



A Little Respect: Swearing, Police and Criminal Justice Discourse

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Abstract

This article interrogates a commonly articulated idea in relation to the criminalisation of offensive language: namely, that swearing at police challenges their authority and thereby deserves criminal punishment. Drawing on critical discourse analysis, the article examines representations of swearing at police officers in offensive language cases and parliamentary debates, including constructions of power, authority and order. It contributes to—but also denaturalises—conceptions about police power and authority in the context of public order policing. The article argues that criminal justice discourse plays a significant and often under-acknowledged role in naturalising the punishment of swearing at, or in the presence of, police officers.

Keywords

Offensive language; police; power; authority; criminal law; resistance.

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Introduction

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 [New South Wales] Police Association is furious at Williams' judgment, and why the police force is considering an appeal. Their authority on the streets is being compromised. (Bolt 2010: 30)¹

The use of offensive, indecent, obscene or insulting language in or near a public place is a crime in all Australian states and territories.² Fines and charges for offensive language are often initiated by police in response to their frustration with what police perceive to be 'an unacceptable occupational hazard': being insulted, criticised or undermined by persons using four-letter words (Brown et al. 2015: 526).

Recent law reform and academic inquiries (for example, McNamara and Quilter 2013, 2014; Methven 2017a, 2017b; New South Wales (NSW) Law Reform Commission 2012; NSW Ombudsman 2009) have questioned the legitimacy of offensive language crimes, with the Australian Law Reform Commission (ALRC) being the latest government agency to pose the question: 'Should offensive language remain a criminal offence?' (ALRC 2017: 13). This article also embarks on a normative inquiry into the legitimacy of offensive language crimes. It does so by adopting the lens of critical discourse analysis (CDA) to analyse how these crimes are represented and justified in criminal justice debates. In particular, the article examines how criminal justice discourse naturalises the notion that police occupy a position of authority in public space that should not be challenged by swear words.

The idea that swearing at police deserves criminal punishment is constructed *through language*. Accordingly, an interdisciplinary approach to law, which profits from critical linguistic theories, can unmask how language is used to justify the criminalisation of persons and their behaviour (Coyle 2010: 19). This article begins by providing an overview of laws that criminalise swearing in Australia. It theorises conceptions of power, authority and order, and explains how these concepts pertain to offensive language crimes. It then examines judicial, media and political discourse to illustrate how swearing is characterised as an affront to a stratified order in which the public must show deference to police. Finally, the article argues against using the criminal law to promote the maintenance of unequal power structures by punishing those who swear at police. It highlights instances where swear words have been used to challenge unequal power relations between protesters and politicians, and Indigenous Australians and police officers.

Offensive language crimes

Various Australian states and territories have offensive language crimes: laws that criminalise the use of offensive, indecent, obscene or insulting words, in or near a public place. One example is s 4A of the *Summary Offences Act 1988* (NSW), which makes it an offence to 'use offensive language in or near, or within hearing from, a public place or a school'. The adjectives 'offensive', 'indecent', 'obscene', and so on, are not defined in legislation. Instead, broad definitions of these adjectives, many of which overlap, have been developed in case law (Methven 2017a: 81-87). These definitions generally require judicial officers to consider what would be offensive, indecent or obscene to the 'reasonable person' with regard to 'contemporary community standards' (see, for example, *Del Vecchio v Couchy*; *Heanes v Herangi*; *McCormack v Langham*). The question of whether the crime of using offensive language in NSW is a strict liability offence, or whether it incorporates subjective *mens rea* (mental) elements remains unresolved (McNamara and Quilter 2013: 555-559).

Despite being characterised as ‘petty’ offences, offensive language crimes can attract significant punishments ranging from a fine of AU\$660 in NSW to up to six months’ imprisonment in the Northern Territory and in Queensland (for example, *Summary Offences Act 2005* (Qld) s 6). As an alternative to charging someone with offensive language, police officers in most Australian jurisdictions can issue on-the-spot fines (criminal infringement notices (CINs), also known as penalty notices) for offensive, obscene or indecent language (see, for example, *Criminal Procedure Regulations* (NSW) reg 106 and sch 3; *Criminal Procedure Act 1986* (NSW) ss 333-337; Methven 2014, 2017a: 110-114).

The literature documents that offensive language CINs and charges are ‘part of an oppressive mechanism of control of Aboriginals’ (Wootten 1991: 184; see also Aboriginal Justice Advisory Council 1999; Brown et al. 2015; Lennan 2006; Methven 2017a; NSW Ombudsman 2009; Walsh 2005; White 2002). In a 2009 study, 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 (NSW Ombudsman 2009: 57). In other words, the ‘victim’ of offensive language is ‘almost invariably the police officer’ (White and Perrone 2005: 46). In the period April 2016-March 2017, 2,770 adults were proceeded against for offensive language in NSW, 1,609 (58 per cent) of whom received a CIN for offensive language. Indigenous Australians accounted for 17 per cent of all adults and 22 per cent of all juveniles proceeded against in NSW for using offensive language (NSW Bureau of Crime Statistics and Research 2017), despite comprising just three per cent of the NSW population (Australian Bureau of Statistics 2017). The overwhelming majority of CINs and charges for offensive language are in response to the words ‘fuck’ and ‘cunt’ (NSW Anti-Discrimination Board 1982: 48-49; NSW Ombudsman 2009: 57).

CDA and criminal justice discourse

Having established that offensive language crimes are commonly used by police in response to those who swear at or near them in public space, this article considers how *discourse* naturalises the notion that swearing at police disrespects authority and warrants criminal punishment. It does so by using CDA as its primary methodological tool with which to analyse a number of offensive language case studies, focusing on the 2009 NSW Local Court case *Police v Grech* and the 2007 Supreme Court of Western Australia case *Heanes v Herangi*. CDA is a form of discourse analysis which views language as both shaping and shaped by society (Mayr and Simpson 2010: 51). Analysts work from the premise that there is no neutral representation of reality; reality is constructed and reconstructed through language (Fowler 1987: 67). CDA scholarship aims to denaturalise ideologies and unequal power relations that have become naturalised through linguistic strategies (Pennycook 2001: 80-81). There is no single method of ‘doing CDA’; scholars have fashioned their own approaches drawing from a range of linguistic ideas, methods and tools (van Dijk 2001: 95; Wodak 2001: 4).

CDA has an ‘intense linguistic character’, relying on linguistic categories like vocabulary, metaphor, transitivity, agency and modality (Martinez 2007: 127), many of which have been derived from Halliday’s systemic-functional grammar (Halliday 1985: xvi-ii). The selection of linguistic devices is a matter for each researcher to determine, based upon their relevance to the research question (Martinez 2007: 127). This article focuses primarily on the linguistic techniques of metaphor, collocation, transitivity and presuppositions.

CDA can be distinguished from other critical linguistic approaches (for example, Fowler et al. 1979) in that it identifies *discourse* as ‘the basic unit of communication’ (Wodak 2001: 2). The article adopts Fairclough’s (1989, 1992: 37-61) and van Leeuwen’s (2008) conceptions of discourse, drawn from the more abstract approach to discourse analysis of French philosopher and historian Michel Foucault (1972, 1977, 1980a). Fairclough’s (1992) model of discourse consists 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).

Fairclough has offered three corresponding descriptions of these dimensions: *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 (Fairclough 1989: 26). Following this approach, this article considers not only the language of selected texts, including offensive language case law, court transcripts, parliamentary debates and newspaper articles, but also their production, interpretation and relationship to society (Luke 2002: 100).

In this model, discourse does not simply refer to an extended stretch of text; it is also a way of signifying a particular social practice from a particular perspective (Fairclough 1989: 24; Wodak 2001: 66). Similarly, van Leeuwen defines discourses as ‘socially constructed ways of knowing some aspect of reality’ (van Leeuwen 2009: 144). The phrase *criminal justice discourse* is used to refer to socially constructed ways of signifying reality in the field of criminal justice. Criminal justice discourse is not one consolidated, homogeneous voice but a plurality of criminal justice perspectives. Consistent with CDA’s aim to denaturalise power structures, the article concentrates on how ‘primary definers’ (Hogg and Brown 1998: 18-19) in criminal justice debates—politicians, judicial officers, police officers, lawyers and the media—represent swearing at police, and suggests how the reality that they construct has been (or could be) resisted.

Conceptions of power, authority and order

The methodological approach undertaken in this study is enhanced by a theorisation of three abstract concepts: ‘authority’, ‘order’ and ‘power.’ In criminal justice debates, each of these words functions largely as a symbol, allowing those who employ them to supply part of their meaning (Cohen 1985: 15). Each term has a significant meaning potential: a capacity for ambiguous, heterogeneous, overlapping and sometimes contradictory interpretations (Fairclough 1992: 75), and this ambivalence can be exploited by the user and the interpreter of the word in question.

The concept of ‘police power’ and its scope 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 ‘at once complex and partial’ (Foucault 1980b: 141). 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) and the *Police Act 1990* (NSW), among others. 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.

The power of police is not only defined by statutes and common law rules (Dixon 1997; Hogg 1983: 13) but is also supplemented by their ‘vast and largely unscrutinised discretion’ (Hogg 1983: 6) to choose how, and whether or not, to implement ‘the law’. Police have at their disposal informal and extra-legal means to limit or restrain others’ behaviours and liberty (McConville Sanders and Leng 1993: 112). These discretionary powers are not ‘legal rules’ but ‘*police rules*’ (Neocleous 2006, emphasis in original): the choices that police make to either exercise, or refrain from exercising, their ability to caution, search, arrest, detain or issue a CIN to an individual.

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: power exercised by dominance or coercion; power exercised routinely by consent; and power as a form

of action or relation between people (Foucault 1977, 1980b; Gramsci 1971; Weber 1914). The first sense of power, power as *dominance*, has its origins in sociologist and philosopher Max Weber's (1914) study of authority in modern and pre-modern states. Power in this sense resides within the State and within other sovereign organisations, and *authority* is power attained by force (its imposition) or coercion. Power conceived of as dominance focuses on the corrective power of the state and its institutions (including the police force) to secure the compliance of others, even in the face of resistance (Weber 1914 cited in Mayr and Simpson 2010: 2).

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. These mechanisms include constructing alliances and integrating (rather than purely dominating) subordinate classes through concessions or ideological means (Gramsci 1971 in Fairclough 1992: 92; Mayr and Simpson 2010: 3). The more that dominant individuals and institutions such as Parliament, the courts, and police build legitimacy by generating consent to their domination, the less coercion they need apply (see Cohen 1980: 102; Gramsci 1971; Mayr and Simpson 2010: 3) In this second sense of power, authority is conceived of as power that has been accrued consensually, through naturalisation of its use over time (Paletz and Harris 1975: 963). Linguists Mayr and Simpson (2010: 2) have acknowledged the integral role of language in legitimating power: power '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'. This article draws on these ideas in identifying how criminal justice discourse generates public consent to police authority, by representing this unequal power relationship as natural, logical and beneficial.

The final sense of power that informs the article is Foucault's theorisation of power as *productive* and *relational*. In this theoretical model, power is not understood as a constraining or repressive force (Foucault 1977, 1980a). Nor does Foucault understand power 'in an instrumental sense, as something to be possessed and located at a central point' (Hogg 1983: 13); it is neither fixed nor objectively determined. 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' (Foucault 1980a: 198). 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 relations go right down into the depths of society. They are not localised in the relations between the state and its citizens (Foucault 1977: 27).

Foucault's theorisation of power is useful in framing swearing at police and the subsequent punishment of that act as a type of power struggle. In this power struggle, the appropriate way for a member of the public to behave around and speak towards a police officer is being negotiated and contested. From Foucault's theoretical analysis, we see police not simply as *possessing* power or *having* authority. Rather, police powers and their authority in public space are subject to contestation or resistance. Foucault advises that, to understand power relations, 'we should investigate the forms of resistance and attempts made to dissociate these relations' (1982: 780). For Foucault, 'forms of resistance' are the 'chemical catalyst so as to bring to light power relations, locate their position, and find out their point of application and the methods used' (1982: 780). Against this theoretical backdrop, the following section employs CDA to interrogate judicial, media and political depictions of swearing at police. Case studies in which swear words have been used to resist power are analysed in the final section of the article to demonstrate how swearing can be an important tool to contest unjust, unequal power relations.

Case study: *Police v Grech*

At around 4.40 pm on 5 November 2009, Adam Royds, a senior constable with the City Central Commuter Crime Unit, was standing inside the ticket barrier of Bondi Junction railway station in Sydney, Australia. 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. Royds asked Grech if he had a valid rail ticket. Grech replied that he was going to the toilet and he had just completed a university exam. Royds told Grech that he was in a restricted area and that he needed a rail ticket. Grech stated: 'I know my rights. I'm going to take it to court', to which Royds replied: 'Good. I'll see you there'. Royds said he would be sending Grech a ticket in the mail for entering a restricted area without a ticket. According to Royds, Grech walked away in a huff, gritting his 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:

Royds: What was that?

Grech: Nothing

Royds: You called me a prick.

Grech: No, I said: 'That's it'.

Royds: You're a liar. They'll be giving you a ticket for offensive language as well.

(Transcript of Proceedings 2010: 4-5)

Grech's offensive language charge was heard by Magistrate Robbie Williams at Waverley Local Court in Sydney on 3 May 2010. The police prosecutor submitted that although the word 'prick' was at 'the lower end of the scale' it was nonetheless offensive in that 'it was meant to raise resentment and disgust and that it was calculated to annoy'. The prosecutor stated that, although members of the community were on the platform at the time, 'the word used was offered for offending the witness, Constable Royd' (Transcript of Proceedings 2010: 2).

Grech's defence solicitor submitted that Grech did not say 'prick' with 'any sexual overtone', nor was he 'referring to anything that would take it above and beyond the meaning of a nasty person'. He further submitted that police officers are more accustomed to hearing offensive language and, while this might not justify the use of the word 'prick' 'in a moral sense', it was relevant as a matter of law (Transcript of Proceedings 2010: 3-4).

In delivering judgment on whether Grech had used offensive language, Magistrate Williams asked what 'a reasonable man' (sic) would consider offensive in the circumstances. His Honour noted the absence of any evidence which suggested children or elderly people were present when the word was used. Magistrate Williams dismissed the charge, reasoning that 'prick' was in 'common usage' in the Australian community and that a reasonable person would not be offended 'due to its current everyday use' (Transcript of Proceedings 2010: 6-7).

Media and political responses

Members of the NSW Police Association, the media and the NSW Parliament were quick to criticise Magistrate Williams' decision in *Police v Grech*. The Secretary of the NSW Police Association argued that the legal system should not make police 'second-class citizens' and 'punching bags for society' (Chambers 2010). Conservative Australian media commentator Andrew Bolt (2010) lamented 'our increasingly contemptuous youth' who were 'so ready to give a gobful to authority'. Bolt blamed the courts for stripping respect from police and compromising 'Their authority on the streets'. 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' (2010). When 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', Hatzistergos responded (2010: 22649-22650): '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’.

Political and media reactions to *Grech’s* case are examples of *recontextualisation* (van Leeuwen 2008, 2009) in criminal justice discourse, in which swearing at police is transformed into the more intangible act of ‘disrespecting authority’. Recontextualisations can add detail, transform persons and events, substitute elements, provide legitimations, eliminate detail or shift focus (van Leeuwen 2008: vii). These depictions of youth disrespecting ‘police authority’ and magistrates as either supporting police (where magistrates convict an accused) or against police (where they acquit an accused) extend beyond *Grech’s* case. When NSW Magistrate Pat O’Shane, an Indigenous Australian magistrate, 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’, media commentators questioned Richardson’s acquittal. Commentator Ross Eastgate lamented a supposed decline in respect for police authority: ‘Whatever happened to good manners? ... the days when people were temperate in their language, were deferential to their elders and had respect for the law and proper authority?’ (Eastgate 2005).

Politicians went further than this, questioning whether Magistrate O’Shane should retain her office. Asked if Magistrate O’Shane should be ‘sacked’, then Liberal Opposition Member Peter Debnam replied: ‘I think the Attorney-General does need to start looking at the performance, especially when you see ongoing campaigns such as hers’ (Australian Associated Press 2005). Then opposition police spokesman, Mick Gallacher, said the decision ‘give[s] 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’ (Australian Associated Press 2005). Other Liberal opposition members casted doubt on Magistrate O’Shane’s capacity to assume an ‘objective’ stance. Malcolm Kerr stated ‘*her* standard of reasonable behaviour does not accord with what *the general public* expects on the streets’ (Kerr 2006: 22814, emphasis added) 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’ (Tink 2005: 20628).

These reactions highlight a key assumption about offensive language crimes: despite it not being written in Australian legislation (Tasmania aside)³ that swearing *per se* is criminally offensive, members of the police, the judiciary and the legislature presume that such crimes should punish four-letter words. This article, however, focuses on the assumptions that swear words disrespect or challenge police authority and, further, that the criminal law is the appropriate means by which to enforce respect for police. The following part continues to unpack these assumptions by focusing on parliamentary debates around the enactment of the *Summary Offences Act 1988* (NSW).

Representations of authority and power in political discourse

In the lead up to the introduction of the *Summary Offences Act 1988* (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.⁴ The Coalition eventually ‘out-bid’ the Labor party with its promise to give ‘police full powers to deal with offensive behaviour’ which had allegedly been ‘taken away’ from police by Labor’s repeal of the *Summary Offences Act 1970* (NSW) (*The Sydney Morning Herald* 1988). The Coalition was duly elected in 1988. When the Summary Offences Bill 1988 was debated in Parliament in June of that year, both the Coalition and Labor parties agreed that more police with greater powers were needed to clean up public streets, quell an unruly youth and re-establish ‘order’ (Hogg and Brown 1998: 21). At the time, Coalition member Bruce Jeffery argued in the NSW Legislative Assembly 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 ...

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. (Jeffery 1988: 1154)

An analysis of linguistic techniques used in this excerpt—metaphors, causality, collocation and transitivity—reveals how discourse legitimises police power and authority in public space. Jeffery *transformed* (van Leeuwen 2008: 17-18) the crimes of offensive language and offensive conduct by *substituting* these offences with the phrase: 'the means to deal with offensive behaviour in all circumstances', along with the abstract terms 'power' and 'powers'. There is also a noticeable *collocation* of the words 'police', 'power' and 'authority', where collocation is the routinised use of words in association with each other (Fairclough 1989: 113-115). This mirrors broader 'law and order' rhetoric, in which it is taken for granted that the words 'police' and 'power' should co-occur (as in the common refrain 'we need more police with greater powers': Hogg and Brown 1998: 35-37).

Significantly, Jeffery conceptualised power in *metaphorical* terms: as a physical object that police 'have', 'need' or 'lack'. In the phrases 'their lack of power', 'police lacking powers', 'he needs power' and 'have adequate powers', the abstract noun 'power' occurs as the object of the *transitive verbs* 'lack', 'need' and 'have'—all verbs suggesting a physical process (Lakoff and Johnson 2003: 26). In the final example, the presence of the adjective 'adequate' before power depicts power as quantifiable. Lakoff and Johnson provide a similar illustration of how rising prices can be viewed metaphorically as an entity via the noun 'inflation', as in the examples: '*Inflation is lowering our standard of living*' and '*If there's much more inflation, we'll never survive*' (Lakoff and Johnson 2003: 26, emphasis in original). 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*' (Lakoff and Johnson 2003: 26, emphasis in original). Through Jeffery's metaphorical representations, 'power' assumes the character of something that is concrete and identifiable: an object of which police need to possess an 'adequate' amount. 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' is also ideologically significant in that to return something is to restore a former position. One can only have something returned to them if it previously belonged to them. These language choices naturalise the assumption that police inherently need and possess power in public space.

Another aspect of Jeffery's rhetoric is that it contains metaphors of strength and weakness, evident in the phrases 'police have been *hamstrung* by their lack of power' and '[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 inherent qualities of police. Significantly, Jeffery is more concerned with the *appearance*, rather than the actuality, of police strength: 'it does not *look good* for the police' and '[police] have been *laughed out of court*'. Thus, an increase in police powers is rationalised in terms of managing public perceptions and expectations of 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.⁵

An additional important ideological aspect of Jeffery's characterisation of the relationship between police, power and authority is *causality* (Fairclough 1989: 51). Many of his clauses begin with the subordinating conjunctions 'if' and 'until', the former being a conjunction to express a condition and the latter, a conjunction to express time. Jeffery represents cause and effect as axiomatic 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'; '*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'. These representations of cause and effect depict the consequences of police lacking power—no respect, more crime and the appearance of weakness—as obvious and inevitable.

The application of CDA to political rhetoric so far has demonstrated various ways in which discourse can naturalise the ideas that police possess power and have authority in public space, and that such authority should not be challenged. If one conceptualises an abstract concept through a certain metaphorical construction (for example, power is an object that 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' (Lakoff and Johnson 2003: 221). An important ideological effect of conceptualising power as an object that police possess is that such a metaphor suppresses alternative ways of conceiving power in relation to police. One alternative conception is Foucault's theorisation of power as constitutive: as a fluid form of action or relation between people, which is negotiated and contested in interaction. For Foucault, relationships of power are 'strategic games between liberties' (Foucault 1988: 19) 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* (for discussion, see Hindess 1996: 98-102). Within this framework, police could not 'lack' power and one could not 'return' power to police, for power could not be possessed to begin with. However, Foucault's fluid conceptualisation of power would not serve the ideological purpose of depicting a stratified public order in which police possess power and command authority.

Whose authority?

An important linguistic technique that depicts authority as something police have by virtue of their occupation is the use of *presuppositions*, propositions that purport to tell people what they already know. Because of this, presuppositions are an 'effective means of manipulating audiences' (Fairclough 1989: 153). An example of a presupposition is Jeffery's phrase '*their* authority' in '[i]f police doubt *their* authority, their position is weakened'. Here, the possessive pronoun 'their' cues the operation of a presupposition (Fairclough 1989: 153). The notion that police have authority and are authority figures is also central to the reasoning in the 2007 Supreme Court of Western Australia case *Heanes v Herangi*, based on which Johnson J upheld the defendant's disorderly conduct charge. This case is doctrinally significant in that it has been cited as authority for the principle that disrespecting police authority, by means that include the use of swear words, may provide grounds for an offensive language conviction (Brown et al. 2015: 526).

Case study: *Heanes v Herangi*

In that case, Heanes's charge of disorderly conduct by using offensive language centred on his words, spoken to Constable Herangi: 'I am on the phone—I am on the phone. I'm fucking talking to my dad. Fuck off'. Heanes had used this language 'outside the Myers [department] store' in inner-city Perth during 'school holidays and there were several children around within hearing distance of the accused'. Constable Herangi also stated: 'There were a few people standing around', maybe 15 people in the vicinity' (Transcript of Proceedings 2006: 5).⁶

In the hearing of Heanes's appeal against his conviction in the Supreme Court of WA, counsel for the 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' (Transcript of Proceedings 2007: 69):

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 (emphasis added).

In the Supreme Court judgment, Johnson J adopted Lochore's characterisation of Heanes's words and the context in which they were used. Her Honour stated that a 'theme' in a number of offensive language cases where police were 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' (*Heanes v Herangi*: 214). Further, Johnson J stated that 'words which ordinary decent-minded people may consider acceptable if spoken in private in very limited circumstances, may not be considered acceptable if said ... to an *authority figure*' (218, emphasis added).

In these extracts from *Heanes v Herangi*, swearing at police officers has been transformed (van Leeuwen 2008) into the more abstract notions of challenging authority or 'inciting others' to challenge authority. Like Jeffery's political rhetoric above, there is also a collocation of the words 'challenge' and 'authority'; 'disrespect' and 'authority'; and 'respect' and 'police'. This authority is not qualified; 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 outline possible constraints on police authority, including those in legislation and at common law. They adopt and further entrench the presumptions that police should go unchallenged in public space, and that swearing at police challenges their authority and warrants criminal sanction. With repetition in criminal justice discourse, these opinions become established truths, what Hogg and Brown (1998: 18) call 'law and order commonsense'.

This is not to ignore counter-voices, like Gummow and Hayne JJ who argued in the High Court of Australia that: 'By their training and temperament police officers must be expected to resist the sting of insults directed to them' (*Coleman v Power*: 59).⁷ Justice Harper similarly stated in the Supreme Court of Victoria: 'It is no offence simply to be angry with the authorities (including, of course, judicial authority)' (*Ferguson v Walkley* 2008: 303). Yet, against the backdrop of the thousands of adults and children proceeded against each year for offensive language in NSW alone (NSW Bureau of Crime Statistics and Research 2017, see above, and in light of the literature which suggests that, in many offensive language incidents, the addressee of the language is the police officer), it is clear that these alternative judicial opinions are having little impact on everyday police practice. Further, while these judges call on police officers to be more robust in the face of insults, their language choices still reinforce the assumptions that swear words 'sting' police and, also, that police have authority—and, indeed, are '*the authorities*'—in public space.

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 personal names rather than by

title ... the boss can tell a dirty joke and the workers will laugh, but not vice versa.
(Jay 2000: 163)

This article has examined representations of the relationship between swearing, power and authority in criminal justice discourse. It has argued that the dominant discourse in relation to offensive language crimes postulates police officers as authority figures and represents challenging that authority, by using 'four-letter words', as criminal. This position recognises one of the myriad pragmatic functions of swear words: as a verbal tool available to marginalised individuals or groups to oppose 'established structures of power' (Eble 1996: 124; Jay 2000). Like slang, profanities can function as an expression of opposition, 'showing a range of attitudes from slight irreverence to downright subversiveness' (Eble 1996: 124). Below, the article examines situations where swear words have been used to challenge unequal power relations, particularly between protesters and politicians; and Indigenous Australians and police officers. It contests the notion that the criminal law should promote the maintenance of unequal power structures by punishing swearing at police in public space.

Case studies: *Cohen v California* and *Lim v The Queen*

A noteworthy case in which swear words were used to challenge political power is the 1971 United States (US) Supreme Court case *Cohen v California*. The appellant, Paul Robert Cohen, had worn a jacket bearing the phrase 'Fuck the Draft' when entering the Los Angeles (LA) County Courthouse. Cohen did so to protest US 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 LA Municipal Court to 30 days' imprisonment for violating a Californian crime of malicious and wilful disruption of the peace by offensive conduct.

Cohen appealed his conviction to the Court of Appeal of California, and then to the US Supreme Court. The Supreme Court quashed his conviction on the basis that, consistent with the First and Fourteenth Amendments to the *US Constitution*, the State may not 'make the simple public display ... of this single four-letter expletive a criminal offense'.⁸ Justice Harland reasoned that (*Cohen v California*: 24–25):

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.

An examination of freedom of expression as it pertains to swearing is beyond the scope of this article (for discussion, see Fairman 2006, 2009; Gray 2012).⁹ However, the example has been included here to highlight how the US Supreme Court, like Jeffery's second reading speech extracted above, drew on metaphors of strength and weakness, but to an altogether different end. Rather than characterise challenges to established power structures via four-letter words as criminally offensive, Harland J suggested that a strong society is one that allows for, and even protects, dissident voices.

A more contemporary example in which swear words were used to challenge those in power was when 'peace activist' Danny Lim was standing on a busy Sydney road one morning in August 2015, wearing a sandwich board which displayed the following message:

PEACE SMILE
PEOPLE CAN CHANGE
"TONY YOU CUN'T."
LIAR, HEARTLESS, CRUEL
PEACE BE WITH YOU

The sign was directed at then Australian Prime Minister Tony Abbott. Although initially convicted of offensive behaviour in the Local Court proceedings, District Court Judge Scotting overturned Lim's conviction. Judge Scotting noted that, due to the presence of the apostrophe in 'CUN'T' as well as the strike through the 'U', the appellant had used the word equivocally, possibly as a play on words for 'can't'.¹⁰ Even if Lim had used the word 'cunt' in the sign, the judge reasoned that this word was 'not necessarily offensive' and that criticism of politicians is an 'essential and accepted part of any democracy' (*Lim v The Queen*, para 46-48).

These examples highlight how swear words can function to challenge existing power structures and those in powerful positions. Indeed, the facts of many offensive language cases can be (re)conceptualised in terms of acknowledgement of, and resistance to, unequal power relations, whether it be: a man uttering an insult towards police in anticipation of 'persecut[ion]' in Lismore, 1991 (*McCormack v Langham*); an Indigenous Australian's resistance to British invasion and occupation of Aboriginal land in Redfern, 1992 (*Conners v Craigie*); a homeless Indigenous woman's rejection of police power and control in Brisbane, 2000 (*Del Vecchio v Couchy*); a young man's refusal to comply with police directions in Perth, 2006 (*Heanes v Herangi*); a man's anger at being bitten by a police dog in Sydney, 2007 (*Jolly v The Queen*); a young man's frustration over receiving punishment for a minor transport offence in Bondi, 2010 (*Police v Grech*); or same-sex marriage advocates protesting against the views of 'traditional marriage' advocates in Sydney, 2016 (*Police v Holcombe*).

Perceiving these case facts through the lens of power relations raises the question of whether resistance to those in power, or political policies, expressed through swear words, should be considered criminal? If we answer this question in the affirmative, we accept that a key function of offensive language crimes is to enforce police and the state's authority over others; and to prevent opposition to such authority. 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. And we promote a system whereby *police* determine what is offensive according to their interests, overlooking the legal framing of offensive language crimes as prohibiting *hypothetical* offence occasioned to the fictitious 'reasonable bystander'. In short, we accept the proposition that to challenge unequal power relations within a public setting warrants criminal punishment.

Police swearing at members of the public

A corollary of this proposition is that, where police swear at or otherwise insult those with relatively less power, the criminal law does not intervene. The blindness of the criminal justice system towards injustices perpetrated by police and the state towards Indigenous Australians is routine in Australia. The Aboriginal Legal Services (NSW/ACT) regularly receives complaints about swearing and racist language used by police towards Indigenous people, a problem also identified by the Australian Government's Royal Commission into Aboriginal Deaths in Custody (Australian Human Rights Commission 1996). In 1992, an ABC documentary *Cop it Sweet* filmed police arresting and charging an Indigenous man in Redfern for swearing; the same police swore towards members of the public without reprimand (Brockie 1992).

The hypocrisy of police taking offence to swear words was further highlighted in the 2016 coronial inquest into the death of Ms Dhu, a young Indigenous woman. Ms Dhu had died in August 2014 at the age of 22, after being taken into police custody for unpaid fines (many of which were for swearing at police) (Fogliani 2016). Shift supervisor Sergeant Rick Bond gave evidence at the inquest into her death that he had whispered into Ms Dhu's ear: 'You're a fuckin' junkie'. He also said it was normal practice in the Pilbara for police officers to use the word 'fuck' to detainees (Wahlquist 2016). Ms Dhu's fines for swearing at police, her callous treatment in police custody (she was mocked, ignored, dismissed and laughed at by police as her symptoms progressively worsened until she died of overwhelming staphylococcal infection),¹¹ and her subsequent death,

highlight the gross hypocrisy of a system that punishes members of the public who swear at police, while police themselves swear with impunity.

Conclusion

This article has examined the central place of discourse in naturalising ideas about police power, authority and order; in positioning police at the apex of public space; and in sustaining unequal power relations between police and (other) members of the public. Discursive constructions of swearing at police in the criminal law have helped entrench a number of 'common sense' assumptions including that: police officers inherently possess authority; police officers deserve respect in public space; current unequal social structures are desirable and worth preserving; and swear words are undesirable because they subvert or destabilise this order. Within this 'order', police officers who swear at or otherwise disrespect and degrade members of the public escape punishment. This research advances a strong argument that the maintenance of unequal—and often unjust—power relations is not an appropriate end of criminal punishment. Its findings also point to a need to reconsider whether swearing at police should remain a criminal offence.

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¹ This editorial was written in response to the 2009 NSW Local Court case of *Police v Grech*, an offensive language case examined in this article.

² *Crimes Act 1900* (ACT) s 392; *Summary Offences Act 1988* (NSW) s 4A; *Summary Offences Act 1978* (NT) ss 47 and 53; *Summary Offences Act 1966* (Vic) s 17(1)(c); *Summary Offences Act 2005* (Qld) s 6; *Summary Offences Act 1953* (SA) s 7(1)(a); *Police Offences Act 1935* (Tas) s 12.

³ 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.

⁴ In Australia, the Liberal-National Coalition is a predominantly conservative party.

⁵ As a Queensland police officer said in 2008: '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' (Queensland Crime and Misconduct Commission 2008: 116). Similarly, a NSW police officer stated in 2009: '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 ... people see you and they expect you to take action ... there's expectations ... that you will enforce these minor things' (NSW Ombudsman 2009: 60).

⁶ Constable Herangi alleged that, approximately five minutes prior to the defendant swearing at him, Heanes had bumped into the right hip of Constable Herangi's partner, Constable Paul, with his right elbow, then 'continued walking on'. Heanes gave evidence that he had walked between the two officers without bumping into them. It was this 'incident' that compelled Constables Herangi and Paul to pursue Heanes (Transcript of Proceedings 2006: 3-5).

⁷ This echoes the sentiment in the English Divisional Court case *DPP v Orum*: 'words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom'.

⁸ 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's words did not fall into the US's 'fighting words' exception of free speech protection 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' (see Fairman 2006: 1733-1736).

⁹ The relationship between swearing, power and freedom of speech would benefit from further inquiry in the Australian context with regards to the implied freedom of political communication in the Australian Constitution. Anthony Gray (2012) has written on this subject, although not with regards to the legitimacy of punishing challenges to or subversion of 'authority'; these aspects have been examined in a US context in Robbins (2008).

¹⁰ The prosecution case was that the appellant had inverted a rounded capital A in the word to refer to the Prime Minister as a 'cunt'.

¹¹ She was twice taken to Hedland Health Campus, and both times returned to the police station. Officers and doctors testified they thought Ms Dhu was faking being sick and that she was merely suffering from drug withdrawal symptoms (Wahlquist 2016).

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