.[44] Not only do the judicial officers assimilate magistrates through a plural, generic reference, 'magistrates', but that generic reference is also *functionalised*. Functionalisation 'occurs when social actors are referred to in terms of an activity, in terms of something they do, for instance, an occupation or role'.[45] In the above judicial statements, magistrates are represented as all sharing the same experience: 'a wide experience of life', 'an enormously wide exposure to the colour of daily life' and 'a wide experience of life and human foibles'. By making these linguistic choices, to assimilate and functionalise magistrates, the judges betray 'a view of reality in which generalised essences, classes, constitute the real, and in which specific participants are "specimens" of those classes':[46] each magistrate is a specimen of the more general class, 'magistrates'. The assumption made in these judicial statements is that upon attaining the title 'magistrate', a person also attains the knowledge and experience to distil 'community expectations' on insulting or offensive language. Their representations manufacture as truth the idea that magistrates have a consensus opinion when it comes to what is offensive.

These judicial representations of reality can be contrasted to that of counsel for the appellant, Andrew Boe ('Boe'), in his oral submission to the Queensland Court of Appeal that '[t]he difficulty in leaving it to individual magistrates is then you have the wide differences of approach from a Magistrate in this case to a Magistrate in Wellington who goes to the extreme other end of being extremely tolerant of the most extraordinary behaviour'.[47] In this submission, Boe prefaced the term 'magistrate' with the *modifier* 'individual', and further individualised the magistrate by *singularity* (as opposed to *plurality*), in referring to 'a Magistrate in this case', which he contrasted to the singular 'Magistrate in Wellington'.[48] Through individualisation, Boe portrays a reality in which each magistrate's perception is unique to that individual. He conveys the message that each magistrate, including the one

[43] van Leeuwen, above n 33, 37.

[44] Ibid.

[45] Ibid 42.

[46] Ibid 35.

[47] Transcript of Proceedings, above n 3, 11.

[48] van Leeuwen, above n 33, 37.

who had found Boe's client guilty of using insulting language, has unique experiences and disparate views, and he consequently *delegitimises* the notion that magistrates share the same experience.

5.4.2 Legitimation

In this part, I identify in the judicial statements outlined above instances of *legitimation*. I introduced this term in my theoretical framework (Chapter Two) to describe the 'why' aspect of representations of social practices, 'reasons that either the whole of a social practice or some part of it must take place, or must take place in the way that it does'.[49] Statements such as '[m]agistrates have an enormously wide exposure to the colour of daily life' and '[m]agistrates with a wide experience of life and human foibles are generally in the best position to judge whether conduct should be categorised as disorderly' are examples of what van Leeuwen refers to as *theoretical rationalisation*, a form of legitimation.[50] These legitimations are 'grounded not in whether the action is morally justified or not, nor in whether it is purposeful or effective, but in whether it is founded on some kind of truth, on "the way things are."'[51] Theoretical rationalisation, van Leeuwen explains, is closely related to the category of *naturalisation*, but 'where naturalisations simply state that some practice or action is "natural", theoretical legitimations provide explicit representations of "the way things are"'.[52] A sub-category of theoretical legitimation is *explanation*, where the answer to the 'why' question is 'because doing things this way is appropriate to the nature of these actors'.[53] For instance, the statement 'debaters make great lawyers because they are highly competitive in nature', is an example of an *explanation*, where debaters are attributed the quality or the nature of being competitive, which is presumed to make them 'great lawyers'.

In the above extracts from *Couchy v Del Vecchio* and *Heanes v Herangi*, the actors involved in the practice of judging offensiveness—magistrates—are attributed qualities through the linking word *have* in '[m]agistrates *have* an enormously wide exposure to the colour of daily life through their work every day' and the linking word *with* in '[m]agistrates *with* a wide experience of life and human foibles are generally in the best position to judge whether conduct should be categorised as disorderly'. These sentences are examples of *explanations*,

[49] Ibid 20.

[50] Ibid 115–17.

[51] Ibid 115–16.

[52] Ibid 116.

[53] Ibid.

because the judges have ascribed to the magistrates 'general attributes or habitual activities'.[54] The answer the judges provide to the question, 'Why are magistrates appropriate arbiters of offensive language?' is that magistrates have a 'wide experience of life and human foibles'; they see 'the hurly burly of everyday life'; and they have 'substantial regular contact with many members of the community'.

It is important to emphasise that magistrates are represented in these extracts as the *most* appropriate arbiters of offensiveness, even more than appellate judges. This is evidenced through the judges' use of pronouns.[55] The Queensland Court of Appeal judges use 'they' and 'he' to refer to magistrates: '*he* may be taken to have brought to bear a wide experience of life' and '*they* must see a lot more of these complaints of offences', placing the magistrates in a category distinct from judges. [56] In contrast, the same judges use 'we' and 'us' in an *exclusive* sense, to refer to themselves and other *appellate* judges: '*We* see masses of it in the Criminal Court but Magistrates …' and 'they must see a lot more of these complaints of offences than any of *us* ever do'.[57] In this way, the judges highlight that magistrates and judges are two distinct groups, the views and experiences of each being peculiar to—but uniform within—that group.

Each of the examples of legitimation examined above functions as common sense knowledge about magistrates' abilities to ascertain offensiveness in criminal justice discourse. And indeed, there is nothing new about criminal justice discourse legitimising magistrates as 'experts' on everyday matters, as evidenced by this excerpt from the S*ydney Gazette* on 31 October 1840: 'Magistrates, who are accustomed to sit at Petty Sessions, are men of all others, who see and who know most of the characters and dispositions of the lower orders of society.'[58] Again, in this excerpt magistrates are pluralised and attributed shared characteristics: they 'are men of all others' who 'see and who know most of the characters and dispositions of the lower orders of society'. Through repetition, the notion that magistrates are a generic group with shared characteristics and knowledge, enabling them to determine 'community standards' on offensive language, becomes a taken-for-granted truth that has attained the status of 'law'. With their opinions assuming the appearance of 'common sense truths', judicial officers can avoid or dismiss any suggestion that each magistrate has a unique experience, which shapes her *individual* views on offensive language, and in addition,

[54] Ibid.

[55] See Norman Fairclough, *Language and Power* (Longman, 1989) 127–8.

[56] Transcript of Proceedings, above n 3, 11 (emphasis added).

[57] See Fairclough, above n 55, 127–8.

[58] Quoted in Michael Sturma, *Vice in a Vicious Society* (University of Queensland Press, 1983) 118.

that such unique experience may result in an uneven application of 'the law'. As I have shown, an application of the tools of CDA can expose the discursive techniques used by judicial officers to close themselves off from rationale debate by presenting their ideas as 'the way things are'. My analysis of the technique of legitimation in criminal justice discourse, however, does not end with these observations. In the following section I show how judges assume the viewpoint of a sovereign observer, from which they, by reason of their professional experience, can distil reality from a distant height.

5.4.3 The 'sovereign viewpoint'

It is instructive to analyse how certain discursive aspects, including *transitivity structures* and the *vocabulary*,[59] enable judicial officers to assume a 'sovereign viewpoint', from which they can observe offensiveness. As van Leeuwen has argued, in analysing who is represented as the 'actor', and who is the 'patient', within a given action, we can investigate 'which options are chosen in which institutional and social contexts, and why these choice should have been made, what interests are served by them, and what purposes are achieved.'[60] Alongside categories of magistrates and judges, additional categories of social actors referred to in the above statements are: 'the hurly burly', 'the masses', 'the colour of daily life' and, in the 1840 example, 'the lower orders of society'. The magistrates and judicial officers have been represented as *agents* or 'actors' in the clauses extracted above, and have been allocated the mental process of sensing: they 'see' (or have 'exposure to') 'the hurly burly', 'the colour' and 'the masses'.[61] Meanwhile the latter categories—'the hurly burly', 'the masses', 'the colour of daily life' and 'the lower orders of society'—have been represented as *patients*: they have been allocated a passive role, in other words, they are at the 'receiving end' of the observations of judicial officers.[62]

An analysis of the wording or *vocabulary* is also informative.[63] The judicial officers did not clarify what group of people or individuals they are referring to in the categories 'the hurly burly', 'the masses' and 'the colour of daily life'. Is the reader supposed to construe the term 'masses' to mean something similar to, or the same as, the 'members of the community' (from whose perspective offensiveness is meant to be discerned)? Or were the judges referring to some supposed 'criminal class', or to the so-called 'lower orders', as in the 1840

[59] van Leeuwen, above n 33, 33.

[60] Ibid 32–3.

[61] Ibid.

[62] Ibid.

[63] Norman Fairclough, *Discourse and Social Change* (Polity Press, 1992) 190–4.

example? Some clues can be garnered from further analysis of these terms. While 'the masses' is a concrete noun, and the terms 'the hurly burly' and 'the colour of daily life' are abstract nouns, they all function to *impersonalise* the social actors to whom they refer, representing them by nouns 'whose meanings do not directly include the semantic feature "humans"'.[64] The terms 'the colour' and 'the hurly burly' are also what van Leeuwen calls *abstractions*—a particular kind of personalisation that 'occurs when social actors are represented by means of a quality assigned to them by and in the representation.'[65] In the above examples, the abstracted social actors are referred to by the qualities of being colourful ('the colour') as well as being in an unruly, tumultuous or confused state or situation ('the hurly burly'). Further, the adjective 'colourful' is euphemistically associated with activities considered unconventional and possibly illegal (as in the phrase, 'a colourful racing identity'). The use of the quality 'colourful' is also significant in that it is a synonym for the terms 'vulgar' or 'rude', particularly when referring to taboo words ('colourful language').[66] Both phrases imply a sense of the coarse and the disorderly. Finally, the term 'the masses' denotes 'ordinary people' or 'common people'. All of these categories—the masses, the hurly burly, the colour—are jocular and patronising in tone. These characterisations of members of the public can be contrasted with the categories of 'judge' and 'magistrate', who are *personalised* (represented as human beings), as well as *functionalised* (represented in terms of their occupation—a categorisation that is of particular value in a Western, capitalist society).[67]

Through their representations of social actors, the Court of Appeal judges indicate that knowledge of disorderly conduct or offensive language can be gleaned ('distil[led]') from observing, seeing or being exposed to the masses or the 'hurly burly of daily life'—an amorphous mass—as in 'Magistrates who see the hurly burly of daily life couldn't help but *distil* some sort of perception of community expectations'.[68] They construct a reality in which identified others who belong to particular abstract groups are intimately connected with offensive language. Meanwhile, magistrates and judges, classes represented as distinct from 'the hurly burly', witness this colour when 'in the Criminal courts', but are themselves not colourful. Justice Johnson appears to subscribe to a similar view when her Honour stated in *Heanes v Herangi* that only 'a section of society' use the word 'fuck': 'I cannot accept that the fact that a word is defined in a dictionary and is used, however extensively, by *a section of*

[64] van Leeuwen, above n 33, 46.

[65] Ibid.

[66] The dictionary definitions provided for the adjective 'colourful' include: 'known for activities which are unconventional and possibly illegal' and 'characterised by taboo words'. The entry for 'hurly-burly' is 'full of commotion; tumultuous' *Macquarie Dictionary* (Macmillan, 6th ed, 2013).

[67] van Leeuwen, above n 33, 43.

[68] Transcript of Proceedings, above n 3, 11 (emphasis added).

society, means that the word can never be obscene, or offensive for that matter, in any circumstance.'[69]

If it were true that only a 'section' of society uses the word 'fuck' and the rest of society does not (although linguistic research suggests otherwise),[70] then a problem arises: whose views are judicial officers to consider when ascertaining the 'reasonable person's' view, or 'community standards' on offensive language: that section of society which uses such language, that other section which does not, or an amalgamation of the two?[71] Also, Johnson J's statement is obscure: because her Honour's noun phrase—'a section of society'—is *aggregated* and *indefinitely quantified* (as in van Leeuwen's example, 'a number of critics'),[72] it does not inform us which individuals belong to this 'section' (although presumably Johnson J knows who she is referring to; after all, she categorically states in non-modal present tense that the word 'fuck' '*is* used … by a section of society').[73] While class is not explicitly mentioned in Johnson J's statement, nor in those of the Queensland Court of Appeal judges, their statements imply class divisions and some kind of class superiority. They separate the world into distinct classes, some of which belong to 'the colour of daily life', 'the hurly burly' and 'a section of society', and others (including judges and magistrates) that do not belong to this category, and do not share *their* 'foibles' and everyday experiences. The judges have, to draw upon Mary Douglas' theory of pollution and taboo, structured the chaotic environment around them to render it understandable, by creating a system of classification in which a certain section of society uses and is intimately familiar with offensive language, while others observe its use from a safe distance.[74] The viewpoint assumed by the judicial officers is that of the spectator who, from 'exposure', is able to 'distil' general ideas about the 'masses'. It is, to quote Bourdieu, 'the sovereign viewpoint of those who dominate the social world in practice or in thought',[75] a viewpoint from which the observers can analyse reality from a certain 'distance, height, the overview of the observer who places himself [or herself] above the hurlyburly'.[76] The judicial officers, by not including themselves in the colour of the

[69] (2007) 175 Crim R 175, 212 [168] (Johnson J, emphasis added).

[70] Allan and Burridge, above n 31, 89; Timothy Jay, 'The Utility and Ubiquity of Taboo Words' (2009) 4 *Perspectives on Psychological Science* 153.

[71] I return to this question when I critique constructions of the 'community' in Chapter Eight.

[72] van Leeuwen, above n 33, 38.

[73] Fairclough has stated that '[t]he prevalence of categorical modalities supports a view of the world as transparent … without the need for interpretation and representation' Fairclough, above n 55, 129.

[74] See Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966) 189.

[75] Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Harvard University Press, 1984) 444 Bourdieu supplements this observation with Virginia Woolf's quote that 'general ideas are always Generals' ideas'.

[76] Ibid.

everyday, are in a class above, a class apart. The judicial statements thus naturalise an idea that one must get one's hands dirty and consider the more colourful aspects of society if one is to entertain the question of whether language is offensive. We are not far removed from the view of obscene and indecent language in the 19th and early 20th centuries, explored in Chapter Three, where it was assumed that respectable people—magistrates, police officers, 'fine men', 'decent lads' and 'ladies'—did not use bad language, and swearing was only to be expected from 'unhappy possessors of a foul tongue', 'coloured' folk, lowly criminal 'others', deviants and strangers.

My application of CDA has thus far revealed how judicial officers, through language, legitimise the ability of magistrates to adjudicate offensive language, and construct matters of offensiveness as something more intimately connected with a perceived lower-class, unruly or 'colour[ful]' 'section' of society. Judicial officers have naturalised the assumptions that magistrates—those who 'see', 'know' and come into regular contact with the 'hurly burly of daily life'—are able to 'distil' general ideas about offensiveness. The judicial statements delineate a reality in which offensive language is a domain requiring neither expertise nor empirical research. In the following section, I examine how the linguistic technique of modality rationalises the ability of judicial officers to interpret offensive language.

5.5 Common sense 'wisdom' in *Heanes v Herangi*: an analysis of modality

Modality—the degree of affinity a producer has to a proposition[77]—is another discursive technique that helps show how judges assume the authority to interpret offensiveness. In each passage set out below, Johnson J interpreted the meaning of swear words using her own common sense, without reference to expert evidence or empirical research. In the Supreme Court hearing of *Heanes v Herangi*, Johnson J stated, in relation to 'fuck':

> one of the reasons it may be becoming common usage in every circumstance is because the courts seem to be letting it go by all the time. I'm not convinced that the proposition that it's common parlance is true. It may be more commonly used than it was once before but it's not commonly used in many situations still.[78]

In the Supreme Court judgment, Johnson J stated:

[77] Fairclough, above n 63, 158.

[78] Transcript of Proceedings, above n 35, 40–1.

> In my view ... in order to meet the definition of obscene, it is not necessary for the words to be intended to express a sexual connotation. The only requirement is whether the words used transgress the generally accepted bounds of decency or are an affront to sensibilities. In my opinion, in certain situations, that definition will be met simply because the words have a sexual connotation, irrespective of whether they are being used in that sense.[79]

The judge further held, 'I cannot accept that the fact that a word is defined in a dictionary and is used, however extensively, by a section of society, means that the word can never be obscene, or offensive for that matter, in any circumstance.'[80]

In these three excerpts, Johnson J referred to her own personal authority when offering opinions on offensive language, prefacing many of her remarks with: 'In my view', 'In my opinion', 'I'm not convinced that' or 'I cannot accept that'. The modality of these clauses is *subjective*, in that Johnson J has made the subjective basis for her 'selected degree of affinity with a proposition … explicit'.[81] Her Honour stated, for example, 'I'm not convinced that the proposition that it's common parlance is true', where her Honour could instead have couched this in objective terms: 'This language is not in common parlance'. These examples of subjective modality highlight that the law allows assessments of offensive language to be based solely on personal opinions. Justice Johnson did not (and was not required to) explain *how* she arrived at her views and opinions that swearing is not common parlance, or that swear words are used by 'a section of society'.

It would be misleading to say Johnson J presented only a subjective viewpoint in these passages. *Tense* is another important means of realising modality.[82] The simple present tense realises a categorical modality, as in Fairclough's examples: 'The earth *is* flat' or 'Your library books *are* overdue'.[83] Fairclough has argued that a 'prevalence of categorical modalities supports a view of the world as transparent—as if it signalled its own meaning to any observer, without the need for interpretation and representation.'[84] In a number of instances, Johnson J used the simple present tense forms of the verbs 'be' and 'have': 'the fact that a word … *is* used, however extensively, by a section of society'; '… it *is* not necessary for the words to be intended to express a sexual connotation'; '… *it's* not commonly used in many situations still'; and 'that definition will be met simply because the

[79] *Heanes v Herangi* (2007) 175 Crim R 175, 212 [167] (Johnson J).

[80] Ibid 212 [168] (Johnson J).

[81] Fairclough, above n 63, 159.

[82] Ibid 158–9.

[83] Fairclough, above n 55, 129 (emphasis added).

[84] Ibid.

words *have* a sexual connotation.'[85] By using the simple present tense, Johnson J asserted a categorical commitment to the propositions that 'fuck' is used by a section (rather than all) of society, that it is still not commonly used in many situations and that it has a sexual connotation. It is important to remember that judges have choices available to them when representing a set of circumstances. Justice Johnson could have expressed a lower degree of affinity with those propositions by using *modal adverbs* ('probably' or 'possibly'), *hedges* ('somewhat', 'sort of' or 'a bit'), or *modal auxiliary verbs* ('must', 'may', 'should').[86] Instead Johnson J chose to present her personal views without qualification, disguising any possibility of alternative, intermediate positions. And through the doctrine of precedent—whereby judges recite and apply previous judicial statements about obscene and offensive language—such propositions assume the appearance of timeless truths, as when Johnson J repeated with approval the statement of Windeyer J (who had adopted the views of North J, who had adopted the remark of Sholl J before him) that 'the court is not called upon to overlook or minimise what is really obscenity, merely in order supposedly to show its own judicial broadmindedness or tolerance or imperturbability or even cynicism.'[87]

5.6 Representing swear words as inherently sexual

Couching personal opinions as truths may be persuasive, but it is also misleading. We can question Johnson J's view that some swear words, by their very 'nature', 'have a sexual connotation, irrespective of whether they are being used in that sense'.[88] In this section I examine this language ideology, as well similar ideologies expressed in *Jolly v The Queen*. The first ideology I analyse is what Eades has termed the 'ideology of literalism', whereby judicial officers (selectively) interpret words by reference to their literal or dictionary meaning(s), and exclude other, more probable, contextual meanings.[89] The second ideology can be regarded as a sub-set of this ideology of literalism, being the notion that some words necessarily have a sexual connotation, irrespective of how they are used. Both language ideologies are premised on a 'referential' conception of language, which sees language as 'essentially a transparent and objective medium of communication'.[90] This referential view is

[85] Transcript of Proceedings, above n 35, 40–1 (emphasis added); *Heanes v Herangi* (2007) 175 Crim R 175, 212 (Johnson J, emphasis added).

[86] See Fairclough, above n 63, 159.

[87] *Heanes v Herangi* (2007) 175 Crim R 175, 218 [199] (Johnson J); quoting *Crowe v Graham* (1969) 121 CLR 375, 399 (Windeyer J); citing *Re Lolita* [1961] NZLR 542, 553 (North J); citing *Mackay v Gordon & Gotch (A/sia) Ltd* [1959] VR 420, 426 (Sholl J).

[88] *Heanes v Herangi* (2007) 175 Crim R 175, 212 [167] (Johnson J).

[89] Eades, above n 6, 245–7.

[90] Janet Ainsworth, 'You Have the Right to Remain Silent… but Only If You Ask for It Just so: The Role of Linguistic Ideology in American Police Interrogation Law.' (2008) 15(1) *International Journal of Speech, Language and the Law* 1, 16.

in sharp contrast to a sociolinguistic approach to language, which emphasises the context-dependency of language, conceiving language as a 'non-neutral medium'[91] or a 'tool [that] is 'socially created, manipulated, and changed''.[92] The phenomenon identified as 'word magic' is relevant here: that many humans intuitively believe, contrary to linguistic research (which regards the pairing between a sound/sign and a meaning as arbitrary),[93] that 'the name for an entity is part of its essence, so that the mere act of uttering a name is seen as a way to impinge on its referent'.[94]

As outlined at the beginning of this chapter, in *Jolly v The Queen* the defendant, Sean Jolly, was alleged to have said: 'You are fucking dog cunts. You fucked his mum and he fucked your mum and he fucked his mum and his sister and your brother and son', and 'Fuck off you dog cunts. You fucked his mum and he fucked yours'.[95] When Jolly's conviction for, inter alia, using offensive language under s 4A of the *SO Act* (NSW) was heard in the District Court of NSW, Cogswell DCJ considered the question of whether these words amounted to offensive language, or whether the defendant had a 'reasonable excuse' for their use.[96] Judge Cogswell ultimately found that Jolly's words amounted to offensive language, stating that when Jolly 'went on to make references to members of the police officers' families having sexual relations with each other' this no longer allowed Mr Jolly a defence under the section.[97] Judge Cogswell further stated: 'I have the same view about the reference to animals in the expression "dog cunts". The images conjured up by such language are obviously—in my opinion—very offensive to anyone who might overhear them.'[98]

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[91] Alessandro Duranti, 'Linguistic Anthropology: The Study of Language as a Non-Neutral Medium' in Rajend Mesthrie (ed), *The Cambridge handbook of sociolinguistics* (Cambridge University Press, 2011).

[92] Diana Eades, 'Theorising Language in Sociolinguistics and the Law' in Nik Coupland (ed), *Sociolinguistics: Theoretical Debates* (Cambridge University Press, 2016) 368 (forthcoming).

[93] Allan and Burridge, above n 31, 40.

[94] Pinker, above n 32, 331.

[95] [2009] NSWDC 212, [14].

[96] The appellant was appealing against several convictions handed down by Magistrate Hannam in the Local Court on 5 September 2008, relating to several offences committed following a brawl in the street on which the appellant lived with his family. The defence of 'reasonable excuse', contained in s 4A(2), is examined in Chapter 4.

[97] *Jolly v The Queen* [2009] NSWDC 212, [22] (Cogswell DCJ). It is difficult to ascertain from this statement whether Cogswell DCJ considered that the invocation of the families of police having sexual relations with each other crossed the line. Had he just been talking about the officers themselves, would Jolly have had the defence of reasonable excuse available?

[98] Ibid (Cogswell DCJ).

5.6.1 Recontextualisation

These extracts are examples of *recontextualisation*.[99] As explained in Chapter Two, when judges, police officers, witnesses and so on talk or write about offensive language charges, they recontextualise the words and the context in which they were used by reallocating roles, rearranging the social relations between the participants, reordering the events and reframing the context. Recontextualisations can add detail, transform persons and events, eliminate detail or shift focus.[100] In the present example, Cogswell DCJ transformed the facts of Jolly's case by substituting the words used by Jolly—the noun phrase 'dog cunts' and the sentence: 'You fucked his mum and he fucked your mum and he fucked his mum and his sister and your brother and son'—with the judge's subjective interpretations of the words as 'references to members of the police officers' families having sexual relations with each other'; 'the reference to animals'; and 'the images conjured up by such language'. In construing Jolly's language in this way, Cogswell DCJ, like Johnson J in *Heanes v Herangi*, focused on the literal or surface meanings of the defendant's words, rejecting alternative contextual interpretations that might construe the words as slurs somewhat divorced from their dictionary definitions.

5.6.2 Causality: agency and presuppositions in *Jolly v The Queen*.

It is instructive to analyse Cogswell DCJ's construction of transitivity, particularly that of cause and effect (or causality) in his interpretation of Jolly's words. Fairclough has explained that analysis of *causality* involves interrogating who (or what) 'is represented as causing what to happen, who is represented as doing what to whom'.[101] Judge Cogswell represented his denotative interpretation as the *only* possible interpretation of the words: 'You are fucking dog cunts', and obscures other equally possible interpretations, by using particular grammatical forms, including the representation of *agency* and *presuppositions*.

5.6.2.1 Agency

The clause: 'The images conjured up by such language' is a transactive action in the passive voice, involving two participants: the actor (the one who does the deed), and the goal (the one to which, or to whom, the process is directed.[102] In the clause: 'The images conjured up by

[99] See van Leeuwen, above n 33, 1–22.

[100] Ibid vii.

[101] Fairclough, above n 55, 51.

[102] van Leeuwen, above n 33, 60; Hilary Janks, 'Language and the Design of Texts' (2005) 4(3) *English Teaching* 97, 107.

such language', the abstract noun 'such language' is the actor, 'the images' are the goal, and the verb or the process is 'to conjure up'. Through this grammatical construction of agency, Cogswell DCJ attributed power or causality to the abstract noun 'such language', which is represented as generating 'the images' of dog cunts.

5.6.2.2 Presuppositions

Further, the judge's use of the definite article ('the') in '*[t]he* images conjured up by such language' and '*the* reference to animals in the expression "Dog cunts"' (as opposed to the indefinite article equivalents, such as 'images conjured up by such language'), is ideologically important, in that the definite article can trigger presuppositions: propositions that are deemed common ground, or already in existence. Fairclough gives the example of the presupposition '*the* Soviet threat', in which the definite article signifies to the reader that this threat has already been established.[103] Presuppositions are among the main devices used by writers or speakers to promote their ideological position, and are particularly prevalent in argument, as the negation of a clause containing a presupposition does not change its embedded message.[104] Accordingly, the use of presuppositions makes it more difficult for the audience to reject the view put forward.[105] Critical linguist Hillary Janks has argued that we should be attentive to the persuasive effect of a word as 'seemingly innocuous' as 'the':

> The use of the definite article presupposes shared knowledge. It is therefore used to refer to established information, whereas the indefinite article is used to refer to new information. So, for example, referring to 'weapons of mass destruction' as 'the weapons of mass destruction' presupposes both that we all know what weapons we are talking about and that they exist.[106]

Applying these observations to the phrases of Cogswell DCJ, we see that his Honour represented as already established the fact that Jolly was referring to animals when he used the expression 'dog cunts' by using the definite article: ''the reference to animals in the expression … .' Similarly, Cogswell DCJ presupposed that the words 'dog cunts' conjure up images in the phrase '*[t]he* images conjured up by such language'. The judge attributed to swear words a kind of agency in which these words automatically, without human intervention, evoked images of animals' anatomy. Judge Cogswell did not mention that humans must exercise their imaginations (as Cogswell DCJ did) to conjure up these images.

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[103] Fairclough, above n 63, 120.

[104] Ibid 120–1.

[105] See, eg, Diana Eades, 'Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications' (2008) 20 *Current Issues in Criminal Justice* 209, 216.

[106] Janks, above n 102, 99 n 1.

5.7 Linguistic literature

It could be argued that Jolly's phrase 'fucking dog cunts' was not intended to, and in many minds may not, evoke images of dogs' sexual organs. (Indeed, many people could not readily conjure up such images). To the same end, the phrase used by Jolly, 'fucking dog cunts', was probably not intended, and would not be interpreted by many English speakers, as a reference to female dogs having sex with one another, which a denotative (sexual) interpretation might denote.[107]

Judge Cogswell's choice to construe the words 'dog cunts' in a denotative way is artificial, if not absurd. The judge has made what Wajnyrb identified as a common error when interpreting swear words; he has 'tried to define CUNT as one might, say, "chair" or "physics" or "collective consciousness". It just doesn't work.'[108] As Wajnryb explained, one reason it doesn't work is that swear words are 'overly invested in connotative or emotional associations rather than descriptive or dictionary meanings'.[109] One cannot simply read the entries for swear words in a dictionary to find their meanings in all uses; one must turn to the 'context' of their use.[110] As I argue in Chapter Seven, context itself is a nebulous concept. Police officers, lay witnesses, lawyers and judicial officers must exercise choices in describing context: which people, places, ideas, words and things to include or exclude; aspects that are altered, emphasised and so on.

Laying these interpretative difficulties aside for the time being, in the present example Cogswell DCJ's application of the 'ideology of literalism' overshadows the availability of alternative and perhaps more credible contextual interpretations of Jolly's words—including that Jolly was using the phrase 'fucking dog cunts' as a pejorative, with 'fucking' and 'cunts' added for 'intense emotional effect',[111] and 'dogs' used in the sense of a common insult to denote police officers.[112] Furthermore, it could be argued that Jolly had used the words, 'You

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[107] *Stutsel v Reid* (1990) 20 NSWLR 661 provides another example of where it would be absurd to construe swear words literally. In that case, the respondent, Brian John Reid, said to police officers, 'Why don't you fuck off you dog arse cunts?' ; Similarly, the appellant in *Couchy v Guthrie* [2005] QDC 350 had yelled a number of phrases towards a man in a garage area beneath a boarding house, open to, and in view of, Gibbon Street, Woolloongabba, including: 'Hey, I'll fucking kill that dog cunt'; 'He's just a fucking cunt. A dog. I will fucking kill him'.

[108] Wajnryb, above n 17, 69 (emphasis in original).

[109] Ibid

[110] Ibid.

[111] Ibid 70.

[112] For example, it was argued that the primary trigger for Cameron Doomadgee's arrest and subsequent death on Palm Island in 2004 was Doomadgee's singing of the 'one-hit-wonder' by the Baha Men 'Who let the dogs out … Woof, woof, woof, woof,

fucked his mum and he fucked your mum and he fucked his mum …', to mimic provocative schoolyard or street swearing referred to as 'flyting' or, in African American contexts, as 'playing the dozens': verbal contests involving 'highly inventive *figurative* language, in which the taunts subject the participants, their close relatives, and selected parts of their bodies to an increasingly bizarre set of unpleasant circumstances'.[113] As offensive language is a matter for judicial notice, Cogswell DCJ was either not privy to, or could overlook, such interpretations in favour of his own 'common sense' understandings of how language works.

I now return to the similar sentiments expressed in Johnson J's statement that some swear words, by their very 'nature', 'have a sexual connotation, irrespective of whether they are being used in that sense'. The idea that swear words such as 'fuck' necessarily have a sexual connotation has been disputed in linguistic literature on taboo words and swearing. Linguists Keith Allan and Kate Burridge write that the 'connotation' of a word means 'its semantic effects (nuances of meaning) that arise from encyclopedic knowledge about the word's denotation and also from experience, beliefs and prejudices about the contexts in which the word is typically used', while psychologist and linguist Steven Pinker refers to connotations as an 'emotional colouring distinct from what the word literally refers to'.[114] Connotations change depending on context, and differ between individuals and communities. Meaning is attached to words by humans through social use: on their own, words are just 'sounds heard, sequences of symbols on a page, abstract language constituents.'[115] Thus words, including swear words, do not have a 'nature'. They are neither inherently good nor inherently bad, and they are not inherently sexual.[116]

To turn to the word that Johnson J was contemplating—'fuck'—many linguistic studies have demonstrated that the uses and meaning of this word and its derivatives are 'highly varied'.[117] Christopher Fairman, in his survey of the treatment of 'fuck' in United States law, has written how linguists have identified from this one word 'two distinctive words'. The first, which Fairman calls *Fuck*^{1}, means literally 'to copulate' but also 'encompasses figurative uses such as "to deceive"'.[118] The second word, *Fuck*^{2}, has 'no intrinsic meaning'.[119] *Fuck*^{2} can be

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woof', to which Senior Sergeant Christopher Hurley took offence. See Chloe Hooper, *The Tall Man: Death and Life on Palm Island* (Random House, 2010).

[113] See David Crystal, *The Encyclopedia of the English Language* (Cambridge University Press, 1995) 401 (emphasis added); Geoffrey Hughes, *Swearing: A Social History of Foul Language, Oaths and Profanity in English* (Blackwell, 1991) 47–50.

[114] Allan and Burridge, above n 31, 31.Pinker, above n 32, 331.

[115] Allan and Burridge, above n 31, 40.

[116] Melanie Burns, 'Why We Swear: The Functions of Offensive Language' (2008) 6 *Monash University Linguistic Papers* 61, 61.

[117] Christopher Fairman, 'Fuck' (2006) 28 *Cardozo Law Review* 1711, 1719.

[118] Ibid.

substituted for other swear words, such as 'hell' or 'bloody' (e.g. '*Fucking* fantastic' can be interchanged with '*Bloody* fantastic'), and can be used as a noun (as in 'You're a lazy *fuck'*), as a verb ('to *fuck* someone over'), as an adjective ('This engine's *fucked'*), or as an adverb ('You know *fucking* well what I mean' or 'un*fucking*believable').[120] In all these examples, 'fuck' is being used in a distinct sense. While it may be difficult to encapsulate what this sense is, Fuck[2] is void of any inherent, including sexual, connotation.[121] Just like judges that have come before them, and will come after them, both Johnson J and Cogswell DCJ perpetuate what Allan and Burridge have recognised as a 'persistent belief' amongst the wider community—that the form of an expression communicates the essential nature of what is being referred to.[122] This particular language myth denies that swear words are—as English language scholar Allen Walker Read wrote in 1934—a *symbolic* construct: their obscenity 'lies not in words or things, but in attitudes that people have towards these words and things'.[123] In denying the symbolic value of swear words, and their myriad meanings and usages, judges perpetuate a view that there some words are simply 'dirty' or sexual, thus legitimising their status as 'bad words'.[124]

A further assumption implicit in both Cogswell DCJ's and Johnson J's language ideologies is that swear words warrant criminal sanction because they allude to sexual acts or body parts. It is unlikely the judges would have perceived an exclamation such as 'I had sex last night', uttered aloud in a public place as criminally offensive. It is similarly unlikely that this statement, being void of swear words, would attract police attention. As Henry Hitchings has observed: 'Far fewer people will be upset by the word *vagina* than will be appalled to hear the word *cunt*'.[125]

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[119] Ibid.

[120] Some of these examples are derived from ibid 1718–19.

[121] Ibid 1719–1720.

[122] See Allan and Burridge, above n 31, 40; Similarly, in the US the Federal Communications Commission (FCC) heard complaints about musician Bono's use of the words 'This is really, really fucking brilliant' at a Golden Globes award ceremony in 2003. The FCC ultimately concluded that Bono's use of 'fucking' was not only indecent but also profane. In finding this, the FCC stated that any use of 'fuck' is per se sexual, stating 'We believe that, given the core meaning of the "F-word", any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of any indecency definition': *Complaints Against Various Broadcast Licensees Regarding Their Airing of the `Golden Globe Awards' Program* 19 FCCR 4795 (2004), 4978.

[123] Allen Walker Read, 'An Obscenity Symbol' (1934) 9(4) *American Speech* 264.

[124] Justice Johnson's statement that some words are offensive or indecent 'simply because the words have a sexual connotation, irrespective of whether they are being used in that sense' also promotes an idea that I will raise briefly here, although a meaningful examination is beyond the scope of this thesis: the idea that sex is a negative thing, and that words that refer to sex are offensive. Judges uncritically relegate sexual referents to the domain of the profane, the disgusting, the dangerous and the illegitimate, without questioning why sex is disgusting and 'not for public consumption'.

[125] Hitchings, above n 26, 241.

This brings us back to an observation and an argument I make throughout my thesis: that many politicians, police, judicial officers and members of the general public have presumed that offensive language crimes should target swear words. By singling out swear words as deserving of criminal punishment, the law has naturalised the idea that swear words per se are intrinsically dirty, irrespective of human interpretation or contextual usage. Such a conception ignores sociolinguistic arguments that swear words are, as Burridge has argued, 'weeds of our own making'.[126] Burridge used this metaphor to illustrate her argument that words, like gardens, are contingent on human interpretation and context: 'One speaker's noxious weed can be another's garden ornamental. A linguistic weed today can be a prized garden contributor tomorrow. Whether they are in gardens or in languages, weeds are totally centered around human value judgements'.[127]

Different English speakers use 'cunt' to convey diverse meanings, and for varying effects. To give an anecdotal example, a solicitor for the Aboriginal Legal Service recounted to me a case involving a sexual assault charge, in which she appeared as the defence solicitor. When giving evidence in the case, the Aboriginal witness paused for a few seconds, then asked the lawyer, 'Hey mister, what's that fancy word you use for *cunt*?' In England, 'cunt' was once a publicly acceptable way to refer to a vagina, used denotatively for example in the London street name 'Gropecuntlane' (the name has since been changed to 'Magpie Lane'), or in medical texts, as in Lanfranc's *Science of Chirurgie*, written early in the 15th century, in which it was written, 'In women, the neck of the bladder is short and is made fast to the cunte'.[128] In each of these examples, 'cunt' is used not in a pejorative but in a denotative way, to refer to the vagina. In other words, it was used in a sexual way, but was not intended (and should not be construed) as offensive. Nonetheless, so long as humans maintain and reinforce the tabooed status of the word, including by repeating folk-linguistic ideas about it magically conjuring up sexual images, its shock value persists.[129] Swear words, like other words in the English language, do not have a nature and are not inherently sexual. Their taboo status is created and attached to them by humans, and '[i]nvariably, its powerful magic will fade'.[130]

Not all judges rely on denotative meanings when construing swear words, or argue that swear words are inherently dirty, violent or sexual. For example, Rowland J stated in *Keft v Fraser*, with reference to the meaning of 'fuck':

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[126] Kate Burridge, *Weeds in the Garden of Words* (ABC Books, 2004) 8.

[127] Kate Burridge, 'Taboo, Verbal Hygiene—and Gardens' (2010) 47 *Idiom* 17, 22.

[128] Ruth Wajnryb, *C U Next Tuesday: A Good Look at Bad Language* (Aurum, 2004) 37.

[129] Ibid 41.

[130] Keith Allan and Kate Burridge, 'Raising Gooseflesh - "Dirty Words" and Language Change' (1992) 5 *La Trobe Linguistics Journal* 31.

> The primary meaning of the offending word is sexual intercourse. It is a well known word whether used as a noun, adjective or verb. It has been known for two or three centuries and it has been used by some eminent writers. One hears it being used by people of both sexes and various ages. More often than not, when used either alone or in combination with other words, it does not bear its primary meaning. Outside its primary meaning it was probably used initially as a strong expletive kept for those rare occasions when the strongest expletive only would suit the particular occasion.[131]

The point of including this excerpt is not to suggest that Rowland J's arguments are more correct, or better supported by linguistic literature and empirical research than those of Cogswell DCJ in *Jolly v The Queen* or Johnson J in *Heanes v Herangi*.[132] Rather, it is to point out the ease with which Rowland J masqueraded as a linguist in this case. Like Johnson J and Cogswell DCJ, Rowland J did not identify how he arrived at his views, and as offensive language is a matter for 'judicial notice', he need not have cited sources for them. Like Johnson J, Rowland J wrote in the simple present tense ('It has been known for two or three centuries and it has been used by some eminent writers'), thus representing his propositions as categorical facts; and he wrote in objective terms, with no linguistic indication that these are his individual opinions. We see that different judicial officers proffer different (and sometimes contradictory) language ideologies in offensive language cases. And my critical discourse analysis of judicial discourse has offered insight into *how* judicial officers legitimise the notion that the swearing is a quotidian subject that requires no recourse to linguistic expertise.

5.8 Conclusion

In this chapter, I have used CDA to critique judicial language ideologies. I have argued that offensive language crimes, as they are currently framed and applied, allow legal decision makers to be inoculated from critique by linguistic experts, and to disseminate and entrench myths about swearing. This in turn enables adjudicators to generate and apply 'common sense' ideas about language, including that swear words have an inherent nature and transmit referential meaning. I have revealed various instances in which judges have assumed the role of pseudo-linguist, proffering a number of language ideologies, including that some swear words are inherently sexual and that only a 'section' of society uses the word 'fuck'. I found,

[131] (Unreported, Supreme Court of WA, 21 April 1986) 3–4.

[132] Although many of these statements do in fact better align with linguistic research on the word than those of Cogswell DCJ and Johnson J, including that 'fuck' can function as a noun, adjective or verb; also see Pinker, above n 39, Chapter Seven.

with reference to linguistic literature on swearing, that many of their folk-linguistic views are not supported by linguistic research, in which language is regarded as a non-neutral medium of communication that changes depending on context of use, and curse words are seen as an integral and ubiquitous component of human speech. In presenting these (often misleading) opinions as 'facts', and in spurning expert evidence on questions of language, judges do not only increase their discretion to determine what is, or is not, offensive. They also undermine the integrity of the criminal law, by representing common sense ideas as fact or law, particularly where these theories are adopted in subsequent offensive language cases. In the following chapter I continue my analysis of language ideologies in criminal justice discourse by interrogating two myths propagated in offensive language cases: firstly, that swear words are dirty words and, secondly, that swear words cause physical harm.

CHAPTER SIX
THE 'UNMENTIONABLES':
VERBAL EVASIONS AND METAPHORICAL CONSTRUCTIONS OF THE HARM IN OFFENSIVE SPEECH

On 12 July 2006, Jonathan Stephen Heanes ('Heanes') and his girlfriend were crossing Wellington Street, near Perth train station. Two uniformed police officers, Constables Paul and Herangi, were crossing from the opposite direction. According to Constable Herangi, Heanes walked between the two officers, bumped into Constable Paul with his elbow, then continued crossing the road. Heanes then turned around and smiled at him. After waiting for the pedestrian light to turn green, the police officers decided to locate Heanes. About five minutes later they found Heanes in Myers, a department store, and asked him to come outside.

> Constable Herangi said to Heanes: You deliberately walked into us
> Heanes replied: No I didn't see you.

Heanes's mobile phone rang and he answered it. Constable Herangi told him to turn it off until they sorted the matter out. According to Constable Herangi, Heanes replied, in a loud and clear voice:

> I am on the phone. I'm fucking talking to my dad. Fuck off.[1]

Constable Herangi said it was school holidays at the time and there were several children within hearing distance.[2]

Heanes was arrested and later convicted at Perth Magistrates' Court for disorderly behaviour by using offensive language in public.[3] He was fined $500 plus costs.[4] On 1 August 2007,

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[1] Constable Herangi gave an alternative account of the words used by Heanes when giving evidence, namely: 'I'm on the fucking phone talking to my dad. Fuck off'. In Heanes's account, Constable Herangi went to grab the phone out of his hand and brought the phone down and Heanes stated: 'It's my fucking dad. Just let me talk to him'. This version of events was ultimately not accepted by Magistrate Nicholls Transcript of Proceedings, *Jonathan Stephen Heanes v Western Australia Police Force* (Perth Magistrates' Court, PE 39693 of 2006, Magistrate Nicholls, 23 October 2006) 5, 32.

[2] Ibid 1–5.

[3] *Criminal Code Act 1913* (WA) s 74A ('*Criminal Code* (WA)'). See Chapter Four for discussion of this provision.

[4] Transcript of Proceedings, above n 1, 26.

Heanes's appeal against conviction was dismissed by Johnson J in the Supreme Court of WA.[5]

6.1 Introduction

Heanes's use of the words 'fuck' and 'fucking' to Constable Herangi was the subject of considerable judicial consternation in the lower and appellate court hearings of his disorderly conduct charge. Had Heanes omitted these two words from his phrasing, and instead said to Herangi: 'I am on the phone. I am talking to my dad. Get lost', it is highly unlikely he would have been charged with using offensive language. This observation is consistent with the fact that the utterance of swear words—a finite set of pre-determined words or phrases—is, in practice, a pre-condition for an offensive language charge.

The focus of those enforcing and adjudicating offensive language crimes—police and judicial officers—on swearing, contrasts with the wide margins surrounding offensiveness that the legislation and judges applying it have, in theory, produced. As I established in Chapter Four, common law definitions of 'offensive' are broad, with the oft-cited definition in *Worcester v Smith* being 'such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person'.[6] In theory, a wide variety of words and phrases might shock, disgust, outrage or offend the reasonable person, including the derision of a person's physical or mental capacity, their appearance, sexuality, religious beliefs, ethnicity, personality or credibility. Further, there is no catalogue of words that are obscene, indecent or offensive.[7] Instead, a magistrate's or judge's interpretation of what is offensive should be context-specific and have regard to 'contemporary community standards'.[8] Simply put, the law has created broad parameters around words that *could* amount to offensive language.

Yet, while one might chance upon the rare example of a more creative insult founding an offensive language charge—such as the 17-year old Aboriginal youth fined $50 at Brewarrina

[5] *Heanes v Herangi* (2007) 175 A Crim R 175 One of the grounds of appeal was that the appellant's conduct did not amount to disorderly conduct as, although the language was while impolite, it the language was not offensive in its proper, actual and contemporary context and fell well short of conduct requiring the sanction of the criminal law and attracting a significant penalty under s 74A of the *Criminal Code* (WA).

[6] [1951] VLR 316, 318 (O'Bryan J).

[7] *Hortin v Rowbottom* (1993) 68 A Crim R 381, 389 (Mullighan J).

[8] Ibid (Mullighan J); *Gul v Creed* [2010] VSC 185, [15] (Beach J).

Local Court for calling the arresting constable a 'melon head'[9]—prosecutions for offensive language crimes do not in practice target an infinite number of abusive, bigoted or derogatory expressions. It is an (usually unstated) assumption that offensive language charges will almost always punish a very narrow range of swear words, primarily 'fuck' and its derivatives, and 'cunt'.[10]

With this in mind, this chapter questions why the use of a profanity is assumed as a *sine qua non* for an offensive language charge and investigates the role of discourse in legitimising this assumption. The chapter continues my examination of 'language ideologies' from the previous chapter, and contributes to the overall investigation in my thesis into how criminal justice discourse constructs swear words as 'out of place' and in doing so, maintains unfair and unequal power structures. Focusing on the linguistic devices of substitution and metaphor, I draw on my case studies, including the one outlined at the start of this chapter, *Heanes v Herangi*, to examine how criminal justice discourse creates and portrays the harms caused by 'four-letter words' and their derivatives. In the first part of the chapter, I examine the use of euphemisms, orthophemisms and circumlocutions in criminal justice discourse: how these various modes of representation cover up, cleanse or contain swear words, and bolster their taboo status. Following this, I critically analyse how metaphorical representations of swear words construct these words as dirty or dangerous, and position them as natural and appropriate targets for criminal punishment. I argue that criminal justice discourse on offensive language crimes continues to be 'mediated by magical thinking about contamination and purity'[11]—with intangible swear words conceptualised through discourse as pollutants or as physically forceful objects. I critique discursive constructions by drawing on George Lakoff and Mark Johnson's *Metaphors We Live By*;[12] the CDA work of van Leeuwen and Fairclough;[13] linguistic literature on swearing;[14] and literature on purity, dirt

[9] Brian Taylor, 'Unseemly Language and the Law in New South Wales' (1994) 17 *Journal of the Sydney University Arts Association* 23, 40.

[10] NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities' (2009) 57; NSW Anti-Discrimination Board, 'Study of Street Offences by Aborigines' (Report, 1982) 48–9.

[11] Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press, 2004) 128.

[12] George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 2nd ed, 2003).

[13] See especially Theo van Leeuwen, *Discourse and Practice: New Tools for Critical Discourse Analysis* (Oxford University Press, 2008); Norman Fairclough, *Discourse and Social Change* (Polity Press, 1992); Norman Fairclough, *Language and Power* (Longman, 1989).

[14] See especially, Timothy Jay, *Why We Curse: A Neuro-Psycho-Social Theory of Speech* (John Benjamins, 1999); Timothy Jay, 'The Utility and Ubiquity of Taboo Words' (2009) 4 *Perspectives on Psychological Science* 153; Luke Fleming and Michael Lempert, 'Introduction: Beyond Bad Words' (2011) 84(1) *Anthropological Quarterly* 5; Ruth Wajnryb, *Expletive Deleted: A Good Look at Bad Language* (Simon and Schuster, 2005); Tony McEnery, *Swearing in English: Bad Language, Purity and Power from 1586 to the Present* (Routledge, 2006); Keith Allan and Kate Burridge, *Forbidden Words: Taboo and the Censoring*

and disgust.[15] I contend that, in substituting swear words, and transforming them into concrete but entirely imaginary harms, criminal justice discourse plays a significant role in legitimising the criminal punishment of offensive language. In the final part of the chapter, I argue that dominant metaphors of swear words as dirty, polluting and violent overshadow other ways of viewing swear words. I offer alternative metaphors through which swear words could be conceived of in criminal justice discourse, to right myths about swear words and redress (rather than further entrench) unequal power relations. I argue that the criminal law ought to discard magical thoughts of dangerous, contaminative swear words and consider an alternate view of such words as fleeting expressions of resistance, with no lasting or actual physical pain and no demonstrable polluting effect.

6.2 Verbal evasions

> They are disorderly not because the person hearing them react by using physical violence or anything of that kind but simply because their use is an affront to a person's sensibility and likely to arouse in others shock, shame, disquiet, or revulsion. And a single taboo word can do that.[16]
>
> — Chief Justice Burt, *Keft v Fraser*

One means by which swear words are represented as dirty or contaminative in offensive language cases, including in *Heanes v Herangi*, is through euphemisms or circumlocutions to replace swear words. Euphemisms—variously referred to as 'anti-obscenities', 'verbal evasions' or 'the opposite of swearing'—cover up taboos and disguise or erase things and ideas that prompt strong emotional feelings of disgust, shock or shame.[17] As I established in my theoretical framework (Chapter Two), the concept of taboo is central to understanding the relationship between swear words and euphemisms. Swear words are not offensive per se, yet they often refer to behaviours, body parts, ideas or labels considered by a social or cultural group as taboo, where 'taboo' refers to a 'ban or inhibition resulting from social custom or aversion'.[18] In other words, swear words often allude to things that a group of people have an

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of Language (Cambridge University Press, 2006); Melissa Mohr, *Holy Shit: A Brief History of Swearing* (Oxford University Press, 2013); Henry Hitchings, *The Language Wars: A History of Proper English* (Farrar, Straus and Giroux, 2011).

[15] See especially Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966); William Ian Miller, *The Anatomy of Disgust* (Harvard University Press, 1997).

[16] *Keft v Fraser* (Unreported, Supreme Court of WA, 21 April 1986) 10–11 (Burt CJ).

[17] See Hitchings, above n 14; Mohr, above n 14, 197.

[18] *The American Heritage Dictionary of the English Language* (Houghton Mifflin, 2000) 200; see also Kate Burridge, 'Linguistic Cleanliness Is Next to Godliness: Taboo and Purism' (2010) 26 *English Today* 3; Hitchings, above n 14, 240.

aversion to or feel disgusted by.[19] In the late 19th and early 20th centuries, with a continuing trend towards secularism in predominantly English-speaking nations such as England and Australia, words that referred to religious ideas and objects began to lose their taboo value. Words considered to be 'obscene' or 'indecent' were words that referred to sexual activities, sexual (or sexualised) body parts, bodily functions, death, race and ethnicity:[20] 'Social propriety began to take precedence over religious susceptibilities in the condemnation of bad language'.[21]

Euphemisms that concealed (or attempted to conceal) sexual activities, sexualised body parts and all things scatological were at their height in the latter half of the 19th century. As I explained in Chapter Three, it was in the Victorian era—a period that framed a 'polite society' as one in which sex and excrement were concealed from public view, and social elites advertised their respectability through dress, behaviour and language public, while practising vices behind closed doors—that the first comprehensive offensive language laws were introduced in the colony of NSW.[22] Of course, the Victorians still engaged in conduct deemed immodest or promiscuous; they just put much effort into, and placed significant value on, hiding squalor or subversion from public view.[23] As Wajnryb has written, there is 'no doubt' that behind 'those staid pronouncements and demure exteriors', rules were broken and 'passions… seethed'.[24] As this zeal for drawing boundaries between publicly and privately acceptable behaviour extended to language, a practice developed of substituting for tabooed terms expressions considered less offensive, such as 'shoot' or 'sugar' instead of 'shit', 'peripheral excitement' instead of 'masturbation', and 'limb' or 'lower extremity' instead of 'leg'.[25] Unutterable words could also be replaced with even more indirect terms, such as inexpressibles, indescribables, etceteras, unmentionables, ineffables, indispensables, innominables and inexplicables.[26] These substitutions performed the important function of condemning taboo concepts and insulating the user from the sullying effects of the condemned language.[27] The use of euphemisms was also an important means of

[19] For example, we saw in Chapter Three that curse words once commonly prosecuted as profane words, such as 'Hell', 'Damn' or 'Jesus Christ', gradually lost their taboo status, thus their prosecution depleted, as did the prosecution of profane words more generally. Now such words are mostly considered taboo only amongst groups adhering to Christian views about good versus bad (or sinful) words Jay, 'The Utility and Ubiquity of Taboo Words', above n 14, 155.

[20] Hitchings, above n 14, 241; Hayley Davis, 'What Makes Bad Language Bad' (1989) 9(1) *Language and Communication* 1, 8.

[21] Davis, above n 20, 8.

[22] See *Vagrancy Act 1849* (NSW), discussed in Chapter Three.

[23] Hitchings, above n 14, 145.

[24] Ruth Wajnryb, *C U Next Tuesday: A Good Look at Bad Language* (Aurum, 2004) 129.

[25] Mohr, above n 14, 197; Hitchings, above n 14, 144.

[26] Mohr, above n 14, 191–3.

[27] Ibid.

demonstrating one's adherence to the etiquette of the middle and upper-classes (noting that these classes and their etiquette were neither constant nor objectively discernible). Ladies, in particular, were expected to use 'delicate language' to 'advertise their delicate sensibilities' and thereby their social and moral worth.[28]

When considering the linguistic phenomenon of verbal evasions, it is also instructive to consider *orthophemisms*. An orthophemism, like a euphemism, is an alternative to a tabooed expression. Allan and Burridge have written that both orthophemisms and euphemisms arise from similar motivations: so that the speaker/user can avoid being embarrassed, looked down upon ('loss of face'), and/or avoid embarrassing or offending the hearer or some third party.[29] The key difference between a euphemism and an orthophemism is that the latter is typically more formal and more direct (or literal) than the corresponding euphemism, which is typically more colloquial or figurative (or indirect);[30] for example, the word 'faeces' would be considered an orthophemism, and 'night soil' a euphemism.[31] Other ways in which tabooed expressions are replaced include circumlocutions and special citational forms like 'the F-word'.[32] In the following part, I examine instances where swear words have been replaced with circumlocutions and euphemisms, and examine the possible ideological effects of such replacement.

6.2.1 Transforming meaning through euphemisms

In criminal justice discourse on offensive language, swear words are commonly replaced using indirect forms of substitution, such as 'the offending word', 'the four-letter word', 'the expletive' and so on. This is demonstrated in the Perth Magistrates' Court hearing of Heanes's offensive language charge. In his closing submissions, the police prosecutor avoided using the word 'fucking' and the expression 'fuck off', stating 'he [Constable Herangi] was responded to *in that way* that has been said in court many a time already and I don't believe I should be saying *it* again.'[33]

[28] Ibid 193.

[29] Allan and Burridge, above n 14, 32–3.

[30] Ibid 33.

[31] Allan and Burridge also establish a third category of words, dyphemisms, which refers to words with more offensive connotations (such as 'shit'): Ibid 34.

[32] Fleming and Lempert, above n 14, 6.

[33] Transcript of Proceedings, above n 1, part 2, 13 (emphasis added).

In this excerpt, the police prosecutor transformed the actual words 'fuck off' and 'fucking' used by Heanes—'the elements of the actual social practice'—with 'semiotic elements':[34] the circumlocutions 'in that way' and 'it'. Through these substitutions, as van Leeuwen has recognised, 'new meanings are added'.[35] By replacing Heanes's words with indirect expressions, the police prosecutor indicated his disinclination to repeat the swear words aloud. The prosecutor emphasised his aversion to swearing—his view that the word 'fuck' is undesirable to utter—by adding his own 'negative evaluation'[36] of the words. This negative evaluation is expressed in his statement: 'I don't believe I should be saying it again'. In representing the mere repetition of the word 'fuck' as undesirable even in a courtroom hearing (an entirely different context to its original use) the police prosecutor reinforced the social construct that swear words carry their stigma independent of the circumstances in which they are used.

The prosecutor's aversion to mentioning 'unmentionables' is shared by Johnson J in the Supreme Court of WA hearing and judgment. Although Johnson J repeated the words 'fuck' and 'fucking' when reciting the facts of *Heanes v Herangi*, as well as the swear used by other defendants when reciting the facts of other cases discussed in the judgment, her Honour otherwise avoided repeating the word 'fuck' and its derivatives. Instead, Johnson J availed herself of the overabundance of expressions that can substitute for profanities, replacing swear words with the circumlocutions: 'that word', 'it', 'that language', 'the four letter taboo word', 'the relevant word', 'the allegedly obscene word', 'the language', 'a single obscenity', 'an obscenity of that type' and 'words of a particular type'.[37]

Similarly, in the Supreme Court of NSW judgment *Conners v Craigie* (examined in Chapter Eight), McInerney J only reproduced the swear words used by the respondent—'fuck', 'fucking', 'bastard' and 'cunts'—once, when setting out the facts giving rise to Craigie's prosecution on the first page of his Honour's judgment.[38] In the remainder of the judgment, McInerney J referred to 'the language', 'the language complained of', 'those words' and 'the

[34] Van Leeuwen, above n 13, 17.

[35] Ibid.

[36] Don Mohd Zuraidah and Charity Lee, 'Representing Immigrants as Illegals, Threats and Victims in Malaysia: Elite Voices in the Media' (2014) 25(6) *Discourse & Society* 687, 691 citing; van Leeuwen, above n 13.

[37] Transcript of Proceedings, *Jonathan Stephen Heanes v Western Australia Police Force* (Supreme Court of Western Australia, SJA 1111 of 2006, Johnson J, 27 March 2007) 40, 41, 78; *Heanes v Herangi* (2007) 175 A Crim R 175, [163]-[165], [179]-[180], [201], [211].

[38] The phrases that Craigie was said to have used towards the police officers and another man were: 'Fuck off all you white cunts. We've had enough of you. We'd like to see you all dead,' 'You're all fucking white cunts', 'You fucking white bastard, I want to see you dead. You don't fucking belong here'. The respondent further said: Youse are all just fucking white cunts. Get out of the area" *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993).

language in question'.[39] In the Lismore Local Court hearing before Magistrate Pat O'Shane of *Police v Langham*, the words Langham uttered—'Watch these two fucking poofters here, how they fucken persecute me'—were not once uttered aloud in the courtroom.[40] One must access the NSW Supreme Court decision to be privy to the words subject to the offensive language charge. Instead, throughout the Local Court hearing and judgment both the solicitor for the defendant and Magistrate O'Shane replaced Langham's words with indirect expressions: 'these words', 'language of this sort', 'it' and 'language'.[41] The police prosecutor substituted Langham's words with 'language such as this', 'all those', 'that' and 'language'.[42] Further, the complainant, Constable McCormack, replaced Langham's words 'fucking' and 'fuck' with 'it' and, when giving testimony as to his recollection of the events, stated: 'The defendant nodded to a person sitting in the booth in front and said *what I've got in my statement*.'[43]

In *Couchy v Del Vecchio,* Howell DCJ, replaced the word 'cunt' with 'the word referring to the female anatomy'[44] and, in doing so, like Cogswell DCJ in *Jolly v The Queen* (see Chapter Five) replaced the word with a euphemism ('the female anatomy') embedded within an orthophemism ('the word referring to the female anatomy'). This particular circumlocution amounts to both a formal and evasive way of referring to the word's denotative meaning. In using the expression—'the word referring to the female anatomy'—Howell DCJ not only increased the taboo value of the word 'cunt', his Honour also highlighted the denotative meaning of the word 'cunt', and further, stressed the taboo attached to the body part he obliquely referred to—the vagina. Judge Howell also replaced 'fuck' with the circumlocution 'that word'.[45] In the Queensland Court of Appeal proceedings *Del Vecchio v Couchy*, the Court reproduced the swear words allegedly used by the defendant ('fucking cunt') once in the hearing,[46] and twice in its judgment.[47] Otherwise, the indirect expressions 'the words spoken', 'these words', 'the words', 'this', 'that language', 'this sort of conduct', 'this sort of

[39] Ibid 5–8.

[40] Transcript of Proceedings, *Police v Geoffrey Alan Langham* (Lismore Local Court, 16/91, Magistrate O'Shane, 19 February 1991).

[41] Ibid 3–5.

[42] Ibid 5.

[43] Ibid 3 (emphasis added).

[44] Transcript of Proceedings, *Couchy v Del Vecchio* (District Court of Queensland, D1098 of 2001, Howell DCJ, 16 August 2001).

[45] Ibid.

[46] The words were reproduced in the following statement by McPherson JA: 'And I'm not sure that anybody wants to run a – — what would it be? At least a 30 million dollar poll to find out whether the words 'fucking cunt' are regarded as insulting or not': Transcript of Proceedings, *Del Vecchio v Couchy* (Queensland Court of Appeal, 245/2001, de Jersey CJ, McPherson JA and Douglas J, 4 February 2002) 12.

[47] [2002] QCA 9.

language' and 'such words' were used.[48] In the High Court of Australia hearing of Couchy's application for special leave to appeal, Gummow, Callinan and Heydon JJ never uttered the words used by Couchy, instead replacing them with 'the form of the words here', 'a very strong form of words', 'these', 'the words' and 'those words'.[49] If one were to read only the High Court hearing transcript in *Couchy v Del Vecchio*, one could only guess which words were the subject of their Honours' consternation.

6.2.2 Swearing, contamination and containment: then and now

The replacement of swear words in the above cases with verbal evasions demonstrates an aversion—whether conscious or unconscious—of judges, magistrates, prosecutors and lawyers, to repeating expletives in offensive language cases. These legal actors avoid repeating swear words even when their use, in the formal setting of a courtroom, is divorced from its original context of use. In Chapter Three, I documented a historical practice in offensive language trials that continued until the 1950s, being the use of a slip of paper upon which was written a defendant's words. The slip of paper prevented speakers and listeners in court from being tainted by swear words spoken aloud. I explained that the use of this slip of paper was a method of containment, invented in a Victorian society that was ostensibly squeamish about vulgarity. I argued that this historical practice applied magical ideas about contamination to swearing, and demonstrated aspirations of purity. The slip of paper presented an opportunity to contain an otherworldly force, swear words, which posed a threat to the courtroom's sacrosanct character.

The slip of paper is no longer used in offensive language cases, no doubt for those same reasons raised by critics in the heyday of its use: that the procedure was antithetical to notions of accountability and transparency. The slip of paper, in hiding the content of offensive language charges, elevated propriety and modesty over the principle of open justice: including that the law, in court proceedings, should be transparent and accountable to public scrutiny.[50]

While the slip of paper has disappeared, the impulse to avoid or to silence 'bad words' lingers on through the judicial disinclination to repeat words such as 'fuck' and 'cunt' in their judgments, opting instead for circuitous phrases like 'the word referring to the female

[48] Transcript of Proceedings, above n 46; *Del Vecchio v Couchy* [2002] QCA 9.

[49] Transcript of Proceedings, *Couchy v Del Vecchio* [2004] HCATrans 520 (B13 of 2002, Gummow, Callinan and Heydon JJ, 3 December 2004).

[50] Emma Cunliffe, 'Open Justice: Concepts and Judicial Approaches' (2012) 40 *Federal Law Review* 385, 385.

anatomy' or 'the four letter taboo word'. And, as with the language of news reports of obscene or indecent language cases, verbal evasions in modern offensive language trials force readers to exercise their imaginations as to what lies behind the asterisks. Rather than remove the filth, they highlight its presence.

In choosing to replace 'dirty words' with benign substitutes, judges, police officers and lawyers continue to perpetuate the notion that swear words carry within their form a kind of magical power. To some, this power derives from the uttering of a sound, which invokes its referent.[51] To others, the sign itself—regardless of denotation—is potent, an idea neatly encapsulated in George Orwell's *Down and Out in Paris and London*:

> Of its very nature swearing is as irrational as magic—indeed, it is a species of magic … [T]he strange thing is that when a word is well established as a swear word, it seems to lose its original meaning; that is, it loses the thing that made it into a swear word. A word becomes an oath because it means a certain thing, and, because it has become an oath, it ceases to mean that thing.[52]

This mystique is not unearthly, nor is it inherently attached to words such as 'fuck' and 'cunt', even if it is regularly represented as so.[53] Humans create and reinforce the magical power of swear words, and they can similarly take that magical quality away.[54] Orwell wrote of the fading taboo value attached to the word 'bloody', and predicted that 'fucking' (unprintable in 1933 and replaced with a '___') will undergo a similar fate:

> The word has, in fact, moved up in the social scale and ceased to be a swear word for the purposes of the working classes. The current London adjective, now tacked on to every noun, is ___. No doubt in time ___, like 'bloody', will find its way into the drawing-room and be replaced by some other word. [55]

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[51] See Steven Pinker, *The Stuff of Thought: Language as a Window into Human Nature* (Penguin, 2007) 331; Fleming and Lempert, above n 14, 10.

[52] George Orwell, *Down and Out in Paris and London* (Penguin UK, first published 1933, 2001) ch 32.

[53] See, eg, Joel Feinberg, 'Obscene Words and the Law' (1983) 2(2) *Law and Philosophy* 139, 139, where Feinberg writes: 'Obscene utterances, however, unlike other offensive uses of language, shock the listener entirely because of the particular words they employ, quite apart from any other message they may be intended to convey. In virtue of certain linguistic conventions, well understood by all users of the language, these words, simply as words, have an inherent capacity to offend and shock'.

[54] We learn about swear words through the 'socialisation of speech practices', which creates a folk-knowledge around etiquette relating to language: Jay, 'The Utility and Ubiquity of Taboo Words', above n 14, 154.

[55] Victor Gollancz has written that 'The blanks in this passage appeared in the original edition, which I had the pleasure of publishing. The text cannot now be debowdlerized, for the manuscript and original proofs have disappeared. The words written by George Orwell were doubtless of a kind that no publisher could have printed at that time without risking gaol; and even if he had decided to risk it, no printer would have abetted him. The code was very rigid' George Orwell, *Down and Out in Paris and London* (Penguin, first published 1933, 2001) ch 32.

In offensive language cases, by refusing to repeat swear words, 'primary definers'[56] in the criminal justice system perpetuate this mystical notion that unlike other words, curse words have a magical contaminative power by their very utterance. They foster the belief that such words are, to borrow the Victorian terminology, inexpressible, indescribable and inexplicable.[57] The circumlocutions demonstrate a palpable aversion to printing and uttering expletives, even when their use, in the sterile context of a court hearing or judgment, is divorced from any intention to offend. Although no demonstrable harm results from their repetition, disgust dictates that swear words be treated as contaminants, and therefore avoided or purified through verbal evasions.

This sanitisation extends beyond the courtroom to commentaries on legal cases. In an article on disorderly conduct written in 2008, barrister Andrew West replaced the words used by the defendant in the case *R v Balematerilaqere* with the phrase 'using sanitised language':[58] 'He was about to get in when (*using sanitised language*) the accused told him to get in and leave. He turned round and said (*again using sanitised language*) that he would get in when he was ready to.'[59] West similarly replaced the words used in *Couchy v Guthrie*[60] with the term 'obscenities': 'While there they heard the appellant underneath the house yelling *obscenities* at a man seated with her.' [61] West's 'lexical choice'[62] to use the adjective 'sanitised' suggests that the defendant's words were 'dirty', and needed to be purified for publication, perhaps to avoid personal association with such dirt, or perhaps to avoid contaminating the reader. Whatever the reason, this excerpt shows that even in 2008, an author trying to inform his audience of the legal doctrine on disorderly conduct felt compelled to clean up the defendant's language.

[56] Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 19–19; see also Part 1.2.2.4 of Chapter One.

[57] See Mohr, above n 14; Wajnryb, above n 14.

[58] (Unreported, District Court of Brisbane, Everson DCJ, 20 June 2008).

[59] Andrew West, 'What Is Disorderly Conduct?' (2008) 29(3) *Queensland Lawyer* 125, 126 (emphasis added).

[60] The appellant in that case yelled a number of phrases towards a man in a garage area beneath a boarding house, open to, and in view of, Gibbon Street, Woolloongabba, including 'Hey, I'll fucking kill that dog cunt', 'He's just a fucking cunt. A dog. I will fucking kill him', and then to a police officer, 'I'm not talking to you cunts. You can go and get fucked' *Couchy v Guthrie* [2005] QDC 350.

[61] West, above n 59, 126 (emphasis added).

[62] Diana Eades, 'Lexical Struggle in Court: Aboriginal Australians versus the State' (2006) 10(2) *Journal of Sociolinguistics* 153, 154.

6.2.3 The numbing effect

The choices I have so far examined of police, lawyers and judges to euphemise or otherwise obscure words such as 'fuck' and 'cunt' can be contrasted with the following passage of Magistrate Heilpern in his judgment *Police v Butler*.[63] In this judgment, in which his Honour ultimately found Butler not guilty of having used offensive language, Magistrate Heilpern stated:

> The word fuck is extremely commonplace now and has lost much of its punch ... I have stood on Sydney suburban railway stations while private school uniformed kids (girls and boys) yell 'fuck off' to each other across platforms without anyone looking up from their newspaper in surprise … I too have had the experience of having witnesses being cross-examined and responding to propositions by saying 'Fuck off - it didn't happen like that'. I have had witnesses who when asked their name answer 'John fucking Smith' ….
>
> Rupert Murdoch was heard on 'PM' saying 'fucking ABC' following an interview (Media Watch 20 May 2002). Since *Connors* [sic] we have been blessed with 'Chook Fowler, on our television rattling off 'fuck' as though it was the only word he could manage to say. *Connors* [sic] was before advanced microphones could pick up sporting heroes in football telling each other to 'fuck off' with regularity. They may be sin-binned but they are never charged. Jeff Kennett used the word in his last election advertising campaign—'Jeff fucking rules' …
>
> Channel 9 has recently broadcast a show (Sex in the City) that includes the words 'fuck off' and 'fucking' as well as 'cunt' ... Recently, the Sydney Morning Herald revealed that 'fuck' was used in the television program 'The Sopranos' seventy-one times in one single episode ...[64]

In these excerpts alone, Magistrate Heilpern repeated 'fuck' and its derivatives eleven times, and 'cunt' once. In the entire judgment, Magistrate Heilpern wrote 'fuck' and its derivatives *fifty-four* times. With the frequent repetition of this swear word, Magistrate Heilpern fashioned a new and different order to that which I have thus far described, an order in which swear words have a place in the English language, including legal language. Thus, an important effect of Magistrate Heilpern's repetition of 'fuck' in the judgment is that the word starts to lose its 'out of place-ness'. Magistrate Heilpern's repetition of 'fuck' adds weight to his assertion that '[t]he word "fuck" is extremely common place now and has lost much of its punch'. His Honour imparted an impression that swear words are not intrinsically disorderly, dirty or disgusting, and have a place in criminal justice discourse, as well as in society itself. We can imagine that Magistrate Heiplern's judgment would have an entirely different impact had he chosen to instead replace the words 'fuck' and 'cunt' with euphemisms, stating for

[63] [2003] NSWLC 2.

[64] Ibid [22]–[29].

example: 'Channel 9 has recently broadcast a show (Sex in the City) that includes *four-letter words* as well as *references to the female anatomy*' or 'Jeff [*expletive deleted*] rules'. Such substitutions would imply that although Channel 9 or Jeff Kennett might use or broadcast these words, the Magistrate has chosen to refrain from so doing.

Psychologists and linguists have argued that the 'taboo value' of swear words diminishes with repetition; their emotional impact wears out.[65] Wajnryb has referred to this as the 'numbing effect'.[66] To illustrate this effect, Wajnryb gave the example of the play the *Vagina Monologues,* in which the audience is asked to chant 'cunt' repeatedly, with the aim of desensitising them to the emotional charge the word might have previously produced.[67] This numbing effect, as it relates to swear words, has been documented in two scientific studies.[68] In the first study, Richard Stephens et al demonstrated that swearing produces a pain-lessening (hypoalgesic) effect for many people.[69] They found that when participants repeated a swear word, they were able to hold their hand in ice-cold water for, on average, some 40 seconds longer than when they repeated a non-swear word. Participants also reported reduced pain when swearing. The psychologists theorised that swearing increases pain tolerance by provoking an emotional response. However, swearing did not help *all* individuals to withstand pain.[70] To investigate why this might be, Stephens and Claudia Umland conducted a second study, in which they found that the higher a person's daily swearing frequency, the less the benefit of swearing for pain tolerance.[71] For habitual swearers, the swear words generated less of an emotional response.[72] The effects were consistent with 'the psychological phenomenon known as habituation', defined as 'the tendency for the gradient of response to a repeated stimulus to decline'.[73] Their findings were consistent with a hypothesis that the more one uses words that they find 'taboo', the less emotional impact such words have. Simply put, through repeated use and exposure, those using (or hearing) four-letter words become inured to their potency; they become just like any other word.

[65] See Kate Burridge, *Gift of the Gob: Morsels of English Language History* (ABC Books, 2010) 70.

[66] Wajnryb, above n 14, 70–2.

[67] Ibid.

[68] Richard Stephens, John Atkins and Andrew Kingston, 'Swearing as a Response to Pain' (2009) 20 *NeuroReport* 1056; Richard Stephens and Claudia Umland, 'Swearing as a Response to Pain—Effect of Daily Swearing Frequency' (2011) 12(12) *The Journal of Pain* 1274.

[69] Stephens, Atkins and Kingston, above n 68.

[70] Ibid.

[71] Stephens and Umland, above n 68.

[72] Ibid.

[73] Ibid.

In sum, the choice to delete and replace swear words in criminal justice discourse on the one hand, or to unashamedly repeat swear words on the other, has contrasting ideological effects. The former supports a view that certain words are intrinsically dirty and unutterable, reinforcing their taboo status, and in turn, strengthening the conclusion that those who freely use swear words, like Heanes and other defendants in offensive language cases, are disregarding order. Indeed, they are demonstrating a 'love of disorder'.[74] If judges, lawyers, police and academics delete or euphemise swear words in criminal justice discourse, they perpetuate the notion that swear words are dirty words, that they are disorderly and that do not have a 'place' in the language of the law. Following this logic, to repeat four-letter words in a legal context would be permitting disorder in what purports to be an orderly setting. Thus, in order to maintain or to re-establish order, it is necessary to avoid or eradicate the offending object.[75] The purification of criminal justice discourse, through expunging dirty words, plays an important part in maintaining the taboo status of swear words, as well as the impression that these words are offensive to order.

I have thus far argued that sanitising 'four-letter words' in criminal justice discourse affects our perception of these words as offensive. In the following part, I examine how swear words are constructed as dirty and dangerous through metaphorical representation.

6.3 Metaphorical representations of swear words

As I explained in Chapter Five, words—including swear words—are abstract entities, and their meanings have been created and attached to signs and sounds by humans.[76] In other words, the correlation between a word's form and its meaning is not natural but is constructed socially, culturally and historically.[77] Julian Sharman encapsulated this idea in his *Cursory History of Swearing*, when he stated that swear words were not created 'from any one man's store of virulence', but rather resulted 'from a long process of evolution and development … at last spring[ing] into sudden life, in obedience, it would seem, to a nation's clamours'.[78] No single swear word is intrinsically taboo; their dirty quality hinges on a society's 'system of

[74] Cresswell similarly writes, in relation to graffiti, how it 'disturbs notions of order' and represents 'a disregard for order .. a love of disorder'. Tim Cresswell, *In Place/Out of Place: Geography, Ideology, and Transgression* (University of Minnesota Press, 1996) 42.

[75] Douglas, above n 15, 5; see also Cresswell, above n 74, 38–9.

[76] See Melanie Burns, 'Why We Swear: The Functions of Offensive Language' (2008) 6 *Monash University Linguistic Papers* 61, 61.

[77] As psycholinguist Timothy Jay has stated: '[d]eciding what words are taboo is out of the speaker's control because curse words are culturally defined, based on cultural beliefs and attitudes about life itself': Jay, 'The Utility and Ubiquity of Taboo Words', above n 14, 153.

[78] Julian Sharman, *A Cursory History of Swearing* (J. C. Nimmo and Bain, 1884) 192.

classification', which considers the word in question to be an aberrant form.[79] These approaches attest to the malleability of swear words, by underscoring that words lack an impermeable, fixed meaning.

In this second part of this chapter, I examine how *metaphors* can be used to construct a reality distinct to that just outlined, by instead constructing a reality in which swear words are intrinsically contaminative or violent. Metaphors can also downplay or obscure the role of humans in interpreting swear words as dirty words. Metaphors, in structuring our understanding and experience of one kind of thing in terms of another thing, are a crucial means by which our reality is constituted.[80] As Fairclough has written: 'metaphors are not just superficial stylistic adornments of discourse. When we signify things through one metaphor rather than another, we are constructing our reality in one way rather than another.'[81]

In arguing that metaphors do important ideological work, Fairclough draws on Lakoff and Johnson's, *Metaphors We Live By*.[82] Lakoff and Johnson have argued that our ordinary conceptual system is metaphorical in nature and, therefore, that metaphors are 'pervasive in everyday life'.[83] One reason why metaphors are so ideologically significant is that we do not normally pay much attention to the metaphorical workings of our conceptual system. Certain metaphors, if accepted over time, are adopted as natural or self-evident and structure 'the way we perceive, how we think, and what we do'.[84] Even when metaphors are brought to our attention, we might still find it difficult to divorce our thinking from the reality they create.

Lakoff and Johnson give examples of metaphors that tend to go unnoticed because they are now naturalised in Western thought and the English language, including the ideas that 'time is money' (for example, to *invest* time, to be *worth* your while) or that 'arguments are war' (for example, to *gain ground* in an argument, to *win* an argument or to *attack* someone's *weak* points).[85] Of course, time is not money and arguments are not actually war, or even a subspecies of war, but these metaphors demonstrate that how we conceive of arguments is 'partially structured, understood, performed and talked about in terms of WAR'.[86] Thus, metaphorical concepts provide us with only *partial*, not total, understandings of concepts such

[79] See Douglas, above n 15, xvii.

[80] See Lakoff and Johnson, above n 12, 4–5.

[81] Fairclough, above n 13, 194.

[82] Lakoff and Johnson, above n 12.

[83] Ibid 3.

[84] Ibid 28.

[85] Ibid 4, 9.

[86] Ibid 5 (emphasis in original).

as arguments or time. As Lakoff and Johnson have recognised, if metaphors were total, one concept would actually *be* the other, rather than be understood *in terms of* the other concept: 'time isn't really money' and of course, arguments are not war.[87] Because these metaphors provide us with a partial understanding of concepts, they also hide other aspects of concepts.[88] And metaphors can be subject to contestation and to change. As Lakoff and Johnson have observed: 'This isn't a necessary way for human beings to conceptualize time; it is tied to our culture. There are cultures where time is none of these things'.[89] Using these ideas, I explain below how it is not necessary for humans to conceive of swear words as 'dirty words' or as 'hitting' or 'wounding' a person. And by understanding swear words through these metaphors, other qualities of swear words (such as their being non-violent, ephemeral expressions of frustration or resistance) are downplayed or hidden.

Metaphors of swear words being dirty or dangerous have evolved over a long period of time, imposed upon us by people and institutions in positions of relative power or influence—political and religious leaders, judicial officers, legislation, broadcasting rules, workplace codes of conduct, 'pressure groups' that campaign against offensive content and the media.[90] A contemporary example of how people in positions of influence shape the metaphors through which we conceive of behaviour is the phrase 'ice epidemic', commonly used by persons in positions of authority (including former Australian Prime Minister Tony Abbott and heads of government crime bodies) to describe the use of the drug 'ice' (crystal methamphetamine).[91] The metaphorical use of 'epidemic' evokes a reality in which drug use is not only a disease but also one that is rapidly spreading and infecting large numbers of people. The metaphor fosters a sense of emergency, and a sense that something must be done immediately to stop this emergency. The phrase 'ice epidemic' implies that people are 'catching' a disease through transmission and exposure, rather than using a drug because of personal choice, obscuring human agency. If we follow the logic that drug use is a disease, users can be treated for, and even cured of, the disease. Thus metaphorical concepts, if accepted over time, not only 'create realities for us, especially social realities', but also guide

[87] Ibid 12–13.

[88] Ibid 12–13, 163.

[89] Ibid 9.

[90] 'Most of our metaphors have evolved in our culture over a long period, but many are imposed upon us by people in power' ibid 159–60; in relation to the role that such institutions and groups have had in influencing our understanding of 'bad words', see generally McEnery, above n 14.

[91] See, eg, Dan Conifer and Andrew Greene, 'Ice "Epidemic": Prime Minister Tony Abbott Announces Task Force to Tackle Crystal Meth "Menace"' *ABC News* (online), 8 April 2015 <http://www.abc.net.au/news/2015-04-08/tony-abbott-announces-war-on-drug-ice/6376492>.

appropriate future actions that 'fit the metaphor'.[92] In this way, 'metaphors can be self-fulfilling prophecies'.[93]

In recognising that metaphors are partial, human-made, imposed on us by people in powerful positions and guide future action, we can critique the logic that informs them, whose interests they uphold and the responses they suggest. We can also undermine or reject metaphors, and replace old metaphors with new ones.

6.3.1 Words as pollutants

One idea perpetuated through metaphors about swear words in criminal justice discourse, as well as in broader folk-linguistic theories on swearing, is that swear words are pollutants that contaminate space. The police prosecutor employed this metaphorical concept in the Perth Magistrates' Court hearing of *Heanes v Herangi*.[94] When cross-examining Heanes, the prosecutor represented Heanes's words 'I'm fucking talking to my dad. Fuck off' as: 'After you swore, after you *let* all those expletives *out* and those profanities at that particular place and time.'[95]

In this extract, the prosecutor transformed Heanes's words through substitution to 'all those expletives' and 'profanities', and depicted those words as being released through the phrasal verb 'to let [something] out'. If we think of containers as defining 'a limited space (with a bounding surface, a center, and a periphery)' that holds a substance,[96] the prosecutor depicted the words 'fucking' and 'fuck' as a substance, which the defendant 'let out' from the bounded, physical container of his body. The prosecutor employed the 'ontological' metaphorical concept of a person as a 'container' with 'a bounding surface and an in-out orientation'.[97] Lakoff and Johnson have argued that by viewing our experiences as substances we can 'pick out parts of our experience and treat them as discrete entities or substances of a uniform kind', we can 'refer to them, categorize them, group them, and quantify them'.[98] By employing this ontological metaphor, Heanes's 'expletives' and 'profanities' are depicted as substances capable of polluting spaces. In the act of swearing, Heanes's words—once safely

[92] Lakoff and Johnson, above n 12, 156.

[93] Ibid.

[94] Transcript of Proceedings, above n 1.

[95] Ibid pt 2, 8 (emphasis added).

[96] Lakoff and Johnson, above n 12, 92.

[97] Ibid 29.

[98] Ibid 25.

'in place' inside the container of Heanes's body—have, in assuming the character of pollutants released onto uncontained space, become 'out of place'.

The conceptualisation of swear words as pollutants is of particular ideological significance when we remember that public order offences—of which offensive language crimes are one—are conceived of as crimes against 'the order' of public places, or as encapsulating words 'contrary to contemporary standards of public good order'.[99] In the following part, I argue that if public places are conceived of in an idealised way—as clean and tidy spaces—there is in such a place less toleration of disorder, or a greater likelihood that incongruous elements will be considered disorderly.[100] The more the cleanliness of a space is emphasised, the more likely the conclusion that swear words, conceived of as 'dirty words', will be considered disorderly.

6.3.2 Not in front of the children

In the Perth Magistrates' Court hearing of *Heanes v Herangi*, the police prosecutor emphasised the contaminative quality of Heanes's words when he asked Heanes in cross-examination: 'Do you feel it is appropriate to be swearing on the school holidays at lunchtime in Forrest Place, where there is a marquee for the kids there and there is plenty of kids around at the time [sic]?'[101] In the prosecutor's depiction of the context in which Heanes's words were used, the prosecutor used a number of words linked to the semantic field *children*: 'school holidays', 'kids' and 'plenty of kids'.[102] His statement that the marquee has a purpose—'for the kids'—is also ideologically important, in that it emphasises the orderliness and cleanliness of the space Heanes had polluted by 'letting out' his expletives and profanities. By using the overarching category 'kids' the prosecutor avoided having to make any age, knowledge or maturity-based distinctions and, as no details of these aspects were inquired after in the court proceedings, the make-up of the category 'kids' remains unclear. The possibilities—babies, toddlers, primary or high school children—are all merged into one measureless collection—'kids'. In employing the category of 'kids', without describing why swearing before children is especially offensive, the prosecutor drew (whether consciously or unconsciously) on a common folk-linguistic 'theory' detailed in my historical analysis (Chapter Three): that innocent children, when 'exposed' to bad words, catch the habit of

[99] *Coleman v Power* (2004) 220 CLR 1, 26 (Gleeson CJ).

[100] See Douglas, above n 15, xviii.

[101] Transcript of Proceedings, above n 37, pt 2, 7.

[102] I examine this further in Chapter Seven, where I demonstrate the malleability of constructions of context in offensive language cases, including how discursive choices can augment perceptions that swear words are 'out of place'.

swearing as one catches a disease.[103] By placing this unsullied group of people at risk of contamination, Heanes has polluted clean space and thereby disturbed the order of that space. In Chapter Seven, I further interrogate the idea that children are clean, vulnerable and impressionable victims in need of protection from swear words, an idea often used to justify obscene language laws and broadcasting codes.[104] I argue that the connection in Western society between the category 'children' and the qualities of naivety, purity and vulnerability has become so entrenched that lawmakers and law-enforcers readily draw on the notion that children need protection from swear words outside the sanctuary of the family home; and the truth of this assumption is rarely called into question. It is another 'common sense' language ideology that has escaped critical examination in the literature on offensive language crimes.

6.3.3 Words that wound

I have, in the previous part, illustrated examples in which swear words were represented as substances capable of polluting clean space. In the following part, I add to these my examination of another common metaphorical conception of swear words in offensive language cases: as physically harmful objects or weapons. Conceiving of intangible abstract things or concepts—such as words—in terms of the tangible is common. As Lakoff and Johnson have pointed out, we typically conceptualise 'the less clearly delineated in terms of the more clearly delineated'.[105] In the following excerpt from the Brisbane Magistrates' Court hearing in *Del Vecchio v Couchy*, the police prosecutor constructed two realities about Couchy's phrase, 'fucking cunt': firstly, that such swear words are something to which one can be 'exposed', and, secondly, that swear words can be 'directed' towards a particular target:

> She also stated that she has never been spoken to like that before. That her friends don't speak to her like that … She was not used to having those words *directed* at her. Yes, … she did admit that she has been *exposed* to that type of language before in the day room. Of course being a police officer we're *exposed* to that sort of language every day. But, your Worship, in this instance the defendant *directed* the words to the constable and in doing this the constable was insulted.[106]

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[103] As one writer expressed in a Letter to the Editor 'We all know how easily these bad habits are picked up by children; and we do think that a little more energy might be displayed by the police in putting down so contaminating and licentious [a] practice.' 'Drunkenness v Obscenity' *The Hobart Town Mercury* (Hobart), 11 December 1857 2.

[104] See, eg, *Complaints Against Various Broadcast Licensees Regarding Their Airing of the `Golden Globe Awards' Program* 19 FCCR 4795 (2004); for discussion, see 'Propriety', 6 November 2004 <http://www.thisamericanlife.org/radio-archives/episode/267/transcript>.

[105] Lakoff and Johnson, above n 12, 59.

[106] Transcript of Proceedings, *Couchy v Del Vecchio* (Brisbane Magistrates' Court, 30238 of 2000, Magistrate Herlihy, 7 December 2000) 25 (emphasis added).

In this excerpt, the police officers were depicted as being 'exposed' to swear words as one would be to some kind of airborne pollutant or illness. In addition, the use of the verb 'directed', in 'the defendant *directed* the words to the constable' and 'not used to having those words *directed* at her', represented swear words as physical objects capable of being directed at (or targeting) someone. This metaphorical representation of swear words as pollutants or as physical objects has become a natural and pervasive means by which we understand language, particular swearing. As I explained in Chapter Three, such metaphors were prevalent in descriptions of obscene language in newspapers from the 19th and early 20th century, as when the facts of Patrick Donnelly's profane and obscene language trial were described by *The Sydney Morning Herald* in the following terms: 'when refused, by several persons at whose doors he knocked, [Donnelly] opened upon them a *volley* of obscene and profane language; the officer … had *to endure* the most disgusting language from the prisoner on the way to the lockup.'[107] In this depiction, swear words were represented as objects that could be repeatedly flung out from within, objects that the recipient must 'endure'. Newspapers reported in a similar fashion the cases of Frank Sheenan, who in 1889 'indulged' in a '*volley* of disgusting phrases in which the constable was mixed up'; Hugh M'Guinnis, said to have '*fired* forth a *volley of abuse*' at a corporal in 1896; and Mary Ann Baron, who in 1903 was charged with obscene language after 'pouring forth a *volley of abuse* at a neighbour'.[108] Through personification, swear words were ascribed a supernatural power, with a magistrate scolding a defendant in 1937: 'It's a wonder [the language] didn't choke you', and journalists writing that language could 'scorch' the paper it was written on, or make it 'turn yellow and curl up'.[109] In all these examples, the non-physical abstract experience of swearing is grounded in the physical.

The notion that swear words are physical objects that can produce physical effects continues to structure how swear words are perceived in criminal justice discourse. The idea that swear words can physically pierce through the skin is present through the use of the verb 'wound' in in the regularly cited definition of 'offensive' in *Worcester v Smith*: 'such as is calculated to *wound* the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.'[110] The wounding effect of swear words is also underscored by the

[107] 'Central Police Court—Monday' *The Sydney Morning Herald* (Sydney), 13 November 1855 5 (emphasis added).

[108] Sheenan was fined £5 or six weeks imprisonment: 'Obscene Language' *Fitzroy City Press* (Fitzroy), 8 February 1889 2; 'Down Went M'Guinnis' *The Daily News* (Perth), 6 October 1896 3; Baron, an 'old offender', received a sentence of three months imprisonment 'Didn't Remember' *The Daily News* (Perth), 1 July 1903 1 (emphasis added).

[109] '£5 Fine For Using Obscene Language' *Kalgoorlie Miner* (Kalgoorlie), 20 July 1937 6; 'The Orderly Blushed' *Sunday Times* (Perth), 6 December 1936 23; 'Woman's Tongue Brings Trouble' *Shepparton Advertiser* (Victoria), 5 March 1917 2.

[110] [1951] VLR 316, 318 (O'Byran J, emphasis added).

common law description of 'the reasonable person', who is not so 'thin-skinned' that even light insults would wound their feelings, but not so 'thick-skinned' so that no words could pierce through.[111]

Alongside offensive words, insulting words are also regularly conceptualised as objects that wound. In *Thurley v Hayes*, the High Court of Australia defined 'insulting words' in terms of a physical attack: '*to assail* with offensively dishonouring or contemptuous speech or action'.[112] The police prosecutor in *Del Vecchio v Couchy*, referring to the *Oxford English Dictionary* definition of 'insulting', applied this metaphor of assailing to Couchy's words: 'to *assail* with scornful abuse or offensive disrespect. To offer indignity to, to affront, to outrage, *to assail* with offensively dishonouring or contentious speech or action.'[113]

The metaphorical representation of swear words as objects that inflict physical pain was drawn upon by police witnesses in the hearing of Couchy's insulting language charge at Brisbane Magistrates' Court. One witness to the charge, Sergeant McGahey, described Couchy's tone of voice as 'hard' when she uttered the words 'you fucking cunt'.[114] When the police prosecutor asked the other witness and complainant, Constable Del Vecchio, if she could elaborate on her feelings at the time the defendant's words were uttered, Constable Del Vecchio described her experience in physical terms:

> I am not saying that I am a *softie* and things like that—I mean I have been called things like that before … We were considering options of Murri Watch and things like that, and all of a sudden I was *hit* with this *abuse* and I was shocked and I was insulted and I couldn't believe that she said it.[115]

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[111] See Chapter Three; *Re Marland* [1963] 1 DCR 224; *Evans v Frances* (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990); *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991).

[112] (1920) 27 CLR 548, 550 (Knox CJ, Gavan Duffy and Rich JJ, emphasis added). In that case, the defendant had been charged with using insulting language in a public place, when he uttered the following words to a returned soldier: 'You are sponging on the Government and you waste public money and I will bloody well report you'. The High Court (per Knox CJ, Gavan Duffy and Rich JJ) held that the words were capable of being insulting, and adopted the definition of 'insult' that was then provided in the Oxford English Dictionary, being 'to assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to, to affront, outrage'; Further, in *Jordan v Burgoyne* [1963] 2 QB 744, 749. Lord Parker CJ stated that the terms abusive, threatening and insulting are 'all very strong words', and argued that the word 'insult' should be interpreted in the sense of 'hit by words' and not in the weaker sense of displeasing or annoying conduct. In that case, the Divisional Court of the Queen's Bench had to determine whether a speaker's language (the speaker was from the National Front, a neo-Nazi political party) constituted offensive conduct likely to provoke a breach of the peace; this case is cited in LexisNexis, *Bourke's Criminal Law Victoria* (2016) [28,180.35] in relation to the legal definition of 'insulting'.

[113] Transcript of Proceedings, above n 106, 24 (emphasis added).

[114] Ibid 21 (in cross-examination, emphasis added).

[115] Ibid 3.

In this excerpt, Constable Del Vecchio did not (as she could have) represent herself as merely *hearing* the *words*; instead she was 'hit' by 'this abuse'. And by denying that she was a 'softie', her audience might be reminded that Del Vecchio's constitution is, like the reasonable person, not thin-skinned. In the High Court of Australia hearing of the application for special leave to appeal in *Couchy v Del Vecchio*, Gummow J echoed this idea, describing the defendant's swear words as 'a *very strong* form of words'.[116]

In the Supreme Court judgment of *Heanes v Herangi*, Johnson J quoted a number of passages from the High Court case *Coleman v Power*, including Gleeson CJ's description of 'words … that could *wound* a person's feelings' and police officers not being 'completely *impervious* to insult'; McHugh J's statement about words being 'calculated to *hurt*'; and Gummow and Hayne JJ's statements about words '*hurting* an identified person' and that 'police officers must be expected to resist the *sting* of insults *directed* to them'.[117] In these representations, offensive and insulting words are represented as 'strong' physical objects or weapons that are aimed at or target their victims; that hit, wound or assail; that cut into or permeate the skin, and thus constitute a form of physical violence.

6.3.4 Protection from swear words

While being cognisant of the partial view of reality that metaphors construct, it is equally as important, as Lakoff and Johnson have recognised, that we are attuned to 'the perceptions and inferences' that flow from the metaphors, as well as the actions or responses that they sanction.[118] Metaphorical constructions of words as physical violence or as pollutants guide policy responses for future action; if the law understands swear words through these prisms, this informs how lawmakers, law enforcers and judicial officers proceed to act.

One significant implication of perceiving swear words as physically harmful is that the public needs protection from swear words; just as humans need to be shielded from physical assaults, so must they be shielded from verbal assaults. This logic is evident in the following extract from the Supreme Court of WA judgment in *Heanes v Herangi*, where Johnson J repeated Heydon J's 'observations' in *Coleman v Power* with the summation that they constituted 'a compelling statement of the importance of prohibiting, in appropriate

[116] Transcript of Proceedings *Couchy v Del Vecchio* [2004] HCATrans 520 (B13 of 2002, Gummow, Callinan and Heydon JJ, 3 December 2004) (emphasis added).

[117] *Coleman v Power* (2004) 220 CLR 1, 6, 7, 18, 54, 59; quoted in *Heanes v Herangi* (2007) 175 A Crim R 175, [111]–[112], [134] and [136] (Johnson J, emphasis added).

[118] Lakoff and Johnson, above n 12, 156–8.

circumstances and in public places, words of a particular type, be they insulting or offensive':[119]

> Insulting statements give rise to a risk of acrimony leading to breaches of the peace, disorder and violence, and the first legitimate end of s 7(1)(d) is to diminish that risk. A second legitimate end is to forestall the wounding effect on the person publicly insulted. A third legitimate end is to prevent other persons who hear the insults from feeling intimidated or otherwise upset: they have an interest in public peace and an interest in feeling secure, and one specific consequence of those interests being invaded is that they may withdraw from public debate or desist from contributing to it. Insulting words are a form of uncivilised violence and intimidation. It is true that the violence is verbal, not physical, but it is violence which, in its outrage to self-respect, desire for security and like human feelings, may be as damaging and unpredictable in its consequences as other forms of violence. And while the harm that insulting words cause may not be intended, what matters in all instances is the possible effect—the victim of the insult driven to a breach of the peace, the victim of the insult wounded in feelings, other hearers of the insult upset.[120]

Through analysing Heydon J's choices of vocabulary and the ways in which words are connected with one another to achieve textual coherence—his *lexical choices* and *lexical cohesion*—we can see that Heydon J has fashioned an overall meaning of insulting words as physically harmful. This meaning 'transcend[s] the referential meanings of each individual word through a deliberate interplay of lexical items that are semantically and pragmatically related'.[121] Lexical choice and lexical cohesion in discourse 'coalesce' with Lakoff and Johnson's conceptual theory of metaphor.[122] Conceptual metaphors and lexical cohesions, particularly when they are combined, impact upon the way that we think and act; they 'influence our cognitive experiences and predispose us to see aspects of reality in certain ways rather than others'.[123] In this extract, although Heydon J stated that insults are verbal, not physical, forms of violence, his Honour proceeded to argue that 'it is violence' nonetheless; repeated the term 'violence' five times in the extract; and drew analogies between the 'consequences' of insulting words and physical violence. Justice Heydon used a number of words and metaphors semantically related to physical fighting and war: 'feeling *secure'*, 'desire for *security'*, 'breaches of the *peace'*, 'public *peace'*, 'uncivilised *violence'*, 'interests being *invaded'*, '*withdraw* from public debate', 'the *victim* of the insult *wounded* in feelings' and 'the *wounding* effect'. The combination of Heydon J's lexical choices and the

[119] *Heanes v Herangi* (2007) 175 A Crim R 175, 218–19 (Johnson J).

[120] *Coleman v Power* (2004) 220 CLR 1, 121–2 (Heydon J).

[121] Juan Li, 'Transitivity and Lexical Cohesion: Press Representations of a Political Disaster and Its Actors' (2010) 42 *Journal of Pragmatics* 3444, 3454.

[122] Ibid.

[123] Ibid.

lexical cohesion that is thereby achieved signifies an 'intense preoccupation'[124] with an ideology that conceives of insulting words as the same as, or at least equivalent to, physical violence.

Another significant ideological aspect of the language of Heydon J is his Honour's representation of *cause and effect* in the clause 'the victim of the insult *driven* to a breach of the peace'. One can analyse how cause and effect is constructed through analysing *transitivity*: how the author grammatically represents who does what to whom, and how.[125] In this passive clause, Heydon J omitted the 'actor', and labeled the 'acted upon' who is 'driven' to a breach of the peace as a 'victim'. This implies that the abstract noun 'insulting language' is causative of breaches of the peace (as opposed to the people who *choose* to react to words with physical violence).[126] Through these grammatical choices, his Honour downplayed the significance of *interpretation* and *choice*: the fact that the language can be interpreted and reacted to in multiple ways by its audience, who can choose to react to words with violence, with their own choice of words, or can alternatively ignore them entirely.

The imposition of metaphors of swear words as dirty and dangerous by people whose job it is to debate, interpret and define the meaning of offensiveness (such as High Court judges), and the subsequent acceptance and repetition of those metaphors in future legal decisions, not only fashions a dominant, widely unquestioned reality, but also guides inferences that follow from it. Justice Heydon, for example, justified the constitutionality of insulting language provisions by arguing that s 7(1)(d) of the (since-repealed) *VGOO Act* is reasonably appropriate and adapted to the legitimate ends of forestalling 'the wounding effect on the person publicly insulted', maintaining 'public peace' and ensuring persons feel 'secure'.[127] His Honour's representation of an abstract concept, like insulting language, in terms of something concrete, like physical violence, informs appropriate responses to such language;[128] the legitimate ends that his Honour suggested only make sense if words are understood as objects that attack, pierce the skin and provoke physical aggression: things that humans need *protection* from. The acceptance and naturalisation of this metaphor helps justify the reach of the criminal law to offensive, insulting or obscene language; it aligns the harms that these laws seek to prevent with John Stuart Mill's major justification for criminal punishment—the 'harm principle'—articulated in his philosophical work, *On Liberty*

[124] See Fairclough, above n 13, 193 for his discussion of 'overwording'.

[125] van Leeuwen, above n 13, 32; for a discussion of causation see Fairclough, above n 13, 51.

[126] Andrea Mayr and Paul Simpson, *Language and Power: A Resource Book for Students* (Routledge, 2010) 65.

[127] *Coleman v Power* (2004) 220 CLR 1, 100 (Heydon J).

[128] See Lakoff and Johnson, above n 12, 156.

(1859).[129] As Mill wrote: 'That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'[130] Mill's harm principle, which articulates that the state can only criminally punish individuals to prohibit harmful behaviour to others, as opposed to harm to oneself, has played a 'highly influential role in modern criminal law'.[131]

If curse words were framed as causing harm to others, as well being publicly and morally injurious (in contaminating public space and infringing community standards of civilised public discourse), their criminal punishment comes within all three 'classic' justifications for criminalisation: to prevent harm; to punish 'public' wrongs and to uphold shared standards of morality.[132] In the following two chapters, concerning constructions of community standards and representations of context in criminal justice discourse, I contest the notion that there are shared community standards, and thus a shared morality, regarding civilised public discourse, and underscore the malleability of ideas that separate the public from the private sphere. These chapters thus undermine the latter chief justifications for criminalisation: the prevention and punishment of 'public' wrongs' and the maintenance of moral standards. In the final part of this chapter, however, I continue to interrogate the role of discourse in fostering, or otherwise challenging, the idea that swear words are harmful. I provide alternative ways in which swear words could be conceived of in criminal justice discourse in order to divest these words of 'their supposed magical wounding power'.[133]

6.4 Conclusion

This chapter has demonstrated how language choices—to omit swear words, to replace them with euphemisms or to conceptualise them with metaphors of dirt and violence—have important ideological implications for how swear words are understood and punished in the criminal law. I have argued that when we delete or euphemise swear words in criminal justice discourse, we perpetuate the notion that swear words are dirty words, that they are disorderly and that they do not have a 'place' in the language of the law. I have highlighted that euphemisms and representations of swear words as polluting substances or as weapons are not a natural part of criminal justice discourse, and yet they have been accepted by many to be so. Despite this, magistrates and judges can, and sometimes do (as Magistrate Heilpern did in

[129] John Stuart Mill, *On Liberty* (Longmans, Green, Reader and Dyer, 2nd ed, 1869).

[130] Ibid.

[131] Thalia Anthony, Penny Crofts and Thomas Crofts, *Waller & Williams Criminal Law: Text and Cases* (Butterworths, 12th revised ed, 2013) 6.

[132] Ibid 6–10.

[133] Wajnryb, above n 24, 147.

Police v Butler) resist or undermine common sense ideas about swearing being dirty or violent. But this is rarely the case, and key players in the criminal justice system—lawyers, politicians, police officers, judges and academics—have overwhelmingly failed to question the ideological implications of euphemising, or attributing harmful effects to, swear words.

It is important to reiterate that metaphorical concepts are partial; while they highlight particular constructions of swear words, they also hide other aspects that are inconsistent with the metaphor.[134] For example, if we focus on the battling aspect of arguments, we see arguments as conflict. This may blind us from seeing other aspects of arguments that are inconsistent with the metaphor of a battle, such as the cooperative, productive, problem-solving aspects of arguing.[135] Lakoff and Johnson ask us to imagine an alternative culture, in which arguments were viewed in terms of a different metaphor—as a *dance*. Within this arguments as dance metaphor, participants are 'seen as performers, and the goal is to perform in a balanced and aesthetically pleasing way'.[136] If dancing, as opposed to fighting, were to become the dominant metaphor through which arguments were conceived, people would 'view arguments differently, experience them differently, carry them out differently, and talk about them differently'.[137] Criminal Law theorist Penny Crofts has applied Lakoff and Johnson's insights in a legal context, to the legal regulation of brothels. Crofts has argued that the dominant conceptual metaphor that structures the legal regulation of the sex industry is that of 'sex industry as outlaw': a metaphor that 'invokes lawlessness, criminality and disorder'.[138] Crofts suggests that the sex industry could instead be conceived through the alternative metaphor of 'sex industry as citizen', where the concept of citizenship involves legal status, accountability, legitimacy and the notion of belonging.[139] This alternative conception of the sex industry as citizen, Crofts writes 'might change our specific ways of thinking about the sex industry and how we act towards it'.[140] Turning to swear words, an important implication of the metaphorical representation of swear words in terms of danger and dirt is that such metaphors downplay or overshadow other qualities of swear words. In other words, if we see words such as 'fuck' and 'cunt' as contaminants and weapons, we become blinded to alternative aspects of these swear words. Positive (or not-so-negative) aspects that have been attributed to swear words include their ability to add pungency or

[134] Lakoff and Johnson, above n 12, 10–11.

[135] Ibid.

[136] Ibid 5.

[137] Ibid.

[138] Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) 6(2) *International Journal of Law in Context* 151, 152.

[139] Ibid 153.

[140] Ibid.

convey emotion; to provide catharsis or pain-relief; to express humour; to function as a social lubricant or a solidarity-builder; and to allow users to flaunt established conventions.[141]

One important positive aspect of cursing is that suggested by English Education scholar Edmund J Farrell: taboo words can provide 'an escape hatch through which anger can be vented rather than enacted'.[142] In this alternate metaphor, Farrell recognises that human beings will inevitably feel strong emotions, such as anger or frustration, and that it is better that these strong emotions 'escape' or are released through the use of expletives, rather than by means of physical force. Swear words are seen here as non-violent, fleeting expressions of resistance, words that cause no lasting pain and have no concrete polluting effects, and a preferable alternative to physical contact. If the law were to adopt this view of swear words, it might stop treating expletives as inherently dirty or dangerous, and thus in defiance of a pre-existing order, and instead conceive of swear words as having a legitimate and even a valuable 'place' in human interaction, as non-violent, ephemeral expressions of frustration or resistance. It would contribute to a view that words such as 'fuck' and 'cunt', and the things that they allude to—sexual activities, body parts and bodily functions—have a legitimate place in public discourse.

Another metaphor for conceiving of swearing is as a tool for resistance to unfair or unequal power structures. Whether such resistance is to be conceived of as positive or negative, however, depends on how one conceives of challenges to 'mainstream' values and existing 'orders'. A more conservative ideology (see Chapter Eight) might conceive of such challenges in a negative light. However a progressive view might argue that a heterogeneous society, with a diversity of identities and interest, could benefit from challenges to dominant values and power structures, even where such challenges are voiced through the emotional outlet of four-letter words. Such a position destabilises long-held assumptions that go to the legitimacy of 'public order' crimes. In Chapter Nine, I contest the ideology that sees challenges to hierarchal, long-established structures, including by disrespecting 'police authority', as criminal. I will argue that the contestation of arbitrary exercises of power, through swearing, could be seen as a legitimate means to address unfair inequalities, rather than as harmful, dangerous or criminal. In the following chapter, however, I continue my interrogation of how criminal justice discourse constructs swear words as 'out of place', focusing on the construction of context in criminal justice discourse. I examine how discourse fosters and entrenches stereotypes about places in which swearing is permissible or

[141] Wajnryb, above n 14, 35, 131.

[142] Edmund Farrell, 'Speaking My Mind: A Few Good Words for Bad Words' (2000) 89 *English Journal* 17, 18.

impermissible, thereby normalising the practices of the ‘civil’ majority and deeming criminal those who deviate from ‘normal’ uses of public space.

CHAPTER SEVEN
'A WEED IN AN EXQUISITE GARDEN': CONSTRUCTING CONTEXT IN OFFENSIVE LANGUAGE CASES

> Thus the conversation that is conceded in a club smoking-room would be intolerable in a boudoir. In some sort men have been permitted the enjoyment of swearing, and that with impunity, provided they did not carry it beyond the prohibited pale.[1]
>
> — Julian Sharman

7.1 Introduction

The previous chapter began by outlining the facts in *Heanes v Herangi*, a case in which Jonathan Stephen Heanes ('Heanes') was convicted in Perth Magistrates' Court of disorderly behaviour by using offensive language in a public place.[2] I drew on *Heanes v Herangi* to show how criminal justice discourse constructs swear words as dirty or physically harmful, through circumlocutions and metaphors.

In the hearing of Heanes's disorderly conduct charge, as with all offensive language cases, the presiding magistrate had to consider the context in which the defendant's language was used. As Gleeson CJ stated in *Coleman v Power*: 'Concepts of what is disorderly, or indecent, or offensive, vary with time and place, and may be affected by the circumstances in which the relevant conduct occurs'.[3]

In this chapter, I return to *Heanes v Herangi*, and, drawing on this and other case studies, consider what CDA can bring to analysing constructions of context in offensive language cases. I explore how such constructions contribute to perceptions that defendants and their language are inimical to public order, thus continuing my investigation of how criminal justice discourse constructs swear words as 'out of place' and amenable to criminal punishment. In the first part of the chapter, I theorise 'context' and 'recontextualisation', to lay the foundation for my discussion of language choices made when representing 'the

[1] Julian Sharman, *A Cursory History of Swearing* (J. C. Nimmo and Bain, 1884) 41.

[2] *Herangi v Stephen John Heanes* (Unreported, Perth Magistrates' Court, Magistrate Nicholls, 23 October 2006); *Criminal Code Act 1913* (WA) s 74A ('*Criminal Code*') (disorderly conduct).

[3] (2004) 220 CLR 1, 5–6 (Gleeson CJ). For a discussion of the legal doctrine in relation to this element, see Chapter Four.

context' in which a defendant's words were used. Following this, I examine how discursive choices in *Heanes v Herangi* depict the defendant as willing to upset the order of a public place. In particular, I consider three aspects of recontextualisation: formulation, the addition of semiotic elements, and how the lines are blurred between that which might be considered impolite or indecorous, and that which is criminally offensive. I then examine instances of selective exclusion of aspects of identity and historical context in offensive language cases.

Subsequent to this, I outline and interrogate stereotypes about places in which swearing is deemed in place or out of place, and demonstrate how these stereotypes have assumed the character of 'common sense' in criminal justice discourse on offensive language. I draw on CDA to show how representations entrench conservative stereotypes about appropriate uses of public space, and colour perceptions of whether an accused's language is offensive. I argue that judgments about offensive and inoffensive language in certain contexts are heavily invested in normative assumptions about which places are neat and tidy, or dirty and disorderly, and how orderly places might be rendered disorderly. Judicial officers, alongside politicians and even academics, create and entrench a worldview where expletives do not belong in clean spaces—church services, shopping malls, main streets and musical performances—just like dirt does not belong inside the home, or shoes, which carry dirt, should not be placed on a table.[4] Significantly, these categorisations of orderly and disorderly places, not unlike the swear words targeted by offensive language crimes, are not written in legislation.[5] Instead, they have become, through repetition by 'primary definers'[6] in criminal justice debates, engrained in criminal justice discourse so that appear 'common sense' or logical.[7] Finally, I accentuate the role of criminal justice discourse in reconstructing and embedding the public/private dichotomy.

7.2 Defining key concepts: context and recontextualisation

Before I examine these matters, however, it is first necessary to theorise the term *context*. In offensive language cases, context is often interpreted to mean something analogous to 'place',[8] but the term can refer to something much broader or much narrower. As critical

[4] Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966) 44–5.

[5] Although the Queensland Parliament has come close to this in its Explanatory Note, Summary Offences Bill 2004 (Qld) (Qld).

[6] Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 18–19; see also Part 1.2.2.4 of Chapter One.

[7] Sharman, above n 1, 41.

[8] When referring to 'place', I adopt Cresswell's definition in which place is described as 'social space': 'combin[ing] the spatial with the social'. Cresswell views places as 'neither totally material nor completely mental; they are combinations of the material and mental and cannot be reduced to either.' Tim Cresswell, *In Place/Out of Place: Geography, Ideology, and Transgression* (University of Minnesota Press, 1996) 3, 13.

sociolinguist Jan Blommaert has recognised: 'Context comes in various shapes and operates at various levels, from the infinitely small to the infinitely big.'[9] An example of an *infinitely small* context is 'textual context': a word can be preceded or followed by other words, and a sentence can be preceded or followed by other sentences.[10] Another example of the infinitely small is the intonation, stress or pitch of a single word, as Blommaert writes, a single sound can be 'a very meaningful thing—"yes" pronounced with a falling intonation is declarative and affirmative; spoken with a rising intonation it becomes a question or an expression of amazement or disbelief.'[11] An *infinitely big* context might refer to the language, the country, the cultural group or the historical period etc, in which words were used. From these examples of small and big contexts, we begin to see context as '*potentially* everything' and the act of contextualisation as '*potentially* infinite'.[12] While a critical analysis (including the analysis that I undertake) recognises the difficulty in drawing parameters around context, linguists (and judicial officers) tend to agree that context is indispensible to determining the meaning of words—including the determination of whether a given utterance of a word is offensive. As Allan and Burridge explain, '[t]here is no such thing as an absolute taboo that holds for all worlds, times and contexts.'[13]

Also central to the considerations of this chapter van Leeuwen's theorisation of recontextualisation in discourse.[14] In offensive language cases, context is represented through *recontextualisation*: the process by which social practices (including discursive practices) are *transformed* into discourse (representations of social practices).[15] Representation always involves recontextualisation: 'In the case of a discursive practice, we represent (report, explain, analyse, teach, interpret, dramatize, critique, etc.) some other social practice(s), whether discursive or not, and this therefore always takes place outside the context of the represented practice.'[16]

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[9] Jan Blommaert, *Discourse: A Critical Introduction* (Cambridge University Press, 2005) 40.

[10] See Norman Fairclough, *Discourse and Social Change* (Polity Press, 1992) 81.

[11] Blommaert, above n 9, 40.

[12] Ibid (emphasis in original).

[13] Keith Allan and Kate Burridge, *Forbidden Words: Taboo and the Censoring of Language* (Cambridge University Press, 2006) 27; Blommaert has similarly recognised, in relation to language that 'in order to understand how language works, we need to contextualise it properly, to establish the relations between language usage and the particular purposes for which and conditions under which it operates' Blommaert, above n 9, 14.

[14] Theo van Leeuwen and Ruth Wodak, 'Legitimizing Immigration Control: A Discourse-Historical Analysis' (1999) 1 *Discourse Studies* 83; see also Theo van Leeuwen, *Discourse and Practice: New Tools for Critical Discourse Analysis* (Oxford University Press, 2008); Theo van Leeuwen, 'Discourse as the Recontextualization of Social Practice: A Guide' in Ruth Wodak and Michael Meyer (eds), *Methods of critical discourse analysis* (Sage, 2009) 144.

[15] van Leeuwen and Wodak, above n 14, 93; see also van Leeuwen, above n 14; van Leeuwen, 'Discourse as the Recontextualization of Social Practice', above n 14.

[16] van Leeuwen and Wodak, above n 14, 96.

When determining an offensive language charge, the presiding magistrate has the prerogative to determine—without hearing evidence from any expert witnesses—the contextual features relevant to their assessment of offensiveness.[17] The court may consider one or more of a number of factors, including the location in which, or time at which, the language was used; who was in the vicinity; who would be likely to be in the vicinity; if the defendant was intoxicated; if the language was said to a person in a position of 'authority' (an issue to which I return in my penultimate chapter); if the utterance has special relevance to the recipient (and whether or not the speaker knows this to be the case); if those in the vicinity were 'familiar' with such language; if the defendant was emotional; the tone, volume or 'vehemence' of the utterance; and any mannerisms accompanying the language used.[18]

A problematic aspect of the legal propositions I have just outlined is that they represent context (like offensiveness and community standards) as something that a magistrate can transparently discern and apply. What they overlook is that the words comprising an offensive language charge, as well as the context in which they were uttered (these being a combination of discursive and social practices), must be transformed in a number of discursive texts and practices: in police witness statements, courtroom hearings, legal judgments and sometimes media reports or academic commentary, through the process of *recontextualisation*. In these transformations, certain elements of the original discursive/social practice of swearing may be emphasised, deleted, substituted, rearranged, added and so on. Characteristics of people (such as socio-economic status, 'race',[19] ethnicity or gender) may be included or excluded; aspects of physical geography, mannerisms, and tone of voice may be accentuated or overlooked; and the narrative will begin and end at defined points. The elements that will be transformed hinge on the language choices made by the author, as well as the resources (or texts) that the

[17] See Chapters Four and Five. As Walters J stated, what constitutes 'indecent' language and what are contemporary community standards are questions of fact for the decision of the magistrate, upon which 'evidence is neither needed nor permitted': *Dalton v Bartlett* (1972) 3 SASR 549, 561 (Walters J). Note, however, that the intepretation of context is a matter for police officers when issuing penalty notices.

[18] See *Green v Ashton* [2006] QDC 8; *Del Vecchio v Couchy* [2002] QCA 9; *Spence v Loguch* (Unreported, Supreme Court of NSW, Sully J, 12 November 1991); *Heanes v Herangi* (2007) 175 A Crim R 175; *Hortin v Rowbottom* (1993) 68 A Crim R 381; *Melser v Police* [1967] NZLR 437; *Wainwright v Police* [1968] NZLR 101; *Dillon v Byrne* (1972) 66 QJPR 112.

[19] For a critical analysis of the debate regarding the use of the term race, see Gillian Cowlishaw, 'Racial Positioning, Privilege and Public Debate' in Moreton-Robinson, Aileen (ed), *Whitening race: Essays in social and cultural criticism* (Aboriginal Studies Press, 2004) 59, 60: 'Race is not about biology but about social and psycho-physical constructs which are both a conceptual habit and a reality experienced in social relations, in language, in group identifications and in our bodies. We all carry these categories in our imaginations and inhabitations. Skin colour, in particular, is the focus of all kinds of struggles and contested significance not only between groups, but also within them. The censoring of references to the meaning of colour marks the presence of anxious denial. This is the stuff of "race relations". Aboriginal, Anglo and migrant Australian identities have been formed around inchoate and contradictory reasons and emotions related to race'.

author has at hand to transform. Further, the transformation will 'depend on the interests, goals and values of the context into which the practice is recontextualized.'[20]

In what follows, I highlight instances of inclusion, exclusion and substitution in the process of recontextualisation. I show how police officers, lawyers, politicians and judicial officers erect artificial boundaries as to what falls *within* context or *outside* of context. I draw attention to the choices legal actors make in the process of recontextualisation, and show how these choices foster an image of people, places and language as orderly or disorderly— as 'in place' or 'out of place'.[21] I start this by addressing how 'the facts' in *Heanes v Herangi* are recontextualised, and how this recontextualisation contributes to the construction of Heanes as a person who has transgressed 'normal' behaviour in public space. I focus on the particular linguistic devices of sequencing, formulation and the addition of semiotic elements.

7.3 Recontextualisation in *Heanes v Herangi*

To do this, I will briefly recap (and in doing so, necessarily recontextualise)[22] the facts in *Heanes v Herangi*.[23] The charge of using offensive language centred on Heanes's words, spoken to Constable Herangi: 'I am on the phone—I am on the phone. I'm fucking talking to my dad. Fuck off.'[24] Constable Herangi gave evidence in Perth Magistrates' Court that Heanes had used this language 'outside the Myers store … in Forrest Chase', during 'school holidays and there were several children around within hearing distance of the accused'.[25] Constable Herangi also stated '[t]here were a few people standing around': maybe 15 people in the vicinity.[26] Constable Herangi gave evidence that approximately five minutes prior to Heanes using these words, Heanes had bumped into the right hip of Constable Herangi's partner, Constable Paul, with his right elbow, then 'continued walking on'.[27] Heanes gave evidence that he had walked between the two officers without bumping into them.[28]

[20] Van Leeuwen and Wodak, above n 14, 96.

[21] Douglas, above n 4, 44–5; see also Cresswell, above n 8.

[22] My own summary of 'the facts' is a discursive practice that further recontextualises recontextualisations of 'the facts' in the various judgments and transcripts.

[23] *Herangi v Stephen John Heanes* (Unreported, Perth Magistrates' Court, Magistrate Nicholls, 23 October 2006).

[24] Transcript of Proceedings, *Jonathan Stephen Heanes v Western Australia Police Force* (Perth Magistrates' Court, PE 39693 of 2006, Magistrate Nicholls, 23 October 2006) 32.

[25] Ibid 5.

[26] Ibid; Significantly, Heanes's recollection of the events which tool place on 12 July 2006 conflicted with that of the respondent (Constable Herangi) and his partner (Constable Paul). The Magistrate accepted the account given by the two police officers: *Herangi v Stephen John Heanes* (Unreported, Perth Magistrates' Court, Magistrate Nicholls, 23 October 2006); Transcript of Proceedings, above n 24, pt 2, 32.

[27] Transcript of Proceedings, above n 24, 3.

[28] Ibid pt, 4.

According to Constable Herangi, after Heanes had bumped into Constable Paul, Heanes 'was looking at us with a smile on his face'.[29] It was this 'incident'[30] that compelled Constables Herangi and Paul to pursue Heanes.

7.3.1 Sequencing and formulation

In this section, I show how a defendant, and her or his behaviour, can be constructed as either orderly or disorderly through sequencing and the formulation of social practices in recontextualisation. Within a conversation where the participants are attempting to establish truth claims, participants can use the device of *formulation*—an aspect of interactional control[31]—to translate, summarise, characterise, or furnish the gist of, what another person has said or may be about to say.[32] Formulation is common in situations where asserting one's version of the truth is highly consequential: police interviews with suspects and witnesses, news commentary and legal arguments in court proceedings.[33] In any of these forums, the speaker may formulate or reword the other person's contributions in order to force that other person out of ambivalence, or make the other person be more explicit about what they are saying, often with a goal to convince the other person (or the audience) to accept their version of what had transpired.[34] Examples of formulations, put forward by Fairclough, include expressions such as: 'Is that a threat?' or 'Are you accusing me of lying?' where the words 'threat' and 'lying' replace and re-characterise the other participant's statement.[35]

In the Perth Magistrates' Court hearing of Heanes's offensive language charge, the police prosecutor, Senior Constable Moss, began his examination-in-chief of Constable Herangi by stating:

> Prosecutor: You were in uniform, on duty conducting foot patrols in the Perth central business district?
> Constable Herangi: Yes.
> Prosecutor: You were in company with Constable Caroline Paul?

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[29] Ibid 4.

[30] Ibid 3.

[31] Drew and Heritage describe interactional control as 'gain[ing] a measure of control over the introduction of topics and hence the 'agenda' Paul Drew and John Heritage, 'Analyzing Talk at Work: An Introduction' in Paul Drew and John Heritage (eds), *Talk at work: interaction in institutional settings* (Cambridge University Press, 1992) 49.

[32] Fairclough, above n 10, 157–8.

[33] Ibid; for further discussion of formulation and interactional control in the courtroom setting, see Susan Ehrlich, 'Courtroom Discourse' in Ruth Wodak, Barbara Johnstone and Paul Kerswill (eds), *The Sage Handbook of Sociolinguistics* (Sage, 2011) 361.

[34] Fairclough, above n 10, 157–8.

[35] Norman Fairclough, *Language and Power* (Longman, 1989) 136.

Constable Herangi: Yes.[36]

By choosing to begin the facts of Heanes's case at this point (by way of leading questions),[37] the police prosecutor is able to construct Constable Herangi as a person who is 'in place': he is represented as 'in uniform' and doing his job 'on duty conducting foot patrols'. From the outset, Constable Herangi is represented as the archetypal police officer performing routine aspects of his job.

The police prosecutor then introduced what he referred to as an 'incident':

> Prosecutor: At about 12.10 pm, an *incident* took place. Can you just relate to the court, from your memory, what occurred at that time?
> Constable Herangi: At about 12.10 pm, Constable Paul and I were crossing the road on Wellington Street from Forrest Chase to the Perth train station. I observed a male person on the other side of the road. This male person was about one to two metres on my right-hand side. We crossed the road. Constable Paul and I crossed the road, and this male person has walked between Constable Paul and I, bumping Constable Paul to the hip area with his right elbow, and continued walking on.[38]

The prosecutor's choice to locate the origins of Heanes's offensive language crime in the events at the crossing—and his *formulation* of these event as an 'incident'—foregrounds the significance of what occurred at the crossing. Particularly noteworthy is the contention that Heanes bumped into Constable Paul (contested by Heanes, see Part 7.3 above). The prosecutor's labeling of what transpired at the crossing with the abstract label 'incident' foregrounds the seriousness of the occurrence. Significantly, in the Magistrates' Court and Supreme Court judgments, Magistrate Nicholls and Johnson J adopt the prosecutor's label 'incident', and follow the prosecutor's lead in choosing to begin their narratives of the 'facts' with the 'incident' at the pedestrian crossing on Wellington Street. There is no apparent legal reason as to why the prosecutor recounted the facts of the case from this particular 'incident'. Similarly, there was nothing compelling the Magistrate and Judge to adopt this starting point in the facts of their judgments. It is also unclear why a large proportion of the hearing transcripts and judgments in both proceedings were dedicated to discerning what transpired during this 'incident'.[39] Its inclusion and foregrounding is especially questionable given that,

[36] Transcript of Proceedings, above n 24, 3.

[37] See, eg, *Evidence Act 1995* (Cth) s 37(1), which provides that 'A leading question must not be put to a witness in examination in chief or in re-examination unless: (a) the court gives leave; or (b) the question relates to a matter introductory to the witness's evidence ...'.

[38] Transcript of Proceedings, above n 24, 3 (emphasis added).

[39] Ibid.

in the Magistrates' Court proceedings, it was made clear that the 'incident' was legally irrelevant to the offensive language charge (see below). However, as I will further demonstrate below, the formulation of what transpired at the crossing as an 'incident' enabled the prosecution to advance their construction of Heanes as a person who does not respect, and indeed goes out of his way to transgress, 'social norms' in public places.

7.3.2 Addition of semiotic elements

In the court proceedings, considerable emphasis was placed on Heanes's lack of conformity to unarticulated rules of etiquette at the crossing.[40] In the following instances of recontextualisation, the 'incident' at the crossing has been discursively transformed by the *addition of new semiotic elements*, thereby adding new meanings:[41]

> Magistrate Nicholls: So he bumped the hip of Paul with his right elbow?
> Constable Herangi: Yes. Onto her right hip area and he continued off. *Didn't apologise.*[42]

In this excerpt, Constable Herangi did not recount Heanes's actions (what he *did* do) but rather supplemented Heanes's actions with what he *did not* do—he '[d]idn't apologise'. What Heanes did, and then failed to do at the crossing, was interpreted through the lens of what Constable Herangi considers to be appropriate. Justice Johnson adopted Constable Herangi's transformation of these events in the Supreme Court judgment: 'The two officers were just over half way when the appellant walked between them, bumped Constable Paul to the hip with his right elbow and continued on without apologising.'[43]

The additions of '[d]idn't apologise' and 'without apologising' to the context are both *abstractions*, in that they distil from more specific micro-actions (or lack of micro-actions, being that Heanes failed to say 'sorry', 'pardon me' etc. to Herangi) the more abstract quality of 'without apologising'.[44] If the police officer and judge had simply recounted what Heanes had done, this lack of apology would not have been mentioned. By adding this abstraction, Constable Herangi and Johnson J have added new normative meanings to Heanes's interaction with the police officers. Through the addition of these semiotic elements, Heanes has been depicted as lacking the decorum expected of a member of the community in such circumstances.

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[40] I use the term 'etiquette' here to refer to a set of conventions, that are not universally recognised or adhered to.

[41] See van Leeuwen, above n 14, 16.

[42] Transcript of Proceedings, above n 24, 3 (emphasis added).

[43] *Heanes v Herangi* (2007) 175 A Crim R 175, 175[5] (Johnson J).

[44] See van Leeuwen, above n 14, 69–70.

It is important to underscore that Heanes's alleged lapse in social graces (failing to apologise) did not constitute a crime, nor was it the subject of a criminal charge. This was made clear in the interaction between Heanes's defence counsel, the prosecutor and Magistrate Nicholls: the defence had sought, and obtained, confirmation that the events at the crossing did not form part of Heanes's disorderly conduct charge:

> Defence Counsel: There is one charge of disorderly conduct. We have understood it to be related to what happened outside Myer.
> Magistrate Nicholls: That is what the prosecution case is surely about, isn't it?
> Prosecutor: It is, your Honour.
> …
> Magistrate Nicholls: … I don't think there is any suggestion that the prosecution are prosecuting for whatever he did then about cutting between the two officers as being disorderly conduct ….
> … That is correct, isn't it, senior constable?
> Prosecutor: Yes. That is totally correct, your Honour.[45]

Although the prosecutor confirmed that the events at the pedestrian crossing were not subject to a criminal charge, their inclusion within 'the facts', their foregrounding as an 'incident', and the addition of the semiotic element 'without apologising', created the context in which the defendant was from the outset 'out of place', in contrast to the police officers, who were established as being 'in place'.

7.3.3 Blurring the lines between impolite and criminal

The inclusion of this 'incident' in the context of Heanes's charge is significant for a third reason: it illustrates how, through language, one can render indistinct the line that separates uncivil from criminal behaviour. Although Constable Herangi did not explicate that Heanes's contact amounted to an offence, he blurred the categories of anti-social behaviour and criminal behaviour:

> Defence Counsel: It is not actually an offence of any sort, is it, to walk between two police officers?
> Constable Herangi: He has not been charged for walking between two officers.
> Defence Counsel: He couldn't be, could he, because it is not an offence to wa**k** between two police officers, is it?
> Constable Herangi: If you happen to be reasonably apart. Yes, that is fine.[46]

[45] Transcript of Proceedings, above n 24, 16–17.

[46] Ibid 10.

In this exchange, Constable Herangi did not unequivocally accept the defence counsel's proposition that Heanes's conduct was not an offence. Instead, he assumed the authority to determine the proper distance that people should keep from police officers in public space, countering the defence counsel's proposition with his hypothetical example '[i]f you happen to be reasonably apart. Yes, that is fine'. In Constable Herangi's recontextualisation of the facts, Heanes failed to keep to, or know 'his place', when proximate to an 'authority figure'.

This representation of 'impolite' behaviour as bordering on, or akin to, criminal behaviour is a feature of criminal justice discourse on offensive language and behaviour. Take for example the following extract from *Police v Pfeifer*.[47] As I wrote in Chapter Four, that case concerned an appeal to the Full Court of South Australia against Pfeifer's conviction for behaving in an offensive manner in a public place.[48] Pfeifer had been charged with this offence after wearing a T-shirt in an Adelaide shopping mall, which displayed the words: 'Too drunk to fuck', a title of a song performed by the *Dead Kennedys*.[49] In upholding Pfeifer's conviction, Doyle CJ drew an analogy between adhering to road rules and adhering to the 'wishes and sensibilities of society':

> It is commonplace that in our daily life we all must, in various ways, consider the interests and activities of others. We all understand that in various ways we should or must refrain from doing things either because society could not function unless we all adhere to some particular rule of conduct (such as driving on the left hand side of the road) or because society could not function unless we take some account of the wishes and sensibilities of society.[50]

Judge Doyle failed to acknowledge that the rule to which he referred—a person must drive on the left hand side of the road—is self-explanatory. Adherence to this rule can be objectively determined and applied. (If a person is driving on the right hand side of the road, that individual has patently breached the rule). Such a rule is, by its very nature, different to the more nebulous 'wishes and sensibilities of society'. This phrase is an example of a *presupposition*, a proposition taken by the producer of a text as already established or given.[51] As I will explain in the following chapter, this and other presuppositions, such as 'social expectations' or 'social behaviour in public places', are highly prevalent in offensive language and behaviour cases, and may manipulate audience into accepting that their

[47] (1997) 68 SASR 285 (Doyle CJ, Debelle and Lander JJ agreeing).

[48] Contrary to *Summary Offences Act 1953* (SA) s 7(1) ('*SO Act*').

[49] The shirt was a birthday present from the appellant's mother.

[50] *Police v Pfeifer* (1997) 68 SASR 285, 292 (Doyle CJ, Debelle and Lander JJ agreeing).

[51] Fairclough, above n 10, 120–1.

underlying premise requires no further explanation.

In *Police v Pfeifer*, Doyle CJ further described Pfeifer's conduct as that 'which many members of the community consider they should not have to tolerate.'[52] This resembles a common refrain of media commentators, heads of police associations and politicians: that a magistrate's acquittal of an offensive language charge signals to the public that swearing at police is 'okay', 'acceptable', 'fine', or amounts to judicial encouragement to swear at police officers. [53] For example, commentator Nicole Rox formulated (see above) the acquittal of Rufus Richardson by Magistrate Pat O'Shane for having used offensive language in public (Richardson had given police 'the finger' and stated 'Youse are fucked'), transforming this acquittal into: 'A magistrate this week ruled it is *acceptable* to swear at police'.[54] In relation to the same case, reporter Ross Eastgate surmised: 'The message that is being relayed to society and to our kids in particular is that [it] is *perfectly okay* to assault and abuse police … Why do we bother to teach our kids the concept of good manners when the law says that offensive language and behaviour in public are *perfectly acceptable*?'[55] I critique these and similar formulations in Chapter Nine, where I interrogate the construction and legitimation of police authority in offensive language cases. For the purposes of this chapter, and returning to *Heanes v Herangi*, it is necessary to emphasise how such formulations, and analogies such as that articulated by Doyle CJ in *Police v Pfeifer*, justify the incursion of the criminal law into the realm of good etiquette or manners. Although the conduct of Heanes at the crossing was not subject to criminal charge, it was still represented, through the police officer's and magistrate's recontextualisation of 'the facts', as unacceptable. To include the incident at the crossing within the 'context' of Heanes's utterance, and to foreground its significance despite its legal irrelevance, categorises Heanes as one who has no regard for the sensibilities of society. By the time Constable Herangi informed the Court that Heanes had said the word *fuck* and its derivatives to police officers, he had already been slotted into the stereotype of youth behaving badly. In the next part, I demonstrate how this stereotype is fashioned through

[52] (1997) 68 SASR 285, 288 (Doyle CJ, Debelle and Lander JJ agreeing).

[53] See, eg, Andrew Bolt, 'Suddenly Sensitive' *Herald Sun* (Melbourne), 18 June 2010 <http://blogs.news.com.au/heraldsun/andrewbolt/index.php/heraldsun/comments/suddenly_sensitive/desc/> 'A magistrate says this is fine if it's done to police'; see also the following statement made by David Barr MP in NSW Parliament: 'This response is in direct contrast to that of Magistrate Pat O'Shane, who this week ruled that a drunken man was within his rights to scream obscenities and make abusive gestures at police', New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 October 2005 18951 (Mr David Barr); Similarly, Queensland Police Union president Ian Leavers stated, in relation to an acquittal of an offensive language charge by a magistrate in Townsville: 'In determining not to appeal the wrong message has been sent to the public that it's now OK to use four-letter words and swear at police' Roanne Johnson, 'Swear Case Rankles Union' *Townsville Bulletin* (Townsville), 8 September 2010 10.

[54] Nicole Cox, 'Curses, Now It's All Right to Say * * * *' *Sunday Mail* (Queensland), 23 October 2005 22 (emphasis added).

[55] Ross Eastgate, 'A Manner of Speaking' *The Gold Coast Bulletin* (Gold Coast), 26 October 2005 23 (emphasis added).

criminal justice discourse in relation to offensive language.

7.4 Representing social actors

7.4.1 Appraisement and indetermination in *Heanes v Herangi*

> A person who behaves in a disorderly manner in public is usually a young male.[56]
>
> — Sue Walker, Shadow Attorney-General for Queensland

In the following analysis, I illustrate how Heanes is framed as a recalcitrant youth as a result of language choices made when representing social actors.[57] I explain how these language choices construct alleged offenders and bystanders as relevant or irrelevant, and as 'in place' or 'out of place'. Van Leeuwen has argued that a significant ideological aspect of the representation of social actors is *appraisement*—where social actors are referred to in interpersonal terms, 'which evaluate them as good or bad, loved or hated, admired or pitied.'[58] To provide an illustration of this, the terminology used in Australian political and media discourse since 'the Tampa Incident' of October 2001 has been rife with words that negatively appraise asylum seekers travelling by boat. This group of people has been variously referred to as, and assimilated into the categories of, 'queue jumpers', 'illegals', 'boat people', 'unlawful maritime arrivals', 'illegal maritime arrivals' and the exceptionally abstract—'transferees'.[59] While these words may have similar denotations, their respective registers—ranging from the informal to the bureaucratic—and their connotations, which alternatively ostracise, demonise, criminalise or depersonalise, have significant implications for the construction of reality. This is particularly so when they become naturalised into

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[56] Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 October 2004 7374b–7387a (Sue Walker, Coalition Shadow A-G and Minister for Justice); discussing the Crimes Amendment (Simple Offences) Bill 2004 (WA).

[57] See van Leeuwen, above n 14.

[58] Van Leeuwen provides the example of 'thugs' in the sentence, '[Eighty] young white thugs attacked African street vendors', as an adjective that negatively evaluates the young white individuals. Additional evaluative labels provided by van Leeuwen include 'the darling', 'the bastard' or 'the wretch', all nouns that denote positive or negative appraisement ibid 45; see also Teun van Dijk, 'What Is Political Discourse Analysis?' (1997) 11 *Belgian Journal of Linguistics* 11, 33: 'Opponents or enemies will be described in more negative terms, as the classical pair of terrorists vs. freedom fighters shows, for instance in former U.S. President Reagan's rhetoric about Nicaragua … Conversely, our bad habits, properties, products or actions will usually tend to be described (if at all) by euphemisms, as when our bombs are called "Peacemaker" and our killings of civilians among the Others as `collateral damage'. We may thus compose a lexicon of Newspeak, Nukespeak, Doublespeak or Politspeak, simply by recording the words that describe us (and our allies) and THEM (and their supporters)'.

[59] See Alison Saxton, '"I Certainly Don't Want People Like That Here": The Discursive Construction of Asylum Seekers' (2003) 109(1) *Media International Australia Incorporating Culture and Policy* 109.

legislation, 'codes of behaviour', legal judgments, news articles, policy documents, and everyday discourse around asylum seekers.[60]

Although not using the term 'appraisement', Eades has similarly described how 'lexical choices' play an important ideological role in court proceedings in how they evaluate social actors and their actions.[61] Eades has argued that competing choices give rise to a 'lexical struggle' between prosecution and defence in 'control[ling] and constrain[ing] the contributions of witnesses'.[62] Indeed, an important component of a legal advocate's role, in a criminal justice trial, is to condense their case into 'themes' and 'labels' which favour their version of reality over the opposition's; these themes and labels 'become the psychological anchors you want the jurors to accept and adopt as their own during the trial.'[63] Eades examined the lexical struggle over the choice of words used to represent the facts in the *Pinkenba case*,[64] including the words *friends* (versus *gang* or *louts*); *walking* (versus *wandering* or *prowling*); and *told* (versus *asked*); as well as the meaning of 'a key word' in the case: the verb *force*.[65] The defence counsel's use and 'perversion' of lexical items in the case, and the acceptance of the same by the magistrate, influenced the latter's conclusions that the three Aboriginal boys in question had freely consented to going in police cars; they were unreliable witnesses; and moreover, they were not 'victims', but 'lying criminals'.[66]

In *Heanes v Herangi*, the police prosecutor and Johnson J used the lexical items 'smart alec' and 'a complete menace' to negatively appraise Heanes:

> Prosecutor: The fact is that you glanced back, Mr Heanes—the fact is that you glanced back because—and you know they weren't too impressed because, like a *smart alec*, you have walked into the officer, haven't you? I put it to you? [67]

And:

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[60] See ibid; Anthea Vogl and Elyse Methven, 'We Will Decide Who Comes to This Country, and How They Behave: A Critical Reading of the Asylum Seeker Code of Behaviour' (2015) 40(3) *Alternative Law Journal* 175.

[61] Diana Eades, 'Lexical Struggle in Court: Aboriginal Australians versus the State' (2006) 10(2) *Journal of Sociolinguistics* 153.

[62] Ibid 154; citing Thomas Mauet, *Trial Techniques* (Aspen, 5th ed, 2000); see also Ehrlich, above n 33.

[63] Eades, above n 61, 153.

[64] *Crawford v Venardos* (Unreported, Brisbane Magistrates' Court, 24 February 1995). I summarise the facts of this case in Chapter One.

[65] Eades, above n 61, 155.

[66] Ibid 157, 163, 175. The magistrate concluded that it was 'OK for six armed police officers to approach Aboriginal boys, tell them to get into a police car, drive them out of town and abandon them in an industrial wasteland in the middle of the night', given that these boys '[had] no regard for members of the community, their property or even the justice system'; quoting *Crawford v Venardos* (Unreported, Brisbane Magistrates' Court, 24 February 1995).

[67] Transcript of Proceedings, above n 24, pt 2, 4-5 (emphasis added).

> Johnson J: Please don't start convincing me that *this fellow* was behaving himself well and not being *a complete menace*.[68]

In addition to these negative appraisements of the defendant and his actions, the language of the judge and prosecutor also contains examples of what van Leeuwen has described as *indetermination*, which is 'typically realized by indefinite pronouns ("somebody", "someone", "some", "some people")'.[69] One such example is in the above excerpt, where Johnson J referred to Heanes as 'this fellow'. Other examples of indetermination are evident in the following two recontextualisations of 'the facts' by the police prosecutor:

> Prosecutor: You're the *sort of person*, Mr Heanes, and you are not alone, and it happens every day out there to officers walking the beat, that would walk out of his way to push into an officer and then in a subsequent exchange then you start mouthing off and swearing. Isn't that the case?[70]

And:

> Prosecutor: … *someone* has decided, namely the accused, to walk between them, for whatever reason. What possess [sic] *people* to do these sorts of things is beyond me, but it does occur, your Honour … he has pushed through the officers, giving the officers cause to go and speak to him regarding his actions, which is quite appropriate in the circumstances.[71]

In these passages, Heanes is represented as an indeterminate individual or group; he is 'this fellow', 'someone', one of the 'people [who] do these sort of things', and the 'sort of person … that would walk out of his way to push into an officer and then in a subsequent exchange … start mouthing off and swearing'. Further, the prosecutor, in an instance of 'lexical perversion', formulated Heanes's contested actions at the crossing (see above), as Heanes having 'walked out of his way to *push into* an officer' and '*pushed through* the officers'.[72] In addition to these examples, the prosecutor lexically perverted Heanes's words—'I am on the phone—I am on the phone. I'm fucking talking to my dad. Fuck off'—by using the lexical item 'mouthing off'. These negative appraisements of Heanes and his actions, combined with the indetermination of Heanes, advance a version of reality in which Heanes is a prototype of a class of young people who act and speak in an undesirable way.

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[68] Transcript of Proceedings, *Jonathan Stephen Heanes v Western Australia Police Force* (Supreme Court of Western Australia, SJA 1111 of 2006, Johnson J, 27 March 2007) 79 (emphasis added).

[69] Van Leeuwen, above n 14, 39–40.

[70] Transcript of Proceedings, above n 24, pt 2, 7 (emphasis added).

[71] Ibid pt 2, 12 (emphasis added).

[72] Ibid pt 2, 7, 12 (emphasis added).

7.4.2 Manifest intertextual references in Heanes v Herangi

Furthering this depiction of young people behaving badly, in the Supreme Court judgment, Johnson J quoted an excerpt from *Beahan v McDermott* in which Anderson J described 'young people' as a category of people 'who often behave badly, sometimes with total disregard for the convenience and well-being of others', and posited that '[y]oung people who flaunt [sic] the law, abuse police officers and fling obscenities cannot always expect to be dealt with sympathetically by the courts. Generally speaking they must be punished for the public good.'[73]

Such a *manifest intertextual reference*—where a text overtly draws upon other texts[74]—to previous relevant cases, is a prevalent and essential feature of a legal judgment. This is because the doctrine of precedent, or *stare decisis*, requires judges to interpret and apply relevant authoritative judgments that preceded their case. However, it must be recognised that this doctrine is subject to judicial manipulation: judges have choices available to them when determining which cases, or extracts of cases, to quote, abridge, omit or apply. This process of selective abridgement and omission is evident in how Johnson J drew upon the precedent of *Beahan v McDermott*. Justice Johnson neglected to acknowledge in the judgment that in *Beahan v McDermott*, Anderson J ultimately allowed the appellant's appeal, and held that no conviction be recorded. This was despite the fact that Beahan had pleaded guilty in the Magistrates' Court hearing of his charge. Justice Anderson's decision was influenced by Beahan's, youth, his good character, his lack of antecedents, and the triviality of the conduct (the appellant had uttered a 'single [undisclosed] obscenity' to himself).[75] Further, Anderson J's comment, reproduced by Johnson J, did not apply to Beahan. As his Honour wrote, the appellant had not behaved 'in a disorderly fashion or aggressively'.[76] Instead, the comment was obiter dicta: it did not form a necessary part of his Honour's decision.[77]

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[73] *Heanes v Herangi* (2007) 175 A Crim R 175, 214–15 (Johnson J); quoting *Beahan v McDermott* (Unreported, Supreme Court of WA, Anderson J, 24 April 1991) 4.

[74] Fairclough, above n 10, 117–18.

[75] *Beahan v McDermott* (Unreported, Supreme Court of WA, Anderson J, 24 April 1991) 4.

[76] Ibid 7.

[77] As Anderson J stated: 'this was a trivial incident of disorderly conduct. The obscenity was not deliberately directed at the police and was uttered by the appellant to himself as he was in the process of obeying a police direction … It may fairly be inferred that it was uttered impulsively. There is no suggestion that any member of the public might have been offended or distressed by it' ibid 4.

Rather than emphasise these facts, or Beahan's successful appeal, Johnson J reasoned in *Heanes v Herangi*: '[Beahan's] plea of guilty indicates that, irrespective of whether the obscenity was used to a person, the fact that an obscenity of that type was able to be heard in a public place was the relevant factor and justified a criminal sanction.'[78] Justice Johnson's selective, and indeed subversive, interpretation and application of the judgment and outcome in *Beahan v McDermot,* and her Honour's inclusion of Anderson J's obiter relating to young people behaving badly, allowed Johnson J to slot Heanes (22 years old at the time) into the category of disrespectful youth warranting punishment.

7.5 Representing bystanders

An important aspect of the discursive construction of context in offensive language cases is the representation of bystanders or potential bystanders. The relevance of bystanders to the offensiveness of a defendant's language was highlighted by Burt CJ when his Honour expressed that '[t]he idea of a 'public place' as used in the statute is not simply geographical. It is assumed to contain human beings with ears.'[79]

In determining whether language is offensive, magistrates can consider how the language may have affected any people who *were* in the public place, as well as how the language might affect those who are *likely* to frequent the place in question.[80] In other words, a court will consider the (often assumed) views and reactions of those in the vicinity at the time, as well as the supposed views of 'the reasonable bystander'—a person likely to be in the vicinity at the time.[81] For example, in *Saunders v Herold*, Higgins J considered whether persons *likely* to be outside Canberra Worker's Club would be offended by the language used by Saunders to Constable Herold: 'Why don't you cunts just fuck off and leave us alone?'[82] Justice Higgins found that

[78] Justice Johnson further distorted the significance of this comment by not mentioning that this comment was obiter dicta, but instead framed it as a comment that Anderson J made 'with respect to the issue of context and the relevance of the fact that the language was used to, or in the presence of, police officers' *Heanes v Herangi* (2007) 175 A Crim R 175, 214–15 (Johnson J).

[79] *Keft v Fraser* (Unreported, Supreme Court of WA, 21 April 1986) 10–11; cited in *Heanes v Herangi* (2007) 175 A Crim R 175, 210 (Johnson J).

[80] A charge of using offensive language under s 4A of the SO Act (NSW) can be made out where no member of the public was present at the time, and thus no one was actually offended. Therefore, the prosecution need not prove that any actual person heard, or was offended by the language used. See *Stutsel v Reid* (1990) 20 NSWLR 661.

[81] *Saunders v Herold* (1991) 105 FLR 1, 8 (Higgins J).

[82] The appellant also stated: 'I want to know why we had to leave ... I've done nothing wrong, can you tell me where the fuck I'm staying', ibid 2.

> in the absence of a group of school children, aged pensioners or a congregation of worshippers gathered outside the Canberra Worker's Club, there was not likely to be anyone present who would, rightly or not, be considered by the reasonable bystander to be offended so as to indirectly offend that bystander.[83]

In this part of the chapter, I show how lexical choices by politicians, police officers, lawyers and judges represent bystanders in offensive language cases, and perpetuate stereotypes about categories of people likely to be disgusted or 'harmed' by swearing. I build on my findings in the previous chapter, by demonstrating how discursive choices in recontextualisation contribute to the construction of a defendant's words as dirty or harmful, and thus deserving of criminal sanction.

7.5.1 Representing bystanders: denotations and connotations

In *Heanes v Herangi,* the bystanders present when Heanes said 'I'm on the fucking phone talking to my dad. Fuck off', were represented in a number of ways. When giving evidence-in-chief at Perth Magistrates' Court, Constable Herangi stated: 'At that time it was school holidays and there were *several children* within hearing distance of the accused.'[84] Constable Herangi added: 'There were *a few people* standing around … *15 maybe*'.[85]

Constable Paul gave evidence that: 'At the time it was school holidays and very busy. There was *a number of children* in the area within hearing distance of the accused [sic]',[86] and 'I observed *a lady and a child* walk into the store at the time. It was school holidays. There was a marquee in Forrest Place for *the children*. It was lunch time. I saw *a number of people* around.' [87]

In the police officers' testimonies, extracted above, the bystanders were depicted as 'several children', 'the children', 'a number of children', 'a lady and a child' and 'a number of people'. When the police prosecutor cross-examined Heanes, the prosecutor added 'plenty of kids' to this list of bystanders, asking Heanes: 'Do you feel it is appropriate to be swearing on the school holidays at lunchtime in Forrest Place, where there is a marquee for the kids there and there is *plenty of kids* around at the time [sic]? Do you think it is appropriate?'[88]

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[83] Ibid 8 (Higgins J).

[84] Transcript of Proceedings, above n 24, 5 (emphasis added).

[85] Ibid (emphasis added).

[86] Ibid 18 (emphasis added).

[87] Ibid 19 (emphasis added).

[88] Ibid pt 2, 7 (emphasis added).

Both Magistrate Nicholls and Johnson J adopted the police officers' and prosecutor's descriptions of the context in which Heanes had said 'I'm on the fucking phone talking to my dad. Fuck off'. Magistrate Nicholls stated: 'There were *people and children* in the proximity and some of the people were looking at what was going on and were certainly within earshot. It was lunch time.'[89] In the Supreme Court transcript, Johnson J added the category 'mothers' to the bystanders, stating: 'The evidence was that it was lunchtime and apparently the only people there were *mothers and children*.'[90] In the Supreme Court judgment, Johnson J wrote: 'The words were found to have been said in the proximity and within the hearing of *both adults and children*',[91] and also that '[i]n the context of this case, words which ordinary decent-minded people may consider acceptable if spoken in private in very limited circumstances, may not be considered acceptable if said in public or to an authority figure or in the presence of *children*.'[92]

These lexical choices were far from inevitable. *Alternate wordings* could have been used to represent the bystanders,[93] such as 'young people', 'youth', 'adolescents', 'teenagers', 'juveniles' or 'minors'. The categories 'children' and 'kids' could also have been *pre-* or *post-modified* by adding, for example: '*school-aged* children' '*high school* kids' or 'children *between the ages of zero and five*'.[94] Instead, the police officers, prosecutor and judicial officers chose to use the broader categories 'children', 'kids', 'mothers' and 'adults'. The defence counsel did not question, and the magistrate and judge were not informed of (nor did they question) the approximate or actual ages of the 'children', nor did they clarify the age at which one transitions from a child to an adult. It is left to the reader of the transcripts and judgments to make assumptions about who falls into these categories, relying on the connotations of words and their own everyday experience of them (what Fairclough has referred to as *members' resources*: people's internalised knowledge of language, the natural and social worlds they inhabit, their values, beliefs, assumptions and so on, which they bring to the interpretation of texts).[95]

[89] Ibid pt 2, 17.

[90] Transcript of Proceedings, above n 68, 68.

[91] *Heanes v Herangi* (2007) 175 A Crim R 175, 184 (Johnson J).

[92] Ibid 218 (Johnson J).

[93] See Fairclough, above n 10, 77.

[94] See van Leeuwen, above n 14, 33.

[95] Fairclough, above n 10, 72, 80.

7.5.2 Representing bystanders: relational identification

In this part I focus on the coupling 'mothers and children', used by Johnson J in the Supreme Court hearing. This particular lexical choice identifies the participants relationally. *Relational identification*, as van Leeuwen has explained, is realised by a closed set of nouns such as 'friend', 'aunt' and so on, which represent social actors 'in terms of their personal, kinship … relations to each other'.[96] This transformation was not substantiated by evidence in the lower court proceedings; rather, her Honour transformed the bystanders into 'mothers and children' from the police officers' original descriptions in Perth Magistrates' Court.

By categorising the bystanders in these terms, Johnson J emphasised the role of a woman as a child's caregiver.[97] The category 'children' can similarly signify a relational identity (one is the child of one's parent(s)), but can also function as a *classification*: 'children' as distinct from 'adults' or 'young people' (see below).[98] Both senses of the word 'children' have connotations of vulnerability: the former sense highlights children's need to be cared for, and the latter sense highlights children's contrasting status with adults. Such constructions of children are consistent with dominant ideas of 'contemporary childhood' in Western society, which 'remains an essentially protectionist experience. Obliged by the adult world to be happy, children … are seen "as lacking responsibility, having rights to protection and training but not to autonomy".'[99]

Additional insight into how judicial officers represent social actors in the recontextualisation of 'the facts' can be gained from examining whether these actors are categorised *generically*—as a class, or *specifically*—as an 'identifiable individual'.[100] In the extracts above, the bystanders were represented not as identifiable individuals, but generically. They were described as 'a number of people', 'a few people standing around … 15 maybe', 'a lady and a child', 'plenty of kids', 'a number of children' 'several children', 'people and children' and 'mothers and children'. In many of these instances, the plural is used to *assimilate* the bystanders into groups.[101] The genericisation and assimilation of the groups over-emphasises

[96] Van Leeuwen, above n 14, 43.

[97] See ibid 44. Note that other language choices might have been made. The social actors might, for example, have been characterised as 'nannies and children' or 'babysitters and children' or 'unaccompanied children—abandoned urchins—wandering the streets alone'. It should be clear that each of these choices has a distinct ideological impact.

[98] See ibid.

[99] Allison James and Chris Jenks, 'Public Perceptions of Childhood Criminality' (1996) 47(2) *The British Journal of Sociology* 315, 318; quoting Chris Jenks, *The Sociology of Childhood: Essential Readings* (Batsford, 1982) 21.

[100] See van Leeuwen, above n 14, 35.

[101] See ibid 37–8.

their consensus and uniformity.[102] The reader may forget (and Johnson J has overlooked) the fact that these groups—mothers, children, and kids—are made up of individuals, whose views on swearing and its offensiveness (or otherwise) in certain contexts are undeniably heterogeneous.

7.5.3 Representing bystanders: 'youth' or 'kids'

The lexical items chosen to represent bystanders in *Heanes v Herangi*—'children', 'kids', 'adults and children' and 'mothers and children'—are especially ideologically significant when one contrasts these lexical items to how Heanes, the defendant, was represented. Heanes, as I have already identified, was negatively appraised as being a 'complete menace', 'like a smart alec', and belonging to the category of 'young people' who 'flaunt [sic] the law, abuse police officers and fling obscenities'. While 'youth' and 'young people' are generally depicted as typical offenders in offensive language cases, and in criminal justice discourse in relation to public order crimes more generally,[103] 'children' and 'kids' are typically represented as needing protection from offence. The cases give no indication as to what age separates these apparently contrasting categories: 'kids' and 'young people'. When do vulnerable children morph into youth, and thereafter pose a threat to public safety? Is it the age at which they learn and begin to use swear words (this being a particularly young age, as I detail below)?

In considering the ideological effects of these categories—'children', 'kids', 'adults and children' and 'mothers and children'—it is illustrative to draw on the work of cultural geographer David Sibley.[104] Sibley, in his work on purity and defilement, has recognised that the boundary separating child and adult is an 'arbitrary' and a 'decidedly fuzzy one', with 'adolescence' being an 'ambiguous zone' between the categories of child/adult, 'defined by exclusion':[105]

> Adolescents are denied access to the adult world, but they attempt to distance themselves from the world of the child. At the same time, they retain some links with childhood. Adolescents may be

[102] Ibid 144, 147; For further discussion of the effects of homogenization in discourse, see Rudolf De Cillia, Martin Reisigl and Ruth Wodak, 'The Discursive Construction of National Identities' (1999) 10(2) *Discourse & Society* 149.

[103] I interrogate this idea in the following chapter, where I analyse exclusionary constructions of community in offensive language cases; see also David Walker, 'Youth on Trial: The Mt Rennie Case' (1986) 50 *Labour History* 28; Paul Schoff, 'The Hunting of the Larrikin: Law, Larrikinism, and the Flight of Respectability in Nineteenth-Century South Australia' (1995) 1 *Australian Journal of Legal History* 93; Melissa Bellanta, *Larrikins: A History* (University of Queensland Press, 2012).

[104] David Sibley, *Geographies of Exclusion: Society and Difference in the West* (Routledge, 1995).

[105] Ibid 34–5.

> threatening because they transgress the adult/child boundary and appear discrepant in 'adult' spaces. While they may be chased off the equipment in the children's playground… they may also be thrown out of a public house for under-age drinking.[106]

The police officers, police prosecutor and judicial officers in *Heanes v Herangi* did not let such ambiguities spoil their portrayal of 'the context'. Instead, they fashioned a picture of public space in which its occupants fell into discrete, homogenous categories: of pure or impure, and as easily offended or as a likely source of offence. In fashioning such a picture, it is necessary to exclude the category of young people as potential bystanders. As I argue below, 'youth', 'minors' and other potentially 'unclean'[107] categories (such as 'men'), must be excluded from the context in which a defendant's words were uttered, if one is to impose a 'symbolic' order of cleanliness, susceptible to pollution by four-letter words. [108]

In the foregoing analysis, I used CDA to critique over-simplistic depictions of bystanders and defendants in the case of *Heanes v Herangi*. It is important to acknowledge the possibility that complexity *can* be added to the picture, and that lawyers and judicial officers alike can challenge the stereotype of children as innocent and impressionable when in public space. I noted in the preceding chapter, how Magistrate Heilpern, in *Police v Butler,* repeated the word *fuck* and its derivatives *fifty-four* times, and with this frequent repetition, fashioned an order in which swear words have a 'place' in legal language.[109] I contrasted Magistrate Heilpern to those judicial officers who had 'cleaned up' swear words in spoken and written texts, replacing them with verbal evasions. In *Police v Butler*, Magistrate Heilpern provided a contrasting impression of 'school children' to that which one would gain from reading the transcripts and judgments in *Heanes v Herangi*:

> I have stood on Sydney suburban railway stations while private school uniformed kids (girls and boys) yell "fuck off" to each other across platforms without anyone looking up from their newspaper in surprise …
> … If your children like JJJ [an ABC radio station] and listen to it in the morning, one cannot help be assailed by the word 'fuck' with regularity between mouthfuls of toast. [110]

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[106] Ibid.

[107] Ibid 37; see also Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966) 50: 'Uncleanness or dirt is that which must not be included if a pattern is to be maintained'.

[108] Douglas, 43-4.

[109] [2003] NSWLC 2 (Magistrate Heilpern).

[110] Ibid [23].

In this excerpt, Magistrate Heilpern referred not to youth or young people, but to 'children' and 'private school uniformed kids' as categories of persons who use the word *fuck* regularly. The *pre-modifier* 'private school uniformed',[111] which Magistrate Heilpern placed before 'kids', is significant (and exceptional) in that it counters language ideologies repeated throughout the historical discourse on obscene and indecent language trials (examined in Chapter Three) and also identified in more recent language ideologies (Chapter Five): where swear words were represented as only being used by a lower-class 'section of society', a class of individuals deemed unrefined and linguistically impoverished.

Magistrate Heilpern's discursive choices disrupt the notion that children from 'good homes' are less likely to use offensive language. And his Honour's unorthodox statements are supported by linguistic literature on children and swearing. This research has found that while swear words are commonly used amongst teenagers, very young children in Western society also have heard and use swear words.[112] Psycholinguists Timothy Jay and Kirstin Jay's extensive studies, conducted between 1992 and 2015, of the language of children in the United States, have found that children learn swear words from a very young age, around one or two.[113] In the 2013 study, involving predominantly middle-class, Caucasian children aged between one and 12, Jay and Jay found that the taboo lexicon of very young children expanded rapidly between the ages of 1-2 and 3-4 years, and that by the time children entered school (5-6 years) they had a 'fairly elaborate (42-word) vocabulary' of curse words.[114] Adults and children disagreed on which words were 'bad' or inappropriate (for example, a child under the age of six may have considered the use of the word 'poophead' more insulting than an adult); and older and younger children also disagreed with one another on the relative inappropriateness of specific words.[115] The words considered 'taboo' change with one's life experience, especially as children begin to develop knowledge of 'adult' issues, such as sexuality and social class.[116] Nevertheless, common four-letter taboo words were heard amongst the youngest cohort.[117] Significantly, the source of children's knowledge of swearing was not likely to be people swearing at police outside shopping centres, nor people

[111] See van Leeuwen, above n 14, 33.

[112] See Timothy Jay and Kristin Jay, 'A Child's Garden of Curses: A Gender, Historical, and Age-Related Evaluation of the Taboo Lexicon' (2013) 126(4) *American Journal of Psychology* 459.

[113] See Kristin Jay and Timothy Jay, 'Taboo Word Fluency and Knowledge of Slurs and General Pejoratives: Deconstructing the Poverty-of-Vocabulary Myth' (2015) 52 *Language Sciences* 251; Jay and Jay, above n 112; Timothy Jay, *Why We Curse: A Neuro-Psycho-Social Theory of Speech* (John Benjamins, 1999); Timothy Jay, *Cursing in America* (John Benjamins, 1992).

[114] Jay and Jay, above n 112, 470.

[115] Ibid.

[116] Ibid.

[117] Ibid 472.

'disrupt[ing] a family picnic in a park'.[118] Jay and Jay's studies have found that young children are most likely to learn the form and content of swear words within the home, from their parents or siblings.[119] In sum, the linguistic literature supports the claim that, unless children in the vicinity of Heanes and the police officers were of a particularly young age, Heanes's words 'fuck' and 'fucking' would not have tarnished the ears of innocent babes. And even if this were the first time that children in the vicinity of Heanes had heard the word 'fuck', no evidence was presented in the court proceedings to suggest that the children had paid attention to, or thereafter used, this word. Nor was there evidence given to establish that a child's knowledge of swear words is harmful.[120] Yet, as I detailed in Chapters Four and Five, because offensiveness of language is a question for 'judicial notice', expert (linguistic) evidence is neither permitted nor deemed necessary. For this reason, judicial officers can propagate the myth that swear words are particularly harmful or dangerous to children, and consequently, children require 'protection' from four-letter words when outside the supposed sanctuary of the home.

7.6 Representing social actors: exclusions and gender stereotypes

In the previous part of the chapter, I showed how in *Heanes v Herangi*, the categories 'children', 'kids', 'women' and 'mothers' were assumed as more likely to be offended by swearing in public space. In this part, I consider which categories of social actors are *excluded* from constructions of context, either consciously or subconsciously. As van Leeuwen has argued, in analysing the recontextualisation of social practices, 'absences' are as significant in CDA as are presences.[121]

The categories 'men' or 'fathers' are notably absent from the descriptions of context in *Heanes v Herangi.*[122] If men were within earshot, or in the vicinity, the reader must assume either that such men were implicitly included within the category 'people'. While this question cannot be answered through CDA, it does seem clear from the lack of explicit

[118] Contrary to representations made by Tony McGrady MP about 'Persons who choose to disrupt a family picnic in a park', discussed below in Part 7.6: Queensland, *Parliamentary Debates*, Legislative Assembly, 23 October 2003 4363 (Tony McGrady, Minister for Police and Corrective Services).

[119] Jay and Jay, above n 112; Timothy Jay, Kirsta King and Tim Duncan, 'Memories of Punishment for Cursing' (2006) 55 *Sex Roles* 123, 129–30.

[120] See also Joel Feinberg, 'Obscene Words and the Law' (1983) 2(2) *Law and Philosophy* 139, 142–4.

[121] Van Leeuwen, above n 14, 41.

[122] The only exception was Heanes's father, Stephen John Heanes (on the phone to Heanes at the time his words were said), whose presence and opinion as to whether Heanes's language was offensive or not was not taken into account by either judicial officer in their recontextualisations of context. Stephen Heanes gave evidence in court that he had heard only one 'eff word', which was not particularly loud, and then a lot of commotion: Transcript of Proceedings, above n 24, pt 2, 8-12.

acknowledgement of any bystanders of the male gender that men and fathers were signified as irrelevant to the context of Heanes's utterance.

The acknowledgement of the presence of women, mothers and children, and the implication that these groups need greater protection from swear words vis-à-vis other *potential* groups of people who *might* have been present, reproduces outmoded gender stereotypes identified in my historical analysis (Chapter Three). And it is a common theme in offensive language and behaviour cases from the mid-20th century onwards. For example, in *Roberston v Samuels*, the defendant had used the words: 'Oh fuck this. This is only a fuck-up anyhow. We must all be good citizens like all mother fuckers' at Elder Park in Adelaide.[123] Justice Hogarth found: 'In this case the words were used both in public and in the presence of *women* and *children*; and I think that their use in such circumstances was highly offensive.'[124]

In *McCormack v Langham*, a case study examined in the following chapter, Studdert J in the Supreme Court of NSW that the use of the words 'watch those two fucking poofters persecute me' in a hot food bar in 1991 in Lismore, NSW, was offensive.[125] Justice Studdert took into account the fact that 'children' were amongst the 30 patrons of the restaurant at the time the words were uttered.[126] In the 1991 case *Saunders v Herold*, Higgins J in the Supreme Court of ACT similarly referred to 'a group of school children' as a group that 'would, rightly or not, be considered by the reasonable bystander to be offended'.[127]

These stereotypes of women and children warranting greater protection from offensive words and conduct persist into the 21st century, as demonstrated by *Heanes v Herangi*, as well as in the second reading speech to the Summary Offences Bill 2003 (Qld), where the Queensland Minister for Police and Corrective Services, Tony McGrady, stated: 'Persons who choose to disrupt a family picnic in a park, groups of people who have nothing better to do than intimidate people at railway stations or persons who take delight in intimidating *women* or *children* at a shopping centre will face the full force of the law.'[128]

The Minister's comments were quoted with approval by McGill DCJ in the Queensland District Court in 2005, when considering a charge of offensive language in *Couchy v*

[123] (1973) 4 SASR 465, 465–6 (Hogarth J).

[124] Ibid 473 (Hogarth J, emphasis added).

[125] (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991).

[126] Ibid.

[127] (1991) 105 FLR 1, 8 (Higgins J).

[128] Queensland, *Parliamentary Debates*, Legislative Assembly, 23 October 2003 4363 (Tony McGrady, Minister for Police and Corrective Services, emphasis added).

Birchley.[129] In the same year, in *Butterworth v Geddes*, Forde DCJ considered as relevant the fact that '[a]t the material time, there were *children and other persons* in the street' when the appellant, Kaylor Maree Butterworth, stood in her own yard and said, 'fucking leave them alone', 'fucking pigs', and 'You cunts – you cunts can't come into my yard' and 'you can get fucked'.[130] In *Coleman v Power*, Gleeson CJ, gave the following illustration in justifying the constitutional validity of the crime of using insulting words in public: 'A *mother* who takes her *children* to play in a park might encounter threats, abuse or insults from some rowdy group. She may be quite unlikely to respond, physically or at all. She may be more likely simply to leave the park.'[131]

Common to these representations is the depiction of women, mothers and children as 'victims' of offensive or insulting words. Language plays a normative role, reproducing outmoded constraints in relation to swearing and gender. It reinforces the message that women are the 'polite sex', who do (or should) not swear, while 'manly oaths' are the prerogative of men. This is despite the fact that, as shown in Chapter Three, women have sworn, and continue to swear.

Stereotypes of the non-swearing female are undermined not only by the many obscene and indecent language trials of female defendants, but also by sociolinguistic literature, which demonstrates that women do swear, and is inconclusive on the question of whether men or women are more offended by swear words.[132] Some research suggests that men swear differently, and more frequently than women, and that women report being more offended by certain swear words.[133] However, it has also been documented that women curse more frequently than men in a nursing home setting,[134] destabilising the assumption that genteel old ladies warrant greater protection from swear words.

Even if women do swear less than men, or use different swear words from men, these attitudes towards swearing, gender, context and propriety are no doubt socially constructed.

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[129] [2005] QDC 334, [38] (McGill DCJ).

[130] Judge Forde ultimately concluded that 'I agree with the learned magistrate that the combination of factors amounted to the appellant acting in both a disorderly and offensive way: the waving of her arms, the nature of the language used, the tone of the words, the time of early morning and in a residential area, her intoxicated state and the presence of both adults and children in the street and within hearing distance': *Butterworth v Geddes* [2005] QDC 333, [2], [12] (Forde DCJ).

[131] (2004) 220 CLR 1, 4 (Gleeson CJ, emphasis added).

[132] See Vivian de Klerk, 'How Taboo Are Taboo Words for Girls?' (1992) 21 *Language in Society* 277; Jay and Jay, above n 112, 471; Jennifer Coates, *Women, Men and Language* (Longman, 1986).

[133] See, eg, Gary Selnow, 'Sex Differences in Uses and Perceptions of Profanity' (1985) 12 *Sex Roles* 303.

[134] Timothy Jay, 'Cursing: A Damned Persistent Lexicon' in Douglas J Herrmann et al (eds), *Basic and Applied Memory Research: Volume 1: Theory in Context; Volume 2: Practical Applications* (Psychology Press, 2014).

Neither men nor women are born with an innate aversion to the words *fuck* or *cunt,* nor an innate aversion to the other sex's use of these words. In their research published in 2013, Jay and Jay found that gender differences in frequency of swearing were more obvious in older children than younger children, suggesting that 'the time of transition to school is when adult-like gendered habits of emotional expression become more salient'.[135] Because of this finding, Jay and Jay argued that any gender differences in swearing, like differences in 'gendered language', are acquired through social interaction: that '[i]t is reasonable to expect gender differences in the content and frequency of swearing to emerge as children acquire gender-based communication practices through social interaction'.[136] This is particularly so when children enter the schoolyard where 'the us-versus-them mentality gives rise to gender conformity' and more entrenched gender roles'.[137] The data they obtained in 2013, when compared to data obtained by Jay in 1986, also suggested that gender differences in the spoken frequency of taboo words is 'diminishing', perhaps as a result of 'greater presence of women in our public observational contexts, for example, on college campuses and in the workforce'.[138] Ideas about swearing and gender are also culturally specific. For example, anthropological and linguistic studies of how Indigenous Australians use taboo language have documented a liberal use of taboo words and expressions by Indigenous women, where such use is not associated with shame or stigma.[139] As anthropologist and academic in Indigenous studies, Marcia Langton, has observed: 'there is at least one major difference between swearing behaviour in Aboriginal societies and swearing in Western societies—for instance, there is no public sanction on swearing by women in Aboriginal Australia'.[140]

In contesting the stereotype that women swear (or should swear) less than men, it is necessary to address the role of *power*. Linguist Vivian de Klerk has argued that, in Western culture, 'stereotypical powerful speech' is usually associated with the 'assertion of dominance, interrupting, challenging, disputing, and being direct', language that 'by definition, subsumes expletives'.[141] Thus it is recognised that swear words can be used to assert, or attempt to assert, power. In addition to this use, as I explained in Chapter Six, swear words can function as a tool to reinforce, challenge or subvert power structures: they can be used to intentionally violate social codes, and they can shock, indicate disregard, express anger or frustration.

[135] Jay and Jay, above n 112, 471.

[136] Ibid 460.

[137] Ibid 461.

[138] Ibid 471.

[139] Marcia Langton, 'Medicine Square' in Ian Keen (ed), *Being Black: Aboriginal Cultures in 'Settled' Australia* (Aboriginal Studies Press, 1988) 201, 208.

[140] Ibid.

[141] Vivian de Klerk, 'Expletives: Men Only?' (1991) 58 *Communication Monographs* 156, 156.

Swear words can also act as a 'social marker of group identity and solidarity, frequently serving to distinguish men from women in certain cultures, or marking memberships of adolescent subcultures'.[142] The patriarchal discourse that I have identified in the case law and parliamentary debates—that women should not swear, and that men should not swear in front of women—delegitimises women's access to this multifaceted, powerful component of human speech.[143] It is the product of, and reinvigorates, a long history of social pressures that have constrained women's language and behaviour vis-à-vis men.[144] In the following part of this chapter, I continue to interrogate normative representations of 'public' places in offensive language cases, including the idea that swearing is a predominantly male pursuit that is to be conducted in masculine spaces. I do this by applying van Leeuwen's work on recontextualising time, place and spatial arrangements, to representations of context in *Heanes v Herangi*.[145]

7.7 Representing time and place in offensive language cases

As noted at the outset of this chapter, the legal doctrine dictates that the offensiveness, indecency or obscenity of an utterance is contingent on time and place.[146] In this part, I apply van Leeuwen's 'grammar of space', and his description of semiotic resources for representing timing in discourse, to representations of context in offensive language cases.[147] I show how such representations, and normative suggestions as to how places *should* be used, construct a defendant's language as 'out of place'.

In *Heanes v Herangi*, the time, place and spatial arrangements, when Heanes said 'I'm on the fucking phone talking to my dad. Fuck off', are depicted in the following ways in Perth

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[142] Ibid 157.

[143] As Vivian de Klerk's research has found, females have a 'much more guilty, self-condemnatory, and narrow-minded perception' of the use of slang, an attitude that is reinforced by the opposite sex' Vivian de Klerk, 'Slang: A Male Domain?' (1990) 22(9–10) *Sex Roles* 589, 603.

[144] For example, the novels of prominent female writers in the Victoria era, including Jane Austen and the Bronte sisters, ensured that their female characters rarely or never swore, as Hughes has written, 'Although these characters are often highly articulate and independent [at least for their times], they are nevertheless usually very restrained verbally, never resorting to strong or foul language'. And yet, prior to the Victorian era, such as in the Medieval and Renaissance, more liberal normative assumptions relating to women and swearing existed, as can be exemplified by the records of Queen Elizabeth swearing liberally or swearing 'like a man' (although note that such a description clearly identified swearing as male, and powerful [particularly when used by a monarch] speech Geoffrey Hughes, *An Encyclopedia of Swearing: The Social History of Oaths, Profanity, Foul Language, and Ethnic Slurs in the English-Speaking World* (ME Sharpe, 2006) 502; see also Tony McEnery, *Swearing in English: Bad Language, Purity and Power from 1586 to the Present* (Routledge, 2006).

[145] See van Leeuwen, above n 14.

[146] *Coleman v Power* (2004) 220 CLR 1, 5–6 (Gleeson CJ).

[147] Van Leeuwen, above n 14, 91.

Magistrates' Court.[148] Constable Paul stated: 'There was a marquee in Forrest Place for the children. It was lunch time.'[149] The police prosecutor described the context as: 'A person swearing in that manner, in their face, outside of Myers, 12 o'clock in the afternoon, Wednesday, school holidays, people around the place.'[150] In giving reasons for judgment, Magistrate Nicholls accepted the police officers' characterisations of place, and rejected those of the defendant.[151] Magistrate Nicholls described the context as: 'Outside the Myers store ... There were people and children in the proximity and some of the people were looking at what was going on and were certainly within earshot. It was lunchtime'.[152] The Magistrate concluded that 'to tell a police officer, loudly in Forrest Chase, to 'fuck off' is, in my view, still sufficient to be a clear case of disorderly behaviour.'[153]

In the Supreme Court hearing transcript, Johnson J described the words used by Heanes as said 'to a police officer outside Myers in the middle of the day'.[154] Counsel representing the prosecution in the Supreme Court proceedings, Mr Lochore, referred to the language being used 'shortly after midday in Forrest Chase during school holidays',[155] 'in a public forum'[156] and 'in a manner that distinctly disrupted the decorum of Forrest Chase at midday during the school holidays.'[157]

In these excerpts, *locative phrases* with prepositions such as 'in' and 'outside' are used to depict the place in which Heanes', namely '*in* Forrest Chase' (a shopping centre in of Perth CBD), '*in* a public forum', '*outside* Myers' (a department store) and '*[o]utside* the Myers store'.[158] Van Leeuwen explains that locative phrases with prepositions such as 'in' and 'outside' indicate 'static' locations. Thus the locative phrases used by the judicial officers and prosecutors fix Heanes's words 'in place'.[159] Timing can also be represented in a number of ways, including as *exact* timing, where timing is regulated in an inflexible way (such as 'at

[148] Ibid.

[149] Transcript of Proceedings, above n 24, pt 1, 19.

[150] Ibid pt 2, 14.

[151] *Herangi v Stephen John Heanes* (Unreported, Perth Magistrates' Court, Magistrate Nicholls, 23 October 2006). Heanes gave evidence that there were 'not plenty of kids around the immediate scene where we were', and that the 'marquee in Forrest chase was at least a hundred metres away from the entrance at Myer' and 'certainly' not within hearing distance: Transcript of Proceedings, above n 24, pt 2 7-8.

[152] Transcript of Proceedings, above n 24, pt 2, 17-18.

[153] Ibid pt 2, 18.

[154] Transcript of Proceedings, above n 68, 28.

[155] Ibid 66.

[156] Ibid 69.

[157] Ibid 74.

[158] Emphasis added.

[159] Van Leeuwen, above n 14, 80.

six o'clock'); *inexact* timing, which is 'still regulated but in a relatively relaxed way' (such as 'during the night' or 'from time to time'); and *regulated inexact timing*, which can be expressed by 'diluting exact time expressions with modifiers' (such as 'by approximately the middle of the afternoon').[160] In the above representations, Heanes's utterances are fixed in time with the prepositions 'at' and 'in' through the use of the exact timing phrases: '*12 o'clock* in the afternoon, Wednesday' and '*at* midday', as well as *inexact* timing phrases *'in* the middle of the day' and '*shortly after* midday'.[161] Common to all of these representations is that Heanes used the language in question at or around midday.

According to van Leeuwen, in the process of recontextualisation, timing can also be *synchronized*.[162] That is, social activities can be 'timed in relation to other social activities, or to events in the natural world, or to artificially created events, such as the passing of time on a clock.'[163] Heanes's words—'I am on the phone. I'm fucking talking to my dad. Fuck off'—were 'synchronized with other social activities',[164] in the expressions: 'it was school holidays at the time', 'during school holidays', 'during the school holidays' and '[i]t was lunch time'. Each of these phrases is an example of *social synchronisation*, which is distinct from 'clock time'.[165] As van Leeuwen explains, clock time, is more *artificial*, and is measured by instruments devised for the purposes of calculating time (such as '12 o'clock').[166] However social synchronisation, 'involves awareness of the social environment, attentiveness to what other people are doing' (such as 'You have to wait until we get back').[167] It is important to acknowledge that the police officers, prosecutor, counsel for the prosecution and the judicial officers *chose* their representations of time and place, when alternative representations were available to them. They could have instead restricted their representations of when Heanes had used the words 'I am on the phone. I'm fucking talking to my dad. Fuck off' to artificially imposed times, such as 'at 12 o'clock'. They also could have omitted references to the shopping centre and referred only to street location (for example, 'in Murray street' or 'on Padbury walk'), or described the location in more abstract terms, as in: 'at the eastern side of a pedestrianised square within the CBD of Perth'.

[160] Ibid.

[161] Emphasis added.

[162] van Leeuwen, above n 14, 77–8.

[163] Ibid.

[164] Ibid 78.

[165] Ibid 79.

[166] Ibid.

[167] Ibid 78.

By timing Heanes's words in accordance with the social events 'school holidays' and 'lunch time', the police, prosecutors and judicial officers assumed meanings and functions inherent in those more abstract expressions of time. [168] The judge, the magistrate, the police officers, the prosecutor and counsel for the prosecution never explained *why* these times and locations rendered the language more offensive. Why might it be more offensive to use swear words at lunch time, during school holidays, or outside a department store (as opposed to say, at night time or during the school term)? Since reasons are never provided for these assumptions, those interpreting the representations of context in *Heanes v Herangi* must rely on their own understanding of what is appropriate at certain times or in particular locations. Alternatively, they must adjust their understanding of appropriate uses of place, at certain times, to fit within the established paradigm. Drawing on my analysis at the start of this chapter, one can deduce that the socially synchronised temporal indicator 'during school holidays' is a reminder that school children are expected to be in, or near, shopping centres in the school holidays, and therefore, that one should not use the words 'fuck' or 'fucking' at these times. The interpreter must also assume that swearing is inappropriate outside a large department store, or in a shopping centre, because these places are at such times, likely to be frequented by 'mothers and children'.

While most of the representations of context that I have so far discussed rely on implicit ideas about how contexts are to be used, there is one example that *explicitly* ascribed a purpose to a place. When giving evidence in *Heanes v Herangi,* Constable Paul authoritatively assigned a function to the 'marquee in Forrest Place', stating that it was '*for* the children'. Van Leeuwen has provided the sentence '"There is a drawer to put your things in," she [the teacher] said' as exemplifying the ascription of a normative purpose to a space: the drawer is the expected location in which to put the student's things.[169] In a similar fashion, the use by Constable Paul of the preposition 'for' in the phrase 'a marquee in Forrest Place *for* the children', 'normatively and authoritatively' assigned a function to the marquee: it is 'for the children'.[170] Constable Paul neither elucidated how this aspect of context made Heanes's words offensive, nor identified how proximate the marquee was to Heanes; it simply 'was' '[t]here'.[171] Nor did anyone query whether children were using this marquee when Heanes swore. Like the locative phrases outlined above, the ultimate relevance of this place to the offensiveness of Heanes's language is implied to be logical. All these descriptions of context assume and

[168] Ibid 97.

[169] Ibid.

[170] Ibid.

[171] Heanes later give evidence that it was 100 metres away, evidence that was rejected without further interrogation by the Court. See Transcript of Proceedings, above n 24, 8.

reinforce a worldview in which particular public places have obvious legitimate and illegitimate uses; it is legitimate for 'mothers' and 'school children' to use and enjoy a shopping centre at midday or around lunch time, but it is illegitimate for a young man to tell a police officer to 'fuck off' near a department store at midday during school holidays. They reinforce the existence of an objective and transparent order in public places.

7.8 Reproducing stereotypes about context

The representations of context that I examined above draw upon, and contribute to, a historical series of normative assumptions in which politicians, police officers, lawyers and judicial officers have reproduced stereotypes about places in which swearing is permissible or impermissible. Applying the ideas of Douglas, I conceive of these stereotypes as forming part of a schema, through which judges and politicians have: 'in the chaos of shifting impressions … construct[ed] a stable world in which objects have recognisable shapes, are located in depth, and have permanence. In perceiving [they] are building, taking some cues and rejecting others.'[172] The most acceptable cues will fit into the pattern; ambiguous ones may be harmonised to fit; discordant ones 'tend to be rejected', or, if accepted 'the structure of assumptions has to be modified'.[173] As the pattern takes shape, things are more easily labelled as acceptable or anomalous: 'Their names then affect the way they are perceived next time: once labelled they are more speedily slotted into the pigeon-holes in future.'[174]

Take for example the 1986 Supreme Court of WA case *Keft v Fraser* concerning a comedian, 'Rodney Rude', who had been convicted of having used obscene language in a public place.[175] The appellant had performed at the Perth Concert Hall before a 'sell-out audience'. Attendees had gained entrance to the appellant's performance by purchasing a ticket, and in a prominent place, in or about the entrance, were signs stating 'persons under 18 not permitted' and 'some language might offend'. During the performance, the appellant used the word *fuck* and its derivatives on 30 occasions.

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[172] Douglas, above n 4, 45.

[173] Ibid.

[174] Ibid; note that criminal law scholar Penny Crofts has critically applied Douglas's ideas about taboo, purity and 'matter out of place' in examining the legal regulation of brothels, particularly how they are associated with disorder and a 'fear or moral contamination, corruption or pollution': Penny Crofts, 'Brothels and Disorderly Acts' (2007) 1(1) *Public Space: The Journal of Law and Social Justice* 1, 1.

[175] (Unreported, Supreme Court of WA, 21 April 1986). Keft had been charged under the *Police Act 1892* (WA) s 59. For discussion of this section see historical analysis in Chapter Three. That section was repealed and replaced by the *Criminal Code* (WA) s 74A.

In considering the context of the appellant's words, Burt CJ noted: 'all public places are not the same. If it be a place where people of all kinds are assembled such as, to take a local example, the Hay Street Mall at high noon, then the use of the words complained of here if uttered for all to hear could, I think, be fairly described as being disorderly conduct'.[176]

This passage, repeated with approval by Johnson J in *Heanes v Herangi*,[177] is one of a number of normative statements about appropriate and inappropriate uses of certain places in offensive language cases. In the 1991 case *Saunders v Herold*, Higgins J in the Supreme Court of the ACT proffered the following examples of locations demanding different standards of conduct or language: 'Conduct and language engaged in at a football match or on a tennis or squash court may be acceptable, or, at least, unremarkable, but offensive if engaged in during a church service or a formal social event'.[178]

These representations comprise part of a set of broad generalisations about places in which it is more or less acceptable to be offensive, and categories of people who are more or less easily offended. To illustrate the prevalence of such stereotypes, I set out below, in chronological order, a series of generalisations on the use of offensive language and behaviour. These generalisations have been articulated by judicial officers, but also in some cases, by academics and politicians, and have been accumulated from case law, explanatory memoranda and parliamentary debates:

> **1968:** Conduct that is acceptable at a *football match* or *boxing match* may well be disorderly at a *musical* or *dramatic performance.* Behaviour that is permissible at a *political meeting* may deeply offend at a *religious gathering.*[179]

> **1972:** In my personal experience (which involves hearing all three words ['fuck', 'fucked' and 'cunt'] used probably many thousands of times … *in the army during World War II*) the words as most commonly used are almost always used in a sense which is not indecent. They may properly be characterised as either uncouth or offensive; I personally find them so on most occasions, particularly when used *in public* or *in the presence of women.*[180]

[176] *Keft v Fraser* (Unreported, Supreme Court of WA, 21 April 1986) 10–11.

[177] *Heanes v Herangi* (2007) 175 A Crim R 175, 210 [159] (Johnson J).

[178] *Saunders v Herold* (1991) 105 FLR 1, 5 (Higgins J); quoted in *Police v Paton* [2009] NSWLC 34, [22] (Magistrate Richardson); and in Keren Adams, 'DPP v Carr: Case and Comment' (2003) 27 *Criminal Law Journal* 278, 281.

[179] *Wainwright v Police* [1968] NZLR 101, 103 (Wild CJ, emphasis added).

[180] *Dalton v Bartlett* (1972) 3 SASR 549, 556–7 (Hogarth J, emphasis added).

1973: But what may be regarded as not improper—or perhaps even conventional and proper—*in an army camp* is one thing … In this case the words were used both *in public* and *in the presence of women and children*; and I think that their use in such circumstances was highly offensive.[181]

1991: 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 at a church fete*.[182]

1995: There was no evidence that persons in the public area were offended, nor that the public area was frequented by *gentle old ladies* or *convent school girls*.[183]

2003: A vulgar gesture *at a wedding* may well be offensive but the same digital activity *at a football match* merely jocular.[184]

2003: No member of this House would be so naive to suggest that *a private conversation between 2 persons drinking in a public bar of a hotel* might not involve the use of obscene language … provided that it is not directed to another person who is not a party to the conversation … Should the same language be used *in the restaurant of a hotel where children might be present*, or a *shopping mall*, its use … might constitute an offence.[185]

2004: A person calling another person a slut in a *shopping centre* or a *park* may constitute offensive language. A person using obscene language *in a mall* or a *street* may constitute offensive language. A person using obscene language *in the public bar of a hotel in the course of a conversation* with another person may not constitute offensive language. A person who disrupts *a church service* by using language offensive to persons at that service or to persons who are gathering for the service or to persons who are *outside a place of worship* after a service may commit an offence.[186]

2009: If these words ['fuck' and its derivatives] were used, for example, *to young children in a playground* of a school or *to nuns in a convent*, a reasonable robust person would regard the use of those words to be offensive.[187]

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[181] *Robertson v Samuels* (1973) 4 SASR 465, 473 (Hogarth J, emphasis added).

[182] *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991) 3 (emphasis added).

[183] *Commissioner of Police v Anderson* [1996] NSWCA 116 (Meagher JA, emphasis added).

[184] *Nelson v Mathieson* [2003] VSC 451, [17] (Nathan J, emphasis added).

[185] Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2003 4364 (Tony McGrady, Minister for Police and Corrective Services, emphasis added), in the Second Reading speech of the Police Powers and Responsibilities and Other Legislation Amendment Bill 2003 (Qld).

[186] The Explanatory Note also states: 'However, the section does not prevent a person from lawfully protesting and expressing an opinion about adverse decision or actions of a church or its members' Explanatory Note, Summary Offences Bill 2004 (Qld).

[187] *Police v Paton* [2009] NSWLC 34, [28] (Magistrate Richardson, emphasis added).

2013: Something done or said in one context (such as a *pub*) may not be offensive, but if done in another may well be so (such as in a *playground with young children about*).[188]

From this chronology, we see that judgments about offensive language and behaviour in certain contexts are heavily invested in normative assumptions about which places are clean and orderly, or dirty and disorderly. We are told that shopping centres, suburban malls, school playgrounds, restaurants, parks, main streets, weddings, formal social events, church services, church fetes, nunneries, and 'public' places in which women, children, gentle old ladies or convent school girls are present, are contexts in which one is to avoid offensive language and behaviour.[189] According to judicial officers and politicians, these are places with an inherent order that could be disrupted by 'dirty' words. By contrast, army camps, hotel bars (or at least private conversations therein), football matches, boxing matches, tennis courts, squash courts, all-male dressing rooms and political meetings—are places in which dirt may be acceptable or even expected; these are places that either have no order, or have an order that allows for 'swear words'. These spatial stereotypes make sense if one views swear words as dirty words that belong in *dirty* spaces—a bar, a football match, political debates—just like waste belongs in the garbage bin. In this worldview, expletives do not belong in *clean* spaces—church services, shopping malls, main streets and musical performances—just like dirt does not belong inside the home, or just as food, 'not dirty in itself', might elicit shame or disgust if bespattered on clothing, or dripping down one's beard.[190] If a swear word is uttered in contexts constructed as 'clean' through criminal justice discourse, that word is more likely to be considered criminally offensive. In disordering order, it is, to borrow Wajnryb's metaphors, 'a weed in an exquisite garden, a rotten apple in a barrel of beauties.'[191]

It is important to underscore, as Douglas has, that places are not inherently clean or dirty; they are only dirty if the dominant group labels them so. In other words, there is no such thing as 'absolute dirt'; dirt 'exists in the eye of the beholder'.[192] These categorisations of place have merely become, through repetition by powerful voices, engrained in criminal justice discourse

[188] Luke McNamara and Julia Quilter, 'Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)' (2013) 36 *University of New South Wales Law Journal* 534, 554 (emphasis added). It is important to note that the authors, in describing how courts have approached the relevance of context in reported cases, may not have endorses the position of those cases. Nonetheless, in failing to bring the reader's attention to the normative influence of judicial generalisations about context, and the fact that they can be contested, academic discourse influences understandings of public places in which one should, or should not, swear.

[189] I interrogate the public/private dichotomy that is (re)constructed and reflected in criminal justice discourse in the final part of this chapter.

[190] Douglas, above n 107, 44–5.

[191] Ruth Wajnryb, *Expletive Deleted: A Good Look at Bad Language* (Simon and Schuster, 2005) 179.

[192] Douglas, above n 107, 2. I continue this argument in the following chapter.

so that they have come to be considered 'common sense': 'an accepted code of rules, a kind of modus vivendi'.[193] Significantly, these categorisations of orderly and disorderly places, like the swear words assumed to be the logical target of offensive language charges, are not written into legislation. And perhaps there would be public outcry if state and territory parliaments were to pre-emptively itemise places in which four-letter words are, regardless of other contextual aspects, considered criminally offensive or inoffensive (be they, for example, shopping centres, parks or nunneries).[194] I am not suggesting that such an option would be advisable or preferable, except on the chance that it might expose to the voting public just how draconian and all-encompassing offensive language crimes can *potentially* be, and thereby spark a more considered debate about the legitimacy of such crimes. In the absence, however, of such clear guidelines, those interpreting and applying the criminal law continue to rely on stereotypes about order and disorder, uncritically crafted in the more flexible domains of judge-made case law, explanatory memoranda and parliamentary debates.[195]

Extending this apparent flexibility is a prominent linguistic feature of these stereotypes: the prevalence of the *modal auxiliary verb*s 'could', 'might' and 'may'.[196] These modal auxiliary verbs create low-modality propositions. Consider, for example, the difference between the more tentatively worded statement: '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 at a church fete', and this same statement when the modal auxiliary verbs 'may' and 'might well' have been removed from it, and the *non-modal present tense* is used: 'What passes as inoffensive language if exchanged between footballers in an all male environment in a dressing room after a match, offends if repeated in mixed company at a church fete'.[197] The use of modal auxiliary verbs renders it difficult for one to disagree with the truth of such propositions, or for disagreements to be of much consequence.

Additionally, the use of modal auxiliary verbs gives an *impression* of flexibility: it is at the presiding judicial officer's discretion (or that of a police officer issuing a penalty notice) to, drawing on their 'common sense', alternatively accept or reject the propositions as they see fit. I have italicised 'impression' here because I would argue that the existence, consistency, and repetition of these stereotypes create the façade of an objectively apparent order, in which

[193] Sharman, above n 1, 41.

[194] Although legislation such as the *SO Act* (NSW) provides that a person shall not use offensive language in, near, or within hearing from, a 'school', that language must still be considered in the context in which it is used.

[195] I consider how this might undermine the rule of law and the legitimacy of such crimes in Chapter Ten.

[196] See Norman Fairclough, *Language and Power* (Longman, 2nd revised ed, 2001) 105–6.

[197] See Fairclough, above n 35, 129 (emphasis added); see Chapter Five for an examination, using Fairclough's ideas, of the ideological effect of judicial statements in the present tense.

certain words may be offensive or not depending on whether they belong, or do not belong to that order. This semblance of an objectively apparent order has ideological significance. Through repetition, the criminal law re-enacts 'rituals of separation'[198], where sacred and clean places—nunneries, church services and weddings, are contrasted with those that are unclean or even profane—football matches, hotel bars and battlefields. Over time, the depictions take the form a standardised pattern, so that we forget that the separations are contestable and not always logical.

The undesirability of these stereotypes about context is further demonstrated by their infantilisation of women, placed in the same category as children: as needing 'protection' from 'dirty words'. Those 'dirtier' contexts identified above, such as a football match, a boxing contest, a hotel bar and the battlefield, have historically been regarded as (and many still perceive them to be) highly masculine spaces in Western society. These were spaces that women had (and in many respects still have) less or little access to; places where women were either not invited, or were not welcome; places where a woman's presence was considered odd or inappropriate. Conversely, shopping centres, parks, churches and musical performances were, and continue to be viewed as, contexts in which women belong and are expected to be present in. These assumptions ingrain a patriarchal idea identified earlier in this chapter: that swearing is a masculine pursuit, one that is 'appropriate' if performed behind barriers that exclude women, whether such barriers enclose the male section of a bar, an all-male dressing room or a private male conversation. We have not progressed far from what Sharman observed in 1884, as quoted in the epigraph to this chapter, that 'the conversation that is conceded in a club smoking-room would be intolerable in a boudoir. In some sort men have been permitted the enjoyment of swearing, and that with impunity, provided they did not carry it beyond the prohibited pale'[199] In the following part of this chapter, I consider a further undesirable aspect of constructions of context in offensive language cases: their propensity to be exploited, and selectively interpreted, in a way that renders swear words used by Indigenous Australians as disorderly. I use CDA to interrogate how aspects of a defendant's identity, including racial identity, were selectively 'whitewashed' from the context of *Del Vecchio v Couchy*,[200] and question the ideological impact of their exclusion.

[198] Douglas, above n 107, 51.

[199] Sharman, above n 1, 41.

[200] [2002] QCA 9.

7.9 Obscuring 'race'

> The universalised subject of legality, who, unsurprisingly, displays all the characteristics of benchmark man, leaves virtually no space for women, Aboriginal people, or differentially situated others.[201]
>
> — Margaret Thornton

In recontextualising context in offensive language cases, it is not only categories of bystanders (such as 'men', see above), but also aspects of a person's identity, that may be excluded. In this part of the chapter, I draw on the case *Del Vecchio v Couchy* to examine how the Queensland Court of Appeal judges rendered irrelevant to the context in which Couchy's language was used, her Indigenous identity. This analysis comprises part of my broader investigation in this thesis of how language choices can avert our eyes from social explanations for a defendant's conduct, such as poverty, homelessness, intoxication and strained Indigenous-police relations. I argue that through their deletions and exclusions, the judges in *Del Vecchio v Couchy* re-imagined a 'whited-out' context in which Australians are all 'equal' before the law.

To summarise the facts of *Del Vecchio v Couchy*, at approximately 4 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.[202] 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'.[203] Couchy was arrested for using insulting words in a public place, contrary to s 7(1) of the (since-repealed) *VGOO Act*.[204] On 7 December 2000, Magistrate Herlihy convicted Couchy in Brisbane Magistrates' Court of having used insulting words to a person in a public place, and sentenced her to three weeks imprisonment.[205] Judge Howell, in the District Court of

[201] Margaret Thornton, *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 12.

[202] The racial identities of the police witness and complainant were not mentioned in the proceedings, presumably because, as Moreton-Robinson has recognised, '[a]s a categorical object, race is deemed to belong to the other. This has resulted in many theories about race being blind to whiteness' Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Moreton-Robinson, Aileen (ed), *Whitening race: Essays in social and cultural criticism* (Aboriginal Studies Press, 2004) 75, 76.

[203] Constable Del Vecchio also submitted an alternative version of the words used by Couchy—'Fuck you cunt': Transcript of Proceedings, *Couchy v Del Vecchio* (Brisbane Magistrates' Court, 30238 of 2000, Magistrate Herlihy, 7 December 2000) 2.

[204] See Chapters Three and Four. The relevant offensive language crime, of public nuisance, is now contained in the *Summary Offences Act 2005* (Qld) s 6 ('*SO Act*'). That section makes it an offence to use offensive, obscene, indecent, threatening or abusive (but not insulting) language.

[205] *Del Vecchio v Couchy* (Unreported, Brisbane Magistrates' Court, Magistrate Herlihy, 7 December 2000).

Queensland, dismissed Couchy's appeal against conviction, but reduced her sentence to seven days.[206] Couchy's subsequent appeal to the Queensland Court of Appeal was dismissed, as was her application for special leave to appeal to the High Court of Australia.[207]

Couchy's case is not unusual. Couchy was homeless, a status that made her especially visible in public spaces.[208] As an Indigenous Australian, she was statistically much more likely than a non-Indigenous Australian to be charged with an offensive language crime.[209] Indigenous Australians have also been subjected to a greater degree of intervention in their everyday activities, including the 'most intimate parts of their lives'.[210] Another reason that Couchy's Indigenous identity is significant, is that anthropological and linguistic research demonstrates that many Indigenous Australians use swear words differently, and more frequently, than non-Indigenous Australians.[211] As Eades has stated:

> Simply put, what is widely considered to be obscene language in many sectors of mainstream Australian society is less likely to be offensive in Aboriginal societies. Swearing, like fighting, is considered to be a normal part of Aboriginal social interaction, and in particular a necessary part of settling disputes.[212]

Another notable feature of Couchy's case was the power asymmetry between her and the police officers. The transcripts detail many instances, in addition to her arrest, in which the

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[206] *Couchy v Del Vecchio* (Unreported, District Court of Queensland, Howell DCJ, 16 August 2001).

[207] *Del Vecchio v Couchy* [2002] QCA 9; The High Court were not satisfied that there would be sufficient prospects of success to warrant a grant of leave: *Couchy v Del Vecchio* (Gummow, Callinan and Heydon JJ, 2004) vol 520.

[208] See Tamara Walsh, 'Waltzing Matilda One Hundred Years Later: Interactions between Homeless Persons and the Criminal Justice System in Queensland' (2003) 25 *Sydney Law Review* 75; Tamara Walsh, 'Who is "Public" in a "Public Space"?' (2004) 29 *Alternative Law Journal* 81.

[209] See, eg, 'Study of Street Offences by Aborigines' (NSW Anti-Discrimination Board, 1982); Aboriginal Justice Advisory Council, 'Policing Public Order: Offensive Language and Behaviour, the Impact on Aboriginal People' (1999).

[210] Chris Ronalds, Murray Chapman and Kevin Kitchener, 'Policing Aborigines' in Mark Findlay, Sandra Egger and Jeff Sutton (eds), *Issues in Criminal Justice Administration* (Allen & Unwin, 1983) 168, 171.

[211] Brian Taylor, 'Offensive Language: A Linguistic and Sociolinguistic Perspective' in Diana Eades (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (University of New South Wales Press, 1995) 219, 236; Marcia Langton, 'Medicine Square' in Ian Keen (ed), *Being black: Aboriginal cultures in 'settled' Australia* (Aboriginal Studies Press, 1988) 201.

[212] Diana Eades, *Aboriginal Ways of Using English* (Aboriginal Studies Press, 2013) 103; Ashley Montagu has further argued in his Anatomy of Swearing that Aboriginal Australians' swearing practices had 'developed far beyond any of the peoples of Western cultures' in 'their sanctioning of swearing under the appropriate conditions'; Aboriginal Australians have recognised the power and uses of swearing for good and for bad and use swear words in a 'sort of ritualized letting off of steam—the induction of a general feeling of well-being as a consequence of being permitted to enjoy to the full the freedom of what, under other conditions, is prohibited.' Ashley Montagu, *The Anatomy of Swearing* (Collier Books, 1967) 18. This research is particularly significant in light of my findings in the following chapter, of how judicial officers applying the 'community standards' to offensive language charges gloss over, or obscure, differences in linguistic practices.

police officers assumed authority over Couchy, and in which Couchy resisted that authority.[213] First, Sergeant McGahey suggested to Couchy that she should go to the compound, a request which Couchy was not legally obliged to comply with: 'I said to her, "Lisa ... Do you want to go to the compound?" She then said, "Sarge, the compound is for fucking dogs".'[214] Constable Del Vecchio dictated that Couchy state her full name and address, although Couchy was familiar to Sergeant McGahey, which Couchy refused to do: 'I said to her, "I am Constable Del Vecchio from Fortitude Valley Police. Can you state your full and correct name and address for me?" She turned her back and wouldn't answer me.'[215] Third, the Constables directed Couchy to get in the van, which Couchy also refused (but was forced) to do: 'I [Constable Del Vecchio] said "Get into the back of the van". She said "No"… Constable Eaddie and myself assisted her into the back of the van.'[216]

When this obvious power asymmetry is taken into account, as well as the facts that Couchy is Indigenous, was homeless, and regularly came into contact with the police,[217] one might entertain multiple interpretations of Couchy's use of the words 'fucking cunt' to a (presumably non-Indigenous) female police officer, in the early hours of the morning, on an inner-city Brisbane street. The phrase could be construed as an expression of resistance. Or perhaps Couchy was venting frustration, in response to having to repeat her name to Constable Del Vecchio, and following the Sergeant's suggestion that she be transported to the compound. Couchy's swear words could have been construed, to use linguist Ashley Montagu's words, as a 'letting off of steam:'[218] her emotions having 'escaped' through the use of expletives, rather than by means of physical force.[219]

However, the judicial officers determining Couchy's charge and appeal declined to take the aforementioned contextual factors into account, and further declined to entertain a sympathetic reading of her words. The Queensland Court of Appeal rejected defence counsel Andrew Boe's submissions that Couchy's 'Aboriginality', her poverty, and the 'plight of Indigenous people in the community', were relevant to their assessment of whether her language was insulting with regards to contemporary community standards. The Chief Justice

[213] I further interrogate ideas about police authority in Chapter Nine.

[214] Transcript of Proceedings, above n 203, 2 (Sergeant McGahey).

[215] Ibid.

[216] Ibid 3.

[217] It was noted in the Magistrates' Court proceedings that Couchy had an extensive criminal history, mainly of minor offences. Couchy was also the appellant in subsequent offensive language cases, namely: *Couchy v Birchley* [2005] QDC 334; *Couchy v Guthrie* [2005] QDC 350.

[218] Montagu, above n 212, 18.

[219] As I wrote in Chapter Six, this metaphor of the alternative 'escape valve' conceives of swear words as non-violent, fleeting expressions of resistance, that cause no lasting pain, nor any concrete polluting effects. See also Wajnryb, above n 191, 142.

stated: 'he [the Magistrate] may not have taken into account the Aboriginality of her, but I might say for my part I have some question as to whether that was relevant.'[220] Justice Douglas added: 'I just think to add the word 'Aboriginal' stretches the bar too far; it's not necessary.'[221]

The Court denied that Couchy's 'derelict'[222] state or her poverty were relevant to the context in which her words were said, with McPherson JA and de Jersey CJ suggesting that to take her poverty into account would be a matter of reverse discrimination. As McPherson JA stated: '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.'[223] The Chief Justice stated, 'we readily concede disadvantage, but I'm not sure that in the particular context here it was operative'.[224] Alongside denying the relevance of Couchy's Indigenous identity and aspects of disadvantage, de Jersey CJ deliberately de-gendered the defendant, correcting his representation of Couchy as 'the woman' by changing this to 'the person': 'A feature of the intoxication and the apparent helplessness of the woman—I'm sorry, I should say "the person".'[225] In the name of equality before the law, the Court refused to acknowledge fundamental aspects of Couchy's identity and social situation. So much so that the Court of Appeal in its judgment never acknowledged that the defendant was Indigenous.[226]

A rationale provided by the judges for excluding these aspects was that to take Couchy's Indigenous identity and poverty into account would amount to discrimination against wealthy people like themselves.[227] The judges failed to mention the very low likelihood that they—in light of their socio-economic status, social standing, occupation, education and language habits, in short, their *privilege*—would find themselves in a similar position to that of the defendant.

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

[220] Transcript of Proceedings, *Couchy v Del Vecchio* (District Court of Queensland, D1098 of 2001, Howell DCJ, 16 August 2001) 5–6.

[221] Ibid 6.

[222] Transcript of Proceedings, *Del Vecchio v Couchy* (Queensland Court of Appeal, 245/2001, de Jersey CJ, McPherson JA and Douglas J, 4 February 2002) 4 (Douglas J).

[223] Ibid 3.

[224] Ibid 7.

[225] Ibid 6.

[226] See *Del Vecchio v Couchy* [2002] QCA 9.

[227] As exemplified by McPherson JA's statement, reproduced in Part 7.9 above: 'You mean that if I said these words I'd be guilty of an offence, but if she says them she's not?' Transcript of Proceedings, above n 222, 3.

for using what Taylor calls 'high category' swear words (such as 'cunt' or 'fuck'), even where they use these words in relatively public locations.[228] Meanwhile, less privileged members of society, including those disadvantaged by poverty or homelessness, those whose language deviates from so-called 'Standard English',[229] and Indigenous persons, continue to be overrepresented in offensive language cases.[230] By using abstract, unrealistic hypothetical examples; by erasing the words 'Aboriginal' and 'Indigenous' from the defendant's identity; and by failing to acknowledge disadvantage in their constructions of context, the judicial officers in *Del Vecchio v Couchy* averted its audience's eyes from social explanations for the defendant's conduct: poverty, intoxication, disenfranchisement and strained Indigenous-police relations. Through their deletions and exclusions, the judges were complicit in a 'denial of racism';[231] they disallowed Couchy's swear words to be considered in the important and *real* context of the criminal justice system's ongoing oppression and criminalisation of Indigenous Australians, and instead recontextualised Couchy's words in an imagined, 'whited-out' context in which we are all 'equal' before the law.

The judicial officers hearing Couchy's insulting language charge and appeals were not as neutral as many of them professed to be. The judicial officers in the Magistrates' and High Court placed significant emphasis on the police officer's gender. In the Magistrates' Court, Magistrate Herlihy held that the word 'cunt' was insulting *to a female*, be it a police officer or otherwise.[232] In the hearing of Couchy's High Court application, Gummow J stated: '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.'[233] Justice Callinan insisted that:

> 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?[234]

[228] Taylor, above n 211, 232.

[229] See Chapter Eight for discussion and criticism of the notion of 'Standard English'.

[230] Taylor, above n 211, 234.

[231] Teun van Dijk argues that 'one of the crucial properties of contemporary racism is its denial' in Teun van Dijk, 'Discourse and the Denial of Racism' (1992) 3(1) *Discourse & Society* 87, 87.

[232] *Del Vecchio v Couchy* (Unreported, Brisbane Magistrates' Court, Magistrate Herlihy, 7 December 2000) (emphasis added).

[233] *Couchy v Del Vecchio* [2004] HCATrans 520 (B13 of 2002, Gummow, Callinan and Heydon JJ, 3 December 2004) 3 (emphasis added).

[234] Ibid 3–4 (emphasis added).

The judicial officers deemed the female gender of the police complainant to be significant to 'the context' of Couchy's insulting language charge. Further, Callinan J, in the above excerpt, added when recontextualising 'the context' the patriarchal notion that *male* police officers might feel compelled to use 'physical' force if swear words were said 'to a woman'. Justice Callinan adopted and naturalised an essentialised view of women and men, in which both genders should conform to scripted reactions to the word 'cunt'. While a female should react in shock or disgust upon hearing the word, a male might feel compelled to defend the distressed female by resorting to violence.

In the foregoing analysis, I have shown how judicial language choices reproduce the stereotype of 'the coy, non-swearing female' and explained how this stereotype informed the judges' determinations in *Del Vecchio v Couchy* that the defendant's language was criminally insulting. From my analysis of aspects of recontextualisation in this case, we see how judicial officers can selectively omit aspects of context that might explain, and render less insulting, a defendant's behaviour.

7.10 Constructing the public/private dichotomy

Before I conclude this chapter, it is important to highlight that representations of context in offensive language cases, legislation, explanatory memoranda and parliamentary debates, have naturalised the contestable idea that swear words are only criminally punishable if spoken in, or near, a 'public' place.[235] For example, Hogarth J stressed in *Dalton v Bartlett* (see above) that certain words used liberally in an army camp should not be repeated '*in public* or in the presence of women'.[236] In the Supreme Court hearing of *Heanes v Herangi*, counsel for the prosecution emphasised that the defendant's words had been used 'in a public forum'.[237] Both abstract locative phrases—'in a public place' and 'in a public forum'—invoke the public/private dichotomy, through which the law 'differentially constitutes' a person and her or his behaviour according to whether that person is in a location deemed 'public' or 'private'.[238]

There is, of course, nothing natural or logical about the idea that certain words uttered in private spaces are less offensive than those same words uttered in public, just as there is

[235] See Chapter Three for my historical analysis of this assumption.

[236] *Dalton v Bartlett* (1972) 3 SASR 549, 556–7 (Hogarth J, emphasis added).

[237] Transcript of Proceedings, above n 68, 69.

[238] Ngaire Naffine, 'Sexing the Subject (of Law)' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995).

nothing natural or logical about the idea that certain words are less offensive uttered on a tennis court than during a musical performance. Instead, this public/private distinction—now so entrenched in the Western liberal legal tradition[239]—is a product of history and culture, an aspect of the 'well-nurtured myth' that the public and the private constitute 'two analytically discrete realms'.[240]

In recognising that the public/private distinction informing public order laws today is a product of European culture and history, we must also recognise that the assumption that supposedly offensive words (especially swear words) are worthy of punishment if uttered in a public place, as opposed to a private place, is an unnatural construction. It is also a construction that privileges persons in whose interests it was created, and who adhere to the distinction, over those who reject it.

As described in my historical analysis, when crimes of using obscene, indecent or profane language in public were enacted in 1849, they were created in the minds, and following the habits, of the most privileged members of European colonisers.[241] They were readily used to ostracise, to the point of criminalisation, the language of people deemed poor or poorly

[239] See generally Thornton, above n 201, 11; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2002) Chapter Two; Norbert Elias, *The Civilizing Process* (Basil Blackwell, 1982) 69; Melissa Mohr, *Holy Shit: A Brief History of Swearing* (Oxford University Press, 2013) 103–12, 156–7; William Ian Miller, *The Anatomy of Disgust* (Harvard University Press, 1997) 151. The public/private dichotomy as it relates to, and demarcates zones in which swearing may be criminally offensive, has a substantial basis in the rise of the notion of 'civility' in European society during the Renaissance period. This period witnessed the development of what was termed by historian Norbert Elias in The Civilising Process the 'advance in the frontiers of shame', a shame that reached its zenith in the Victorian Era. An integral component of this 'civilising process' was the idea that a person's bodily functions, sexual activities, and naked flesh should remain hidden from public view, and that their words should not even hint at such things. In the Middle Ages, as linguist and historian Melissa Mohr has identified, there 'was almost no such thing as privacy as we know it, even for the very rich. The earliest houses consisted of a large, central great hall and a few outbuildings. Most of the business of life was conducted in the hall—visitors were entertained, meals were cooked … meals were eaten … [and] the hall was also, apparently where one might openly perform some bodily functions we would most definitely conceal today.' Up until the 16th century, most people slept naked, and servants slept naked in the same room as their masters. In the Middle Ages there was also, as Elias has identified, a high threshold to such acts as spitting, defecating, and sex in the company of others; there was much less of an 'invisible wall of affects which now seems to rise between one human body and another, repelling and separating'. And importantly, in the Middle Ages, the words considered obscene did not allude to sexual acts, (sexualised) body parts, and bodily functions, but religious concepts and name. Depictions like those of Elias and Mohr, of an almost disgust-free Middle Ages, have received criticism due to their 'caricatured view' of the period. Yet it is true that people directly witnessed others having sex during the Middle Ages more often than those in Western society do today. Even in the 16th century, as Mohr has observed, 'people were suspicious of privacy—who knew what you could get up to all by your lonesome, with only the devil for company?' But as personal, private spaces developed in European society, it became important to hide 'shameful' actions and body parts from public spaces and polite society. Conduct once acceptable in 'public' was increasingly perceived as immoral, sinful and even 'criminal'.

[240] Margaret Thornton, *Public and Private Feminist Legal Debates* (Oxford University Press, 1995) 11; see also Graycar and Morgan, above n 239, 2.

[241] See Chapter Three.

educated, criminals, larrikins, 'coloured' people, vagrants and vagabonds. In more recent times, legal academics have documented that the intrusion of the criminal law into so-called 'public places' has disproportionately disadvantaged Indigenous persons as well as other persons who are more likely to conduct a greater array of everyday activities in 'public' space (such as people who are homeless or poor), rendering them more visible to police, and more likely to be the subject of state intervention.[242]

Criminal justice discourse re-enacts this public/private dichotomy by uncritically representing swearing as offensive if done in 'a public forum' or 'public places', as opposed to, for example, in private conversations, a closed-off political meeting or an all-male changing room. It obscures the dynamism of public space, the fluid distinction between public and the private, and the fact that many people do not adhere to, and reject, the rigid, exclusionary vision promoted by the criminal law, in which swearing is restricted to 'private' spaces.

7.11 Conclusion

In this chapter, I have demonstrated how legal judgments of offensiveness turn on tacit and contestable understandings of context. I conducted a CDA of constructions of context in offensive language crimes by magistrates, judges, police officers, politicians and lawyers. In my analysis, I highlighted choices that judicial officers, politicians, police officers and lawyers made in recontextualising instances of offensive language use, and showed how these choices fostered and naturalised an image of people, places and language as orderly or disorderly, or as 'in place' or 'out of place'. I examined how the recontextualisation of 'the facts' that formed the subject of the offensive language charge in *Heanes v Herangi* contributed to the construction of the defendant as a person who had transgressed 'normal' behaviour in a public place. I then examined how representations of context in a series of

[242] A detailed analysis of the multiple reasons for this heightened visibility and inequitable policing in public space is beyond the scope of this thesis, but they importantly include socio-economic, cultural and linguistic factors; the higher number of police in 'Aboriginal towns'; and the fact that the law has deemed Aboriginal settlements to fall within the definition of 'public places' (many of these factors were apparent in Couchy v Del Vecchio, as I discussed above, but were rejected by the judges as irrelevant); see, eg, Langton, above n 211; Jarrod White, 'Power/Knowledge and Public Space: Policing the "Aboriginal Towns"' (1997) 30 *The Australian and New Zealand Journal of Criminology* 275; Walsh, 'Who is "Public" in a "Public Space"?', above n 208; Rob White, 'Indigenous Young Australians, Criminal Justice and Offensive Language' (2002) 5 *Journal of Youth Studies* 21; Gail Travis, 'Police Discretion in Law Enforcement: A Study of Section 5 of the NSW Offences in Public Places Act 1979' in Mark Findlay, Sandra Egger and Jeff Sutton (eds), *Issues in criminal justice administration* (Allen & Unwin, 1983) 200; see the cases *Myers v Simpson* (1965) 6 FLR 440; *Smith v Wayne* (1974) 3 ALR 459, which consider the charge of being drunk in a public place. However, there have been conflicting decisions on whether Aboriginal reserves are 'public places'. The NT Supreme Court held in the case of *Myers v Simpson* (1965) 6 FLR 440 that an Aboriginal reserve was not a public place; while in the latter *Smith v Wayne* (1974) 3 ALR 459, Muirhead J reasoned that people lawfully on an Aboriginal reserve within the meaning of the Social Welfare Ordinance 1964 (NT) are 'the public' in a 'public place'.

offensive language cases and parliamentary statements have both drawn upon, and contributed to, a history of normative assumptions about contexts in which swearing is permissible or impermissible. This repetition of stereotypes about appropriate places in which one should, or should not swear, contributes to 'genesis amnesia'[243]—a process by which we forget the history of human-made 'truths', so that ideas about orderly and disorderly places appear natural or common sense. My analysis of criminal justice discourse has provoked a remembering of how human-made stereotypes have normalised the supposedly 'civil' practices of the privileged majority, and punished those who deviate from this supposed norm. Constructions of context in the criminal law have legitimised the criminal punishment of enactments of difference in imagined orderly spaces: performances of heterogeneity that challenge a stratified society.

This chapter has highlighted an idea central to my thesis: that if public places are represented in criminal justice discourse as clean and orderly, swear words, when conceived of as 'dirty words', will appear more polluting. If, however, public places are represented as dynamic, fluid, or messy, similar to Magistrate Heilpern's representations in *Police v Butler*, colourful or dirty words may have a 'place' in such a context. Discursive choices play an important ideological role in such constructions, a role that has gone unacknowledged in academic literature on offensive language crimes. To further highlight this point, I include here one final illustration, from the case of *Police v Bubbles*.[244] In this case, Magistrate Payne painted the following picture of 'the context' in which the words of Milo Bubbles, 'fucking wankers', were spoken to police officers at about 9.10 pm, in front of Brunswick Street Mall:

> As Kings Cross is to Sydney, St Kilda is to Melbourne then Fortitude Valley is to Brisbane. The Brunswick Street Mall is a place of night time activity which can include the seedy side of life. There is public drinking, drug use and drug transactions, prostitution and criminal behaviour. It is also a place of regular nightlife of nightclubs, restaurants and brightly lit take-away food places. It is a place where expletives would be likely to be used more regularly in common speech than in Brisbane suburban malls.[245]

This representation of Brunswick Street Mall and Fortitude Valley as dynamic and colourful, but also as garish and lurid—via adjectives such as 'brightly lit' and 'seedy', and through the inclusion of deviant, transgressive and potentially criminal behaviours 'drug use and drug transactions, prostitution and criminal behaviour'—contributes not only to perceptions of how

[243] Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Harvard University Press, 1984); this is examined further in my theoretical framework, see Chapter Two.

[244] [2006] QMC 6.

[245] Ibid 12–13 [63] (Magistrate Payne).

such places (and by way of contrast, 'Brisbane suburban malls') are used, but also to normative assumptions about how these places should be used, and ultimately to perceptions that swear words may, or may not, pollute such a space. This extract illustrates how judicial language shapes ideas about appropriate behaviour in public space, and can also disrupt visions of neat, orderly public space. In the following chapter, I consider how criminal justice discourse fosters the image of an orderly, stratified and exclusionary public space through representations of the reasonable person, the community and community standards.

CHAPTER EIGHT
IN THE EYE OF THE BEHOLDER: CONSTRUCTIONS OF THE 'REASONABLE PERSON' AND 'COMMUNITY STANDARDS' IN OFFENSIVE LANGUAGE CASES

At 12.45 pm on 1 January 1991, Constable Denning and Constable McCormack entered Leo's Hot Food, a restaurant in Lismore, NSW. Geoffrey Alan Langham ('Langham') was sitting in a rear booth of the premises. At least 30 adults and children of various ages were in Leo's Hot Food at the time. According to Constable McCormack, he looked at Langham for a few seconds, and heard Langham say to the person sitting in the booth next to him in a loud voice: 'Watch these two fucking poofters here, how they fucken persecute me.' Constable McCormack told Langham that he was under arrest for offensive language. Langham replied 'Yeah, it figures, doesn't it.'

The charge was heard on 19 February 1991 by Magistrate Pat O'Shane at Lismore Local Court. Magistrate O'Shane dismissed the information, finding there was no prima facie case established. In her Honour's reasons for judgment, Magistrate O'Shane stated: 'what is considered offensive in language changes with the times' and 'language, such as that spoken by the respondent in this matter, is language of common usage these days and not such as would offend the reasonable man.'[1]

The prosecution appealed Magistrate O'Shane's decision to the Supreme Court of NSW where, on 5 September 1991, Studdert J delivered judgment in which his Honour allowed the appeal.[2] Justice Studdert found Magistrate O'Shane's statement—that language such as that spoken by the respondent would not offend the 'reasonable man'—involved an error of law. In contrast to Magistrate O'Shane's reasonable man, Studdert J's reasonable man was offended by the language used by Langham. Justice Studdert rejected the contention that the community's standards had 'slipped' to such an extent that the defendant's utterances could

[1] The case stated in the decision *McCormack v Langham* (Unreported, Lismore Local Court, Magistrate Pat O'Shane, 19 February 1991) 2–4 (stated on 2 July 1991).

[2] *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991).

not constitute an offence. Accordingly, Studdert J remitted the matter to Magistrate O'Shane to be dealt with according to the law.[3]

8.1 Introduction

A central issue in Langham's appeal was the identity and perspective of the reasonable person. As I explained in Chapter Four, the common law definition of offensiveness is that stipulated by O'Bryan J in *Worcester v Smith*, being 'such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a *reasonable person*.'[4] Therefore, in *McCormack v Langham*, the prosecution had to prove that Langham's words, in the context in which they were used, would offend the reasonable person. Langham's guilt (at least in theory) did not depend on whether or not patrons dining in Leo's Hot Food were personally offended. Although it is common for courts to hear evidence of bystanders (predominantly police officers), the crime of using offensive language in public does not target actual offence, but rather *hypothetical* offence: how language *might* affect someone in the relevant public place at the time, or someone who might contemplate using that place, the latter being variously referred to as 'the reasonable person', 'the reasonable man' or 'the reasonably tolerant bystander'.[5]

While offensive language is judged objectively, and generally from the perspective of the reasonable person, jurisdictions vary as to which test to use in assessing offensiveness: 'the reasonable person' test, the 'contemporary community standards' test, or an amalgamation of both (the latter being the approach taken in NSW; see Chapter Four). In WA and Queensland, courts tend to refer only to the standards of the community (with exceptions—see for example Howell DCJ's statement in *Couchy v Del Vecchio* below).[6] For crimes involving the use of abusive, indecent, insulting or obscene language, judicial officers generally ask whether the

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[3] Ibid 6–7.

[4] [1951] VLR 316, 318 (O'Bryan J, emphasis added).

[5] Evidence that some particular reasonable person was present, or in fact offended by the impugned behaviour, is relevant and admissible but not strictly necessary: *R v Connolly and Willis* (1984) 1 NSWLR 373, 384 (Wood J); this issue is examined in Chapter Four, see also *Inglis v Fish* [1961] VR 607 where Page J stated that '[t]he behaviour must have 'occurred in a place where the presence of members of the public might reasonably have been anticipated; and in circumstances where such behaviour could be seen [or heard] by any member of the public who happened to be present if he were looking [or listening]"; Loveday J provided that rationale that: 'Members of the public who use or may use public places should know that they are protected from offensive language used in the public place or within hearing distance of the public place. In the absence of such protection they might well avoid the public place', *Stutsel v Reid* (1990) 20 NSWLR 661, 663–4; see also *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993).

[6] (Unreported, District Court of Queensland, Howell DCJ, 16 August 2001); see also Chapter Four.

language in question is in breach of contemporary community standards.[7] Exactly *what* or *who* this community entails is far from clear, as this chapter will show.

Objective tests that employ the perspective of the 'reasonable person' or 'community standards' are not unique to criminal law, or to the law generally.[8] The reasonable person standard has been the subject of much academic and judicial critique, particularly regarding the continuing tendency of the law to appeal to objective standards or 'knowledge' to silence, or stigmatise as subjective, those views that 'do not reflect the orthodox epistemological order'.[9] And as I demonstrated in Chapter Four, the use of these objective standards for

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[7] See Chapter Four; *Bills v Brown* [1974] Tas SR (NC) N13 (Chambers J); adopting the test articulated in *Police v Drummond* [1973] 2 NZLR 263; see also *Robertson v Samuels* (1973) 4 SASR 465, 471 where Hogarth J stated in the Supreme Court of SA that where the relevant charge was one of using indecent language in a public place, 'the language is to be categorized objectively, according to the standards prevailing among the community at large'; in *E (a child) v The Queen* (1994) 76 A Crim R 343, 347 in the Supreme Court of WA, concerning a charge of disorderly conduct by using obscene language, White J referred to 'the standards of the community, not of a particular witness'; in *Gul v Creed* [2010] VSC 185, 5 concerning a charge of indecent language, Beach J in the Supreme Court of Victoria held that 'in determining whether something is indecent, it is contemporary standards which must be applied'.

[8] See, eg, *Crimes Act 1900* (NSW) s 23 (extreme provocation), an element of which is that 'the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased'; *Johnson v Johnson* (2000) 201 CLR 488, 493 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); for further examples, see Mayo Moran, 'Who Is the Reasonable Person?' (2010) 14(4) *Lewis & Clark Law Review* 1233; Peter Westen, 'Individualizing the Reasonable Person in Criminal Law' (2008) 2(3) *Criminal Law and Philosophy*; Donald Braman, 'Cultural Cognition and the Reasonable Person' (2010) 14(4) *Lewis & Clark Law Review* 1455.

[9] Davies has examined feminist critiques of objective legal standards and how, although purporting to be gender-neutral, they operate as male standards. The male position is seen as 'position-less'. Meanwhile, 'women are visibly sexed, and never neutral enough to be objective': Margaret Davies, *Asking the Law Question* (Thomson, 3rd revised, 2008) 176; Catharine MacKinnon has identified that the reasonable person is political, but the law conceals this political aspect, and the fact that 'man has become the measure of all things'. In law, women are often either explicitly or implicitly measured by how far they correspond with, or deviate from, men: Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 34; American legal philosopher Martha Nussbaum has criticized criticised the tendency of judges and juries to routinely equate the reasonable person with the average or ordinary person (or 'man'), thus excluding minority identities and views. Nussbaum has observed that historically, the reasonable person was equated, and arguable arguably continues to be equated, with middle-aged property-owning white men in the labour force. It excluded women, the poor, youth, non-whites, people with mental illnesses and so on: Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press, 2004) 33–6; The ordinary person test in the law of provocation has attracted judicial criticism in relation to its purported neutrality. Justice McHugh, in in a dissenting judgment delivered in *Masciantonio v The Queen* (1995) 183 CLR 58, 72–3 stated that in a multicultural country such as Australia, the notion of an ordinary person is not only 'pure fiction'., Justice McHugh argued that the ordinary person standard, for the law of provocation, should incorporate the 'general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue', and . McHugh J argued that if these characteristics were not incorporated, 'the law of provocation is likely to result in discrimination and injustice'. Justice McHugh argued that the invocation of the ordinary person test in cases heard by juries of predominantly Anglo-Saxon-Celtic origin 'almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar' (McHugh J); Justice Murphy raised similar concerns in the High Court case of *Moffa v The Queen* (1977) 138 CLR 601, 625–6, that the 'objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is'. However, Murphy J believed that if an objective test were to incorporate subjective features of the

offensive language crimes has not escaped criticism from some members of the judiciary and legal practitioners.[10] But such judicial criticism of objective standards in offensive language cases is rare. For the most part, magistrates and judges do not critically engage with the question of *who* the reasonable person or community might be; what attributes they might have; what values they might hold; and what historical, cultural and political backgrounds inform their views.

In this chapter, I use CDA to contribute a new perspective to a number of themes that emerge from the vast literature on objective standards in the law, including the law's blindness to its own partiality and subjectivity; its historical and continuing tendency to postulate a white, male, physically and mentally-able viewpoint as objective (the 'view from nowhere'); and the use of abstract standards to increase and obscure judicial discretion.[11] I destabilise the notion that the reasonable person and the community—as they are currently constructed and applied—are appropriate standards from which to judge offensive language, and demonstrate how these devices have been exploited to include certain groups of people while excluding 'Others'. I draw on the ideas of anthropologist Anthony Cohen in his essay 'The Symbolic Construction of the Community', by regarding the community and the reasonable person as highly malleable 'symbols'. I show how these symbols are manipulated by judicial officers, politicians, lawyers and police officers to legitimise the notion that swear words are dirty words and to obscure the partiality of their views on offensiveness. In doing so, I recall Douglas's assertion that dirt 'exists in the eye of the beholder' and that there is nothing that is dirty for all people, at all times and in all places.[12]

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accused, this 'would result in unequal treatment'. Instead, Murphy J stated that the objective test 'has no place in a rational criminal jurisprudence and should be 'discarded'. For a comparative approach to rhetorical appeals to 'the community' in discourses of crime control, see Nicola Lacey and Lucia Zedna, 'Discourses of Community in Criminal Justice' (1995) 22(3) *Journal of Law and Society* 301.

[10] See Chapter Four, discussing *White v Edwards* (Unreported, Supreme Court of NSW, Yeldham J, 5 March 1982) 5–6; Mark Dennis, '"Dog Arse Cunts": A Discussion Paper on the Law of Offensive Language and Offensive Manner' <http://criminalcle.net.au/attachments/Offensive_Language_and_Offensive_Manner_Discussion_Paper__Dog_Arse_Cunts.pdf>; similarly Bray CJ noted in *Romeyko v Samuels* (1972) 2 SASR 529, 563: 'With respect, I deprecate references to the right-minded man. Phrases like this conceal value judgments, which, in effect, prejudge the issue'; Another example, is the critique of the reasonable person by French CJ in the High Court case *Monis v The Queen* (2013) 249 CLR 92, 123 [44], regarding an appeal against conviction of the criminal offence under s 471.12 of the Criminal Code (Cth) of using a postal or similar service in way that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'. The Chief Justice stated: 'the construct [of the reasonable person] is intended to remind the judge or the jury of the need to view the circumstances of allegedly offensive conduct through objective eyes and to put to one side subjective reactions which may be related to specific individual attitudes or sensitivities. That, however, is easier said than done' (French CJ).

[11] See above n 9.

[12] Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966) 2.

In the first part of the chapter, I outline Cohen's idea about the community as a symbol in more detail, and relate this to the concept of the reasonable person. In the second part, I examine how the reasonable person is discursively constructed in offensive language cases. Focusing on the linguistic techniques of *hedging*, *presuppositions* and *negation*, I argue that while judicial statements *appear* to delimit the reasonable person's attributes and attitudes, upon closer inspection they augment judicial discretion. I analyse how politicians, judicial officers, lawyers and police officers, through discourse, actively construct the symbolic boundaries of the community and the reasonable person. I examine their discursive efforts at keeping these symbols alive, and how they gloss over factors that might injure or even eliminate their existence—including differences in terms of power, age, culture, language background, gender, history, race and politics. I draw on linguistic research to argue that the ascertainment of community values in relation to language is not as straightforward as judges and parliamentarians might have us believe. Finally, I question how the word 'community' is used rhetorically to create and reinforce boundaries that include and exclude. This chapter thus continues to draw on the tools of CDA to analyse core legal elements of offensive language crimes—in this case, the perspective of the reasonable person and community standards—illuminating issues of unfairness, inequality and discrimination in their interpretation and application.

8.2 The community and the reasonable person as symbols

A central idea underpinning my analysis in this chapter is that the phrases 'the reasonable person' and 'the community'—just like the words freedom, justice or love—exist primarily in symbolic terms.[13] The 'symbolic boundaries' that enclose the community exist in the eye of the beholder.[14] As Cohen has argued:

> Symbols, then, do more than merely stand for or represent something else. Indeed, if that was all they did, they would be redundant. They also allow those who employ them to supply part of their meaning … But their meanings are not shared in the same way … Symbols do not so much express meaning as give us the capacity to make meaning.[15]

The notion that the community is an imagined entity was also emphasised by historian and political scientist Benedict Anderson in his book *Imagined Communities: Reflections on the*

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[13] See Anthony Cohen, *The Symbolic Construction of Community* (Ellis Horwood, 1985) 15.

[14] Ibid 13–15; see Douglas, above n 12, 2.

[15] Cohen, above n 13, 14–15.

Origin and Spread of Nationalism.[16] Anderson conceived of the modern nation as an 'imagined political community', 'imagined as both inherently limited and sovereign'.[17] Anderson observed that '*all* communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined'.[18]

Because of the imagined or symbolic nature of the 'community', ideas about what a community entails are not shared by all, but are mediated by the idiosyncratic experience and perceptions of the individual; its adherents 'attach their own meanings to it',[19] or, as Anderson has written: 'Communities are to be distinguished, not by their falsity/genuineness, but by the *style* in which they are imagined'.[20] Significantly, in his theorisation of the word community, Cohen finds that the term implies 'both similarity and difference': 'the word's use would seem to imply two related suggestions: that the members of a group of people (a) have something in common with each other, which (b) distinguished them in a significant way from other members of other putative groups.'[21]

Community is thus interpreted by Cohen to be 'a *relational* idea': a community is defined in opposition to those who exist outside of the community, and this opposition or distinction is expressed through 'the boundary'.[22] The notion of the boundary—a border that encloses those who *belong*, and keeps out those who do not—is essential to understanding how one might conceive of a community.

Many of Cohen's ideas can similarly be applied to 'the reasonable person', and I do so throughout this chapter. Like the community, the reasonable person is a symbolic entity, the meaning of which is mediated by the idiosyncratic experiences and perceptions of the individual. When explicitly invoked, her existence is defined by her opposition or distinction to (and thereby implies the existence of), people who are not reasonable, or 'unreasonable persons'. Accordingly, the reasonable person is an exclusive concept: it does not encompass *all* people. And, as with the community, the meaning of 'the reasonable person' is particularly

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[16] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983).

[17] Ibid 6.

[18] Ibid x (emphasis added).

[19] Cohen, above n 13, 14–15.

[20] Anderson, above n 16, x (emphasis added).

[21] In this interpretation, Cohen follows Wittgenstein's advice to construe a word not through 'lexical meaning' but through 'use' Cohen, above n 13, 12.

[22] Ibid (emphasis in original).

hard to pin down; it is 'almost impossible to spell out with precision',[23] despite judicial efforts to do so.

8.3 The representation of the reasonable person in offensive language cases

To examine how the reasonable person is imagined in criminal justice discourse, I return to *McCormack v Langham*, the facts of which were outlined at the outset of this chapter. In that case, Studdert J in the Supreme Court of NSW described the 'reasonable man' as follows:

> The reasonable man is not necessarily thin skinned or so thin skinned as to take the view that the learned magistrate [in *Evans v Frances*] says. He has some sensitivity, I should have thought, to social behaviour, social expectations in public places where other people are. To convert the reasonable man into one who is not so thin skinned as not to be distressed or offended by such language in my submission is not to apply that test of the reasonable man.[24]

A number of cases have added qualities to, or subtracted qualities from, this reasonable person. As previously outlined, alongside being not too thin-skinned,[25] nor overly thick-skinned,[26] the reasonable person has been described as 'reasonably tolerant and understanding and reasonably contemporary in his reactions'.[27] In *Spence v Loguch*, Sully J stated that the 'emphasis in that description is to be placed upon the notion of reasonableness'.[28] Further, the reasonable person has been described as 'neither a social anarchist, nor a social cynic, whose view of changes in social standards is that they are all in one direction, namely the direction of irresponsible self-indulgence, laxity and permissiveness'.[29]

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[23] Ibid 15.

[24] *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991) 5; quoting *Evans v Frances* (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990); citing *Thonnery v Humphries* (Unreported, Supreme Court of NSW, Foster J, 19 June 1987).

[25] *Evans v Frances* (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990); cited in *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991) 5.

[26] *Re Marland* [1963] 1 DCR 224; but see *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991).

[27] *Ball v McIntyre* (1966) 9 FLR 237 ('*Ball v McIntyre*'); quoted in *Spence v Loguch* (Unreported, Supreme Court of NSW, Sully J, 12 November 1991) 10; also quoted in *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993); *Police v Butler* [2003] NSWLC 2, [7] (Magistrate Helpeirn); *Monis v The Queen* (2013) 249 CLR 92, 123 [44] (French CJ).

[28] *Spence v Loguch* (Unreported, Supreme Court of NSW, Sully J, 12 November 1991) 4; in that case, the defendant was charged with offensive behaviour under the *Summary Offences Act 1988* (NSW) s 4(1) ('*SO Act*'), after urinating against a brick wall outside a hotel in Coffs Harbour. The case involved an appeal against the dismissal of the charge by Magistrate Pat O'Shane.

[29] *Evans v Frances* (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990); cited in *Spence v Loguch* (Unreported, Supreme Court of NSW, Sully J, 12 November 1991); *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993); *Monis v The Queen* (2013) 249 CLR 92, 123 [44] (French CJ).

CDA is particularly useful in analysing how judicial officers, through these representations, construct the reasonable person. In the following part of the chapter, I analyse how the linguistic technique of *hedging,* as well as the use of the *simple present tense*, *presuppositions* and *negative assertions*, augment judicial discretion, allowing judicial officers to imbue this symbolic entity with their own language ideologies on offensiveness.

8.3.1 Hedging

The legal statements about the reasonable person, outlined above, convey the impression that they will assist a judicial officer when she or he is tasked with ascertaining the perspective of 'the reasonable person'.[30] However, the prevalence of hedges in these statements indicates that they are highly tentative, and offer legal decision-makers considerable discretion in applying this perspective.

Hedging, a form of *modality*, is one way in which producers of a text indicate their affinity to a proposition—their commitment to, or distance from, a proposition.[31] Fairclough has recognised that hedging can 'tone down' a statement through the use of *modal auxiliary verbs* (for example *may*, *might*, *could*, *can't* and *ought*).[32] In the above representations of the reasonable person, hedges such as 'not necessarily' and 'not so' in '*not necessarily* thin skinned' and '*not so* thin skinned'; 'some' and 'I should have thought' in '*some* sensitivity, *I should have thought*, to social behaviour'; and 'reasonably' in '*reasonably* tolerant and understanding and *reasonably* contemporary in his reactions' create an expressive modal meaning of possibility and probability, as opposed to a categorical commitment. This more tentative wording creates indistinct boundaries around the reasonable person; there is no clearly discernible boundary around a reasonable person's sensitivity, their empathy or their capacity for tolerance. The limit is as elusive as what is 'reasonable'.

8.3.2 Modality

Fairclough reminds us that modality isn't limited to the use of modal auxiliary verbs such as 'may' or 'must'; the producer of a text's affinity or commitment to a proposition is also

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[30] Note that a police officer must similarly be guided by these legal principles when ascertaining this perspective for the purpose of deciding whether or not to issue a CIN for offensive language, see Chapter Four.

[31] Norman Fairclough, *Discourse and Social Change* (Polity Press, 1992) 116, 142.

[32] Norman Fairclough, *Language and Power* (Longman, 1989) 127. Modality can also be expressed by other formal features including adverbs and tense.

indicated by the *simple present tense form*.[33] I examined modality, including hedging, in Chapter Five, in which I explained how Johnson J in *Heanes v Herangi* expressed a number of statements in the simple present tense when proffering language ideologies on the word 'fuck', including that it '*is* used … by a section of society' and '*it's* not commonly used in many situations still'.[34] I argued that by choosing to present her Honour's personal views on the meaning of the word 'fuck' in the simple present tense, without hedges, Johnson J masked the possibility for alternative, intermediate positions. These observations can equally be applied to the descriptions of the reasonable person. The clauses beginning with '[t]he reasonable person *is* not necessarily thin skinned … ' and '[t]he reasonable man *has* some sensitivity … to social behaviour', being in the simple present tense, realise a *categorical modality*.[35] The ideological effect of this is that the reasonable person is translated into a realisable truth that exists; in other words, 'he is'.[36]

8.3.3 Presuppositions

The use of the *definite article*—'the' in '*the* reasonable person'—is also ideologically important in translating this symbol into an entity that exists, by *presupposing* the existence of a reasonable person.[37] The phrase 'the reasonable person' is an example of what Fairclough has called an 'existential assumption',[38] an assumption about what exists 'triggered by markers of definite reference such as definite articles and demonstratives (the, this, that, these, those)'.[39] Due to the use of the definite article 'the' before 'reasonable person', even if the reader disagrees with these statements, by expressing them in the negative (for example by stating 'the reasonable person does not have sensitivity to social expectations' or 'the reasonable person is not reasonably tolerant'), the reader is nevertheless co-opted into agreeing with the underlying proposition that there is such an entity as '*the* reasonable person'. Consequently, as Fairclough has stated: 'Presuppositions are effective ways to manipulate people, because they are often difficult to challenge'.[40]

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[33] Fairclough, above n 31, 159; see also Fairclough, above n 32, 129.

[34] (2007) 175 A Crim R 175, 212 (Johnson J, emphasis added); Transcript of Proceedings, *Jonathan Stephen Heanes v Western Australia Police Force* (Supreme Court of Western Australia, SJA 1111 of 2006, Johnson J, 27 March 2007) 40–1.

[35] Emphasis added.

[36] I use the mail pronoun 'he' to reflect the language used to describe 'the reasonable pronoun', in which, even in the last three decades, the male standard is commonly used as a substitution for this so-called 'universal' standard.

[37] See Fairclough, above n 32, 132.

[38] Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (Routledge, 2003) 55.

[39] Ibid 55–6.

[40] Fairclough, above n 32, 39.

Alongside the use of the definite article, there are further examples of *presuppositions*—propositions taken by the producer of a text as already established or given[41]—in judicial representations of the reasonable person and the community (I return to the latter in Part 8.4.2 below). In the statement: 'He has some sensitivity, I should have thought, to *social behaviour*, *social expectations in public places* where other people are',[42] the presuppositions are 'social behaviour … in public places' and 'social expectations in public places.' Likewise, the noun phrases 'social standards', 'social anarchist' and 'social cynic' in the depictions of the reasonable person are examples of presuppositions whose meaning is never clarified; they are presumed to require no further explanation. If one disagrees with these propositions, by stating that 'the reasonable person is *not* sensitive about social expectations or social standards in public places', they have nevertheless accepted the underlying premise: that there are social expectations about appropriate behaviour in public places.

The use of these presuppositions increases the discretion, and therefore the power, of judges discerning the supposed reactions of a reasonable person to offensive language. The judicial officers in these examples do not explain *why* or *how* a person's language is offensive: they merely conclude language is offensive *because* it has breached a tacit understanding of appropriate behaviour to which the reasonable person is sensitive. Through their repetition, judicial officers naturalise the assumption that members of the public have a shared understanding—an unwritten code—of appropriate behaviour in public places, of which we are all aware and to which we are all subject. This assumption is central to the legitimacy of offensive language crimes and to public order offences more generally. It naturalises the idea—interrogated in my previous chapter—that public places have an inherent, objectively discernible order. The linguistic techniques identified above also conceal how images of an ideal public order have been, and continue to be, fashioned by powerful elites in their interests, in a way that has marginalised (to the point of criminalisation) alternative uses of public space, while also concealing alternative versions of appropriate behaviour in public places.

8.3.4 Negative assertions

Another notable linguistic feature of judicial depictions of the reasonable person is the prevalence of *negative assertions.*[43] In the examples extracted above there are a number of

[41] Fairclough, above n 31, 120–1.

[42] Emphasis added.

[43] See Fairclough, above n 31, 120–1.

statements in which we are told what the reasonable person is *not:* she or he is '*not* thin skinned', '*not* so thick skinned' and '*not* a social anarchist, *nor* a social cynic'. But telling us what the reasonable person *is not* provides little clarity as to what the reasonable person *is*. Thus, this abundance of negative assertions adds little of substance to the definition of the reasonable person. An additional implication of negative assertions is that the qualities mentioned therein, such as being a 'social cynic' or 'social anarchist', are negative qualities. While what it means to be a social cynic or social anarchist is never explained (see above), the framing of these categories in a negative light implies that judicial officers consider it unreasonable, and also undesirable, to be progressive, radical, permissive, lax or to question existing power structures. In *Heanes v Herangi*, Johnson J similarly deemed 'broadmindedness', 'tolerance', 'imperturbability' and 'cynicism' as qualities that judicial officers should shun when faced with 'what is really obscenity':

> I agree with the remark of Sholl J in the Supreme Court of Victoria, repeated by North J in the Supreme Court of New Zealand, that 'the court is not called upon to overlook or minimise what is really obscenity, merely in order supposedly to show its own judicial broadmindedness or tolerance or imperturbability or even cynicism'.[44]

This discourse constructs the reasonable person as bereft of cynicism, tolerance, broadmindedness, self-indulgence, permissiveness and laxity (or indeed a sense of humour, given that in some offensive language cases, if the defendant's swearing had not been taken so seriously by charging officers, their words might have elicited laughter, not criminal sanction). The imagined reasonable person is not sceptical of existing hierarchies, but conforms to unwritten rules about appropriate social behaviour. Reasonable people are entirely unremarkable human beings who keep to, and do not question, 'their place' in the social order. Their capacity to reason extends so far as to allow for complicity to social structures, but not so far as to engage an understanding of the disempowering function of such structures.

8.3.5 Textual silences

A critical discourse analyst should be attentive to *absences* or 'textual silences' in representations—that which is left unspecified—and question the ideological implications of

[44] (2007) 175 A Crim R 175, 218 [199] (Johnson J); citing *Mackay v Gordon & Gotch (A/sia) Ltd* [1959] VR 420, 426 (Sholl J); and *Re Lolita* [1961] NZLR 542, 553 (North J); a view that is also espoused by Windeyer J in *Crowe v Graham* (1969) 121 CLR 375, 399.

such exclusions.[45] It is notable that the judgments of Studdert J and Magistrate O'Shane in *McCormack v Langham* failed to articulate *how* the above qualities and values of the reasonable person (or lack thereof) might affect this person's views of the language under consideration. The judicial officers failed to examine how being reasonably tolerant, reasonably contemporary and reasonably understanding would affect the reasonable person's perception of the use of the words '[w]atch these two fucking poofters here, how they fucken persecute me.' They did not consider, for example, if speaking the words 'fuck', 'fucken' or 'poofters' could give rise to some sort of 'social anarchy' (social anarchy being something that the reasonable person is said to eschew). The judicial officers did not explain whether swearing in public errs on the side of permissiveness or laxity. Their Honours did not consider how 'reasonableness', including a 'reasonable' level of tolerance, might influence one's perception of these words.

These considerations are relevant to a judicial officer's reasoning that 'the reasonable person' would find the defendant's language offensive. Their exclusion from the reasons for judgment is part of a systemic failure to meaningfully interrogate how the characteristics of the reasonable person inform her or his views. An entirely unexceptional example of such gaps in reasoning can be observed in *Couchy v Del Vecchio*, where Howell DCJ stated: 'One must apply the objective test and the reasonable person, applying the objective test and looking at all the circumstances, would understandably and reasonably come to a conclusion, beyond reasonable doubt, that the words were insulting and intended to be insulting.'[46] In this example, we are provided with an abstract entity ('the reasonable person'), and a conclusion ('the words ['You fucking cunt'] were insulting'), but no linking information to explain *how* Howell DCJ arrived at such a conclusion. The conclusion is represented as inevitable and without need for further explanation. By applying objective standards in this way, judicial officers can avoid articulating the language ideologies that inform their views, thereby preventing these ideologies from being subjected to review or critique.

8.4 Race, history and the identity of the reasonable person

In the foregoing analysis, I showed how judicial officers can increase their discretion through linguistic techniques used to represent the reasonable person. In this part of the chapter, I

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[45] Huckin has defined 'textual silence' as 'the omission of some piece of information that is pertinent to the topic at hand' Thomas Huckin, 'Textual Silence and the Discourse of Homelessness' (2002) 13 *Discourse & Society* 347, 348; see Chapter Seven for my examination of exclusions or textual silences in relation to the construction of context in offensive language cases.

[46] Transcript of Proceedings, *Couchy v Del Vecchio* (District Court of Queensland, D1098 of 2001, Howell DCJ, 16 August 2001) 72–3.

examine how alternative representations of the reasonable person can highlight racial identity and racism, or mask the 'whiteness' of the reasonable person perspective. I do this through the case study of *Conners v Craigie*,[47] a case where the identity of the reasonable person, and how she or he would react to swear words, was highly contested, and critical to the guilt or innocence of the defendant.

In that case the defendant, William David Craigie ('Craigie'), 'an Aboriginal',[48] had approached a group of three men—two police officers and a man named Martin Hatton—on 5 August 1992 in Redfern, NSW and said: 'Fuck off all you white cunts. We've had enough of you. We'd like to see you all dead.' After being warned about his language and told to move on by Constable Conners, Craigie said: 'You're all fucking white cunts.' Constable Conners warned him a second time, and then, seeming to address Hatton, Craigie said: 'You fucking white bastard, I want to see you dead. You don't belong here.' Craigie then said: 'Youse are all just fucking white cunts. Get out of the area.'[49] The police officers arrested Craigie and charged him with using offensive language in a public place, contrary to s 4(1)(b) of the *SO Act* (NSW).[50]

The Redfern Local Court proceedings took place on 24 November 1992. Craigie gave evidence about the events leading up to his arrest, including that he had been drinking with a friend at the Somerset Hotel, Redfern, and had been watching a film about Aboriginal deaths in custody and the Wilcannia riots.[51] In Magistrate Horler's judgment, delivered *ex tempore*, her Honour repeated the words of Kerr J in *Ball v McIntyre*, stating:

> Conduct which offends against the standard of good taste or good manners which is a breach of the rules of courtesy or runs contrary to commonly accepted social rules may well be ill advised, hurtful and not proper conduct but this charge of offensive conduct … is not available to ensure punishment to those who differ from the majority.[52]

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[47] (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993).

[48] This is the description given to Craigie by McInerney J in his Honour's judgment, see ibid 2.

[49] The facts are those stated in the Supreme Court of New South Wales judgment of ibid 1–2; However, differing versions of the words used by Craigie were given in evidence by the police officers in the Local Court proceedings. Craigie said in evidence that he couldn't recall the words that were used, but that he had been drinking that night, at that his drinking sometimes caused memory lapses: Transcript of Proceedings, *Conners v Craigie* (Redfern Local Court, 124/92, Magistrate Horler, 24 November 1992) 9–10.

[50] Section 4(1)(b) was the predecessor to, and contained the same substantive elements as *Summary Offences Act 1988* (NSW) s 4A ('*SO Act*'); *Conners v Craigie* (Unreported, Redfern Local Court, Magistrate Horler, 24 November 1992).

[51] Transcript of Proceedings, above n 49, 9–11.

[52] *Conners v Craigie* (Unreported, Redfern Local Court, Magistrate Horler, 24 November 1992); citing *Ball v McIntyre* (1966) 9 FLR 237 (Kerr J).

Magistrate Horler said that while 'different minds may well come to different conclusions as to the reaction of the reasonable man … for my part I believe that a so called reasonable man is reasonably tolerant and understanding and reasonably contemporary in his reactions.'[53] Magistrate Horler noted:

> it is an objective test and therefore the tribunal of fact has to, doing the best it can try to determine what a reasonable person and the community standards would be in relation to the conduct in question and doing the best I can it seems to me that in the context of a street in Redfern in 1992 having regard to the known and accepted dispossession by the original white settlers of this country of the aboriginal people … and coming from a heavily affected by alcohol aboriginal person the language addressed to non-aboriginal persons … would have to be although extremely wounding … it seems to me that in the context of what is intended by the words the reasonable person would have to conclude that hurtful though it was and probably intended to be it could not in that context be regarded as being offensive language. It seems to me that had the persons to whom it was directed been other than police officers they would have walked away.[54]

8.4.1 Modality

An analysis of the *modality* in these excerpts of Magistrate Horler's judgment—the author or speaker's degree of commitment to any given proposition (see above, and Chapters Five and Seven)—highlights that Magistrate Horler was not entirely at ease with the existence of 'the reasonable man' or her ability to objectively discern 'his'[55] perspective. Magistrate Horler 'toned down' or diminished her affinity with the proposition that there is such an entity as the reasonable man or person, using the *hedge* 'so called' before 'reasonable man' and repeating the hedge 'doing the best I can' when determining 'what a reasonable person … would be.' This succession of low modality propositions indicates that Magistrate Horler had reservations about her ability to attain an objective stance on offensive language. Adding to this impression is the fact that the modality of a number of these statements is *subjective*, in that Magistrate Horler made the subjective nature of her assessments explicit when her Honour stated '[it] seems to me that …' and 'doing the best I can it seems to me that …'.[56] Magistrate Horler also stated 'different minds may well come to different conclusions as to the reaction of the reasonable man', again indicating her Honour's reluctance to recognise a

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[53] *Conners v Craigie* (Unreported, Redfern Local Court, Magistrate Horler, 24 November 1992).

[54] Transcript of Proceedings, above n 49, 13–14.

[55] I have used the pronoun 'his' here to reflect the langugage used in the case, which interchanged the 'reasonable man' with the 'reasonabel person', and the general tendancy to identify this person as a male.

[56] See Fairclough, above n 31, 159.

neutral standpoint. Through these language choices, Magistrate Horler explicitly acknowledged her discretion when determining whether or not language is offensive, and that because of this discretion, Magistrate Horler's views of what is 'reasonable' may differ to those of another magistrate.

8.4.2 Transitivity and the categorisation of social actors: the Local Court judgment

Magistrate Horler's judgment is especially interesting—and atypical—for the knowledge that she attributed to the reasonable bystander inserted into 'the context' in which Craigie's language was used. Magistrate Horler used the phrase 'the known and accepted dispossession by the original white settlers of this country of the aboriginal people'. It is informative to analyse the *transitivity* of this clause—who or what is represented as doing what to whom, and how—a critical concern in CDA given that '[r]epresentations can reallocate roles or rearrange the social relations between the participants'.[57] By probing who are the actors, who is acted upon, and what processes are involved in that action, we recognise that the 'grammar of language is a system of "options" from which speakers and writers choose according to social circumstances', and that these options are important in (re)constructing reality.[58] Magistrate Horler *deleted the agent* from the passive clause 'the known and accepted dispossession by the original white settlers of this country of the aboriginal people', in which 'aboriginal people' are allocated a *passive* role (they are represented as being 'at the receiving end' of the dispossession).[59] We are not told who knows or accepts the dispossession of Aboriginal people; the implicit assumption is that *we all* know and accept (and therefore, that the reasonable person must know and accept) that Aboriginal people were dispossessed by white 'settlers'.

Additional insight can be gained by analysing how social actors have been characterised in this passage. When analysing the categorisation of social actors, van Leeuwen has underscored the importance of paying attention to how agents and patients are represented in respect of a given action, for example, *impersonally* or *personally*, *individually* or *collectively*, or by focusing on an aspect of their identity: their occupation, their religion, their gender, and so on.[60] In the clause 'the known and accepted dispossession by the original white settlers of this country of the aboriginal people', Magistrate Horler contrasted 'the original

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[57] Theo van Leeuwen, *Discourse and Practice: New Tools for Critical Discourse Analysis* (Oxford University Press, 2008) 32; transitivity has previously been examined in Chapter Five.

[58] See Andrea Mayr and Paul Simpson, *Language and Power: A Resource Book for Students* (Routledge, 2010) 65.

[59] See Fairclough, above n 31, 158; van Leeuwen, above n 57, 33.

[60] See van Leeuwen, above n 57, 32.

white settlers' with 'the aboriginal people'. Her Honour chose to represent these groups collectively (rather than individually), and by reference to their race. In ascribing the noun 'settlers' (as opposed to 'people') to the adjective 'white', Magistrate Horler identified the original white population by an *activity*—they 'settled' Australia.[61] This can be contrasted to Magistrate Horler's ascription of the noun 'people' to the adjective 'aboriginal'. Magistrate Horler also contrasted 'a heavily affected by alcohol aboriginal person' to 'non-aboriginal persons' when stating: 'coming from a heavily affected by alcohol aboriginal person the language addressed to non-aboriginal persons'.

From analysing transitivity structures and the categorisation of social actors in Magistrate Horler's judgment, it becomes clear that Magistrate Horler viewed race, the British colonisation of Australia, and racism as meaningful features of Craigie's, and the other participants', identities and the society that they occupied; these were key factors which influenced the reasonable person's assessment that Craigie's words, in the context of a street in Redfern in 1992, were not offensive.

8.4.3 Categorisation of social actors: the Supreme Court judgment

Magistate Horler's discussion and application of the reasonable person perspective can be contrasted to that of McInerney J in the Supreme Court of NSW. Justice McInerney heard the (initial)[62] appeal against the dismissal by Magistrate Horler of the charge of using offensive language in a public place. In giving reasons for judgment, Justice McInerney stated:

> Her Worship … inferred the language in question was not directed to the Constables or Mr Hatton personally but to a class of persons, namely, 'non-Aboriginal persons'. I say inferred, because the respondent alleged he was unable to remember what he had said on the night. Even assuming, which is doubtful, that her Worship was entitled on the evidence to so find, in my view it was an irrelevant consideration. What has to be considered is: what would the attitude of a reasonably tolerant bystander be in the circumstances? When considered in that context, in my view there is no answer other than that such an objective observer would conclude the language was offensive. To introduce the fact that the language was not offensive because it was directed at the Constables and Mr Hatton as members of the white race and not to them personally, in my view, is irrelevant in such an objective assessment …

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[61] Noting that this activity of 'settling' is ideologically loaded and contested. Magistrate Horler might have instead chosen to represent these social actors as 'white invaders of Aboriginal land'.

[62] When the matter was remitted to the Magistrate, it was again appealed to Dunford J in the Supreme Court of NSW. See *Conners v Craigie* (1994) 76 A Crim R 502.

> In my view, therefore, the learned Magistrate was prohibited from excusing the behaviour of the respondent on the basis that the offensive nature of the language was excused by virtue of it being directed to the white race in general.[63]

By contrasting the two judgments, and again paying attention to McInerney J's *categorisation of social actors,* we see that McInerney J's reasonable person is distinct from that of Magistrate Horler. Justice McInerney described Craigie once by name, on the second page of his Honour's judgment. Otherwise, McInerney J described Craigie through *generic* references—as 'the respondent' (a specimen of the generic class 'respondents'), as 'he', 'him', and also as 'an Aboriginal' (a specimen of the generic class 'Aboriginal people')[64]—thus attributing to Craigie an identity in which race is his defining feature. However, McInerney J rejected Magistrate Horler's characterisation of the police officers and third witness as belonging to a class of persons defined by their race; his Honour did not describe the witnesses and the complainant as 'non-Aboriginal persons' or 'white Australians'. Justice McInerney instead chose to refer to the police officers as belonging to a generic class, identified through their *occupation* ('the Constables'), while the third witness was *individualised* and *nominated*, being referred to by way of his title and surname—'Mr Hatton'.[65]

An important aspect of McInerney J's representation of the reasonable person is *exclusion*: what goes unsaid about the reasonable person and the other participants, and the implications of these textual silences (see above at 8.2.5). Justice McInerney was alive to the defendant's race, but not alive to the race(s) of the other participants; or, alternatively, he deemed their race(s) inconsequential, and saw these participants as more aptly identified in terms of their profession or name. The final social actor referred to in the judgment was the hypothetical 'reasonable person', represented by McInerney J as 'a reasonably tolerant bystander'. This bystander was attributed no race, and was not deemed to know or accept the historical dispossession of Aboriginal Australians at the hands of white 'settlers'. Justice McInerney's reasonable person was not cognisant of the history of, and ongoing, oppression and discrimination inflicted on Aboriginal Australians by non-Aboriginal Australians. The street

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[63] *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993) 7–8. It should also be noted that McInerney J further stated: 'The fact that a reasonable person would not regard the language as warranting arrest would not necessarily mean that that person did not regard the language as offensive. I can imagine a reasonable person in the circumstances, although finding the language offensive, walking away from the offender'. Such a statement is inconsistent with the legal 'gloss' added to the test for offensive language, that being that being that the charge or arrest must warrant the interference of the criminal law, as discussed in Chapter Four.

[64] *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993); see van Leeuwen, above n 57, 35.

[65] See van Leeuwen, above n 57, 37.

in Redfern was not mentioned as relevant to the reasonable person's assessment, nor was the fact that Craigie had recently watched a film about Aboriginal deaths in custody. Instead, McInerney J excluded racism from 'the context' into which his Honour inserted the reasonable person,[66] accepting the appellant's submission that 'what has to be determined is the attitude of the reasonably tolerant bystander without the introduction of a racial context'.[67] According to McInerney J, it was *unreasonable* to be aware of racial tensions between Aboriginal and non-Aboriginal Australians.

Justice McInerney took this view despite the clearly racialised subject matter of Craigie's language: 'Fuck off all you *white* cunts', 'You're all fucking *white* cunts' and 'You fucking *white* bastard … You don't fucking belong here'.[68] In his repeated use of the adjective 'white', Craigie identified the police officers and Mr Hatton not through their profession, nor as individuals, but by generic, pejorative references—as 'cunts' and as a 'bastard'—and *pre-modified* these pejoratives by including adjectives that refer explicitly to skin colour.[69] It is perplexing to think how a judge might consider how 'a reasonably tolerant bystander', unaware of racial politics, identity politics or Australia's colonial history, could comprehend the meaning of the words, 'Fuck off all you white cunts', or the sentiments expressed by the words, 'You don't fucking belong here' and 'We've had enough of you. We'd like to see you all dead', uttered in Redfern in 1992—the same year in which then-Australian Prime Minister, Paul Keating, delivered a speech in Redfern Park, in which he acknowledged:

> Just a mile or two from [Redfern is] the place where the first European settlers [sic] landed. In too many ways it tells us that their failure to bring much more than devastation and demoralisation to Aboriginal Australia continues to be our failure …
>
> [I]t was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases, the alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds.[70]

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[66] See my discussion of constructions of context in offensive language cases in Chapter Seven.

[67] *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993) 5–6.

[68] Emphasis added.

[69] See van Leeuwen, above n 57, 33, 79 on pre- and post-modification.

[70] Paul Keating, 'Redfern Speech (Year for the World's Indigenous People)' (Speech delivered at the International Year of the World's Indigenous People, Redfern Park, 10 December 1992) 10 <https://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf>.

1992 was also the year in which ABC aired Jenny Brockie's documentary *Cop it Sweet*, which filmed the racist views and practices of police at Redfern police station.[71] 1992 was one year after the report and recommendations regarding Aboriginal deaths in custody was handed down by the RCIADIC.[72] It is hard to conceive, except through sheer denial or deliberate inoculation, how a judge in 1992 could conceive of 'the context' of Redfern without racial identity, racism and racial tensions between police and Aboriginal Australians being at the forefront of their mind.

In erasing the dispossession and ongoing racial discrimination by non-Aboriginal people towards Aboriginal people from 'the context', and by discounting the race of the witnesses but being alive to Craigie's race as 'an Aboriginal' (thereby constructing him as a racialised 'Other'), McInerney J assumed that a white or non-Aboriginal standpoint (his Honour's standpoint) was the neutral standpoint.[73] The reasonable person, to McInerney J, was not a reasonable Aboriginal Australian but a reasonable white Australian, ignorant of, or indifferent towards, history and racism. In enabling the reasonable white Australian to be ignorant of racism against Aboriginal people, McInerney J also prohibited that person from empathising with Craigie's contempt for white Australians. Craigie's repeated use of the adjective 'white' and his statement '[y]ou don't belong here' loses its intended meaning. The reasonable person's, the judge's, and the audience's attention is averted from the significance of these additional words, and directed towards Craigie's curse words ('cunt' and 'fucking'), deemed 'out of place' in a white-washed context.

In this part of the chapter, I have applied CDA to *Conners v Craigie*, to illustrate how the perspective of the reasonable person can be employed by judicial officers to hide 'beneath the surface of race-neutrality'.[74] I have shown how judicial officers can be partially colourblind, and can exploit this symbol—the reasonable person—to deny the effect of their 'whiteness'

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[71] Including police officers openly referring to Aboriginal people as 'coons'—see Jenny Brockie, *Cop It Sweet* (ABC Television, 1992); Chris Cunneen, 'Problem: Police' (1992) 139 *Australian Left Review* 24, 24; Hal Wootten, 'Aborigines and Police' (1993) 16 *University of New South Wales Law Journal* 265, 267. Note also that Redfern was the headquarters of the Aboriginal Legal Service, established in 1970 in direct response to police treatment of Aboriginal people.

[72] See Elliot Johnson, Commissioner, 'Royal Commission into Aboriginal Deaths in Custody National Report' (Report, Australian Government Publishing Service, 1991).

[73] See Richard Dyer, *White: Essays on Race and Culture* (Routledge, 2013) 9: 'White people have power and believe that they think, feel and act like and for all people; white people, unable to see their particularity, cannot take account of other people's; white people create the dominant images of the world and don't quite see that they thus construct the world in their own image; white people set standards of humanity by which they are bound to succeed and others bound to fail'.

[74] See Luke McNamara, '"Equality before the Law" in Polyethnic Societies: The Construction of Normative Criminal Law Standards' (2004) 11(2) *Murdoch University Electronic Journal of Law* 1, 21; see also Barbara Flagg, '"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent' (1993) 91(5) *Michigan Law Review* 953.

on their interpretation of language. There are many parallels between how McInerney J employed the reasonable person standard in *Conners v Craigie* and how 'contemporary community standards' were constructed and applied by the Queensland Court of Appeal judges in *Del Vecchio v Couchy*, so as to perpetuate a judicial blindness to the operation of white privilege, the significance of racial identity and racial tensions between police and Indigenous Australians, power inequalities and issues of historical and ongoing disadvantage.[75] Both cases involved an Indigenous defendant swearing at (presumably) non-Indigenous police officers,[76] to contest the exercise of power by those non-Indigenous police officers over the Indigenous person (and in *Conners v Craigie*, the legitimacy of the white colonisers' occupation of 'place'). In both cases, after voicing objection to 'police authority',[77] Indigenous Australians were subsequently charged with using insulting or offensive language. And in both cases, in addition to contesting aspects of 'the context' in which the language was used, there was an ideological struggle over the identity of the reasonable person or the community, including their history, culture and race; their sensitivity to difference; and their awareness of ongoing power struggles, racism, sexism, and political or class tensions.[78]

Like those judicial constructions of context examined in Chapter Six, through selective deletions, McInereny J in *Conners v Craigie* and the judicial officers in *Del Vecchio v Couchy*

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[75] See especially Transcript of Proceedings, *Del Vecchio v Couchy* (Queensland Court of Appeal, 245/2001, de Jersey CJ, McPherson JA and Douglas J, 4 February 2002); *Del Vecchio v Couchy* [2002] QCA 9 and for my exploration of these aspects in Del Vecchio v Couchy in relation to judicial constructions of 'context', see Chapter Seven.

[76] As noted in Chapter Seven, the racial identities of the police witness and complainant were not mentioned in the proceedings, presumably because, as Moreton-Robinson has recognised, '[a]s a categorical object, race is deemed to belong to the other. This has resulted in many theories about race being blind to whiteness' Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Moreton-Robinson, Aileen (ed), *Whitening race: Essays in social and cultural criticism* (Aboriginal Studies Press, 2004) 75, 76.

[77] See Chapter Nine for my critical analysis of how 'police authority' is constructed in criminal justice discourse.

[78] Cf Regina Graycar and Jenny Morgan's discussion in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2002) 61–5; of *RDS v The Queen* [1997] 3 SCR 484, particularly the part of the judgment of Justices L'Heureux-Dube and McLachlin in that case regarding the reasonable person, who is central to the reasonable apprehension of bias doctrine. Justices L'Heureux-Dube and McLachlin stated that that reasonable person in the context of that case was 'an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the Canadian Charter of Rights and Freedoms … includ[ing] the principles of equality set out in s. 15 of the Charter. The Supreme Court justices further stated that the 'reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the Charter"s equality provisions. These are matters of which judicial notice may be taken.' Justices L'Heureux-Dube and McLachlin also pointed out that the reasonable person was not only aware of disadvantage, but also, as a member of the local Nova Scotia community, aware of the 'pernicious reality' of racism, including the extensive history of 'widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues … A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally'.

were complicit in a denial of how whiteness and privilege 'coloured' their judgments, and prevented the defendant's swear words from being considered in light of broader structural issues, including the criminal justice system's ongoing oppression and criminalisation of Indigenous Australians. By maintaining a pretence of equal application of the law, the judges rendered as insignificant the fact that despite their broad framing, offensive language crimes have consistently and overwhelmingly punished the use of 'four-letter' words by members of marginalised groups who, through their language, have contested unequal power structures. In my concluding chapter, I will argue that if those policing and interpreting these crimes took structural issues of disadvantage into account; recognised *different* linguistic habits or challenges to unequal power structures as not necessarily criminal; and were not inclined to reinforce bland stereotypes about 'public order', but instead embraced a more dynamic idea of 'order', Craigie's or Couchy's words might have been faced with understanding, rather than criminal punishment. In the following part, I return again to *Del Vecchio v Couchy*, to critique constructions of 'the community' in offensive language cases.

8.5 Constructing 'the community'

Justice McInerney's blinkered conception of the reasonable person is echoed in judicial depictions of 'the community' in *Del Vecchio v Couchy*, the facts and procedural history of which I 'recontextualised' in Part 7.9 of the previous chapter. Couchy's charge for using insulting language in a public place was heard by Magistrate Herlihy in Brisbane Magistrates' Court on 7 December 2000. In his reasons for judgment, Magistrate Herlihy concluded:

> Any word other than 'cunt' may have put a doubt in my mind. But the word 'cunt' itself, I would hold to be insulting to a female, be it a police officer or otherwise. That word coupled with the word 'fucking' is, I would have thought, in today's standards applying in Brisbane 2000 would be [sic] insulting when used in a loud voice at somebody who is asked one's name and address.[79]

In *Del Vecchio v Couchy*, the Magistrate had regard to the fact that the relevant test was an 'objective' one,[80] and applied 'today's standards applying in Brisbane 2000'. This aligns with the notion that in insulting or offensive language cases, a court must have regard to contemporary community standards.[81] And as I established in Chapters Four and Five, a magistrate is not permitted to hear expert linguistic evidence on contemporary community

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[79] *Del Vecchio v Couchy* (Unreported, Brisbane Magistrates' Court, Magistrate Herlihy, 7 December 2000), delivered ex tempore.

[80] Ibid.

[81] See *Del Vecchio v Couchy* [2002] QCA 9 and authorities referred to in Chapter Four.

standards, nor are those standards to be assessed with reference to the views of a particular witness.[82] Instead, a magistrate must use their 'common sense' to determine what community standards are, and then assess whether the defendant's language would offend them.[83] Thus the assessment of community standards is characterised as a matter for 'judicial notice'[84], on which 'evidence is neither needed nor permitted'.[85]

These statements of law rest on a series of assumptions: that there is an entity called a 'community'; that this community has shared values on how language should be used; and that magistrates and judges are able to identify these shared standards by virtue of their office. In this part of the chapter, I draw on the work of Fairclough and Theo van Leeuwen, linguistic literature generally, and Cohen's idea of the community as a symbol, to critique these assumptions and the ambivalence surrounding the community standards test. I argue that CDA can help expose some of the linguistic techniques that make a judge's determination of 'good public order' appear straightforward or logical.[86] And I continue to examine a critical theme of this chapter—the rhetorical use of 'objective' standpoints to create boundaries that include some groups of people while excluding 'Others'.

8.5.1 Inconsistent descriptions of 'the community'

In the various court proceedings in *Del Vecchio v Couchy*, the judges use a number of words or phrases in lieu of the words 'community' and 'community standards'. In the judgment delivered in Brisbane Magistrates' Court, Magistrate Herlihy referred to 'today's standards applying in Brisbane 2000'.[87] Similarly, in delivering judgment *ex tempore*, Howell DCJ stated: 'One must clearly apply *contemporary standards*. What would be insulting *in 1950* may not be insulting *in 2001*.'[88]

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[82] See, eg, *E (a child) v The Queen* (1994) 76 A Crim R 343; *Gul v Creed* [2010] VSC 185 ('*Gul v Creed*').

[83] See, eg, *Couchy v Birchley* [2005] QDC 334, [38]-[42] (McGill CJ).

[84] See Transcript of Proceedings, *Del Vecchio v Couchy* (Queensland Court of Appeal, 245/2001, de Jersey CJ, McPherson JA and Douglas J, 4 February 2002) 3 (McPherson JA).

[85] *Dalton v Bartlett* (1972) 3 SASR 549, 561 (Walters J); citing *Crowe v Graham* (1969) 121 CLR 375, 411 (Windeyer J).

[86] There is little consistency in the case law on whether a magistrate should be assessing contemporary community standards of language use, contemporary community standards of decency, contemporary community standards of good public order, or contemporary warrants community standards as to whether the language criminal punishment. Cf page 4 of the Court of Appeal transcript (4 December 2002), citing *Dillon v Byrne* (1972) 66 QJPR 112, 133, where the court states that: 'Disorderly conduct is conduct which is disorderly; it is conduct which, while sufficiently ill-mannered, or in bad taste, to meet with the disapproval of well-conducted and reasonable men and women, is also something more -- it must in my opinion, tend to annoy or insult such persons as are faced with it -- and sufficiently deeply or seriously to warrant the interference of the criminal law.'

[87] *Del Vecchio v Couchy* (Unreported, Brisbane Magistrates' Court, Magistrate Herlihy, 7 December 2000).

[88] *Couchy v Del Vecchio* (Unreported, District Court of Queensland, Howell DCJ, 16 August 2001) (emphasis added).

In the Queensland Court of Appeal proceedings, de Jersey CJ stated:

> But I thought the test really was focused more on simply what was objectively insulting in the context of *reasonable community expectations—contemporary community expectations* … whether this could objectively be so viewed as *in this day and age* insulting language.[89]

The Chief Justice also referred to whether 'right-thinking members of the community' would accept 'this sort of conduct'.[90] Justice McPherson stated:

> If it's a matter of *contemporary community standards,* though, there's only one way I can see it could be ascertained and that's by judicial notice. I suppose you could try to call evidence on it but how could you get anyone who is expert in that matter, either generally or in particular? Would it be *contemporary standards in that part of Brisbane* or *contemporary standards throughout Australia*? I can't see that anybody, even an expert or someone claiming to be an expert, could say what that was if you looked at, say, Tasmania or Hobart or Perth or some place well out in the country. So it would have to be, I think, judicial notice.[91]

Justice McPherson also pondered whether a hypothetical poll could be conducted to ascertain the attitudes of 'the whole of Australia'.[92]

In the hearing transcripts and judgments of *Del Vecchio v Couchy*, there is no clear, consistent notion of which 'community' the judges should be referring to. While Magistrate Herlihy placed temporal and geographical boundaries around the community—'Brisbane 2000'—Howell DCJ did not clarify whether the community was limited to Brisbane or extended beyond the city. Justice McPherson aspired to delineate the community and questioned how its standards could be accurately defined, asking: 'Would it be contemporary standards in that part of Brisbane or contemporary standards throughout Australia?'[93] However, his Honour's questions were never answered. And despite not arriving at a consensus as to what the 'community' or its standards entailed, the Court of Appeal ultimately held that Couchy's

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[89] Transcript of Proceedings, above n 75, 4 (emphasis added).

[90] Ibid 9, where the Chief Justice stated: 'Mr Boe comes close to saying that the conviction wasn't a reasonable result because the police officer should almost have expected this sort of conduct and simply shrugged it off, and that right-thinking members of the community, knowing the circumstances, would accept that'.

[91] Ibid 10–11 (emphasis added).

[92] Ibid 12, where McPherson JA stated: 'Well, this is state wide, this offence, and if there are similar statutes in other States, it covers the whole of Australia. And I'm not at all sure that anybody wants to run a—what would it be? At least a 30 million dollar poll to find out whether the words 'fucking cunt' are regarded as insulting or not. It seems to be an extraordinary sort of measure to make and one that wouldn't guarantee accurate results anyway'.

[93] Ibid 10–11.

language breached those standards, stating '[t]he test to be applied in these cases is clearly established and it was apparently applied',[94] and finding that

> both the Magistrate and the District Court Judge applied the correct test, that is, what is objectively considered to be insulting in accordance with contemporary community expectations … I believe that even allowing for modern licence, *the community* would generally still regard the use of the words 'you fucking cunt' to a female police officer going about her duty, albeit by a drunken person in the early morning, as insulting.[95]

From this analysis, we can see a preparedness of the judicial officers in *Del Vecchio v Couchy* to conclude that the defendant's swear words breached community standards, without their having a shared, or even clear, picture of what this community resembles.

8.5.2 Presuppositions

As with descriptions of the reasonable person (see above), the judicial officers used an abundance of *presuppositions* in these passages: propositions taken by the producer as already established.[96] The repeated use of the phrase 'the community', as with the reasonable person, suggests to the reader that this entity *exists*. If the reader disagrees with the statements, saying for example 'the community would not find the words "fucking cunt" insulting', she or he has accepted the underlying proposition—that there is a community. Through repetition, the community becomes a non-debatable truth, despite judicial officers never agreeing upon or delineating its boundaries, be they physical, racial, religious, economic, linguistic or something else entirely.[97]

Alongside 'the community' and 'the reasonable person', further examples of presuppositions in offensive language cases are 'right-thinking members of the public',[98] 'well-conducted and reasonable men and women'[99], 'ordinary citizens'[100], 'ordinary decent-minded people',[101] 'the

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[94] *Del Vecchio v Couchy* [2002] QCA 9, 4.

[95] Ibid (emphasis added).

[96] See Fairclough, above n 31, 120–1; see Part 8.2.3 above on presuppositions used in describing 'the reasonable person'.

[97] Fairclough, above n 38, 55–61.

[98] *Heanes v Herangi* (2007) 175 A Crim R 175, [149]; citing *Melser v Police* [1967] NZLR 437 ('*Melser v Police*') per North P; and *Police v Christie* [1962] NZLR 1109, per Henry J.

[99] *Heanes v Herangi* (2007) 175 A Crim R 175; citing *Melser v Police* [1967] NZLR 437 per Turner J.

[100] *Heanes v Herangi* (2007) 175 A Crim R 175; citing Burt CJ in *Keft v Fraser* (Unreported, Supreme Court of WA, 21 April 1986) 10–11.

[101] *Bradbury v Staines* [1970] Qd R 76, 89 (Matthews J).

standards of the community',[102] 'reasonable community expectations',[103] 'contemporary community expectations',[104] 'current standards of decency',[105] 'the objective nature of the language'[106], 'then current mores'[107], 'contemporary standards … currently adopted by the Australian community',[108] 'standards accepted by ordinary decent-minded people',[109] 'the sensibilities of ordinary citizens'[110] and 'accepted standards of public decency'.[111] I critique the lack of consistency of these terms, and how they are used to both include and exclude, in a latter part of the chapter. For now, it is important to acknowledge that each of these noun phrases are presumed in offensive language cases to be already established, uncontested, and therefore requiring no further explanation, as when de Jersey CJ stated in the Court of Appeal proceedings in *Del Vecchio v Couchy*: 'But I thought the test really was focused more on simply what was objectively insulting in the context of reasonable community expectations—contemporary community expectations.'[112] Through their repetition, we are coaxed into accepting that 'the community', 'ordinary decent-minded people', 'contemporary community standards' and so on are pre-existing truths and furthermore, that a magistrate or judge is able to objectively distil what these standards are by applying their judicial 'common sense'.

8.6 Fixing community standards

An important feature of the representation of community standards in offensive language cases is that they are signified as able to be fixed and observed in time, whilst also being on a trajectory of change throughout time. This is achieved by the attribution of *temporal pre- or*

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[102] *Saunders v Herold* (1991) 105 FLR 1, 6 ('*Saunders v Herold*') (Higgins J); quoting *Khan v Bazeley* (1986) 40 SASR 481, 486 (O'Loughlin J).

[103] Transcript of Proceedings, above n 75, 4 (emphasis added).

[104] Ibid; see also *Couchy v Birchley* [2005] QDC 334, 10 [36] (McGill DCJ); *Police v Bubbles* [2006] QMC 6, 8 [40] ('*Police v Bubbles*') (Magistrate Payne).

[105] *Heanes v Herangi* (2007) 175 A Crim R 175, 213 [171], where Johnson J stated: 'the question as to whether the words were obscene—in the sense that they offended current standards of decency—was to be determined in light of the standards of the community, not of a particular witness ... the court can make that decision based on current standards of decency'.

[106] In delivering judgment in ibid 205, Johnson J stated: 'It is the objective nature of the language, according to then current mores, which is the relevant consideration'.

[107] Ibid.

[108] Ibid 218 [198] (Johnson J); citing *Crowe v Graham* (1969) 121 CLR 375, 399 (Windeyer J).

[109] *Heanes v Herangi* (2007) 175 A Crim R 175, 218 [198] (Johnson J); citing *Crowe v Graham* (1969) 121 CLR 375, 399 (Windeyer J).

[110] *Heanes v Herangi* (2007) 175 A Crim R 175, 210–11 [159] (Johnson J); quoting Burt CJ in *Keft v Fraser* (Unreported, Supreme Court of WA, 21 April 1986) 10–11.

[111] *Heanes v Herangi* (2007) 175 A Crim R 175, 210–11 [159] (Johnson J); quoting Burt CJ in *Keft v Fraser* (Unreported, Supreme Court of WA, 21 April 1986) 10–11.

[112] Transcript of Proceedings, above n 75, 4.

post-modifiers in order to qualify 'the community' and its 'standards'.[113] Community standards are depicted as being 'current', 'contemporary', 'currently adopted', 'then', 'in Brisbane 2000', 'in 1950' and 'in 2001'. The ideological significance of such qualifiers is more salient if one asks what possible qualifiers are *absent* from these representations. There is no mention of community standards changing culturally, individually, according to ethnicity, gender, race, linguistic background, occupation, education, age-group and so on. These possible qualifiers are rendered unnecessary or insignificant. Their *exclusion* reinforces an impression that the community and its standards are homogeneous in nature and, as with the reasonable person, hides the law's tendency to postulate a white, male, physically and mentally-able viewpoint as the objective viewpoint. (I progress this argument in the final part of the chapter, where I focus on groups which are explicitly excluded from the community in criminal justice discourse on offensive language crimes).

The community is thus represented as a cohesive unit whose expectations can be identified by, and shift with, the passage of time, where time is measured in years as opposed to, say, minutes, hours or decades. Judges and politicians entrench this idea that standards of language can be fixed in place by using the *vocabulary* of 'preserving' or 'maintaining' standards of language or behaviour, as if maintaining this imagined status quo were possible and also desirable. In *Heanes v Herangi*, Johnson J quoted the following passage from *Police v Christie*, in which Henry J represented unspecified 'public values' as something that should be 'preserved': 'A conviction ought not to be entered unless the conduct or behaviour is such that it constitutes an attack upon public values that ought to be *preserved*.'[114] In *Coleman v Power*, Gummow and Hayne JJ in the High Court of Australia similarly wrote that laws against profane, indecent or obscene language ensured that a 'minimum standard of … decorum or seemly discourse in public places is *maintained*'.[115]

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[113] See van Leeuwen, above n 57, 33.

[114] [1962] NZLR 1109, 1113 (Henry J, emphasis added), referring to the nature of disorderly conduct in those terms; cited in *Heanes v Herangi* (2007) 175 A Crim R 175, 208 [148] (Johnson J); the passage was also quoted by White J in *E (a child) v The Queen* (1994) 76 A Crim R 343, 350.

[115] Justices Gummow and Hayne drew a distinction here between obscene, indecent and profane language on the one hand, and insulting, abusive or threatening language on the other. Their Honours stated: 'The proscription of profane, indecent or obscene language marks a limit on the kind of language which may be employed in or within the hearing of public places. Enforcement of that limit ensures that a minimum standard of what, in other times, might have been called decorum or seemly discourse in public places is maintained. By contrast, the requirement that 'threatening, abusive, or insulting words' be used to a person demonstrates that s 7(1)(d) is not directed simply to regulating the way in which people speak in public. No crime would be committed by uttering threats to, or abuse or insults about, some person who is not there to hear what is said (unless, of course, the speaker's behaviour could be held to fall within s 7[1][c]). That being so, the proscription of the use of insulting words to another, and for that matter the proscription of engaging in insulting behaviour, must find support in more than the creation and enforcement of particular standards of discourse and behaviour in public' '*Coleman v Power* (2004) 220 CLR 1, 56 [190]-[191] ('*Coleman v Power*') (Gummow and Hayne JJ, emphasis added).

This vocabulary is echoed in parliamentary debates about offensive or insulting language provisions. When discussing the amendment of the Queensland public nuisance offence in 2003, Independent member Liz Cunningham stated: 'I think there is a standard we have to *maintain* within the community. We have to *maintain* a standard of appropriate language'[116] Conversely, Cunningham casted in a negative light the notion that a Queensland parliament could, by way of legal amendments, shift ideas about language: 'if we are not very careful we will be telegraphing, by changes just in terminology, that language that has been historically inappropriate and unacceptable as far as the general public is concerned is now acceptable'[117] In reply to the Second Reading speech of the Summary Offences Bill 2004 (Qld), Liberal National Party member, John-Paul Langbroek, stated: 'the moral capital of society needs to be *protected*, and whatever we can do in this place to ensure that civility is *maintained* should be done'.[118]

The judges and politicians in each of the above examples construct a reality in which there are minimum standards of language use or public decorum that should be 'preserved' 'maintained' or 'protected' by the criminal law. This conservative discourse represents permanency or immobility as desirable, and changes to acceptable language or social standards as undesirable. And criminal punishment is presumed to be the appropriate way to combat shifts in 'community standards'.

These representations are undermined by linguistic, historical and anthropological research, which has demonstrated that there are no fixed, universal standards of appropriate language use and that linguistic change is necessary as languages respond to the societies in which they are employed (for example, the word 'tweet' took on a new denotation with the advent of the social media site Twitter. Other words that have only recently entered the lexicon range from '3D printing' to 'e-learning', 'crowdfunding', 'bailout' and 'the Arab Spring'). Language cannot be fossilised or 'maintained'. As philologist Sidney Baker wrote in *The Australian Language* in 1945: 'Language is never static; it is being continually moulded and modified'.[119] Burridge has similarly argued that there is no single standard of appropriate language use at any given point in time. Burridge, and linguist Deborah Cameron, have both

[116] Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2003 5059–60 (Liz Cunningham, emphasis added), in relation to the Police Powers and Responsibilities and Other Legislation Amendment Bill 2003 (Qld).

[117] Ibid 5059 (Liz Cunningham), in relation to the Police Powers and Responsibilities and Other Legislation Amendment Bill 2003 (Qld).

[118] Queensland, *Parliamentary Debates*, Legislative Assembly, 23 February 2005 143 (John-Paul Langbroek, emphasis added).

[119] Sidney Baker, *The Australian Language* (Routledge, 1987) 12. To a similar end, Cameron has argued that the 'state of the language' is a 'discursive construct': Deborah Cameron, *Verbal Hygiene* (Routledge, 1995) 213.

dispelled notions of a 'proper', an 'appropriate' or a 'natural'[120] way to speak, arguing that such value-judgments about language are relative, historically-contingent, context-specific and fashioned by humans.[121] Moreover, the notion of the existence, or even the possibility, of a single Standard English is 'something of a linguistic fantasy—an ossified paragon of linguistic virtue that would be more accurately called the "Superstandard" to acknowledge its otherworldliness'. [122] In short, the English language has never been a static single homogeneous language; it has always consisted of a conglomeration of dialects, where words and grammatical forms change with human use.

These views are not without their opponents. Indeed, there is still a divide within the broad field of linguistics between those who view language as something that should grow organically, and those who, alongside the more conservative opinions espoused by the judicial officers and politicians above, would prefer language to be sectioned off, contained and nurtured.[123] But this latter group is fighting a losing battle. The English language is, and always has been, subject to variance; it is not static and cannot be 'preserved', despite the efforts of numerous people and institutions. This variance has been documented in countless studies by linguists and anthropologists; and for the purposes of the present chapter, it is important to underscore that perceptions of taboo shift according to gender, age, cultural and individual biases.[124] A study undertaken in 2000, for example, documented how perceptions of taboo language in the United Kingdom varied according to individuals' age, gender and region.[125] For example, young people were less concerned about many 'four-letter words' but more likely to consider terms of racial or ethnic abuse 'very severe'.[126] As I noted in the previous chapter, many Indigenous Australians have been identified as having distinct

[120] Cameron, above n 119, 215. Cameron has argued that '[s]tories which represent language as solely or primarily a "natural" phenomenon are problematic, whether they are written in the scientific jargon of experts or the venacular of popular cliché. What they distort and mystify is our relationship to language and the extent of our responsibility for shaping it. Natural forces operate irrespective of what humans say, do or believe about them'.

[121] See ibid 212–16; see also Kate Burridge, 'Linguistic Cleanliness Is next to Godliness: Taboo and Purism' (2010) 26 *English Today* 3; Kate Burridge, 'Taboo, Verbal Hygiene - and Gardens' (2010) 47 *Idiom* 17.

[122] Burridge, 'Linguistic Cleanliness Is next to Godliness: Taboo and Purism', above n 121, 8; referring to Wolfram and Fasold's discussion of 'Superstandard forms' of language, see Walt Wolfram and Ralph Fasold, *Social Dialects and American English* (Prentice-Hall, 1974).

[123] See Burridge, 'Linguistic Cleanliness Is next to Godliness: Taboo and Purism', above n 121, 8–9.

[124] See Keith Allan and Kate Burridge, *Forbidden Words: Taboo and the Censoring of Language* (Cambridge University Press, 2006).

[125] Andrea Millwood-Hargrave, 'Delete Expletives?' (Broadcasting Standards Commission, 2000).

[126] Ibid 10–11. The study also found that the word 'bastard' was more likely to be thought 'very severe' in the Midlands and north (40% and 39%, respectively) than in the south (26%). Furthermore, the word 'wanker' was thought to be 'very severe' by more people in the Midlands (45%) than in the south (37%) or the north (32%). The study also found that the women in the sample found the swear words 'cunt', 'motherfucker' and 'fuck' far more offensive than did men, and older respondents found them more offensive than younger ones.

attitudes and practices from non-Indigenous Australians regarding the relationship between taboo language, (dis)order and place. Anthropologist Marcia Langton wrote that for many Aboriginal people, swearing is not a form of 'deviance' or 'social anarchy', but instead constitutes, alongside fighting, 'appropriate rule-governed behaviour' and functions as a resolution-processing and social-ordering device derived from traditional Aboriginal cultural patterns.[127] Similarly, former Commissioner into Aboriginal Deaths in Custody Hal Wootten emphasised the need for the criminal justice system to recognise cultural differences in language and behaviour, noting for example that many Indigenous Australians 'think it is rude to look other people in the eye, while many whites regard avoidance of eye contact as shiftiness, and suspicious'.[128]

Even narrowly defined communities—such as 'the Indigenous Australian community', 'the legal community' or 'the Brisbane community'—do not share one, fixed perspective on what is offensive, or alternatively, a shared perspective that changes uniformly over time. Thus we cannot 'simply reimagin[e] the community as a set of autonomously-conceived subcommunities' where 'ethnic groups, classes, age groups and so on seem most self-contained, their communication most homogeneous.'[129] The unavoidable fluidity in how humans use language destabilises ideas that underpin the legitimacy of offensive language crimes: that there are 'community standards' on appropriate language in public space; that these standards can be fixed in time; that maintaining or preserving these standards is possible and desirable; and finally, that such standards can be discerned and applied to a set of case facts by a judicial (or police)[130] officer.

8.7 Inclusion and exclusion

In the above analysis, I have argued that there is little consistency in the use, or clarity in the definitions, of the terms 'community' and 'community standards' in criminal justice discourse on offensive language. I presented literature that undermines the proposition that judicial officers can objectively discern community standards of appropriate language use, and that language standards can be fixed in time or maintained. In this part, I draw on Cohen's

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[127] Marcia Langton, 'Medicine Square' in Ian Keen (ed), *Being black: Aboriginal cultures in 'settled' Australia* (Aboriginal Studies Press, 1988) 201, 202.

[128] Wootten, above n 71, 270. Wootten emphasised that not only are Aboriginal Australians typically the poorest of the poor, they are also culturally different, and the application of a policy which does not recognise cultural difference will be unfair, particularly if the policy incorporates norms from one culture.

[129] See Mary Louise Pratt, 'Linguistic Utopias' in Nigel Fabb (ed), *The Linguistics of Writing: Arguments between Language and Literature* (Methuen, 1987) 57.

[130] Noting that police officers can issue a CIN, and for the purpose of such must discern community standards.

argument that the 'community'—a symbolic construct—is 'a *relational* idea': a community is defined in opposition to those who exist outside that community, expressed though the *boundary* enclosing the community.[131] I analyse how this symbolic boundary which encloses those who belong, and keeps out those who do not, is constructed through criminal justice discourse, focusing on the language of politicians and judicial officers. I recognise that 'language choices'[132] made to include or exclude social actors are essential to the creation of symbolic boundaries; as van Leeuwen has recognised, a writer or speaker can

> include or exclude social actors to suit their interests and purposes ... Some of the exclusions may be 'innocent', details which the readers are assumed to know already, or which are deemed irrelevant to them; others tie in closely to propaganda strategies of creating fear and of setting up … enemies of 'our' interests.[133]

Accordingly, the constitution of an ostensibly orderly, cohesive and homogeneous community of insiders, involves labeling, and eliminating or ostracizing, defiling elements that threaten this imagined order. This returns us yet again to Douglas's contention that 'dirt is that which must not be included if a pattern is to be maintained'.[134] Below, I show how representational choices made by judges, politicians and legislative drafters fashion an orderly community, and pushes disorderly elements outside its borders.

On 1 April 2004, prior to Couchy's appeal being heard by the High Court of Australia, the Queensland Labor government replaced the provision under which Couchy was charged and convicted with a broader public nuisance offence.[135] The provision made it a crime for a person to behave in, inter alia, an offensive way where that 'person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public'.[136] The offence is contained in div 1 of pt 2 of the *SO Act* (Qld), titled 'Offences about quality of community use of public places',[137] the 'object' of which is to ensure that 'as far as practicable, *members of the public* may lawfully use and pass through

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[131] Cohen, above n 13, 12 (emphasis added).

[132] Michael Coyle, 'Notes on the Study of Language: Towards a Critical Race Criminology' (2010) 11 *Western Criminology Review* 11, 11.

[133] Van Leeuwen, above n 57, 28.

[134] Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966) 50.

[135] See *SO Act* (Qld) s 6 (public nuisance). This replacement was partly a response by the Queensland Government to the High Court challenge of *Vagrants Gaming and Other Offences Act 1931* (Qld) s 7(1)(d) ('*VGOO Act*'); in *Coleman v Power* (2004) 220 CLR 1.

[136] *SO Act* (Qld) s 6. ('*SO Act*') For a doctrinal analysis in relation to this section, see Chapter Four.

[137] It was, prior to then, contained in pt 2A of the *VGOO Act* (Qld) entitled 'Quality of Community Use of Public Places'.

public places without interference from acts of nuisance committed by *others*' ('the object provision').[138]

A CDA of these provisions, and the parliamentary debates in relation to their introduction, demonstrates that the Queensland Parliament did not have *all* Queenslanders in mind when using the terms 'the public' and 'the community'. It is informative to analyse how social actors are categorised within the object provision, and the *transitivity* structures (see Part 8.3.2 above) within the clause 'members of the public may lawfully use and pass through public places without interference from acts of nuisance committed by others': in other words, who is represented as doing what to whom, and how.[139] In the object provision, the drafter of the legislation has separated social actors into two discrete categories: 'members of the public' and 'others'.[140] The first category, 'members of the public', are the 'actors', in that they are ascribed the action of 'lawfully us[ing] and pass[ing] through public places', but they are also represented as at risk of being 'acted upon' by 'others' who may commit 'interference' by way of 'acts of nuisance'.[141] Significantly, the noun and noun-phrase 'interference' and 'acts of nuisance' are examples of *nominalisations*, in that they nominalise or 'reduce' actions into nouns and noun phrases.[142] Nominalisations allow an author to condense information (in 'deeply embedded form[s]')[143], and because of this, can also obscure actors and component parts of activities.[144] (The phrase 'public nuisance', for example, does not tell us which discrete actions might comprise a public nuisance). These 'others'—who commit acts of nuisance—are constructed as mutually exclusive of, and therefore outside the boundaries that enclose, 'the public'. The object provision gives no further details as to what kinds of individuals or groups comprise the legitimate 'members of the public' and the illegitimate 'others'. Like the word 'community', these abstract terms operate as symbols, allowing a judicial officer to imbue them with meaning.[145] Further examples of an exclusive 'community' can be observed in the following phrases in offensive and insulting language cases, which *qualify* the community (mainly through *pre-modifiers*)[146] to comprise: '*well-conducted and reasonable* men and women',[147] '*average members* of the

[138] *SO Act* (Qld) s 5 (emphasis added).

[139] See Mayr and Simpson, above n 58, 65.

[140] See generally van Leeuwen, above n 57, 28–54.

[141] See ibid 32, for a discussion of 'role allocation'.

[142] Mayr and Simpson, above n 58, 6.

[143] Van Leeuwen, above n 57, 35.

[144] See ibid 30, 35.

[145] Cohen, above n 13, 14.

[146] See van Leeuwen, above n 57, 33.

[147] *Heanes v Herangi* (2007) 175 A Crim R 175, 218 [197] (Johnson J, emphasis added); citing *Melser v Police* [1967] NZLR 437 per Turner J.

community', '*ordinary decent-minded people*',[148] '*most people* in Australian society',[149] '*ordinary* citizens',[150] '*right-thinking* members of the public'[151] or '*the silent many'*.[152] Being *presuppositions* (see Parts 8.2.3 and 8.4.2 above), the detail of who is included in and excluded from these phrases is left to the discretion of the judicial officer (or police officer). These phrases do not erect observable physical borders around the community, but exclude individuals or groups deemed as extra- or out-of-the-ordinary; citizens who are envisaged as belonging to 'the noisy few'; and people considered to be wrong-thinking, debauched or immoral. In order to create a neat and tidy picture of the community—an 'orderly' community—these people are pushed outside its 'elastic boundaries'.[153]

Members of parliament similarly constructed 'the community' as an exclusive concept when the Queensland public nuisance provision was debated in Parliament in October 2003. At that time, Tony McGrady (Minister for Police and Corrective Services), stated:

> I have no doubt that a majority of members of this House have received complaints from their constituents about the unacceptable behaviour of some people in public places. Public places are there for the use of all members of the community. Persons who choose to disrupt a family picnic in a park, groups of people who have nothing better to do than intimidate people at railway stations or persons who take delight in intimidating women or children at a shopping centre will face the full force of the law. They do not have my sympathy or the sympathy of the vast majority of our fellow Queenslanders.[154]

Although the Minister's use of the adjective 'all' in front of 'community' would, at first blush, indicate that the community includes 'all Queenslanders', the remainder of this passage reveals this not to be the case; 'all members of the community' is both an inclusive and an exclusive category. McGrady specified 'the vast majority of our fellow Queenslanders', including 'women', 'children', 'famil[ies]' and 'people at railway stations' as categories of people who are included in 'all members of the community'. Each of these categories are represented as those 'acted upon':[155] persons subjected to the actions of 'some people', whom

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[148] *Bradbury v Staines* [1970] Qd R 76, 89 (Matthews J, emphasis added).

[149] *Police v Pfeifer* (1997) 68 SASR 285, 292 (Doyle CJ, emphasis added).

[150] *Heanes v Herangi* (2007) 175 A Crim R 175, 211 [159] (Johnson J, emphasis added); quoting Burt CJ in *Keft v Fraser* (Unreported, Supreme Court of WA, 21 April 1986) 10–11.

[151] *Heanes v Herangi* (2007) 175 A Crim R 175, 209 [149] (Johnson J, emphasis added); citing *Melser v Police* [1967] NZLR 437 (North P); and *Police v Christie* [1962] NZLR 1109 (Henry J).

[152] *Hortin v Rowbottom* (1993) 68 A Crim R 381, 319 (Mullighan J).

[153] Anderson, above n 16, 7.

[154] Queensland, *Parliamentary Debates*, Legislative Assembly, 23 October 2003 4363 (Tony McGrady).

[155] See van Leeuwen, above n 57, 32.

McGrady described as '[p]ersons who choose to disrupt', 'groups of people who have nothing better to do than intimidate', and 'persons who take delight in intimidating' Thus, McGrady depicted 'the community' as at threat from illegitimate users of public space. McGrady ascribed to these illegitimate users the *exclusive pronoun* 'they',[156] implying that 'they' are different from 'the vast majority of *our* fellow Queenslanders'. The pronoun 'our' is used *inclusively*, indicating that McGrady conceived of himself and other members of the Queensland parliament as belonging to the community. This rhetoric unifies 'the community' as a group of law-abiding Queenslanders, with whom McGrady claimed solidarity, and positions 'others'—those who threaten 'our' peaceful enjoyment of public space—outside the boundaries enclosing the community.

This impression of an inclusive and an exclusive community was reinforced in the second reading speech to the Summary Offences Bill 2004 (Qld) ('the Bill'), when then-Minister for Police and Corrective Services, Judy Spence, stated that the Bill

> is designed to enhance the safety of each and every member of the Queensland community … It provides protection from public nuisance offences to members of the community who have a legitimate right to enjoy the use of public places … I have received representations from members of the Queensland community regarding the need for positive changes to the law to protect law-abiding members of our community.[157]

Although initially claiming that the Bill aimed to enhance the safety of 'each and every member of the Queensland community', Spence later *qualified* the community with the *post-modifier* 'members of the community *who have a legitimate right to the use of public places*' and the *pre-modifier* '*law-abiding members of* the community'.[158] The community, in McGrady's and Spence's minds, is an exclusive concept: it does not comprise all Queenslanders, but is limited to those who are law-abiding or have a legitimate right to enjoy public places.

8.7.1 Exclusion of young people from the community

A category often pushed outside the malleable boundaries that enclose community in criminal justice discourse in relation to offensive language crimes is young people. I explored how the abstract categories 'youth' and 'young people' were represented as typical offenders in

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[156] See ibid 54.

[157] Queensland, *Parliamentary Debates*, Legislative Assembly, 28 September 2004 2395 (Judy Spence).

[158] Emphasis added. Note that van Leeuwen, above n 57, 107 gives the example of 'experts' being qualified as 'some experts'.

offensive language cases in Chapter Seven, whereas 'kids' and 'children' were represented as typical victims. I identified a discourse that characterised young people as a threat to public order. I pointed to the extract in *Beahan v McDermott*,[159] quoted by Johnson J in *Heanes v Herangi*,[160] in which Anderson J stated that

> young people … often behave badly, sometimes with total disregard for the convenience and well-being of others … Young people who flaunt [sic] the law, abuse police officers and fling obscenities about cannot always expect to be dealt with sympathetically, either by the police or by the courts. Generally speaking they must be punished for the public good.[161]

In this representation, Anderson J assigned 'young people' the *exclusive pronoun* 'they',[162] implying that *they* are different from 'others', 'the public' and 'police officers', who are represented as the passive recipients of young people's disorderly actions. Young people were similarly represented as threats to public order when Coalition member Bruce Jeffery stated that the Summary Offences Bill 1988 (NSW)

> will go a long way towards cracking down on loutish and disgusting behaviour which disrupts families in suburban areas and country town … Members of Parliament have a responsibility to ensure that all citizens may go about their business without fear of harassment or inconvenience … our streets are a nursery for crime. Let us face it, they are. Young thugs are allowed to repeatedly offend and flout the law. They have no respect for law enforcement. They will turn into big-time criminals if they think they can get off scot-free with committing crimes. We must prevent that.[163]

Jeffery's notion of 'all citizens', like Spence's and McGrady's notions of 'all members of the community', is an inclusive and exclusive category, including 'families in suburban and country towns' but excluding 'young thugs'. Through the metaphor 'our streets being a nursery for crime', Jeffery depicted '*our* streets' (with the *inclusive pronoun* 'our') as rearing young people as criminals. Jeffery also used the *exclusive pronoun* 'we' to denote himself and his fellow members of parliament.[164] He juxtaposed this exclusive group 'we' with 'they'—'young thugs', thus, depicting the two categories as mutually exclusive. In this representation, Jeffery constructed a reality in which young people are located outside, and pose a threat to,

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[159] (Unreported, Supreme Court of WA, Anderson J, 24 April 1991).

[160] (2007) 175 A Crim R 175, 215 [180] (Johnson J).

[161] *Beahan v McDermott* (Unreported, Supreme Court of WA, Anderson J, 24 April 1991) 8.

[162] See Fairclough, above n 32, 127–8.

[163] New South Wales, *Parliamentary Debates*, Legislative Assembly, 31 May 1988 1154–5 (Bruce Jeffery).

[164] See Fairclough, above n 32, 127–8.

the community, and in which members of parliament—the protectors of the community—must forestall this threat by introducing tougher criminal laws.

8.7.2 Exclusion of Indigenous people from the community

Earlier in this chapter, I cited *Conners v Craigie* to illustrate how McInerney J created an imagined, 'whited-out' context and denied the relevance of race, racism and his own whiteness to the reasonable person's (and thus his own) assessment of offensive language. This built on my analysis in Chapter Seven of how the Court of Appeal judges in *Del Vecchio v Couchy* blinded themselves to the defendant's 'Aboriginality', with the Chief Justice arguing 'for my part I have some question as to whether that was relevant', while Douglas J stated 'I just think to add the word 'Aboriginal' stretches the bar too far; it's not necessary'.[165] In this part of the chapter, I use CDA to show that the Court of Appeal not only excluded Couchy's racial identity from the context, but also excluded Aboriginal people from 'the community' whose expectations Couchy was found to have breached.

In the Court of Appeal hearing in *Del Vecchio v Couchy*, defence counsel Mr Andrew Boe ('Boe') submitted to the Court: 'in this context it's an Aboriginal woman and if the Court is assessing contemporary community expectations or standards, I'm just tritely recording that views differ on these matters.'[166] Chief Justice de Jersey replied to Boe by *formulating*[167] his submission, asking: 'Are you saying really that this sort of conduct is such an endemic feature of *the Aboriginal presentation* in these sorts of circumstances that it should be accepted by *the general community* as an ordinary aspect of life which … doesn't warrant this sort of censure?'[168]

In this representation, de Jersey CJ established two categories of social actors: one being 'the Aboriginal presentation', and the other being 'the general community'. The resulting impression is that the categories are mutually exclusive: Aboriginal people are distinct from 'the general community'. Chief Justice de Jersey assigned a race to Aboriginal persons, but not the 'general community'; race is deemed to belong to the racialised 'Other', while the community (like the reasonable person) has no race.[169] The Chief Justice's representation, which excluded Aboriginal people from the community, can be contrasted to that of Boe, who

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[165] Transcript of Proceedings, above n 75, 5–6.

[166] Ibid 2.

[167] See Fairclough, above n 32, 135–7.

[168] Transcript of Proceedings, above n 75, 2 (emphasis added).

[169] It is ostensibly 'race-neutral', see Moreton-Robinson, above n 76, 76.

depicted Couchy, whom he characterised as 'a drunk Aboriginal woman', as *belonging to* a 'portion of the community': 'The context is that the words are spoken by a drunk Aboriginal woman being interviewed by police and some might say that that's a feature that attends that portion of the community more than others.'[170]

It is notable that the Chief Justice, in depicting Aboriginal persons as 'the Aboriginal *presentation'*, removed the quality 'human' from Aboriginal people. This is an example of an *abstraction*, whereby social actors are impersonalised by being represented through a quality assigned to them.[171] Chief Justice de Jersey imparted a worldview in which Aboriginal persons are not persons but are a 'presentation', which can be 'accepted' or 'rejected' by 'the general community'; the Chief Justice 'locate[d] the racialised other in the liminal space between the human/animal distinction'.[172] Further, by focusing on the *transitivity* of the clause—'that this sort of conduct is such an endemic feature of *the Aboriginal presentation* in these sorts of circumstances that it should be accepted by *the general community* as an ordinary aspect of life'—we see that de Jersey CJ placed non-Aboriginal persons—'the general community'—in the position of 'the mind', capable of observing and knowing the conduct of the Indigenous 'Other'.[173] Through his Honour's language choices, de Jersey CJ continued a historical tendency whereby, as Moreton-Robinson has observed, 'the dominant epistemological position within the Western world has been the white Cartesian male subject whose disembodied way of knowing has been positioned in opposition to white women's and Indigenous people's production of knowledge.'[174] The Chief Justice's standpoint—the white, male and privileged standpoint—is posited as the neutral standpoint from which language is to be judged. Meanwhile Indigenous Australians are positioned outside the borders of the community, kept in 'their place' by state surveillance and censure.

8.8 Conclusion

In this chapter I have used CDA to analyse how the perspective of the reasonable person and the standards of the community are constructed and employed in offensive language cases. Drawing on Cohen's work, I have argued that the community and the reasonable person are

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[170] Transcript of Proceedings, above n 75, 2 Note that Justice McPherson replied to Boe's contention with the formulation, 'You mean that if I said these words I'd be guilty of an offence, but if she says them she's not?', thereby identifying with the 'others'—the non-Aboriginal portion of the community.

[171] Van Leeuwen gives the example of Muslim immigrants in media discourse being referred to as 'the problem'. See van Leeuwen, above n 57, 46.

[172] Moreton-Robinson, above n 76, 77.

[173] See ibid 80: 'The primitive is the body, while the white intellectual is the mind'.

[174] Ibid 76.

allowed to operate as symbols,[175] the boundaries of which are not objectively apparent, but exist in the mind of the beholder. Because of this, ideas of what the reasonable person, the community, and their expectations entail are not universally shared but instead are mediated by the unique experiences and perceptions of the individual judicial officer or police officer. I contested the idea of one homogeneous fixed community, with shared standards on appropriate language use in public space, by drawing on literature to show significant variations between how individuals and groups use language. I argued that even narrowly defined communities do not share one objectively discernible view on swearing, language, order and place.

Through my detailed analysis of linguistic techniques used in offensive language cases and related texts, including court hearing transcripts, legislative provisions and parliamentary debates, I have shown how judges appear to draw parameters around what is 'reasonable', but that, in reality, their statements are almost void of any meaningful content. Despite this, judicial officers continue to refer to 'the reasonable person', 'the community', and 'community standards' as if these were concrete entities that exist and can be fairly discerned and applied.

I argued that the symbolic nature, and therefore the malleability of these standards, allows judicial officers to don a veil of objectivity and deny the cultural and historical assumptions that inform their views. My analysis of court transcripts and judgments in *Conners v Craigie* and in *Del Vecchio v Couchy* exposed how these objective standards, as currently interpreted and applied, can perpetuate a judicial blindness to history, cultural differences, racial identity and racial tensions. This blindness is particularly concerning given that, as I established above, many Indigenous Australians have attitudes and practices that do not align with those attributed to non-Indigenous Australians. I further showed, through various examples in court transcripts, parliamentary debates and legislative provisions, how the boundaries enclosing the community are fashioned by the individual in whose mind they are envisioned, to *include* those 'pure' elements deemed to belong—such as families, or those who have a 'legitimate right' to use public places—while *excluding* those defiling elements deemed not to belong, such as youth and Indigenous persons. The repetition and acceptance of these 'rituals of separation'[176] in criminal justice discourse obscures the determinative role of those occupying positions of relative *power* in defining and separating the pure from the unclean. My application of CDA to these integral elements of offensive language crimes supports an

[175] Cohen, above n 13.

[176] Douglas, above n 12, 51.

argument that these 'objective' tests, insofar as they are currently interpreted and applied, are an unsuitable yardstick in the fraught area of offensive language, where one's history, culture, social environment and personal preferences shape how one uses and perceives language. And if legal decision-makers persist in uncritically referring to, and using, these malleable and contested legal fictions in ways that I have identified in this chapter, the criminal law will continue to discriminate and entrench unfair and unequal power relations under the label of objectivity. In the following chapter, I develop my examination of how unequal power relations are fashioned, maintained and obscured in criminal justice discourse, by focusing on the interrelationship between language, power, authority, order and offensiveness.

CHAPTER NINE
'FOUR-LETTER' THREATS TO AUTHORITY? REPRESENTATIONS OF POWER, AUTHORITY, ORDER AND DISCRETION

> But who suffers most from our increasingly contemptuous youth, so ready to give a gobful to authority? … Police will tell you what rabble they must now deal with, and how they struggle to command the respect that has been stripped from them by courts, lousy parents, and the barbarians behind the new up-yours entertainment.
>
> That's why the NSW Police Association is furious at Williams' judgment, and why the police force is considering an appeal. Their authority on the streets is being compromised.[1]
>
> — Andrew Bolt

At around 4.40 pm on 5 November 2009, Adam Royds, a senior constable with the City Central Commuter Crime Unit ('Senior Constable Royds'), was standing inside the ticket barrier of Bondi Junction railway station. Senior Constable Royds was in full uniform at the time. A young man, Henry Grech ('Grech'), walked up to the gate next to the ticket barrier and opened it. Senior Constable Royds asked Grech if he had a ticket. Grech replied that he was going to the toilet and that he had just had a university exam. Senior Constable Royds elicited Grech's name, date of birth and address, and the following exchange ensued:

> Senior Constable Royds: And why don't you have a valid rail ticket?
> Grech: Where does it say I have to have a ticket to go to the toilet?
> Senior Constable Royds: You are in a restricted area. You need a rail ticket.
> Grech: I know my rights. I'm going to take it to court.
> Senior Constable Royds: Good. I'll see you there.

Senior Constable Royds opened the doors of the barrier and Grech walked out to the right. Senior Constable Royds told Grech that he would be sending him a ticket in the mail for entering a restricted area without a ticket. According to Senior Constable Royds, Grech walked away in a huff, gritting his

[1] Andrew Bolt, 'Judging by Magistrate's Words, This Is a Swearing-in Ceremony' *Herald Sun* (Melbourne), 5 May 2010 30.

teeth, clenching his jaw and shaking his head. When Grech was about five metres away, he uttered the word 'prick'. The following conversation took place:

> Senior Constable Royds: What was that?
> Grech: Nothing
> Senior Constable Royds: You called me a prick.
> Grech: No, I said: 'That's it'.
> Senior Constable Royds: You're a liar. They'll be giving you a ticket for offensive language as well.[2]

On 3 May 2010, Grech's offensive language charge was heard by Magistrate Robbie Williams at Waverley Local Court in Sydney, NSW. The police prosecutor, Sergeant Drury, submitted that although the word 'prick' was at 'the lower end of the scale' it nonetheless fit 'the criteria of offensive language [in] that it was meant to raise resentment and disgust and that it was calculated to annoy'.[3] The prosecutor stated that although 'there were members of the community on the platform' at the time, 'the word used was offered for offending the witness, Constable Royd'.[4] Defence solicitor Nick Hanna submitted that Grech did not use the word 'prick' with 'any sexual overtone' and that he 'wasn't referring to anything that would take it above and beyond the meaning of a nasty person'.[5] Hanna further submitted that '[p]olice officers are clearly more use [sic] to hearing offensive language or language which may be arguably offensive than other members of the community. It's not to say that justifies the use of the language in a moral sense, but clearly as a matter of law it's relevant.'[6]

In delivering judgment, Magistrate Williams asked what 'a reasonable man' would consider offensive in the circumstances.[7] His Honour noted that there was no evidence of children or elderly people present at the time the word was used.[8] Dismissing the proceedings, Magistrate Williams found 'prick' to be in 'common usage in the community'; his Honour was not satisfied that 'a reasonable person would be offended by its use due to its current everyday use'; nor did Magistrate Williams 'consider that used in this context [directed] at the police officer it was offensive'.[9]

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[2] Transcript of Proceedings, *Police v Grech* (Waverley Local Court, Magistrate Nicholls, 2010) 4–5; see also 'Police Witness Statement of Senior Constable Adam Royds in the Matter of Henry Grech (Offensive Language)' (City South Police Station, 3 May 2010).

[3] Transcript of Proceedings, above n 2, 2.

[4] Ibid.

[5] Ibid 4.

[6] Ibid 3.

[7] *Police v Grech* (Unreported, Waverley Local Court, Magistrate Williams, 3 May 2010) 5.

[8] Ibid 6, where Magistrate Williams stated: 'There's also no evidence that there were children present or indeed that anybody was indeed in earshot of the accused. And I would submit that [whether there were children present] is clearly a consideration because there are numerous decisions which—I am paraphrasing here, but essentially say that unless the words are used in front of children or on a school bus or in similar circumstances then it is very difficult to categorise those words as offensive'. For critique of the construction of children as typical victims of offensive language crimes, see Chapter Seven on constructions of context.

[9] Ibid 7.

Grech's acquittal attracted prompt criticism from the media, members of parliament and the NSW Police Association. Responding to the decision, NSW Police Association Secretary, Peter Remfrey, said the legal system should not be making police 'second-class citizens' and 'punching bags for society'.[10] Conservative media commentators, including Andrew Bolt, lamented 'our increasingly contemptuous youth' who were 'so ready to give a gobful to authority'.[11] Bolt blamed the courts for stripping respect from police and compromising '[t]heir authority on the streets'.[12] He argued that 'magistrates and judges' were guilty of double standards in 'authorising an abuse of lowly police that they'd probably never forgive if it were aimed at them'.[13] When, in the aftermath of *Police v Grech*, NSW Attorney-General John Hatzistergos was questioned in Parliament as to why 'verbal abuse of police officers continue[s] to be treated as lesser offences by magistrates in contradiction of community expectations'.[14] Hatzistergos responded: 'I believe that police officers are entitled to respect. As a community we must take respect more seriously, and that includes ensuring that our children learn its value at a very early stage of their lives'.[15]

These representations of youth disrespecting 'police authority', and magistrates as either on the side of police (where they convict an accused), or against police (where they acquit an accused), extend beyond Grech's case. When NSW Magistrate Pat O'Shane dismissed an offensive language charge against 27-year-old Rufus Richardson, after he walked up to police patrolling The Rocks in Sydney, 'gave them the finger', and said 'Youse are fucked', politicians and media commentators questioned not only Richardson's acquittal, but also the fitness of Magistrate O'Shane to occupy the position of magistrate. Opinion pieces lamented a decline in respect for police authority. Commentator Ross Eastgate asked: 'Whatever happened to good manners? You know what I mean, the days when people were temperate in their language, were deferential to their elders and had respect for the law and proper authority?'[16]

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[10] See Geoff Chambers, 'Judge Condones Student Calling Police A "prick"' *The Daily Telegraph* (online), 4 May 2010 <http://www.dailytelegraph.com.au/news/nsw/judge-condones-abuse-of-police/story-e6freuzi-1225861773410>. Note that these statements are examples of negative assertions (see Chapter Eight), and that therefore, they presuppose the existence of positive assertions to the contrary.

[11] See Andrew Bolt, 'Judging by Magistrate's Words, This Is a Swearing-in Ceremony, Andrew Bolt', *Herald-Sun* (Melbourne), 5 May 2010 30.

[12] See Ibid.

[13] See Ibid.

[14] New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 May 2010 22649 (Marie Ficarra).

[15] Ibid 22649–50 (John Hatzistergos, A-G). Hatzistergos stated: 'I understand that police have sought the advice of the Director of Public Prosecutions about the case to which the honourable member is referring. As those matters will potentially be dealt with through that process it is inappropriate for me to comment directly. However, like most members, I believe that police officers are entitled to respect. As a community we must take respect more seriously, and that includes ensuring that our children learn its value at a very early stage of their lives'.

[16] Ross Eastgate, 'A Manner of Speaking' *The Gold Coast Bulletin* (Gold Coast), 26 October 2005 23.

Magistrate O'Shane, an Indigenous Australian, was subjected to ongoing scrutiny from members of the NSW Parliament in relation to her capacity to assume an 'objective' stance on offensive language.[17] Malcolm Kerr, Member of the NSW Liberal Opposition party, contended that '*her* standard of reasonable behaviour does not accord with what *the general public* expects on the streets,'[18] while Shadow Attorney-General, Andrew Tink, argued: 'The Pat O'Shane decision on offensive language must not stand … If we have to set out in a bill what words are offensive for some people on the bench to get the message, let us do it.'[19]

9.1 Introduction

Grech's and Richardson's cases, and reactions to them, draw together key ideas that I have examined in my thesis. These include the prevalence of language ideologies—common sense views about how language works—in judicial and other opinions about what is offensive; the use of metaphors to depict swear words as forms of violence (for example, the representation of swear words as 'verbal abuse': see Chapters Five and Six); the repetition of uncritical constructions of contexts in which swearing is deemed either acceptable or unacceptable (for example, Magistrate Williams's acknowledgment that no children or elderly people were present: see Chapter Seven); the blurring of the line between impolite and criminally offensive conduct (Chapter Seven); representations of youth as typical offenders of offensive language crimes and as outside 'the community' (Chapters Seven and Eight); and disagreement between judicial officers, politicians and media commentators over the views and standards ascribed to 'the community' and 'the reasonable person' (Chapter Eight). The cases also highlight a key assumption about offensive language crimes that I have interrogated throughout my thesis, namely, that despite it not being written in legislation (Tasmania aside)[20] that swearing *per se* is a crime, the idea that offensive language crimes should target 'four-letter words' language has become naturalised into understandings of offensive language crimes, informing how these crimes are policed and punished.

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[17] 'O'Shane Faces Fresh Criticism' *Australian Associated Press*, 18 October 2005. Asked if Magistrate O'Shane should be 'sacked', Liberal Opposition Member Peter Debnam said: 'I think the Attorney-General does need to start looking at the performance, especially when you see ongoing campaigns such as hers'. NSW Opposition Leader of the Legislative Council and police spokesman, Mick Gallacher, said the decision sent a dangerous message to the community: 'And what we see, by (the) reporting of it today, will give the green light to all those yobbos out there that they can simply abuse the cops, and the cops have got to cop it on the chin', he told reporters.

[18] New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 December 2005 22802 (Malcolm Kerr).

[19] New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 October 2005 20622 (Andrew Tink).

[20] See Chapter Four. The *Police Offences Act 1935* (Tas) s 12 makes it a crime to 'curse or swear' in any public place, or within the hearing of any person in that place.

This chapter examines an additional assumption present in Grech's and Richardson's cases, and police and media reactions to them. While state and territory Parliaments have not expressly proscribed 'disrespecting police' or 'challenging police authority', many of the 'primary definers'[21] in debates on the topics of swearing and offensive language crimes—attorneys-general, police and police ministers, judicial officers and media commentators—presume such conduct to warrant criminal sanction, and conceive of offensive language crimes as the appropriate tool with which to achieve this end. Statistics collated in relation to the policing and punishment of offensive language crimes also support the contention that police officers, as typical 'victims', witnesses and (in light of the increasing prevalence of CINs)[22] often arbiters of what is criminally offensive, target and censor language perceived to undermine 'their authority'. Most offensive language fines and charges involve the use of swear words directed at, or in the presence of, police officers. A study conducted by the NSW Anti-Discrimination Board in 1980 found that 75.4 per cent of the 'unseemly words' in its sample of cases were directed at police.[23] In a 2009 study of the issuing of CINs to Aboriginal people, the NSW Ombudsman found that of those CINs issued for offensive language to Aboriginal people between 2002 and 2007, 70 per cent of the language used was directed at police only, and 23 per cent at police and others.[24] Criminal law scholars David Brown et al have recognised that what is 'at issue' in many offensive language interactions between police and the public is 'not the offensiveness of the words uttered'.[25] Instead, it is 'police frustration with an unacceptable occupational hazard (being abused or criticised in colourful language)' and police officers' perception that any lack of respect or deference towards them warrants criminal punishment.[26]

Police were also the addressees and witnesses of the alleged offensive language in the case studies analysed in my thesis. And although the RCIADIC recommended in 1991 that the use of offensive language in circumstances of interventions initiated by police should not normally be occasion for

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[21] Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 18–19.

[22] See Chapter Four.

[23] NSW Anti-Discrimination Board, 'Study of Street Offences by Aborigines' (Report, 1982); cited in Jarrod White, 'Power/Knowledge and Public Space: Policing the "Aboriginal Towns"' (1997) 30 *The Australian and New Zealand Journal of Criminology* 275, 281.

[24] 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities' (New South Wales Ombudsman, 2009) 57, Figure 9. The Ombudsman found that eighteen per cent of the language used was witnessed by police only. The Ombudsman noted that 90 per cent of the CINs involved the word 'fuck'; 68 per cent involved the word 'cunt', 63 per cent used both, and '[o]f the 103 offensive language incidents reviewed, there were four where the language alleged was not specified in the narrative, and there was one incident involving use of the term "white trash"'; criminologists Rob White and Santina Perrone have reflected that '[e]xcept for the notional "community", the victim [of offensive language] is almost invariably the police officer': Rob White and Santina Perrone, *Crime and Social Control* (2nd ed, 2005) 45; see also Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen and Unwin, 2001) 29.

[25] David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (The Federation Press, 2015) 526.

[26] Ibid.

arrest or charge,[27] that recommendation has not been put into practice or law in any Australian state or territory. In his report, RCIADIC Commissioner Hal Wootten noted:

> Over and over again during this commission there has been evidence about Aboriginals using the term 'cunts' in relation to police, usually with the result of a charge of offensive behaviour or at all events strong disapproval. I have often been led to wonder how police could continue to remain offended by a term they heard so often and so routinely … It is surely time that police learnt to ignore mere abuse, let alone simple 'bad language' ... many words that were once considered bad language have become commonplace and are in general use amongst police no less than amongst other people … Charges about language just become part of an oppressive mechanism of control of Aboriginals.[28]

In this chapter, I critically analyse how these ideas about swearing at police, power and authority are naturalised through criminal justice discourse. I examine representations of swearing at police officers in offensive language cases and parliamentary debates, including constructions of power, discretion, authority and order. I build on ideas introduced in my historical analysis (Chapter Three), in which I described how the introduction of comprehensive laws prohibiting the use of obscene, indecent and profane language in a public place from 1849 extended the reach of the criminal law to unwritten 'rules' about etiquette and decorum, blurring the distinction between the indecorous and the criminal. There I argued that, from the mid-19th to the mid-20th century, the chief justification for punishing dirty words was the notion that they might contaminate clean spaces, turning order into disorder. In this chapter, I show how swear words are characterised as an affront to a stratified order in which the public, particularly youth and Indigenous people, must show deference to the police force. I use CDA to highlight how, through *recontextualisation* in criminal justice discourse (see Chapters Two and Seven), swearing at police is transformed into the more intangible act of 'disrespecting authority'. In this recontextualisation, swearing is substituted with 'abuse' and 'disrespect'; police officers are transformed into 'authority' and even 'the law'; and a magistrate's acquittal of the defendant is transformed into 'authorising an abuse of police', 'compromis[ing] authority' or 'strip[ping] police' of their 'proper authority'.[29] These substitutions convey a reality in which police officers inherently possess authority and deserve respect. An individual swearing at police is further abstracted into a general malaise in which foul-mouthed individuals pose a threat to social order. Central to my chapter is the idea that like the word 'community' (see Chapter Eight) each of the abstract terms 'power', 'authority' and 'order' function largely as symbols, allowing those who employ them to supply part of their meaning.[30] Each term has a significant *meaning potential*: a capacity for ambiguous,

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[27] Hal Wootten, *The Royal Commission into Aboriginal Deaths in Custody* (AGPS, 1991) Recommendation no. 86.

[28] Hal Wootten, 'Report of the Inquiry into the Death of David John Gundy' (Royal Commission into Aboriginal Deaths in Custody, 1991) 184.

[29] Bolt, above n 12; Eastgate, above n 17.

[30] See Anthony Cohen, *The Symbolic Construction of Community* (Ellis Horwood, 1985) 14–15.

heterogeneous, overlapping and sometimes contradictory interpretations,[31] and this ambivalence in meaning can be exploited to the advantage of a writer, speaker or the addressee of the words in question. In the following part of the chapter, I theorise conceptions of power, authority and order, and explain how these ideas pertain to policing offensive language crimes. I explain that police have neither limitless powers nor absolute authority; police powers are constrained by 'the law'—statute and common law. Further, police powers and their position of authority are accrued, either consensually or by their imposition, and are the subject of contestation.

Following this, I interrogate how authority, power and discretion are represented and hidden in criminal justice discourse. I analyse a broader set of sources in this chapter than those examined previously—alongside transcripts, parliamentary debates, newspaper articles and case law, I also conduct a CDA of police fact sheets from the cases *McCormack v Langham* and *Conners v Craigie*.[32] I do this to show how police, through various linguistic techniques and via the specialist register of 'cop-speak', are able to give the impression that they merely apply an objectively discernible 'law' when policing offensive language crimes. This chapter argues that discourse plays a critical role in constructing police as victims in offensive language cases; in imposing and legitimising police authority; and in sustaining unequal power relations.

9.2 Conceptions of power, authority and order

The concept and ambit of 'police power' are by no means straightforward. The law—in the form of statutory provisions and common law rules—is a source and an instrument of police power, which is both 'complex and partial'.[33] In NSW, for example, various powers, functions, discretions and responsibilities of, and constraints on, police are contained in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('*LEPRA*') (particularly in relation to police powers to stop, search, arrest, detain and investigate suspects), the *Police Act 1990* (NSW) and the *SO Act* (NSW).[34] These statutes bestow upon police 'powers' to limit and control others' actions, but also contain provisions that act as a check on any irresponsible or excessive use of power. However, police powers should not only be understood according to this legal framework.[35] Police also have at their disposal informal and

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[31] See Norman Fairclough, *Discourse and Social Change* (Polity Press, 1992) 75. Fairclough states that 'Texts are made up of forms which past discursive practice, condensed into conventions, has endowed with meaning potential. The meaning potential of a form is generally heterogeneous, a complex of diverse, overlapping and sometimes contradictory meanings'.

[32] *McCormack v Langham* (Unreported, Supreme Court of NSW, Studdert J, 5 September 1991); *Conners v Craigie* (Unreported, Supreme Court of NSW, McInerney J, 5 July 1993).

[33] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings* (Pantheon, 1980) 141.

[34] See Russell Hogg, 'Perspectives on the Criminal Justice System' in Mark Findlay, Sandra Egger and Jeff Sutton (eds), *Issues in Criminal Justice Administration* (Allen & Unwin, 1983) 18.

[35] David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press, 1997); Hogg, above n 35, 13.

extra-legal practices and tools. The power of police officers is not only defined by the law but also derived from the 'vast and largely unscrutinised discretion'[36] that police enjoy: in terms of choosing how, and if, to implement 'the law', and their ability to use extra-legal means to limit or restrain others' behaviours and liberty.[37] These rules are not 'legal rules' but '*police* rules':[38] the choices that police make to either exercise, or refrain from exercising, their ability to caution, search, arrest, detain or issue an on-the-spot fine to an individual. As socio-legal scholar Michael McConville has recognised, police do not *have* to do these things, but they *may* do so: it is at their discretion.[39]

Alongside the laws and extra-legal tools at police officers' disposal, the concept of power as it pertains to police officers can be conceived of in a number of more abstract senses: as power exercised *by dominance or coercion*; as power exercised routinely *by consent*; and as power as a form of *action* or *relation* between people.[40]

The first sense of power, power as *dominance*, has its origins in sociologist and philosopher Max Weber's study of authority in modern and pre-modern states. Power conceived of as dominance focuses on the corrective power of the state and its institutions (such as judicial and penal institutions, including the police force) to secure the compliance of others, even in the face of resistance.[41] Power in this sense resides *within* the State and within other sovereign organisations.[42] In this first sense of power, *authority* is power attained by force (its imposition) or coercion.

The second sense of power, power exercised routinely by *consent*, draws on political theorist Antonio Gramsci's concept of *hegemony*: the mechanisms through which dominant groups in society successfully persuade subordinate groups to accept the former's own moral, political and cultural values and institutions.[43] The more that dominant individuals and institutions such as the church, the

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[36] Russell Hogg, 'Perspectives on the Criminal Justice System' in Mark Findlay, Sandra Egger and Jeff Sutton (eds), *Issues in Criminal Justice Administration* (Allen & Unwin, 1983) 6.

[37] Michael McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Routledge, 1993) 112.

[38] Mark Neocleous, 'From Social to National Security: On the Fabrication of Economic Order' (2006) 37(3) *Security Dialogue* 363 (emphasis added).

[39] McConville, Sanders and Leng, above n 38.

[40] See Andrea Mayr and Paul Simpson, *Language and Power: A Resource Book for Students* (Routledge, 2010) 2; citing Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, 1978 ed, 1914); Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* (International Publishers, 1971); Foucault, above n 34; Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Allan Lane, 1977).

[41] See Mayr and Simpson, above n 41, 2; citing Weber, above n 41.

[42] See Mayr and Simpson, above n 41, 2; citing Weber, above n 41.

[43] Mayr and Simpson, above n 41, 3; citing Gramsci, above n 41; Fairclough has described hegemony as being 'about constructing alliances, and integrating rather than simply dominating subordinate clases, through concessions or ideological means, to win their consent' Fairclough, above n 32, 92.

courts, police, and the military build legitimacy, by generating consent to their domination, the less coercion they need apply.[44] In this second sense of power, *authority* is conceived of as power that has been accrued consensually, through naturalisation of its use over time.[45] Thus the *authority* of police can be generated by the consent of the public to a particular (usually existing) social order, where that order has been represented as natural, logical and beneficial. This chapter will also show how criminal justice discourse plays a key role in imposing police authority and creating and naturalising unequal power relations between police and the public. As linguists Andrea Mayr and Paul Simpson have acknowledged, power, even if exercised coercively in democratic societies, 'needs to be seen as legitimate by the people in order to be accepted and this process of legitimation is generally expressed *by means of language* and other communicative systems'.[46] A corollary of this is that 'opposing groups will simultaneously be delegimitated' through discourse.[47] Discourse constitutes hegemonic attitudes, opinions and beliefs about police authority and unequal power relations, enabling these ideas to 'develop roots into the system'[48] to make them appear 'natural' or 'common sense'.

The final sense of power that informs my chapter is philosopher Michel Foucault's theorisation of power as *productive* and *relational*. In Foucault's theoretical model, power is not understood as a constraining force (a 'repressive phenomenon')—an obligation or prohibition on those who 'do not have it'.[49] Nor is power understood 'in an instrumental sense, as something to be possessed and located at a central point'; it is neither fixed nor objectively determined.[50] Rather, Foucault conceptualised power as productive: as a form of action or relation between people that is negotiated and contested through interaction. As Foucault stated: 'In reality power means relations, a more-or-less organised, hierarchical, co-ordinated cluster of relations'.[51] Power is a positive, productive force with constitutive effects; it

> invests them [those who do not have it], is transmitted by them and through them; it exerts pressure upon them, just as they themselves, in their struggle against it, resist the grip it has on them. This means that these

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[44] Mayr and Simpson, above n 41, 3; citing Gramsci, above n 41. Note that influential scholar of British subcultures Phil Cohen has written, it is in the interest of the state that police should call on their powers of physical coercion as a 'last resort': Phil Cohen, 'Policing the Working Class City' in Mike Fitzgerald, Gregor McLennan and Jennie Pawson (eds), *Crime and Society: Readings in History and Theory* (Routledge, 1980) 102.

[45] See David Paletz and William Harris, 'Four-Letter Threats to Authority' (1975) 37 *The Journal of Politics* 955, 963.

[46] Mayr and Simpson, above n 41, 2 (emphasis added).

[47] Ibid.

[48] Paletz and Harris, above n 46, 963.

[49] Mayr and Simpson, above n 41, 3; citing Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press, 1980); Foucault, above n 41.

[50] Hogg, above n 37, 13.

[51] Foucault, *Language, Counter-Memory, Practice*, above n 47, 198.

> relations go right down into the depths of society. They are not localised in the relations between the state and its citizens.[52]

Foucault's concept of power is useful in framing swearing at police officers as a type of power struggle, in which the appropriate way for a member of the public to behave towards, and speak to, a police officer in a public space is being negotiated and contested. Offensive language charges and CINs come to function as a controlling device, able to be manipulated by police at their discretion. From Foucault's theoretical analysis, we see police not as simply *possessing* power or *having* authority. Rather, the power of police and their authority in 'public space' have long been, and continue to be, the subject of contestation, as the following analysis demonstrates.

9.3 Authority, power and discretion in political discourse

In this part of the chapter, I show how criminal justice discourse enables ideas about police authority in public space to appear natural or common sense. As I described in my historical analysis (Chapter Three), in the lead up to the introduction of the *SO Act* (NSW), the NSW Liberal–National Party coalition led by (soon-to-be) Premier Nick Greiner had been embroiled in a fierce law-and-order campaign against the NSW Labor party.[53] The Coalition eventually 'out-bid' the Labor party with its promise to give 'police full powers to deal with offensive behaviour',[54] which the Coalition alleged had been 'taken away'[55] from police by the repeal of the *SO Act 1970* (NSW), and was duly elected in 1988. When the Summary Offences Bill 1988 (NSW) was debated in the NSW Parliament, both the Coalition and the Labor parties agreed that more police with greater powers were needed to clean up public streets, quell an unruly youth and re-establish 'order'.[56] Coalition member Bruce Jeffery argued that

> the police have been hamstrung by their lack of power to deal with offensive behaviour, and have been laughed out of court. If a policeman lays a charge and it is dismissed, it does not look good for the police. If a policeman sees a group of youngsters walking the streets, as I see quite late at night when returning home from functions, he needs power to be able to disperse them so that they are not involved in crimes such as stealing …
>
> Until police have adequate powers, there will be no respect for police on the beat. The former Labor Government failed dismally to take heed of the courts and what people in the community were saying about police lacking powers to deal with street crime …

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[52] Foucault, above n 41, 27.

[53] In Australia, the Liberal Party is a conservative party.

[54] 'Libs' Tough Stand on Crime' *The Sydney Morning Herald* (Sydney), 23 February 1988 1.

[55] Ibid.

[56] Hogg and Brown, above n 22, 21.

> I reiterate that we must return to police the means to deal with offensive behaviour in all circumstances. If police doubt their authority, their position is weakened and others will work on that weakness. The police need the backing of the Parliament.[57]

An analysis of the linguistic techniques used in this excerpt—metaphors, causality, collocation and transitivity—reveals how discourse can legitimise police power and authority. Through his language, Jeffery *transformed* the crimes of offensive language and offensive conduct, contained in the *SO Act* (NSW), by *substituting* for these provisions the phrase: 'the means to deal with offensive behaviour in all circumstances', along with the abstract terms 'power' and 'powers'.[58] There is a noticeable *collocation of* the words 'police' and 'power' (where collocation is the routinised use of words in association with each other).[59] This mirrors broader 'law and order' rhetoric, in which it is taken for granted that the words 'police' and 'power' should co-occur.[60] Further, Jeffery conceptualised power in *metaphorical* terms: as a physical object that police possess, have or lack, as in the examples: 'their lack of power', 'police lacking powers', 'he needs power' and 'have adequate powers'.[61] In these examples, the abstract noun 'power' occurs as the object of the *transitive verbs* 'lack', 'need' and 'have'—all verbs suggesting a physical process.[62] In the final example, the use of the adjective 'adequate' before power depicts power as something that can be quantified. Lakoff and Johnson have provided a similar illustration, noting how rising prices can be viewed metaphorically as an entity via the noun 'inflation', as seen in the examples: '*Inflation* is *lowering* our standard of living' and 'If there's much *more inflation*, we'll never survive'.[63] Viewing an abstract experience or concept, like rising prices or power, as an entity 'allows us to refer to it, quantify it, identify a particular aspect of it, and *perhaps even believe that we understand it'*.[64] Through Jeffery's metaphorical representations, 'power' assumes the character of something that is concrete and identifiable;[65] it is an object that police need to possess an 'adequate' amount of. If that power is 'lacking', the obvious solution is that it must be 'return[ed]' to police. Jeffery's use of the transitive verb 'return' in the clause 'we must *return* to police the means to deal with offensive behaviour in all circumstances',[66] is significant for another reason, in that to return something is to restore a former position. One can only have something returned to them if it were theirs to begin with.

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[57] New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 1988 1154 (Bruce Jeffery).

[58] See Theo van Leeuwen, *Discourse and Practice: New Tools for Critical Discourse Analysis* (Oxford University Press, 2008) 17–18.

[59] Norman Fairclough, *Language and Power* (Longman, 1989) 113–15.

[60] See, eg, Hogg and Brown, above n 22, 35–7 where Hogg and Brown discuss the common refrain 'we need more police with greater powers'.

[61] See generally George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 2nd ed, 2003).

[62] See Roger Fowler and Gunther Kress, 'Rules and Regulations' in Roger Fowler et al, *Language and Control* (Routledge, 1979) 34.

[63] Lakoff and Johnson, above n 62, 26 (emphasis in original).

[64] Ibid (emphasis added).

[65] See Roger Fowler and Gunther Kress, 'Rules and Regulations' in Fowler et al, above n 63, 34.

[66] New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 1988 1154 (Bruce Jeffery, emphasis added).

Another aspect of Jeffery's rhetoric is that it contains metaphors of strength and weakness; for example, when he stated that police have been '*hamstrung* by their lack of power', and that '[i]f police doubt their authority, their position is *weakened* and others will work on that *weakness*'. These metaphors postulate not only power and authority, but also strength, as qualities that rightfully belong to police. Significantly, Jeffery was more concerned with the *appearance* of, rather than the actuality of, police strength: 'it does not *look good* for the police' and '[police] have been *laughed out of court*'. Thus, Jeffery justified an increase in police powers in terms of managing perceptions and expectations: how members of the public perceive police. Jeffery did not specify the *agent* in these clauses: we are not told who is laughing police out of court, nor who perceives police as lacking power. Instead, these ideas have been framed as objective truths.[67]

Another important ideological aspect of Jeffery's characterisation of police, and their relationship with power and authority, is *causality*.[68] Jeffery repeatedly constructed his clauses by beginning them with the subordinating conjunctions 'if' and 'until', the former being a conjunction to express a condition and the latter, a conjunction to express time. In this way, Jeffery represented cause and effect as axiomatic, as in the examples: '*If* a policeman lays a charge and it is dismissed, it does not look good for the police'; '*If* a policeman sees a group of youngsters walking the streets … he needs power to be able to disperse them so that they are not involved in crimes such as stealing'; '*If* police doubt their authority, their position is weakened'; and '*Until* police have adequate powers, there will be no respect for police on the beat'.[69] By constructing cause and effect in this fashion, Jeffery represented the consequences of police lacking power—no respect, more crime, and the appearance of weakness—as obvious and inevitable.

My application of CDA to political rhetoric has thus far demonstrated various ways in which discourse shapes and naturalises the ideas that police need to possess power and have authority. As I explained in Chapter Six, drawing on the theories of Lakoff and Johnson, if one conceptualises an abstract concept through a certain metaphorical construction (for example, power is an object that

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[67] The importance of appearing tough—of what people 'see', and their 'expectations'—is highlighted in the following statement of a police officer in relation to the use of CINs for offensive language: 'I'm not going to let anyone walk down the street and just swear at me when I'm off duty or on duty or whatever, you know carrying on like idiots … people see you and they expect you to take action and do something about it ... there's expectations of when you're the police in a small community that you will enforce these minor things'. 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities', above n 25, 60. Similarly, a Queensland police officer stated, in consultations with the Crime and Misconduct Commission in relation to the offence of public nuisance: 'I can get called names all day and I don't arrest. But if members of the public hear someone swearing at me, then I arrest': Public Order Policing: A Review of the Public Nuisance Offence 2008 116.

[68] See Fairclough, above n 60, 51.

[69] Emphasis added.

police possess), and that metaphor is accepted as logical or natural, the metaphor can downplay or hide other aspects of that concept: 'To operate only in terms of a consistent set of metaphors is to hide many aspects of reality'.[70] An important ideological effect of conceptualising power as an object that police should possess is that such a metaphor suppresses alternative ways power could be conceived of in relation to police, such as Foucault's theorisation of power as constitutive: as a fluid form of action or relation between people, which is negotiated and contested in interaction. In this alternative framework, police could not 'lack' power and one could not 'return' power to police, for power could not be conceptualised as a possession to begin with. Rather, relationships of power would be 'strategic games between liberties',[71] where these relationships are unstable and reversible, forms of power are heterogeneous, and positions of relative power are available not just to police, but to *anyone*.[72] However, Foucault's fluid conceptualisation of power would not serve the ideological purposes of depicting a stratified and obvious picture of 'public order', where police occupy a position of authority, while 'youngsters' are deemed 'out of place' and in need of 'dispers[al]'. As I have argued throughout my thesis, this 'systematic ordering'[73] through discourse—the ritual separation of the weak from the powerful, the victim from the aggressor, the pure from the impure, the good from the bad—and the depiction of each of these categories as fixed, objectively discernible and desirable, is essential to the legitimacy of offensive language crimes. If one is to label words as offensive or disorderly, there must be a 'set of ordered relations'[74] to begin with.

9.4 Whose authority?

An important linguistic technique that depicts authority as something that police have by virtue of their occupation is the use of *presuppositions*, a linguistic technique I examined in detail in Chapter Eight. An example of a presupposition is Jeffery's phrase '*their* authority' when he contended that '[i]f police doubt *their* authority, their position is weakened'. In this example, the possessive pronoun 'their' cues the operation of a presupposition.[75] The notion that police have authority, and are authority figures, is also central to the reasoning in *Heanes v Herangi* based on which Johnson J upheld the defendant's disorderly conduct charge.[76] In the hearing transcript, counsel for the

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[70] Lakoff and Johnson, above n 62, 221.

[71] Michel Foucault, 'The Ethics of Care for the Self as a Practice of Freedom' in James Bernauer and David Rasmussen (eds), *The Final Foucault* (MIT Press, 1988) 19.

[72] See Barry Hindess, *Discourse of Power: From Hobbes to Foucault* (John Wiley & Sons, 1996) 98–102.

[73] Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966) 44.

[74] Ibid.

[75] Ibid. Similarly, when then NSW A-G John Dowd introduced the Summary Offences Bill 1988 (NSW), he 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) *Parliamentary Debates* 1178 (John Dowd, A-G, emphasis added).

[76] (2007) 175 A Crim R 175 (Johnson J). I outlined the facts of this case in Chapter Six.

respondent, Mr Lochore, represented the defendant's words, 'I am on the phone—I am on the phone. I'm fucking talking to my dad. Fuck off', as 'a challenge to the authority', a recontextualisation in which Lochore transformed Constable Herangi by substituting him with the abstract noun, 'the authority':

> Lochore: … there's this appreciation of a physical sense of threat as well as threat engendered in the words used to the police officers. So it's a challenge to *the authority* in that sense.
> …
> Justice Johnson: It *challenges authority*, that was the word you used before?
> Lochore: Yes, that's what I'm building up to, your Honour.[77]

In the Supreme Court judgment, Johnson J adopted Lochore's characterisation of Heanes's words,[78] stating that a 'theme' in a number of offensive language cases where police are involved is that language that challenges 'the authority of police officers' is likely to be considered disorderly, because of its potential 'to incite others to involve themselves in challenging the authority of the officers'.[79] Further, Johnson J cited 'an authority figure' as a category of persons to whom the use of certain 'words' may be not be 'acceptable': 'words which ordinary decent-minded people may consider acceptable if spoken in private in very limited circumstances, may not be considered acceptable if said in public or to *an authority figure* or in the presence of children.'[80] This case has since been cited as authority for the principle that a lack of deference to police authority may give rise to an offensive language conviction.[81]

In each of the examples above, swearing at police officers has been transformed into the more abstract notions of challenging authority or 'inciting others' to challenge authority.[82] This authority has not been qualified in any way; neither Johnson J nor counsel for the respondent explained who or what police have authority over—the streets, those who occupy public space, the entire populace? Nor did they mention possible constraints on police authority, including those outlined in legislation and at

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[77] Transcript of Proceedings, *Jonathan Stephen Heanes v Western Australia Police Force* (Supreme Court of Western Australia, SJA 1111 of 2006, Johnson J, 27 March 2007) 69 (emphasis added).

[78] *Heanes v Herangi* (2007) 175 A Crim R 175, 214 [177] (Johnson J); Justice Johnson referred to the case *Robinson v Police* [2004] SASC 271 as 'a case which places greater emphasis on the challenge to police authority in determining whether certain language warrants a criminal sanction'.

[79] *Heanes v Herangi* (2007) 175 A Crim R 175, 214 [177] (Johnson J); Justice Johnson further stated, referring to Heydon J in *Coleman v Power* (2004) 220 CLR 1, 121–2, 'I consider that inciting others to challenge the authority of police officers, even if such a result is not intended, can also be added to Heydon J's examples of the harm which results from the use in public of, in this case, offensive words to a police officer', 219 [202].

[80] *Heanes v Herangi* (2007) 175 A Crim R 175, 218 [198] (Johnson J, emphasis added).

[81] Brown et al, above n 26, 526.

[82] See van Leeuwen, above n 59.

common law. With repetition, the assumptions that police officers have authority, or are authority figures, and that challenges to authority warrant criminal punishment, are posited as established truths or 'law and order commonsense'.[83]

In many of the examples that I have discussed in this chapter so far, there is a *collocation* of the words 'challenge' and 'authority'; 'disrespect' and 'authority'; and 'respect' and 'police'. As I have already stated, the discourse presumes that, in public space, police need to be respected, 'their authority' should go unchallenged and disrespecting them warrants criminal sanction.

It is necessary, however, to acknowledge those counter-voices who argue that insult or 'strong' language is part and parcel of a police officer's work. As Gummow and Hayne JJ stated in the High Court case *Coleman v Power*: 'By their training and temperament police officers must be expected to resist the sting of insults directed to them. The use of such words would constitute no offence unless others who hear what is said are reasonably likely to be provoked to physical retaliation.'[84] Justice Harper similarly noted in the Supreme Court of Victoria:

> It is no offence simply to be angry with the authorities (including, of course, judicial authority). Some people can articulate their anger in measured language that clearly explains their reasons for feeling as they do. Others, especially when their anger is combined with high emotional stress, or alcohol, or other debilitating factors, cannot … Depending always on all the relevant evidence, it would probably be quite wrong to charge someone with an offence simply because such language was used in anger.[85]

Yet, while these judicial opinions call on police officers to be more robust in the face of swearing or insults, they do not question or qualify the 'authority' that police officers exercise in public space. They do not undo the common sense 'knowledge', constructed in criminal justice discourse, that police have authority, or are '*the* authority', in public space.

9.5 Swearing, authority and discourse

> Power gives a speaker the license to do things that the powerless cannot do. Dominance legitimizes invasions of personal space, touching others, engaging in eye contact, and addressing subordinates by their

[83] Hogg and Brown, above n 22, 18.

[84] (2004) 220 CLR 1, 59 (Gummow and Hayne JJ).

[85] *Ferguson v Walkley* (2008) 17 VR 647, 303 [36] (Harper J); also note *DPP v Orum* [1989] 1 WLR 88: 'words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom'; quoted in *Police v Bubbles* [2006] QMC 6, 7 [73]-[74] (Magistrate Payne).

> personal names rather than their title … the boss can tell a dirty joke and the workers will laugh, but not vice versa.[86]
>
> — Timothy Jay

Thus far, I have examined discursive representations of the relationship between swearing, power and authority. I have argued that the dominant discourse in relation to offensive language crimes is one that postulates police officers as authority figures, and represents the undermining or challenging of that authority, by using 'four-letter words', as undesirable to the point of being criminal. Such a position recognises that one of the myriad pragmatic functions of swear words is as a verbal tool to oppose 'established structures of power',[87] a tool available to people who are marginalised or positioned as outsiders by those structures. Swear words can be used by those who might have little political power in a given situation, like many adolescents, university students or Indigenous Australians. Linguist Connie Eble's observations in relation to the register of slang are applicable to this discussion of the use of profanities to challenge power inequalities.[88] As Eble has written: 'Part of the identity of marginalised groups is their position as outsiders vis-à-vis the established structures of power'.[89]

Below, I show how the use of profanities, like slang, can function as 'a verbal expression of this fundamental opposition, showing a range of attitudes from slight irreverence to downright subversiveness'.[90] I examine situations where swear words are used to challenge unequal power relations, involving protesters swearing at (or about) politicians and political policies; and Indigenous Australians swearing at police officers. I question the assumption that individuals should be subjected to criminal punishment for swearing at 'authority figures'. I ask whether the criminal law should promote the maintenance of unequal power structures, whereby cursing is the prerogative of those who are in positions of greater power compared to others, and whereby opposition to that power relationship is considered criminal.

A well-known case in which swear words were used to voice discontent at a political policy, in an attempt to disrupt established relative positions of power, is the 1971 United States Supreme Court case *Cohen v California.*[91] The appellant in that case, Paul Robert Cohen, had worn a jacket bearing the phrase 'Fuck the Draft' when entering the Los Angeles County Courthouse. Cohen did so to

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[86] Timothy Jay, *Why we curse: A neuro-psycho-social theory of speech* (John Benjamins Publishing Companys, 1999), 165.

[87] Connie Eble, *Slang & Sociability: In-Group Language Among College Students* (The University of North Carolina Press, 1996) 124.

[88] See Eble, above n 87.

[89] Ibid 124.

[90] Ibid 124.

[91] 403 US 15 (1971).

protest the United States' involvement in the Vietnam/American War and principally, the government's use of military conscription. After entering the courthouse, Cohen removed the jacket and draped it over his arm. He was subsequently arrested and eventually convicted and sentenced in the Los Angeles Municipal Court to 30 days imprisonment for violating a Californian crime of malicious and willful disruption of the peace by offensive conduct.[92] Cohen's conviction was upheld by the Court of Appeal of California. Cohen appealed his conviction to the US Supreme Court, which quashed his conviction on the basis that, consistent with the 1st and 14th Amendments to the *United States Constitution*, the State may not 'make the simple public display … of this single four-letter expletive a criminal offense.'[93]

The US Supreme Court reasoned that:

> To many, the immediate consequence of this freedom [of expression] may often appear to be only verbal tumult, discord, and even offensive utterance ... That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.[94]

While an examination of the relationship between offensive language and freedom of expression as it pertains to swearing is beyond the scope of this thesis,[95] it is significant for the purposes of this chapter to highlight that the US Supreme Court in *Cohen v California*, like Jeffery's second reading speech to the Summary Offences Bill 1988 (NSW), extracted above, drew on metaphors of strength and weakness, but to an altogether different end. Rather than characterise challenges to established power structures, via swear words, as criminally offensive, the Court suggested that a strong society is one that allows for, and even protects, dissident voices.

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[92] Ibid 16–17 It should also be noted that Cohen neither threatened nor engaged in violence. A bailiff had alerted a municipal court judge of Cohen's jacket, which led to his arrest.

[93] Relevantly, amendment 1 of the Bill of Rights provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances'; *Cohen v California* 403 US 15 (1971).

[94] Ibid 24–5 (Harlan J). The Supreme Court held that Cohen's words did not fall into the US's 'fighting words' exception because there was no direct, provocative personal insult. The Court also held it was not an obscenity case, as the use of the words was not 'in some significant way, erotic'. The Court also reasoned that '[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes'. It is significant to note that four US Supreme Court judges were in the minority: Blackmun J, joined by Burger CJ and Black J, wrote that 'Cohen's absurd and immature antic, in my view, was mainly conduct and little speech' (Blackmun J, dissenting) (at 27); for further analysis of this case see Christopher Fairman, 'Fuck' (2006) 28 *Cardozo Law Review* 1711, 1733–6.

[95] These aspects have been examined in a US context in Ira Robbins, 'Digitus Impudicus: The Middle Finger and the Law' (2008) 41 *UC Davis Law Review* 1403; Fairman, above n 93; Christopher Fairman, *Fuck: Word Taboo and Protecting Our First Amendment Liberties* (Sourcebooks, 2009); Nonetheless, the relationship between swearing, power and freedom of speech would benefit from further inquiry, particularly in the Australian context, with regards to the implied freedom of political communication in the Australian Constitution. Anthony Gray has written on this subject, see Anthony Gray, 'Bloody Censorship: Swearing and Freedom of Speech' (2012) 37(1) *Alternative Law Journal* 37, although not with regards to the legitimacy of punishing challenges to or subversion of 'authority'.

A more local, contemporary example in which swear words were used to challenge power structures was during a demonstration that took place in George Street, Sydney in May 2014. Thousands of university students and staff had united to protest Coalition education policies advocated by the Federal Government under then Prime Minister Tony Abbott. Some protesters wore 'Fuck Tony Abbott' T-shirts, while others held placards inscribed with messages including 'Can you like for one second not be a fuckwit' and 'Christopher Pyne: putting the 'N' in CUTS' (Pyne was the Federal Education Minister at the time). Like Cohen's 'Fuck the Draft' jacket, these swear words were used to convey a rejection of policies advocated by those occupying positions of authority: a Federal cabinet minister and the Prime Minister of Australia.[96]

These examples highlight how swear words can function to challenge existing power structures. And indeed, each of the case studies examined in my thesis can be conceptualised in terms of acknowledgement of, and resistance to, unequal power structures: in *Conners v Craigie* (see Chapter Eight)—a resistance to whites' invasion and occupation of Aboriginal land; in *Del Vecchio v Couchy* (Chapters Seven and Eight)—a rejection of police control; in *Jolly v The Queen* (Chapter Five)—anger at being bitten by a police dog; in *McCormack v Langham* (Chapter Eight)—an insult directed at police in anticipation of police 'persecut[ion]'; in *Heanes v Herangi* (Chapters Six and Seven)—a refusal to comply with police directions; and in *Police v Grech* (this Chapter, above)—a rejection of the officer's power to enforce the law. But should language that has the potential to challenge power structures—swearing—be considered criminal? And further, is the maintenance of an 'unquestionable' hierarchal order something the criminal law should promote?

If we answer these questions in the affirmative, we accept that a key function of offensive language crimes is to enforce police authority over others. We reject the proposition advanced by Harlan J in *Cohen v California* that a strong society is one that allows for, and even protects, dissident voices.[97] And we promote a system whereby offensive language is policed, arbitrated and punished at the hands of the 'victim' who is offended—the police—overlooking the fact that offensive language crimes are legally framed as prohibiting *hypothetical* offence occasioned to the hypothetical 'reasonable bystander' (see Chapter Eight). In short, we accept the proposition that swearing is the prerogative of

[96] Even more recently, in November 2015, US immigration activist group 'Deport Racism' launched a campaign in which they uploaded videos on social media sites of Latino children exclaiming 'Fuck you, racist fuck' to conservative billionaire Donald Trump. The words were used by the children in response to anti-Mexican, anti-immigration sentiments expressed by Trump, who had labelled Mexican immigrants 'rapists', 'murderers' and 'drug-dealers' during his campaign for endorsement as the Republican Party's candidate in the 2017 US presidential election. See Adam Gabbat, 'Donald Trump's Tirade on Mexico's "drugs and Rapists" Outrages US Latinos' *The Guardian* (online), 17 June 2015 <http://www.theguardian.com/us-news/2015/jun/16/donald-trump-mexico-presidential-speech-latino-hispanic>.

[97] See *Cohen v California* 403 US 15 (1971) 24–5 (Harlan J).

the powerful towards the powerless, but not vice versa.

There have been documented many instances where police have sworn at members of the public, particularly Indigenous Australians, with impunity. The Aboriginal Legal Services has noted that it regularly receives complaints about offensive and abusive language and behaviour from police, a problem identified by the RCIADIC.[98] The 1992 ABC documentary *Cop it Sweet* filmed police arresting and charging an Aboriginal defendant on 'The Block' in Redfern for using four-letter words; the same police who were filmed using four-letter words towards members of the public, without caution or reprimand.[99] The hypocrisy of police taking offence to words they themselves use was further highlighted in the 2016 coronial inquest into the death of Ms Dhu, who, in August 2014, at the age of 22, died after being taken into police custody for unpaid fines (many of which were for disorderly conduct because she had sworn at police officers). Sergeant Rick Bond, shift supervisor on the day of Ms Dhu's death, gave evidence at the inquest that he had whispered into Ms Dhu's ear: 'You're a fuckin' junkie'. He said it was normal practice in the Pilbara for police officers to use the word 'fuck' to detainees.[100] Ms Dhu's fines for swearing at police, her treatment in custody,[101] and her subsequent death, highlight the gross hypocrisy and injustice of a situation in which someone can be imprisoned for swearing at a police officer, while police officers can escape punishment for swearing at those in their custody. In maintaining this unjust imbalance, *discourse* has played a powerful role.

Thus far, I have examined the representation of power, authority and swearing in criminal justice discourse on offensive language. I have argued that the dominant discourse promotes a picture of a highly stratified society in which police are 'the authority', and advocates that this hierarchy continue undisturbed. In the following part of the chapter, I return to the cases of *Conners v Craigie* and *McCormack v Langham* to illustrate how police, through discourse, can play an active role in maintaining ideas about a fixed, objectively discernible 'public order' that privileges their position of power vis-à-vis others.

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[98] See 'Indigenous Deaths in Custody' (Australian Human Rights Commission, 1996) 'Chapter 6: Police Practices' <https://www.humanrights.gov.au/publications/indigenous-deaths-custody-chapter-6-police-practices>.

[99] Jenny Brockie, *Cop It Sweet* (ABC Television, 1992).

[100] Calla Wahlquist, 'Ms Dhu Inquest: Officer Was Told of Her Condition Six Hours before She Died' *The Guardian* (online), 22 March 2016 <https://www.theguardian.com/australia-news/2016/mar/22/ms-dhu-inquest-officer-was-told-of-her-condition-six-hours-before-she-died>; see also Hal Wooten's comments above, in Wootten, 'Report of the Inquiry into the Death of David John Gundy', above n 29.

[101] The CCTV footage reportedly shows Ms Dhu being mocked, ignored, dismissed and laughed at by police as she cried, choked on her own vomit in the cells and her hands turned blue. She was twice taken to Hedland Health Campus, and both times returned to the police station. At the coronial inquest in Perth, officers testified they thought Ms Dhu was faking being sick. See Wahlquist, above n 99.

9.6 Cop-speak and how police establish authority through language

An examination of the linguistic features of *speech acts*, *text cohesion* and the institutionalised register *cop-speak* in police officers' language demonstrates that it is not only representations of police, but representations *by* police, that buttress the notion that challenges to 'their authority' warrant criminal punishment. In the Redfern Local Court proceedings of *Conners v Craigie* (the facts of which are detailed in Chapter Eight), Constable Conners gave the following account of Craigie's arrest:

> The defendant continued to abuse both [sic] myself, Constable Drury and the person Martin Hatton, and so I said to him listen mate we're the police. Watch your language. Just keep on walking if you can't talk to us civilly. As I said this I showed the defendant my police identification badge. The defendant continued to abuse myself and others saying fuck off and I don't want anything to do with you. I then said to the defendant look mate this is your last chance. Either watch your language or you'll be arrested and charged okay …
>
> … I then said alright mate that's enough. You're under arrest for offensive language. Do you understand that? The defendant replied go on then arrest me.[102]

Constable Conners legitimised his authority by using a number of *speech acts* when retelling his version of the facts to the court, thereby assuming a position of relative power vis-à-vis the defendant.[103] These speech acts, which are in the forms of *imperatives* and *declaratives*, include the *orders*: 'Watch your language' and 'You're under arrest for offensive language'; the *warning*: 'look mate this is your last chance'; and the *ultimatums*: 'Just keep on walking if you can't talk to us civilly' (an imperative) and 'Either watch your language or you'll be arrested' (a combined imperative and declarative).[104] This combination of speech acts, which can be grouped under the general category of *commands*,[105] indicates that Constable Conners felt an entitlement to control the defendant's actions and words, and thus constrain his liberty. Craigie could either 'choose' to comply with the commands

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[102] Transcript of Proceedings, *Conners v Craigie* (Redfern Local Court, 124/92, Magistrate Horler, 24 November 1992) 2; Note that this is a 'recontextualisation' of the facts by Conners, see Chapter Seven and Theo van Leeuwen, 'Discourse as the Recontextualization of Social Practice: A Guide' in Ruth Wodak and Michael Meyer (eds), *Methods of critical discourse analysis* (Sage, 2009) 144; van Leeuwen, above n 59.

[103] John Austin and John Searle have done significant work on 'speech acts', see John Austin, *How to Do Things with Words* (Oxford University Press, 1975); John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, 1969); Fairclough has written that 'the key insight' of their work on speech acts is that 'language can be seen as a form of action: that spoken or written utterances constitute the performance of speech acts such as promising or asking or asserting or warning; or, on a different plane, referring to people or things, presupposing the existence of people or things or the truth of propositions, and implicating meanings which are not overtly expressed' Fairclough, above n 60, 9.

[104] Ibid. See also Fairclough, above n 60, 155–6.

[105] See Roger Fowler and Gunther Kress, 'Rules and Regulations' in Roger Fowler et al (eds), *Language and Control* (Routledge & Kegan Paul, 1979) 27.

or resist them. But the notion of choice is an illusion in such a scenario. As Constable Conners made clear, if Craigie had chosen not to comply with his orders, he faced the Constable's exercise of coercive powers: arrest, charge and detention in police custody.

In this part, I consider aspects of *cohesion in texts* in the excerpt extracted above.[106] Specifically, I examine the relations between clauses or sentences and whether or not these relations are 'explicitly marked',[107] to probe how Conners established his authority over the defendant. A significant aspect of Constable Conners' recontextualisation of the facts surrounding Craigie's arrest is Conners' explicit reference to his occupation, 'the police', when compelling Craigie to '[w]atch [his] language'. While the two clauses, 'we're the police' and '[w]atch your language', are not explicitly linked with a conjunction (such as 'since' or 'because'), the location of these clauses—side by side—implies that Craigie should refrain from using expletives *because* he is speaking to police officers, as opposed to non-police officers.[108] By way of contrast, Constable Conners depicted the other witness as '*the person* Martin Hatton', thus identifying him with reference to his first and last name as well as the *pre-modifier* 'the person'.[109] As I explained in Chapter Five, van Leeuwen has detailed a number of different representational choices one makes when choosing how to characterise social actors. For example, social actors can be *functionalised*—referred to in terms of what they do (such as 'journalist', 'judge', or '*Constable* Drury'), or individuals can be classified through highly generalised categorisations 'in terms of what they, more or less permanently, or unavoidably, *are'* (such as 'man', 'woman' or '*the person* Martin Hatton').[110] The use of the phrase 'the person Martin Hatton', in its over-elaborate precision (or 'unnatural overspecificity'),[111] is a recognised feature of so-called 'cop-speak' or 'policespeak' (a similar example would be referring to a friend as 'a male associate', see below).[112] Cop-speak has been recognised as a specialist, institutionalised register that cements the

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[106] See Fairclough, above n 32, 174–7.

[107] See ibid 176; see also Fairclough's discussion of 'logical connectors' used in sentences, and the ideological assumptions that such logical connectors cue: Fairclough, above n 60, 131.

[108] As van Leeuwen has identified, 'legitimate authority is vested in [some classes] of people because of their status or role in a particular institution, e.g., parents and teachers in the case of children. Such authorities need not invoke any justification for what they require others to do other than a mere "because I say so," although in practice they may of course choose to provide reasons and arguments': van Leeuwen, above n 59, 106.

[109] See ibid 33.

[110] See ibid 42–3 (emphasis added).

[111] Gwyneth Fox, 'A Comparison of "policespeak" and "normalspeak": A Preliminary Study'' in Gwyneth Fox, Michael Hoey and John Sinclair (eds), *Techniques of Description: Spoken and Written Discourse* (Routledge, 1993) 188.

[112] Eades has summarised the features of 'policespeak' in Diana Eades, *Sociolinguistics and the Legal Process* (Channel View Books, 2010) 153–5, where Eades notes that the term 'policespeak' was first used to refer to the linguistic features that characterise police statements by Gwyneth Fox in Fox, above n 110; see also John Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* (Wiley, 2003) 85–7. The passive voice is frequently used and vocabulary is much more formal than in conversational usage (for example, vocabulary such as 'retain' property rather than 'keep' it). Another feature identified by Gibbons is over-elaboration or 'unnatural overspecificity' (Fox: 188) such as referring to a man as a 'male person' and the use of generic references (e.g. 'residential address' rather

bond between its users and promotes 'insider-ness'.[113] The combination of the use of this distinctive, 'insider' vernacular by police—in particular the unnatural over-specificity of the reference to 'the person Martin Hatton', when contrasted to Constable Conners' representation 'the police'—as well as the aspects of text cohesion examined above, re-emphasise the notion that police officers deserve differential treatment in public space.[114] More specifically, these linguistic aspects legitimise the police officer's right to be respected and obeyed.

In the following part, I examine how additional aspects of cop-speak naturalise police authority when compared to that of the defendants in *Conners v Craigie* and *McCormack v Langham*, through the adoption of seemingly *objective language* or 'generic references',[115] and the use of the *passive voice*, including the objectification of defendants and the obscuration of agency. What follows are examples of cop-speak in Constable Conners' and Constable Drury's witness statements, which the officers recited in the Redfern Local Court proceedings:

- I was driving an unmarked police vehicle
- I had cause to speak to a male person who I now know to be Martin Hatton
- we were approached by a male person who I now know to be the defendant William Craigie
- I then took hold of the defendant and placed him in the rear of the police vehicle
- in company with Constable Conners
- Constable Conners then produced his police identification badge.[116]

In *McCormack v Langham*, Constables Denning and McCormack expressed themselves in a similar register, as is evident in the following extracts from their witness statements:

- Upon arrival at the premises it was noticed that the place was full of people of various ages and all

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than a 'house'), sometimes for legal accuracy. Eades has used the example of '[t]he male person then proceeded in a northerly direction' (154–5). Expressions of time are frequently found following the subject (whereas it is more typical for them to precede the subject or follow the verb) for example, 'then', 'at first' 'continually'.

[113] While recognising this specialist copspeak register, it is important not to neglect the law's role in maintaining its own specialist register that similarly solidifies group cohesion amongst those within the legal profession, predominantly lawyers, academics and judges. See Peter Tiersma, *Legal Language* (University of Chicago Press, 1999) while pushing out those who have limited access to its language. The institution of the law has fashioned its own form of language, 'legal English', which plays an important role in maintaining power inequalities. Gibbons has argued that the technical and complex nature of legal language 'carries a social message concerning the power and authority of the person using it'. Legal English is highly technical, and the reason often given for this is that the law consists of legal concepts which cannot adequately be expressed by lay-words. Thus, the criminal law must come up with its own technical and loaded terms to express such unique concepts as 'voir dire', 'mens rea', 'automatism' 'temporal coincidence' and 'voluntariness'. The highly technical nature of legal language means many laypeople cannot participate in a legal conversation. Nevertheless, the legal system expects that non-specialist members of the public interact in this foreign setting, despite being unable to understand or speak crucial aspects of this register; John Gibbons, 'Language and the Law' in Alan Davies and Catherine Elder (eds), *The Applied Handbook of Critical Linguistics* (Blackwell, 2004) 285, 7; see also Eades, above n 111, 10.

[114] I too have the choice in this chapter to characterise the police officers via their function or by omitting that function.

[115] See Gibbons, above n 111, 85–7; Eades, above n 111, 153–5.

[116] Transcript of Proceedings, above n 101, 2–5.

seats in the place were taken

- I also noticed the defendant in the rear of the premises
- I heard a male voice then say in a loud voice, 'Watch these two fucking poofters here, how they fucken persecute me'
- Constable McCormack and I then approached the defendant
- I then saw him nod his head to a male associate.[117]

A noticeable feature of this cop-speak is its stilted, formal vocabulary: the use of abstract and generic words to describe actions, situations and locations, as well as its 'unnatural overspecificity'. Examples of this stilted, formal vocabulary are the phrases : 'the rear of the premises' (as opposed to, for example, 'the back of the restaurant'), 'the rear of the Police vehicle', 'approached', 'a male associate', 'unmarked police vehicle', and 'I had cause to speak to a male person'.[118] While many of these abstract words are not the most direct or accurate label, their use gives police officers an air of objectivity, formality and correctness, setting their language apart from that used by members of the public. This difference is more pronounced when contrasted with the more conversational or casual language used by the 'civilian' observer, Martin Hatton, whose evidence given in the Local Court proceedings of *Conners v Craigie* included the following: 'Yeah he said to me you fucking white bastard. I want to see you dead. You don't fucking belong here. I then just sort of said hey and stepped backwards … I believe it was a little bit longer than that but that's sort of along the lines of what was said and the contents of what he was trying to get across to us.'[119] Alongside the more informal vocabulary ('yeah', 'hey'), if one analyses the *modality* of this extract, Hatton made his subjective affinity with the propositions explicit (for example, 'I believe it was' and hedged a number of his recollections with, 'just sort of', and 'sort of along the lines of'.[120] These hedges not only underscore Hatton's subjective perspective, but also give recognition to the fallibility of his memory, two aspects that the police officers, through their language, obscured.

An analysis of the *vocabulary* and *transitivity* of these clauses reveals that the police officers position themselves as objective observers of the defendant's and others' actions.[121] As stated in Chapter Eight, an analysis of transitivity recognises that, through the process of recontexualisation, authors or

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[117] See David Allen Denning, 'Statement in the Matter of Geoffrey Alan Langham' (Lismore Police Station Exhibit 'B', 24 January 1991); although it was produced more than two weeks later, the witness statement of Constable McCormack substantially replicated that of Constable Denning: Michael Douglas McCormack, 'Statement in the Matter of Geoffrey Alan Langham' (Lismore Police Station Exhibit 'B', 6 February 1991).

[118] As Eades has noted, in policespeak, vocabulary is much more formal than in conversational usage: Eades, above n 111, 154.

[119] Transcript of Proceedings, above n 101, 7.

[120] See my discussion of subjective modality in Chapter Five. See also Norman Fairclough, *Discourse and Social Change* (Polity Press, 1992) 159.

[121] See van Leeuwen, above n 59, 32; I also examined transitivity in Chapters Six to Eight.

speakers can 'reallocate roles or rearrange the social relations between the participants'.[122] Thus, an analysis of transitivity involves considering who or what is represented as doing what to whom, and how.[123] The role of the critical discourse analyst is to probe the possible ideological motivations behind choices made by authors in their grammatical construction of clauses, including their allocation or obfuscation of causality and responsibility within clauses.[124]

In *McCormack v Langham*, Constables Denning and McCormack '*noticed'* the defendant, they '*saw* him nod his head' and they '*heard* a male voice'. In these clauses, the defendant and his 'male associate' are grammatically represented as *patients* (being 'acted upon'):[125] the objects of the police officers' gaze. Similarly, in *Conners v Craigie*, Constables Conners and Drury gave the following descriptions of the defendant in evidence:

- At the time of the defendant's arrest he appeared to be heavily affected by alcohol. He was unsteady on his feet. His eyes were glazed. His speech was slurred and he smelt heavily of alcohol.
- At the time of the arrest the defendant appeared to be heavily intoxicated by alcohol. He appeared unsteady on his feet. His eyes were glazed and his speech was slurred. The defendant also smelt of intoxicating liquor.[126]

The police officers made these almost identical 'observations' without indicating whose perspective was adopted; they assumed a generic 'police' perspective. Their observations are noteworthy in the way that, unlike Martin Hatton's statements outlined above, they have been depersonalised. By couching their observations in objective terms, the police officers chose not to make their subjective affinity with the propositions explicit (for example, by qualifying their phrases with 'I thought that …', 'In my opinion …' or 'I suspected that …').[127] Ideologically, this objective modality conveys an impression of neutrality: that the officers possessed an external, impartial perspective; their language obscures their formative role in defining a defendant's behaviour as criminally offensive.

The final paragraphs in both Constable Denning's and Constable McCormack's statements are noteworthy for the officers' framing of their actions in the *passive voice*, which allows them to exclude any mention of the agent(s) 'doing' the actions: 'The defendant was then placed in the rear of the Police vehicle and returned to the Lismore Police station where he was charged with the matter

[122] Ibid.

[123] David Machin and Andrea Mayr, *How to Do Critical Discourse Analysis: A Multimodal Introduction* (Sage, 2012) 104.

[124] Fairclough, above n 60, 51, 124; see also Machin and Mayr, above n 122, 104.

[125] See van Leeuwen, above n 59, 32.

[126] Transcript of Proceedings, above n 101, 3–5.

[127] Fairclough, above n 32, 158–60.

now before the Court.'[128]

The audience is not informed *who* 'placed' Langham in the vehicle, who did the charging or who 'returned' McCormack to Lismore Police Station. In the Local Court proceedings in *Conners v Craigie*, Constables Conners and Drury similarly adopted the passive voice and deleted the agent(s) responsible for 'completing' the paperwork, 'convey[ing]' the defendant, 'escort[ing]' the defendant and 'plac[ing]' him in the dock area':

- The defendant was then conveyed to Redfern police station. On arrival at Redfern police station the defendant was placed in the dock area.
- After completing the relevant paperwork the defendant was escorted to the rear of a caged truck[129]

In using language in this way, the officers supressed or backgrounded the social actors responsible for doing the relevant actions; we can only infer that the Constables did the relevant actions from our understanding of how such processes usually occur. Through their *passive agent deletion*, the police officers convey an impression of objectivity: that they can 'distil' general ideas about criminal behaviour by assuming 'the sovereign viewpoint' from which reality is discerned from a certain 'distance' or height'.[130] This impression is analogous to that conveyed by magistrates in criminal justice discourse on offensive language (identified in Chapter Five); upon attaining the title of 'police officer', one loses one's civilian status, and attains the knowledge and experience to distil objective truths. Their language downplays, and often conceals, police officers' determinative roles, and thus their power, in defining criminal behaviour.

9.7 Denying discretion through police language

I have thus far used CDA to critique representations of the interrelationship between police, power, authority, order and swearing, extracted from offensive language cases and transcripts, parliamentary debates and police witness statements. I have argued that these representations construct as obvious or 'common sense' a picture of public space in which police occupy a position of authority relative to members of the public. I have analysed how police buttress their authority and distinct status in a number of ways, including their use of a specialist register, cop-speak. In the following section, I continue an argument, introduced in the foregoing analysis, that an aspect of heightening police power involves obscuring discretion. I show how language can be used to make police choices appear

[128] Denning, above n 116; see also van Leeuwen, above n 59, 29: 'the classic realization [of suppression of social actors is] is through passive agent deletion'.

[129] Transcript of Proceedings, above n 101, 5.

[130] Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Harvard University Press, 1984) 444 discussed in Chapter Five.

logical, and even inevitable, so as to depict police as simply enforcing 'the law'. I analyse instances in which the agency of, and choices available to, people other than police officers, including bystanders and judicial officers, can be hidden in criminal justice discourse in relation to offensive language crimes.

It is already well-acknowledged that broadly worded, all-encompassing offensive language provisions afford police considerable discretion, a discretion zealously guarded by police and their representatives.[131] The phrase historically used to describe public order crimes—'police offences'—recognises the centrality of police in deciding which behaviours to pursue, and which powers (or laws) to draw upon, as well as the fact that police are often the 'victims' of public order offences.[132] What constitutes public order, and infringements of public order, is largely determined by police on patrol.[133] Police must further decide what action to take in relation to that behaviour: whether to deal with the conduct formally (for example, by administering a formal caution, issuing a criminal infringement notice, serving a summons or using powers of arrest), informally (for example, by issuing an informal caution) or take no action at all.[134]

Police discretion is not only structurally unavoidable, it is in many respects a desirable feature of policing: as John Avery, former NSW Commissioner of Police, has acknowledged: 'Police cannot enforce all the laws all the time, even if they tried, nor does anyone expect them to do so.'[135] However, *too much* discretion can undermine a concept fundamental to the Australian legal system: the rule of law—the doctrine that holds that the law should be capable of being known by everyone so that everyone can comply, should be supreme, and should apply universally, equally and fairly.[136] The idea that laws should be capable of being known by everyone was recognised by Yeldham J, who stated in a 'parting' observation in *White v Edwards*: 'in deciding to penalise particular types of conduct, it is essential, for obvious reasons, that members of the community and those charged with

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[131] See, eg, Brown et al, above n 26, 513–18; Hogg and Brown, above n 22, 36; Alvhh Lauer, 'The Offences in Public Places Act - A Policeman's Viewpoint' (1980).

[132] See Brown et al, above n 26, 513–14; White and Perrone, above n 25, 39–41.

[133] See 'Policing Public Order: A Review of the Public Nuisance Offence' (Report, Queensland Crime and Misconduct Commission, 2008) 20; Brown et al, above n 26, 262–8.

[134] See White and Perrone, above n 25, 39–41; relevantly, the NSW Bureau of Crime Statistics and Research recognises that 'shifts in policing policy can also have a marked effect on the number of recorded drug offences, cases of offensive behaviour or of receiving stolen goods': 'New South Wales Recorded Crime Statistics: Quarterly Update March 2016' (NSW Bureau of Crime Statistics and Research, 2016) 25.

[135] John Avery, 'Police – Force or Service?' (1981) quoted in Hal Wootten, 'Aborigines and Police' (1993) 16 *University of New South Wales Law Journal* 265, 271; see also White and Perrone, above n 25, 39; White, above n 24, 276.

[136] Thalia Anthony and Michelle Sanson, *Connecting with Law* (Oxford University Press, 3rd ed, 2014) 116; see AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Springer, first published 1885, 1985) in which Dicey argued that the rule of law has three meanings: first, that the law predominates, not arbitrary power; second, that the law applies to everyone; and third, that the law of the constitution is created by the will of the people.

the enforcement of laws such as that now under consideration, should have reasonably clear guidance as to what conduct is permissible and what is not.'[137]

If a law is drafted too broadly, if it affords decision makers too much discretion, one cannot predict whether one's behaviour is caught by that law, and therefore that law does not possess the characteristics of legal certainty and non-arbitrariness. Another possible risk of too much discretion is that laws will not be applied impartially by police officers or judges, but instead, selective bias or discrimination will occur, in that enforcing officers and decision makers may selectively and unevenly target and punish certain groups or types of behaviour.[138] Such selective bias can be recognised in police action (or inaction) that relies heavily on stereotypes and discriminatory practices, including informal social cues such as physical appearance, language, religion, or skin colour to guide and justify pre-emptive intervention or differentiate between respectable and dangerous or 'criminal' classes.[139] Recognising the significant discretion afforded to police by offensive language laws, as well as the potential for excessive discretion to undermine fundamental aspects of the rule of law, in the following part I consider how criminal justice discourse can impart the *impression* that these laws are applied fairly and equally, by concealing the determinative role of police and judicial officers in arbitrating offensiveness, and downplaying the potential for bias or prejudice to influence police and judicial decision making.

Police are able to give the impression that they are merely applying objectively discernible rules in their policing of offensive language via the linguistic techniques of *presuppositions* and representations of *cause and effect*.[140] These linguistic techniques are evident in the following exchange between the solicitor for the defence, Ms Hendy, and Constable Del Vecchio from the Brisbane Magistrates' Court proceedings of *Del Vecchio v Couchy*:

> Ms Hendy: Well, can you say anything about the tone of voice that you used or the volume that you used once you—she said either, 'You fucking cunt' or 'fucking cunt' to you?
> Constable Del Vecchio: Yes. I would of raised my voice and I would of spoken very sternly to her *because* at that point she changed *the* rules [sic].[141]

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[137] *White v Edwards* (Unreported, Supreme Court of NSW, Yeldham J, 5 March 1982) 9 ('*White v Edwards*').

[138] White and Perrone, above n 25, 42.

[139] Ibid; as Cunneen and White have written: 'The police develop expectations regarding the potential threat or trouble posed by certain groups of young people. This leads them to pre-empt possible trouble by harassing young people whose demeanour, dress and language identify them as being of potential concern. Indeed distinctions are made between the "respectable" and the "rough", the "haves" and the "have-nots" and police action is taken in accordance with these perceptions', Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 3rd ed, 2007).

[140] See Fairclough, above n 60, 51, and see above.

[141] Transcript of Proceedings, *Del Vecchio v Couchy* (Brisbane Magistrates' Court, 30238 of 2000, Magistrate Herlihy, 7 December 2000) 9 (emphasis added).

Constable Del Vecchio's use of the *presupposition* '*the* rules', where the definite article cues the operation of the presupposition,[142] gives the impression that Constable Del Vecchio was following an unwritten set of rules to which everyone, including the defendant, was privy. Constable Del Vecchio also used the causal connective 'because', thus establishing a *cause and effect* relationship between Couchy's words, 'You fucking cunt' on the one hand, and Del Vecchio's decision to raise her voice and speak sternly to her on the other.[143] The use of the enhancing conjunctive adjunct 'because' creates a 'reason plus result' argument (as with the use of the enhancing conjunctive adjunct 'so' in the following example from an advertisement, 'These children are desperate for your help, *so* call Plan now').[144] The ideological effect of Constable Del Vecchio's representation of cause and effect, and her use of the presupposition 'the rules', is to depict her decisions to charge and arrest Couchy as automatic—she was simply following standard procedure—hiding her significant discretion in determining how to react to Couchy's words.

In the Perth Magistrates' Court hearing of *Heanes v Herangi*, Constable Herangi similarly obscured his discretion in choosing whether or not to pursue Heanes (after Heanes had allegedly bumped into the officer), and later, in choosing to charge and arrest Heanes for disorderly conduct (after Heanes had said: 'I'm fucking talking to my dad. Fuck off'), by using the enhancing conjunctive adjunct 'so':[145]

> Constable Herangi: 'When he bumped into us he continued walking through and then I turned around … He continued looking at us until he was out of view from us. Then that is when I said to Constable Paul, 'Did he deliberately walk into us?' She said, 'Yes.' … *So* we basically turned around and went to look for this person …'
> Constable Herangi: He said, 'I'm on the fucking phone talking to my dad. Fuck off.'…
> Prosecutor: You say this took place outside the Myer store …
> Constable Herangi: The entrance was, more or less, in Forrest Chase. If you know where Forrest Chase is, it is on the western side of the Myer store. *So* I placed the accused under arrest'.[146]

Constable Herangi's use of 'so' implies a causal link between: firstly, Constable Herangi's decision to pursue Heanes and Constable Paul's suggestion that Heanes had bumped into the officers; and

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[142] See Fairclough, above n 60, 154, and analysis above.

[143] See Mayr and Simpson, above n 41, 94–6.

[144] Enhancing conjunctive adjuncts, such as 'so', 'because', 'in order to' or 'for', create 'enhancement' by establishing a cause and effect relationship between propositions, whereas the use of the enhancing conjunctive adjuncts 'in order to' and 'for' are purposive connectives in which the emphasis is placed on some future course of action, see ibid 95.

[145] See ibid 94–6.

[146] Transcript of Proceedings, *Jonathan Stephen Heanes v Western Australia Police Force* (Perth Magistrates' Court, PE 39693 of 2006, Magistrate Nicholls, 23 October 2006) 5 (emphasis added).

secondly, Herangi's decision to arrest Heanes and Heanes's language. A cause and effect relationship was also established between Heanes's actions and the officers' choices through the police prosecutor's use of the cop-speak phrase, 'giving the officers cause' in Perth Magistrates' Court, where the prosecutor submitted: 'He has, for whatever reasons, for whatever particular display or end or purpose, he has pushed through the police officers, *giving the officers cause* to go and speak to him regarding his actions, which is quite appropriate in the circumstances.'[147] The police prosecutor further concealed the police officers' discretion by using negative assertions in his closing submission, where he stated: 'in this situation officers are left with *no other alternative* your Honour. A person swearing in that manner, in your face, outside Myers, 12 o'clock in the afternoon, Wednesday, school holidays, people around the place. They have *no option* but than to arrest this accused person.'[148] As Fairclough has recognised, negative assertions can carry a special type of presupposition**,** in that they can imply the existence of positive, antecedent assertions, only in order to contest or reject them.[149] And, like presuppositions, 'negation can be sincere, manipulative or ideological'.[150] In the present example, the police prosecutor's negative assertions, in implicitly rejecting the unstated propositions that the police officer had other options, function to portray police officers' choices as constrained when faced with certain behaviour.[151] These language choices downplay the discretion of the police officers by depicting the officers' actions as consequential and inevitable, and omitting any alternative actions available to police.

9.8 Denying discretion through judicial language

In the previous part of the chapter, I showed how police language choices can downplay or obscure police discretion when determining which actions to take in responding to potentially criminal behaviour. Similarly, the language of judicial officers plays an integral part in legitimising police discretion.[152] In this part, I analyse the role of judicial language in justifying police power, and downplaying the existence or breadth of police discretion—'the power [of language] to disguise power'[153]—focusing on aspects of *transitivity*.[154]

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[147] Ibid part 2, 12 (emphasis added).

[148] Ibid part 2, 13 (emphasis added).

[149] Fairclough, above n 32, 121–2.

[150] Fairclough, above n 60, 155.

[151] See ibid 154–5.

[152] Criminal justice historian, Mark Finnane, has recognised the role that judges play generally in mandating police discretion, stating that discretion 'requires the appropriate degree of legal and judicial mandate if it is not to be seen as totally arbitrary and therefore potentially threatening the legitimacy of policing': Mark Finnane, 'The Politics of Police Powers: The Making of Police Offences Acts' in Mark Finnane (ed), *Policing in Australia: Historical Perspectives* (New South Wales University Press, 1987) 88, 104.

[153] Fairclough, above n 60, 52.

[154] See above; see also van Leeuwen, above n 59, 32; Fairclough, above n 60, 50–3.

How the inanimate noun 'language' (and related inanimate nouns such as 'words') is depicted in offensive language cases has significant ideological consequences, a point I explored in detail in Chapter Six. In this chapter, however, I focus on how grammatical choices made in the depiction of a defendant's words can obscure police power and discretion. In the Supreme Court judgment of *Heanes v Herangi*, Johnson J repeated with approval the following quote of Callinan J in *Coleman v Power*:

> That the police officer concerned may not in fact have been provoked does not avail the appellant. Nor does it avail the appellant that because Constable Power was a police officer, he may have been unlikely to retaliate or be otherwise provoked. *The words used inevitably produced a risk of that.* That was not however the only risk. It is easy to see that there was a further risk that other people present, or in the vicinity, might take exception to, and *be moved to take matters into their own hands, because* a constable was being insulted.[155]

In this excerpt, Callinan J represented '[t]he words used'—an inanimate noun—as the agent (whereas agents are generally realised as animate nouns)[156], attributing to this inanimate noun the verb 'produce'. Through this grammatical construction, Callinan J depicted words as having a 'productive' power. Justice Callinan enhanced the cause and effect relationship between 'the words used' and the 'risk of [retaliation]' by using the causal conjunctive adjunct 'inevitably'.[157] This attribution of the risk of retaliation or provocation to a non-human entity—words—obscured the agency of police officers or others who decide to react to the words. The role of choice in reacting to the words was also obscured in the phrasing of the clause: 'other people present, or in the vicinity, might … be moved to take matters into their own hands'. In this clause, Callinan J did not mention 'what' or 'who' is moving the people to take matters into their own hands. Instead, by using a passive verb structure, in which 'other people present' are allocated a passive role, his Honour was able to omit the causative agent. The ideological significance of such choices is underscored when they are compared to alternative grammatical representations and vocabulary choices available to Callinan J. For example, Callinan J might have instead chosen to write, 'other people present, or in the vicinity might … *decide* to take matters into their own hands'. By using this alternative wording, his Honour would have attached agency, and thus responsibility, to such people. Instead, Callinan J chose a grammatical

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[155] *Coleman v Power* (2004) 220 CLR 1, 93 (Callinan J, emphasis added). Justice Johnson summarised this excerpt as 'Callinan J noted (at 114) that, although the police officer concerned may not in fact have been provoked, that did not avail the appellant. The fact that Constable Power was a police officer and unlikely to retaliate was also said not to avail the appellant. In Callinan J's view, the words used inevitably produced a risk of that but that was not the only risk. His Honour considered there to be a further risk that other people present, or in the vicinity, might take exception to, and be moved to take matters into their own hands, because a constable was being insulted': *Heanes v Herangi* (2007) 175 A Crim R 175, 207 [140].

[156] Fairclough, above n 60, 124.

[157] See Mayr and Simpson, above n 41, 94–5; Fairclough, above n 32, 176, other examples of conjunctive adjuncts include 'therefore', 'so' etc, see above.

construction that concealed the accountability of persons present, thereby shifting the blame to the defendant's words. Further, in using the enhancing conjunctive adjunct 'because' in 'other people present … might …be moved to take matters into their own hands, *because* a constable was being insulted', Callinan J attributed any potential escalation of violence to the fact that a 'constable was being insulted', as opposed to any vigilantes choosing to take the law into their own hands. Thus, representations of causality play a critical role in naturalising the idea that violence is an inevitable outcome of using words considered offensive or insulting.

In the Supreme Court hearing of *Heanes v Herangi,* Johnson J and Mr Wheldon, counsel for the Defence, debated whether the use of certain words, such as those uttered by Heanes, should be considered more disorderly if said 'to a person in authority carrying out their duties',[158] rather than to a member of the public. Mr Wheldon, conceding that 'on the one hand you can say if it's said to someone in authority as against one person saying to a friend in the street it might—it could be seen to be more offensive but whether it amounts to disorderly…', was interrupted by Johnson J, who 'corrected' (and *formulated*) [159] Mr Wheldon's submission, stating:

> No, that's not what it is. I think it is definitely disorder because you have a situation where people are treating the police in a situation with conflict with such contempt the danger is *inciting other people to act accordingly*. You could see I think the very concern at the heart of those cases is that you really are being disorderly and that *things can flow on from that* which is the biggest concern with disorderly conduct, is the *potential for it to escalate.*[160]

If one analyses the transitivity in this excerpt, particularly the choices made by Johnson J in allocating the agents (the participants or *actors*), the processes involved (what gets done, and how), and the beneficiaries of processes (objects or the *acted upon*), Johnson J depicted 'other people' as the passive beneficiaries of the process 'inciting', caused by the active agents, 'people [who] are treating the police … with such contempt'. By choosing to use the verb 'inciting' and, like Callinan J above, allocating 'other people' a passive role, Johnson J disguised the agency—the decision-making capacity—of the 'other people': their choice to either act with or without contempt for police. Further, her Honour's use of metaphors that conceptualise words as a propellant: a source of physical energy, in the clauses 'things can *flow* from [disorderly conduct]' and 'the potential for [disorderly conduct] *to escalate*', allocated responsibility for any retaliatory acts of violence to the defendant's words.[161]

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[158] Transcript of Proceedings, above n 78, 27.

[159] Transcript of Proceedings, *Jonathan Stephen Heanes v Western Australia Police Force* (Perth Magistrates' Court, PE 39693 of 2006, Magistrate Nicholls, 23 October 2006) pt 2, 7, 12 (emphasis added); see discussion of 'formulation' below and in Chapter Seven.

[160] Transcript of Proceedings, above n 78, 27–8 (emphasis added).

[161] See Lakoff and Johnson, above n 62, 59; for further analysis of words being represented as physical objects through metaphors, see Chapter Six.

Again, these metaphors shift the responsibility for any escalation of violence from the people who perpetrate the act, to an inanimate abstract noun—the language of the defendant. As my analysis here shows, these metaphors, grammatical choices and choices of vocabulary play an important role in constructing as common sense the idea that violence can emanate from, and be caused by, swear words, shifting the audience's focus from those persons who choose to react to language with physical force. My analysis in this part advances my arguments in Chapter Six, that criminal justice discourse plays a fundamental role in naturalising the idea that swear words are criminally harmful and dangerous.

9.9 Obscuring police discretion through equal treatment discourse

In the previous part, I analysed how police discretion is represented as constrained in criminal justice discourse, so as to depict police officers' choices to pursue, charge or arrest, and bystanders' potentially violent reactions, as inevitable consequences of using swear words to a police officer. I detailed that where too much discretion is afforded to police officers (as well as other decision makers within the criminal justice process), there is a risk of selective bias and discrimination: that the law in question will not be applied neutrally and impartially, but will instead operate selectively towards certain groups or target certain types of behaviour, and overlook others.[162] One way in which the existence of selective bias and discrimination throughout the criminal justice process is obscured is through claims of equal treatment in policing: what Wootten has labelled 'equal treatment discourse claims'.[163] Wootten recalled that when he was the first Aboriginal Legal Service President from 1970 to 1973, he 'initiated contact with the Commissioner of Police, the reaction was that police have to apply the law and cannot distinguish between races; if Aborigines obey the law they will not be in trouble with the police. Officers were taught to treat all citizens the same.'[164] Wootten argued that this equal treatment discourse has often been used in the law as a 'protective screen',[165] justifying refusals to acknowledge cultural differences, the historical mistreatment, and continuing over-policing and over-criminalisation, of Aboriginal people.

My analysis of criminal justice discourse in offensive language cases reveals that equal treatment discourse claims continue to be relied upon to justify the disproportionate punishment of Indigenous Australians (when compared to non-Indigenous Australians) for offensive language crimes. In the

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[162] See White and Perrone, above n 25, 42; see also Rob White, 'Street Life: Police Practices and Youth Behaviour' in Rob White and Christine Alder (eds), *The police and young people in Australia* (Cambridge University Press, 1994); Harry Blagg and Meredith Wilkie, *Young People and Police Powers* (Australian Youth Foundation, 1995); Cunneen, above n 25.

[163] Wootten, 'Aborigines and Police', above n 134.

[164] Ibid 269.

[165] Ibid.

Queensland Court of Appeal hearing of *Del Vecchio v Couchy*, Couchy's defence counsel, Andrew Boe, submitted that a significantly higher proportion of Aboriginal people are convicted and gaoled for using insulting language. In response, Douglas J stated: 'Yes; but, I mean, that on its own might show that more Aboriginal persons commit these types of offences'.[166] Justice Douglas' statement here is an example of *formulation*—an aspect of interactional control in conversations where the formulator explains, translates, furnishes the gist of or corrects what the other participant has said.[167] By explaining that disproportionate Indigenous prison populations indicates more Indigenous persons commit offensive language crimes, Douglas J imparted a worldview in which the law is a neutral instrument. In this worldview, police officers are merely enforcing, and the courts are merely applying, 'the law', which applies to all equally. Such equal treatment discourse denies structural inequalities, cultural differences and documented over- and differential policing of Indigenous Australians in public space.[168] It divorces the policing of Indigenous Australians from a colonial history in which police were agents of a State which dispossessed Indigenous Australians from their land, subjected Indigenous Australians to specialised forms of government administration and regarded Aboriginal Australians as inferior to white Australians. And equal treatment discourse conceals the myriad choices that police and judicial officers make, and the assumptions on which they rely, in determining what kinds of words and defendants to target and punish with offensive language charges, choices which extend to the characterisation of 'harms' caused by swear words (see Chapter Six); how 'context' is to be described and interpreted (see Chapter Seven); what 'the community' and its 'standards' are, and who the 'reasonable person' is (see Chapter Eight), in offensive language cases. In the final part of this chapter, I analyse how this myth of equal treatment under the law is further perpetuated by the idea that police are instruments of the law, and the courts are simply upholding 'order' in offensive language crimes.

9.10 Representing an 'orderly society'

I encourage the police, as soon as this becomes law, to establish a general order as soon as possible ... I want police to be able to clearly demonstrate to the people of the Northern Territory that they are in control of the streets.[169]

—John Elferink, former Attorney-General, Northern Territory

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[166] Transcript of Proceedings, *Del Vecchio v Couchy* (Queensland Court of Appeal, 245/2001, de Jersey CJ, McPherson JA and Douglas J, 4 February 2002) 7.

[167] Fairclough, above n 32, 157, and see Chapter Seven.

[168] White, above n 24.

[169] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014 Parliamentary Record No. 16 (starting 25 November 2014) (John Elferink, A-G), in relation to the 'paperless arrest' laws in the Northern Territory, during the second reading of the Police Administration Amendment Bill 2014 (NT).

At the start of this chapter, I wrote that conceptions of authority and power cannot be divorced from conceptions of order. I argued that a person's or group's authority can be enforced by coercion, but can also be generated by public consent to a particular order, where that order has been represented as natural, common sense and beneficial. In the realm of public order crimes, there is a fine line between policing law and order, and policing a social order that is considered as, or postulated to be 'desirable' according to those who occupy positions that influence understandings of desirability. Discourse plays an influential role in the representation of order as something that is fixed, concrete, obvious and desirable. This is exemplified in the language of Gleeson CJ in the High Court case *Coleman v Power*: 'The object of such [public order] legislation is generally the same: the preservation of order in public places in the interests of the amenity and security of citizens, and so that they may exercise, without undue disturbance, the rights and freedoms involved in the use and enjoyment of such places.'[170]

This statement on the purpose of public order crimes—the preservation of order in public places—*presupposes* the existence of an identifiable 'order' in public places.[171] Chief Justice Gleeson represented order in public places, like community standards (see Chapter Eight), as capable of being maintained or preserved, and presumed that such preservation is in citizens' 'interests'. If a person were to challenge the assertion of the Chief Justice, contending that the preservation of order in public places is not the object of public order legislation, they would still be accepting the embedded proposition that an 'order' in public places exists. This presupposition 'postulate[s] interpreting subjects with particular prior textual experiences and assumptions, and in doing so, they contribute to the ideological constitution of subjects'.[172] Chief Justice Gleeson presumed that the reader required no further explanation as to what 'orderly' public space looks like; his Honour assumed that the reader understood and shared his conception of what 'order' entails. Through his Honour's language, which imposes on readers the idea that there is an existing order in public spaces, Gleeson CJ obscures their ever-shifting composition; and disguises the reality that ideas about appropriate uses of public space vary culturally, historically and individually.[173] And given the naturalised view in criminal justice discourse that swear words are 'dirty words', capable of polluting clean, orderly spaces,[174] the depiction of public order as fixed, external and worth preserving, is central to legitimising the

[170] (2004) 220 CLR 1, 12 (Gleeson CJ).

[171] See Fairclough, above n 32, 121.

[172] See ibid.

[173] See, eg, Marcia Langton, 'Medicine Square' in Ian Keen (ed), *Being Black: Aboriginal Cultures in 'Settled' Australia* (Aboriginal Studies Press, 1988) 201; Jarrod White, above n 24.

[174] See Chapter Six.

punishment of swearing. The more orderly a system appears, the greater the desire to reject or eliminate dirt—that which 'offends against order'.[175]

9.11 Conclusion

This chapter has examined the central place of discourse in naturalising ideas about police power, authority and order; in obscuring discretion; in positioning police at the apex of public space, in forcing young people and Indigenous Australians to keep to, and to not question, 'their place'; and in sustaining these unequal power relations between police and (other) members of the public. I used CDA to interrogate how police, judicial officers and politicians buttress the legitimacy of offensive language crimes. I showed how language choices can depict as 'common sense' a number of assumptions, including that police officers inherently possess authority; that police officers deserve others' respect in public space; that swear words provoke or cause violence; that police neutrally enforce the law; that there is an objectively discernible public order; that this current 'order' is desirable and worth preserving in the public interest; and that swear words subvert or destabilise the 'order' of society. I have also demonstrated how police power and discretion are hidden through language choices, so as to downplay the considerable latitude afforded to police and judicial officers in determining what kinds of words are offensive, who to target, and how to respond to swear words. I argued that this denial of discretion also denies the influence of bias and prejudice on police and judicial decision-making; structural inequalities and cultural differences; and the far-from-neutral role that police have played in the surveillance and punishment of Indigenous Australians' activities in public space. In my concluding chapter, I continue to highlight how criminal justice discourse re-enacts inequality, by drawing together my arguments in this and the other chapters in my thesis. I highlight key findings, reflect on their impact, and identify theoretical and policy implications arising from my work. I question whether the criminal law should be used to punish swear words on the basis that such words subvert an assumed 'order' or challenge 'authority', in instances where such words do not cause lasting psychological or physical harm. I argue that there is a need to reimagine the concept of public order in the criminal law, and reconsider where, and if, the punishment of swearing fits within that order.

[175] See Douglas, above n 74, 2.

CHAPTER TEN
WHAT TO DO WITH DIRTY WORDS?

> Dirt does not look nice, but it is not necessarily dangerous.[1]
>
> — Mary Douglas

10.1 Introduction

The policing, enforcement, adjudication and legitimation of offensive language crimes, and in particular, the criminal punishment of swearing in public space, cannot be adequately understood without accounting for the role of discourse. Discourse fundamentally shapes perceptions of whether swear words are offensive or inoffensive in certain contexts—whether they are 'in place' or 'out of place'—and thus demanding proscription and punishment.

Prior to my research, the role of criminal justice discourse in the interpretation of, and justifications provided for, offensive language crimes had been relatively opaque. Consequently, there were significant gaps in understanding how these crimes have been interpreted, applied and justified. Using a multidisciplinary approach to offensive language crimes, which has drawn primarily on the CDA ideas of van Leeuwen and Fairclough; informed by linguistic literature on swearing and Douglas's theorisation of taboo, purity and dirt, I have rendered more transparent the role of discourse in depicting swear words as dirty, disorderly and dangerous. My thesis has engaged with how primary definers in criminal justice debates—judicial officers, attorneys-general, lawyers, academics, media commentators, police officers, police ministers and police unions leaders—construct a dominant 'knowledge' around offensiveness. I have illuminated ways in which this knowledge can be contested and resisted. My thesis has unpacked and challenged taken-for-granted ideas about swear words, context, the reasonable person, community standards, authority, power, order and disorder, many of which have persisted since the introduction of comprehensive prohibitions of obscene or indecent speech in the mid-19th century.

In this chapter, I synthesise the main arguments in my thesis and explain the significance of my original research. I highlight key findings, reflect on their impact, suggest possible applications of my research, and identify theoretical and policy implications arising from my

[1] Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966) xi.

work. This includes areas in which change is needed to redress inequalities and injustices identified in my thesis. I evaluate my research methodology and propose further research to be undertaken.

10.2 Dirt exists in the eye of the beholder

A key problematic aspect of the adjudication of offensive language crimes, underscored by my thesis, is that community standards on offensiveness are deemed a matter for judicial notice, upon which expert evidence is inadmissible.[2] Because of this, judicial officers need not account for the linguistic or folk-linguistic assumptions and theories which inform their findings. Employing CDA, I revealed how various linguistic techniques—including modality, presuppositions, transitivity, categorisation and negation—legitimise the ability of judicial officers to ascertain an objective stance on offensiveness, thereby augmenting judicial discretion.[3] By applying CDA to this legal area, I exposed how discourse naturalises the notion that swearing is a 'common sense' subject that requires no recourse to linguistic expertise. I identified how linguistic techniques can downplay the subjectivity inherent in judicial and police determinations of offensiveness, and can position decision-makers as sovereign spectators able to 'distil' general ideas about offensiveness from a distant height.[4]

It is not just the variability of judgments in relation to offensiveness that undermines the legitimacy of these crimes. A fundamental observation of my thesis, derived from my application of Douglas's conception of dirt as 'matter out of place', is that swear words are often denounced as dirty, threatening or unworldly because many influential voices, including judicial officers, have an inadequate understanding of the meaning and function of swear words. This inadequate understanding allows them to fashion and (re)apply language ideologies to swear words in offensive language cases. My thesis has exposed and debunked many tacit 'common sense' judgments about swear words, relied on to construct swear words as criminally offensive.[5] I have done so with the broader aim of challenging the assumption that a profanity is, or should be, a fundamental element of an offensive language charge. A selection of language ideologies that my thesis has identified and contested include that:

- swear words have a 'nature', which is invariably disgusting, dirty or sexual

[2] See Chapters Four, Five and Eight.

[3] It is important to reiterate my point made in Chapter Two that judges' broad discretion when construing offensive language crimes is not, for the most part, of their own making. The legislature has drafted and maintained laws with broad, vague legal elements such as 'offensive language', which afford decision-makers significant discretion.

[4] See Chapters Five and Nine.

[5] See Diana Eades, *Sociolinguistics and the Legal Process* (Channel View Books, 2010) 241; see also Diana Eades, 'The Social Consequences of Language Ideologies in Courtroom Cross-Examination' (2012) 41(4) *Language in Society* 471.

- swear words are contagious or polluting
- swear words axiomatically conjure up disgusting or sexual images
- swear words do not comprise part of 'Standard English'
- swear words are only used by a section of society, a section that is lower class and poorly educated
- swear words are more worthy of punishment if uttered in public (as opposed to private) spaces
- swear words should be considered more offensive if spoken to an authority figure, or in the presence of the elderly, women or children
- 'ladies' do not, and should not, swear
- bad people use bad language
- slipping language standards lead to increased moral depravity and social disorder
- it is possible to rid the English language of swear words.

These language ideologies about swearing, reflected and reinforced in the law, are not neutral ideas that transcend discourse; they do not exist in the abstract. Rather, they have been fashioned in the minds, and to protect the interests, of influential members of society: police, judicial officers, politicians, lawyers and the media. When reproduced by powerful voices, these myths shape societal perceptions of whether words should be perceived as dirty words, and whether their criminal punishment is justified. Through their repetition, they fashion a semblance of order, in which certain words, when uttered in the appropriate 'context', are declared to be 'in place', while anomalous or 'dirty' words are designated to be 'out of place'.[6] The language ideologies listed above also undermine the integrity of the justice system, by representing contested views and personal opinion as objectively discernible 'facts' and even law.

10.3 'Weeds of our own making'

My thesis has endeavored to free swear words from some of the evils that are (often groundlessly) attributed to them; it has undermined the taken-for-granted idea that swear words are criminally offensive. I have countered folk-linguistic ideas with linguistic research that situates curse words as an integral, ubiquitous and multifaceted component of human speech.[7] As I noted in Chapters Six and Seven, every person has the equipment to swear, and

[6] As Douglas has identified, dirt as 'matter out of place', 'implies two conditions: a set of ordered relations and a contravention of that order' Douglas, above n 1, 44.

[7] See Chapters Five to Nine.

they do so from infancy until old age.[8] It just depends on how one chooses to use their swearing equipment, and in which contexts. My thesis has identified that many of the language ideologies promoted in criminal justice discourse are contrary to a sociolinguistic understanding of language as a non-neutral medium of communication, the meaning of which changes depending on context of use.[9] I have argued that swear words, like other words in the English language, do not have a nature: they are neither inherently good nor inherently bad, and they are not inherently sexual.[10] Their stigmatised status is created and attached to words by humans, and this stigma will change over time. To return to Burridge's metaphor, they are 'weeds of our own making'.[11] Interpretations of swear words as 'in place' or 'out of place'—like classifications of plants which range from a prized garden ornamental to a noxious weed—are contingent on human interpretation and context.[12]

Judicial officers need not propagate tired language ideologies of swear words being inherently dirty or sexual, as I explained in Chapter Six. They might instead choose to repeat swear words throughout the trial proceedings and judgment, numbing their audience to any shock value a word might otherwise have had. They might, like Magistrate Heilpern did in *Police v Butler*, describe the social uses of swear words in quotidian terms, and speak of 'private school uniformed kids (girls and boys) yell[ing] "fuck off" to each other across platforms'.[13] Alternatively, a judge might reason, as Rowland J did in *Keft v Fraser*, that the word 'fuck' is a well-known word whether used as a noun, adjective or verb, known for two or three centuries and used by eminent writers.[14] In these judgments, swear words are not depicted as inherently dirty, but reattributed a place in ordinary human communication. Not only are these judicial officers' views more consistent with sociolinguistic research on swearing, they also illustrate how—with offensiveness deemed a matter for judicial notice—decision-makers can apply entirely contradictory ideas when adjudicating offensiveness. They might view swear words as disgusting, sexual or violent, or alternatively, as an indispensable component

[8] Indeed, swearing persists even when many other essential linguistic abilities have been lost. See Keith Allan and Kathryn Burridge, 'Swearing' in Pam Peters, Collins, Peter and Smith, Adam (eds), *Comparative Studies in Australian and New Zealand English: Grammar and Beyond* (John Benjamins, 2009) 361, 364.

[9] See Chapter Five; see also Diana Eades, 'Theorising Language in Sociolinguistics and the Law' in Nik Coupland (ed), *Sociolinguistics: Theoretical Debates* (Cambridge University Press, 2016) 368 (forthcoming); Alessandro Duranti, 'Linguistic Anthropology: The Study of Language as a Non-Neutral Medium' in Rajend Mesthrie (ed), *The Cambridge handbook of sociolinguistics* (Cambridge University Press, 2011).

[10] See Chapter Five.

[11] Kate Burridge, *Weeds in the Garden of Words* (ABC Books, 2004) 8.

[12] See Kate Burridge, 'Taboo, Verbal Hygiene—and Gardens' (2010) 47 *Idiom* 17, 22; Burridge, above n 11, 8.

[13] [2003] NSWLC 2, [22] (Magistrate Heilpern).

[14] (Unreported, Supreme Court of WA, 21 April 1986) 3–4 (Rowland J).

of language with myriad functions, including as emotional, non-violent, ephemeral expressions of frustration, anger or resistance.

In light of these findings, I implore those adjudicating offensive language crimes to reject unsubstantiated myths about swearing, and acknowledge that swear words are a routine occurrence in everyday language, with connotative or emotional functions that are essential for speech.[15] I encourage decision-makers to engage with linguistic research that acknowledges the many benign, and even positive, uses of swear words alongside those uses which may be viewed as negative or harmful. Swear words can function as a social marker of group identity and solidarity; signify memberships of subcultures; add emphasis; reinforce, challenge or subvert power structures; violate social codes; shock; indicate disregard; and express anger or frustration. I return to the issue of whether legal judgments about offensiveness can be enriched by engaging with linguistic scholarship in Part 10.7 below.

10.4 Challenging classifications of order

> That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.[16]
>
> — Justice Harlan

My research has highlighted how swear words may provide a direct, succinct means to convey discontent at a political policy and challenge or disrupt unequal relations of power.[17] As I have already acknowledged, each of my case studies can be conceptualised in terms of a struggle over, and resistance to, unequal power structures. A significant original contribution of my thesis has been to highlight how criminal justice discourse transforms the act of swearing at police, through recontextualisation, into 'disrespecting authority', and further transforms this into a criminal act. Drawing on the cases *Couchy v Del Vecchio* and *Conners v Craigie*, in Chapter Seven I identified how judicial officers deny racism, and selectively blind themselves to social, cultural and historical contexts, including the criminal justice system's ongoing oppression and criminalisation of Indigenous Australians. I illustrated how, through their language choices, judicial officers imposed an imagined, 'whited-out' context in which we are all equal before the law. I advanced this argument in Chapter Eight, where I explained how the symbolic entities 'the reasonable person' and 'the community' can be manipulated by judicial officers to include some categories of people, but exclude 'Others'.

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[15] See Chapter Six.

[16] *Cohen v California* 403 US 15 (1971) 24–5 (Harlan J).

[17] See Chapter Nine.

The reliance in offensive language cases on these abstract legal fictions disengages us from the reality that it is not the reasonable person who defines offensiveness; it is *police* who are charged with policing (and regularly adjudicating and punishing)[18] speech in Australia, while judicial officers are charged with adjudicating and punishing speech. The supposedly neutral stances of the community and the reasonable person can be exploited to impose imagined majoritarian perspectives that marginalise (to the point of criminalisation) alternative uses of public space. They can foster intolerance towards, and fear of, difference. I illustrated how the phrase 'the community' has been rhetorically exploited to evoke images of an idealised, orderly public space bereft of tolerance, permissiveness, creativity and difference. In this idealised picture of public space, which historically has been fashioned in the minds of (mainly) old, white, wealthy men in positions of power, politeness is performed in public, while vice is confined to 'private' spaces; rigid hierarchies separate male from female, young from old, and the educated from the uneducated; and youth and Indigenous people are pushed outside the boundaries enclosing 'the community'.

My thesis findings go to the heart of a fundamental problem with offensive language crimes: despite their broad framing, they have been disproportionately interpreted in a fashion that punishes members of marginalised groups who, through swearing at or in the vicinity of police, have contested unequal power relations. If those policing and interpreting these crimes took structural issues of disadvantage into account; if they recognised *different* linguistic habits and uses of public space as dissimilar to their own, but not necessarily *criminal*; if they did not readily reinforce stereotypes about how public places should, or should not, be used; in sum, if police and judicial officers were to embrace a new kind of 'public order', defendants like Craigie and Couchy might be met with understanding, rather than criminal punishment. These findings point to larger questions of whether the law should be criminalising behaviour that doesn't conform to the unarticulated, abstract concept 'public decorum'.

10.5 Tidying untidiness

In analysing discursive constructions of context, I identified persistent assumptions in criminal justice discourse concerning the relationship between language, (dis)order and place, many of which have previously gone unquestioned. I argued that criminal justice discourse contributes not only to perceptions of how certain places *are* used, but also creates normative assumptions about how places *should be* used, and ultimately to perceptions that swear words

[18] See Chapter Four on police officers' use of CINs for offensive language crimes.

may, or may not, pollute such spaces. Representations, such as 'conduct that is acceptable at a football match or boxing match may well be disorderly at a musical or dramatic performance',[19] play an integral role in fashioning a sanitised picture of public space capable of being polluted by four-letter words. Through repetition, the depictions form a standardised pattern. We forget that the separations are contestable; that they are, to many, undesirable, and that they have long been used to label as 'disorderly' or 'dangerous' challenges to unfair exercises of power. My thesis has sought to undo the 'genesis amnesia' within the criminal law: the process of historical forgetting that has enabled stereotypes about appropriate behaviour in certain contexts to form part of the legal doctrine on offensive language crimes.[20]

10.6 Gaps in judicial reasoning

My research on judicial discourse was to some extent hindered by inadequate or incomplete reasons for judgments, given that in many of my case studies and in the broader pool of offensive language cases, judicial officers did not adequately consider each legal element of offensive language crimes. I attribute these gaps in judicial reasoning in part to a reluctance of judicial officers to take seriously their role of adjudicating offensive language charges (given the perception that offensiveness is an 'everyday' or unremarkable subject, requiring no expertise); in part to a willingness to maintain broad judicial discretion; and also, to an unwillingness to acknowledge or critique the shortcomings of the legal elements of offensive language crimes. Gaps in judicial reasoning were rendered particularly acute by my analysis in Chapter Eight, where I illustrated how the legal fictions 'the reasonable person' and 'the community' could be employed to bypass explanations of *why* or *how* a person's language is criminally offensive in a particular context; judicial officers can (and do), without explanation, simply state that language is offensive *because* it has breached unarticulated community standards. I identified a lack of consistency, or clarity, as to what 'the community' entails, and whether its borders are defined in physical, racial, religious, economic, linguistic terms, or by something else entirely.

My findings point to a need for judicial officers to identify who the reasonable person and the community are, what attitudes and prejudices they hold, and clearly articulate how these aspects affect a conclusion that a defendant's language was criminally offensive. My findings also point to the necessity for judicial officers to appreciate the complex and multiple

[19] See *Saunders v Herold* (1991) 105 FLR 1, 5 (Higgins J); quoted in *Police v Paton* [2009] NSWLC 34, [22] (Magistrate Richardson); and in Keren Adams, 'DPP v Carr: Case and Comment' (2003) 27 *Criminal Law Journal* 278, 281.

[20] See Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977) 79; see also Chapter Two.

elements of offensive language crimes, and for them to achieve consistency in their application of these elements.[21]

10.7 Where to now?

The arguments that I have presented suggest that offensive language determinations should be exposed to linguistic critique. This raises the question of how linguistic critique might enter into this domain. One possibility is that linguistic experts (and where relevant, other experts, for example, anthropologists or historians) could give evidence in offensive language trials in relation to the usages and meanings of language in any given context. This suggestion could be criticised for unduly wasting resources, particularly on a crime as minor as offensive language. To counter such anticipated criticism, I rely on my findings, consistent with those of McNamara and Quilter: that the legal elements of offensive language crimes are complex and multifaceted;[22] that the social consequences of these crimes—their criminogenic effect on Indigenous and young people—are deleterious; and that judicial officers have, for the most part, not been providing adequate reasoning for their decisions that language is criminally offensive, nor have they been held to account for this failure.

Subjecting judicial reasoning to linguistic critique may not resolve inconsistencies in judicial interpretation, but may instead expose a more fundamental problem: that there is no reliable, fair and objective way for ascertaining offensiveness. This however is no reason to cordon off the criminal law from expert critique. If a linguist were to conclude that a judge cannot fairly and objectively ascertain 'the context' in which language was used, 'community standards' or the perspective of 'the reasonable person' (conclusions which my thesis supports), the linguist is not to blame for exposing such issues. Instead, a more appropriate inference would be that offensive language crimes, as they are currently framed and interpreted, can no longer be maintained, and that the resources directed to policing, adjudicating and punishing this minor crime (and monitoring these aspects) should be redirected to more legitimate criminal justice concerns.

Further problems are encountered where one entertains the question of how linguistic research and expertise may inform police determinations of offensiveness. The lack of

[21] This is consistent with McNamara and Quilter's findings in Luke McNamara and Julia Quilter, 'Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)' (2013) 36 *University of New South Wales Law Journal* 534; see also Luke McNamara and Julia Quilter, 'Turning the Spotlight on "Offensiveness" as a Basis for Criminal Liability' (2014) 39 *Alternative Law Journal* 36.

[22] See McNamara and Quilter, 'Time to Define the Cornerstone of Public Order Legislation', above n 21; see also my analysis in Chapter Four.

fairness, consistency and transparency of decision-making with regards to offensive language is even starker when applied to police officers' use of CINs for offensive language. When CINs are issued, it is often the addressees of language—police—who adjudicate its offensiveness. While I analysed police language in Chapter Nine, there is need to further interrogate, drawing on a method of critical linguistic analysis such as CDA, how police decisions are made in respect of offensive language charges, including what elements police take into account, and what reasoning they apply to their determinations. There is scope for further linguistic analysis to be applied to police fact sheets, witness statements and analyses of databases, such as the COPS (Computerised Operational Policing System) database of NSW Police. And yet, even if one were to access these texts, there is still limited possibility for properly scrutinising police decision-making processes when it comes to issuing CINs. This is because police, when issuing CINs, need not provide written reasons detailing how they determined each legal element of offensive language crimes, shielding their interpretative reasoning from review. To prevent unfairness, and to increase transparency and consistency in legal decision-making, my research findings suggest that police officers, along with judicial officers, should be required to provide detailed written reasons explaining why, in any given case, each legal element of offensive language crimes has been satisfied beyond reasonable doubt.

10.8 Should offensive language crimes be amended or abolished?

My suggestions above are aimed towards improving the adjudication of offensive language crimes by both police and judicial officers. However, there is a more fundamental question to be answered—is the criminal law too harsh an instrument for dealing with swearing? And if it is, is it necessary to reform or repeal offensive language crimes? In addressing these questions, it is important to underscore that criminal liability, as criminal law scholars Andrew Ashworth and Jeremy Horder have explained, is 'the strongest form of censure that society can inflict'.[23] While my thesis has not sought to directly argue for abolition of offensive language crimes, their *legitimacy* has been central to my inquiry. Accordingly, I canvas here how my research sheds light on possible amendments to, and supports the repeal of, offensive language crimes.

A number of criminal law scholars and law reform bodies have called for the abolition of offensive language crimes.[24] Arguments for abolition include:

[23] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 2013) 1.

[24] See, eg, McNamara and Quilter, 'Time to Define the Cornerstone of Public Order Legislation', above n 21; Jo Lennan, 'The "Janus Faces" of Offensive Language Laws: 1970-2005' (2006) 8 *UTS Law Review* 118; see also NSW Law Reform

- the indeterminacy of offensive language crimes and their consequent risk of inconsistent application;
- the ubiquitous uses of swear words in popular culture, amongst police officers, and amongst persons in positions of influence (including Australian Prime Ministers), undermining the contention that their use is contrary to community standards;
- the disproportionate representation of vulnerable people and minority groups, particularly Indigenous Australians, amongst persons punished for using offensive language;
- the 'victim' (usually a police officer) is vested with the decision to ignore, issue a CIN or prosecute the offence, thus the victim also plays the role of investigator and judge;
- the relatively minimal harm caused by 'fleeting expletives';
- the availability of other offences in the criminal law to target specific areas of insult, the incitement of violence, or intimidation;[25]
- police have other 'street sweeping' tools (such as move-on powers)[26] at their disposal to control or contain disruptive or disorderly words.[27]

My findings summarised in this chapter add to these arguments which support the abolition of offensive language crimes, or alternatively, indicate that further effort is needed to reduce the impact of offensive language crimes. I am reluctant to suggest that the legitimacy of offensive language crimes would be bolstered by incorporating a mens rea element into offensive language crimes, such as an element requiring the prosecution to prove that an accused intended or was reckless to the fact that their language could 'wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person'.[28] McNamara and Quilter have argued that a mens rea element might spare unwitting or 'luckless' victims, who neither intended nor foresaw the possibility that their language could cause offence. But this logic cannot be applied to offensive language crimes. The legal doctrine on offensive language crimes articulates that such crimes punish *hypothetical*, as opposed to actual, offence (see Chapters Four and Eight): offence to the 'reasonable person'. Is it possible for a

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Commission, 'Penalty Notices' (Report, 2012) 311 [10.88] where the NSW Law Reform Commission, after consideration of submissions from multiple stakeholders, recommended the following question be the subject of further inquiry: 'Should the offence of offensive language in the Summary Offences Act 1988 (NSW), and wherever else it occurs, be abolished?'; rather than follow this recommendation, the NSW Government introduced tougher measures to deal with offensive language, see Elyse Methven, 'A Very Expensive Lesson: Counting the Costs of Penalty Notice for Anti-Social Behaviour' (2014) 26 *Current Issues in Criminal Justice* 249.

[25] In NSW, see, eg, *Crimes Act 1900* (NSW) s 60 (assault and other actions against police officers), which provides that 'a person who assaults ... harasses or intimidates a police officer while in the execution of the officer's duty, although no actual bodily harm is occasioned to the officer, is liable to imprisonment for 5 years'; s 61 (common assault, which includes psychic assault); s 93C (affray); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13 (stalking or intimidation with intent to cause fear of physical or mental harm).

[26] See, eg, *Law Enforcement (Powers and Responsibilities) Act 1997* (NSW) s 197.

[27] Many of these were articulated in NSW Law Reform Commission, above n 24, 307–310.

[28] *Worcester v Smith* [1951] VLR 316, 318.

person to intend to offend this fictitious 'reasonable person' in a situation where, for example, they are telling a police officer to 'fuck off'? Would the prosecution need to prove that the defendant foresaw at least the possibility that the reasonable person would be offended when the defendant said these words to a police officer? If so, how could this logically be proven? Moreover, the incorporation of a mens rea element does not rectify myriad problems highlighted by my thesis, including that swearing causes little, if any, concrete harms; the interpretative difficulties of discerning community standards and the perspective of the reasonable person (which presumably would remain elements of the crimes); the malleability of representations of 'context'; the uncritical repetition of stereotypes regarding 'contexts' in which language may be more offensive; and finally, the disproportionate punishment of minorities, including Indigenous Australians and youth, for swearing at (or in the presence of) police.

The abolition argument is supported by a central claim of my thesis: that with offensiveness placed within the realm of judicial 'common sense', different legal minds apply different, and even contradictory, language ideologies to swear words. Diverging language ideologies raise a significant problem for the legitimacy of offensive language crimes, given that a core criminal justice principle is that persons 'should not be forced to guess at their peril'[29] whether their behaviour will be punished. If one's punishment under the criminal law is a question of chance—relying predominantly on the whims of 'the authorities'—the crime does not possess the characteristics of legal certainty, consistency and non-arbitrariness. My analysis of judicial reasoning in offensive language cases suggests that a person cannot predict with sufficient certainty which linguistic or folk-linguistic ideas might be applied to their words. Although my thesis has identified a dominant representation of swear words in criminal justice discourse as dirty, dangerous and disrespectful, given the open-ended elements of offensive language crimes there is still the opportunity for magistrates to, as Magistrate Heilpern did in *Police v Butler*, adopt the alternative view that words such as 'fuck' are an ordinary, ubiquitous component of human speech. Accordingly, one cannot know whether a nearby police officer or presiding magistrate will conceive of their words as fair, foul or entirely unremarkable.

It is not just this unpredictability of application that undermines the legitimacy of offensive language crimes. There is also the question of whether swearing, where unaccompanied by threats of imminent unlawful contact, warrants criminal sanction. I have shown instances in criminal justice discourse where—through verbal evasions, metaphors and representations of

[29] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2009) 12.

transitivity—swear words are depicted as physically forceful or provocative of violence, despite the reality that the words inflicted no such physical force.[30] These findings support McNamara and Quilter's contention that 'something more than mere offensiveness'[31] is needed to support a criminal conviction for offensive language crimes, for example, an additional element requiring that the language directly threaten or produce a direct risk of violence. And yet, even if such an element were added to offensive language crimes, my research suggests that judicial officers, through discourse, might still attribute magically productive powers to words, as Heydon J did in *Coleman v Power* where his Honour stated: 'Insulting words are a form of uncivilised violence and intimidation … what matters in all instances is the possible effect—the victim of the insult *driven* to a breach of the peace'.[32]

Another suggestion requiring further scholarly examination is whether offensive language crimes should be limited in scope, so that the mere utterance of swear words, unaccompanied by threats of violence, or vilification on the grounds of perceived race, religion, ethnicity, sexuality, gender, or mental or physical impairment, is excluded from criminal punishment.[33] I have argued that it is neither obvious nor inevitable that swear words are the target of offensive language crimes. The assumption that a small selection of swear words are dirty or harmful, and warrant criminal punishment—an assumption which has been naturalised through criminal justice discourse—diverts the attention of politicians, judicial officers and police officers from *other* uses of language that offensive language crimes *could* punish.

The Australian media has reported a number of cases recently where police have charged or fined people for using offensive language in circumstances where the language was characterised as 'racist'.[34] These cases might be indicative of a change in broader attitudes towards offensive language, in that many Australians today would find the public utterance of bigoted, racist or discriminatory speech more offensive than swear words void of prejudicial

[30] See Chapter Six.

[31] McNamara and Quilter, 'Turning the Spotlight on "Offensiveness" as a Basis for Criminal Liability', above n 21, 37.

[32] (2004) 220 CLR 1, 100 [323] (Heydon J, emphasis added). For discussion of this extract, see Chapter Six.

[33] Note that these laws have been more 'commonly characterised as an instrument of racism ... rather than a legal mechanism for regulating racism': David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (The Federation Press, 6th ed, 2015) 541.

[34] See, eg, Nicole Visentin, 'Sydney Woman Nicole Boyle Jailed for Racist Tirade' *The Sydney Morning Herald* (online), 12 April 2016 <http://www.smh.com.au/nsw/sydney-woman-nicole-boyle-jailed-for-racist-tirade-20160412-go4icp.html>; see also the case of Karen Bailey, who pleaded guilty at Downing Centre Local Court last Thursday to the crime of using offensive language. Bailey received a 12-month good behaviour bond for the offence, with no conviction recorded. Bailey launched into a 'racist tirade' on Sydney public transport in early July 2014. Her abusive, xenophobic remarks were filmed by a fellow commuter, uploaded onto YouTube, and was circulated on social media: Elyse Methven, 'Racist Rants and Viral Videos: Why the Law Alone Can't End Racism' *The Conversation* (online), 6 April 2014 <http://theconversation.com/racist-rants-and-viral-videos-why-the-law-alone-cant-end-racism-30107>.

content.[35] Further research should consider how offensive language crimes could be limited in scope to apply to bigoted, racist or discriminatory forms of speech. Such research should extend, in this era of 'social media', to the adequacy and legitimacy of crimes prohibiting offensive or harassing speech on electronic mediums, such as on Twitter or Facebook.[36] The research would need to account for the current legislative landscape, principally the existence and adequacy of anti-vilification criminal offences in Australian jurisdictions, many of which are recognised as ineffective (except in 'symbolic' terms) and unusable.[37] Further, any such inquiry would need to contemplate the possibility that police officers would use their discretion to disproportionately target minorities' speech (for example, if police were called 'white cunts' as in the case *Green v Ashton*),[38] and overlook racist or discriminatory speech aimed at minority groups (including language used by police). An inquiry as to whether offensive language crimes should be redrafted to target racist, homophobic, sexist etc. speech must also consider the relationship between the criminal law and society, including the capacity of the law to bring about cultural, institutional and attitudinal change.

10.9 Conclusion

To conclude, I want to reflect on a recent push, identified in Chapter Four, by state and territory governments to introduce tougher, more extensive public order powers to clean the streets of 'dirty elements'. This is exemplified by the NT Government's 'paperless arrest' scheme introduced in 2014.[39] These laws were not enacted after considered debate or in response to empirical evidence. Rather, when former NT Attorney-General John Elferink (an

[35] Note that research conducted in the United Kingdom, in 2000, by the Advertising Standards Authority (ASA), the British Broadcasting Corporation (BBC), the Broadcasting Standards Commission (BSC) and the Independent Television Commission (ITC), found that 'Many more respondents now say that racial abuse words are "very severe" and there were greater concerns about transmitting "strong" language that may offend others. While younger respondents were not as concerned as others in the sample about the use of many of the words tested, they were particularly likely to consider terms of racial abuse as "very severe"', see Andrea Millwood-Hargrave, 'Delete Expletives?' (Broadcasting Standards Commission, 2000) 3 <http://ligali.org/pdf/ASA_Delete_Expletives_Dec_2000.pdf>.

[36] See, eg, *Criminal Code 1995* (Cth) s 474.17 (using a carriage service to menace, harass or cause offence).

[37] See, eg, *Anti-Discrimination Act 1977* (NSW) s 20D(1), which contains the offence of aggravated racial vilification. The section only criminalises racial vilification where the vilification is aggravated by threats of 'physical harm towards, or towards any property of, the person or group of persons' or incitements of 'others to threaten physical harm towards, or towards any property of, the person or group of person'; David Brown et al have characterised the role of this provision as 'largely symbolic', given that 'in more than 25 years there have been no prosecutions under s 20D' Brown et al, above n 33, 544.

[38] [2006] QDC 8.

[39] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 October 2014 12th Assembly, 1st Session, Parliamentary Record No. 15 (John Elferink, A-G and Minister for Justice). They are not always paperless in that police may still issue a criminal infringement notice to the fine recipient; the regime is contained in *Police Administration Act 1978* (NT) pt VII div 4AA. See also the NSW Government's introduction of $500 fines for swearing, introduced in 2013, and examined in Chapter Four.

ex-police officer) introduced the paperless arrest laws in Parliament, he justified them in terms of 'common sense' cop logic, that 'every single copper out there will know this truth: the moron standing on a street corner being a foul-mouthed git at 9.30 pm at night is nearly always the person you are arresting at 2 am for a serious assault, sexual assault or something worse.'[40]

When politicians, police and judges justify the criminalisation of offensive language with unsubstantiated claims of preventing more serious offences, and abstract ideas about 'clean streets', 'public order' and 'respect for authority' (as Elferink did), they allude to a system in which order is defined by, and swearing is the prerogative of, the powerful, while those with relatively less power can be arbitrarily punished for challenging an unequal, unjust order. In light of my research findings, I believe that we need to reimagine the concept of public order, and to reconsider if the criminal punishment of swearing fits within that order. Rather than respond to words perceived as 'matter out of place' negatively, by attempting to eliminate or punish them, we can positively reorganise our environment to incorporate 'four-letter words'. In re-ordering perceptions of public order, it is also necessary to change the narrative whereby politicians and police perceive clean streets as streets free from Indigenous Australians, view criminal punishment as the appropriate tool for conflict resolution between Indigenous Australians and police officers, and see custody as the appropriate place for Indigenous people. Finally, I appeal for further legislative inquiry into how offensive language crimes are policed, interpreted and punished across Australia.

[40] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014 12th Assembly, 1st Session, Parliamentary Record No. 16 (John Elferink, A-G and Minister for Justice).

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