THE "JANUS FACES" OF OFFENSIVE LANGUAGE LAWS, 1970–2005

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Introduction

In New South Wales the use of offensive language in public remains a punishable offence under law.[1] Charges under the laws also continue to constitute a significant proportion of criminal charges in New South Wales.

The offensive language laws and the vital question of their legitimacy—their acceptance by the public and, particularly, by those they affect—is the subject of this essay. The approach that is adopted to assess the law's legitimacy is a simple one: it compares the operation of the law to the terms it sets for itself. The framework for this discussion is drawn from the measure suggested by the German philosopher Jürgen Habermas for the legitimacy of law in contemporary society; in essence, the extent to which the law's ideals, or norms, are matched by the reality of its operation.[2]

Theoretical framework

The theoretical basis for this essay is the notion developed by Habermas in his recent work, *Between Facts and Norms*, of the divergence that often lies between (translated literally) the *faktizität* (facticity) and *geltung* (legitimacy) in the law.[3] Habermas argues there is a divergence between the ideals of the constitutional state and the realities of its political processes, "that run their course along more or less constitutional lines".[4] The same divergence may be observed of particular laws, between the norms by which a law is justified and the reality of its factual operation in a social context. As Habermas writes, the law turns its "Janus faces" towards its addressees (the governed) on the one side and its authors (legislators) on the other.[5] What Habermas contends is that one way the legitimacy of a law may be measured is by

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1 *Summary Offences Act 1988* (NSW) s 4(b).

2 Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 129. Legitimacy in this sense is distinct from constitutional validity. On the constitutional validity of laws comparable to offensive language laws, see *Coleman v Power* (2004) 209 ALR 182.

3 John P McCormick, "Habermas' Discourse Theory of Law: Bridging Anglo-American and Continental Legal Traditions?' (1997) 60 *Modern Law Review* 734–43, 735.

4 Habermas, above n 2, 129.

5 Ibid.

6 See, Immanuel Kant, *The Grounding for the Metaphysics of Morals* (1981).

the extent to which its factual operation diverges from its norms. The relationship between the two "faces" of the law—fact and norm, operation and intent, deeds and words—is a yardstick of the law's legitimacy. A law's claim to deserve recognition and compliance rests on this.

A related criterion of legitimacy, proposed by Habermas and adopted here, is the extent to which the law is applied equally. Following Kant, Habermas argues that because coercive laws derive their legitimacy from also being laws of freedom, they must guarantee the freedom of all persons equally.[6] Since norms are backed by the threat of state sanction, there is an "expectation that these norms guarantee the autonomy of all legal persons equally".[7] As the law punishes, so it must protect. Accepting the above view, not only is equality in the application of the law fair and desirable; it is essential to the legitimacy of the law-making power itself.

To put it simply for the purposes of this discussion, the law should do what it says, and it should be equally applied to all. These ideas, representing one aspect of Habermas' theory of the legitimacy of law in society, are adopted for the coherence they provide to the conflicting accounts of past and existing offensive language laws in New South Wales.[8] These measures of legitimacy are in themselves ideals, and as such may never be completely realised, but they nevertheless provide a useful yardstick by which to assess the law.

This discussion considers the string of offensive language laws from 1970 to the present in New South Wales: the *Summary Offences Act 1970*; the *Offences in Public Places Act 1979*, the *Summary Offences Act 1988*; and the *Summary Offences (Amendment) Act 1993*. Each of these laws, and the rhetoric of protection by which they were justified, are assessed against the mounting evidence of the law's operation to the detriment of those who, on the terms the law sets for itself, most require its protection. The disjuncture between fact and norm, intention and operation, is evident, particularly in indications of the law's application to Aboriginal people.

The inequality of the law's operation takes two forms: firstly, its disproportionate punishment of Aboriginal people for their use of offensive language, and secondly, its failure to punish offensive remarks directed at them. The criticisms levelled at offensive language laws for their disproportionate punishment of, and failure to protect, Aboriginal people (particularly, Aboriginal women) in New South Wales are, through the theoretical framework of the paper, linked back to the very heart of the laws' legitimacy.

6 See, Immanuel Kant, *The Grounding for the Metaphysics of Morals* (1981).

7 Habermas, above n 2, 447.

8 It should be noted that, in searching for a coherent and legitimate basis for law in contemporary society, Habermas ultimately turns his attention to the genesis of a law, the law-making process itself: see Habermas, above n 2, 135. Indeed, the model he develops has a great deal to offer on the politics of law, space, and public communication, although an exploration of these aspects and their relevance to the laws at issue is beyond the scope of this paper.

The Summary Offences Act of 1970

The *Summary Offences Act 1970*, contrary to its long title did not abolish a single previously enacted offence.[9] Section 9 made the use of "unseemly words" within or near public places an offence. "Unseemly words" was defined to mean "obscene, indecent, profane, threatening, abusive or insulting words", thereby combining the previously separate offences of "threatening, abusive or insulting" language, and obscenity: s 4. The penalty was $200 (up from $50) or imprisonment for three months.

Section 9 was introduced following a Police Department committee's recommendation that police be given greater discretionary powers to permit them to "take account of the changing norms and social values occurring within society and to be selective in enforcing minor offences."[10] In his second reading speech, Eric Willis, the Minister for Labour and Industry, justified the increase in discretionary punishment by suggesting that a lower penalty could always be imposed by the courts, although the maximum would in some cases be warranted, particularly for "gangs of hoodlums".[11] Nevertheless, Willis said, the law retained its protection of "traditional liberties and rights". The norms accompanying the introduction of the law were thus multiple, ranging from the maintenance of public order, to protecting decent citizens from the "unwanted attentions" of unsavoury characters, as well as the preservation of "traditional rights and liberties".

An investigation of whether the operation of the law was actually effective in achieving all of these things is beyond the scope of this paper. Nevertheless, the results of research conducted through the 1970s sheds some light on the operation of the provisions. Throughout the 1970s, a number of reports portrayed the disproportionate enforcement of the *Summary Offences Act*'s offensive conduct provisions (which included "unseemly words") against Aboriginal people. For example, a 1974 study showed that a defendant charged with offensive behaviour in towns with a high Aboriginal population was seven times more likely to receive a prison sentence than a defendant in other country towns, and six times more likely to receive a prison sentence than his or her counterpart in Sydney.[12] Similarly, in 1976 Eggleston highlighted the over-representation of Aboriginal people for street offences.[13] In 1978, an eight weekend long "fuck count" conducted by researchers in a country town found that the

9 M O Tubbs, *From Penal Colony to Summary Penalty, An Historical Anatomy of an Offensive Act: The Summary Offences Act 1970, No 96 (*NSW) (Thesis, Macquarie University, 1979) The long title of the Act was "An Act to make provisions with respect to certain offences to be made punishable in a summary manner; to repeal the *Vagrancy Act 1902* and certain provision of the *Police Offences Act 1901* and certain other enactments; and for purposes connected therewith."

10 Ibid 4–5.

11 Ibid.

12 New South Wales Bureau of Crime Statistics and Research, *Minor Offences—City and Country New South Wales*, Report No 18 (1974).

13 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into New South Wales, Victoria and Tasmania*, (1991) 278, 299.

word was used more frequently in public by whites, members of the police were often heard to utter it, and all townspeople interviewed admitting to using it, but it was Aborigines who were mostly charged for its use.[14] There is thus some indication that the increased discretion granted to the police "to be selective in enforcing minor offences" was used to enforce the offence of "unseemly words" in the *Summary Offences Act* in an inequitable way, particularly against Aboriginal people. The inequitable operation of the law would, according to Habermas' theory, undermine the legitimacy of the law.[15] Indeed, these indications of the law's unfair and punitive enforcement provided the context for the abolishment of the offence in 1979.

The Offences in Public Places Act of 1979

In 1979, the *Summary Offences Act 1970* was replaced by the *Offences in Public Places Act* (NSW) (the "1979 Act") as part of a number of reforms aimed at "curbing some of the excesses of our criminal law".[16] The ideal of a fair and moderate criminal law was reflected in the removal of the offence of offensive language. Additionally, the offence of offensive conduct was narrowed to apply only to public behaviour that "would be likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or seriously affronted."[17] The penalty was $200; imprisonment was not a sentencing option.

However, studies showed the decriminalisation of offensive language and the reduction in scope of offensive conduct proved illusory. After an initial period of selective non-enforcement of public order laws by police in protest at the perceived reduction in their powers,[18] levels of arrest for offensive behaviour under the 1979 Act were actually very high, a practice which Bonney attributed to instructions from the Police Commissioner.[19] Furthermore, a 1982 survey conducted by the Anti-Discrimination Board found that, in the Aboriginal communities surveyed, the use of "unseemly words" amounted to 61% of offensive behaviour charges. Because the police interpreted the offensive conduct provision to include offensive language, language was still the subject of charges. There was thus a demonstrable divergence between the express intent of the amendments and the fact of their enforcement, which continued to be highly inequitable.

The Anti-Discrimination Board also found that arrests often resulted from confrontations initiated by the police themselves; "the most frequent set of preceding circumstances were where the offender or an associate of

14 Paul Wilson and John Braithwaite (eds), *Two Faces of Deviance* (1978).
15 Habermas, above n 2, 447.
16 New South Wales, *Parliamentary Debates,* Legislative Assembly, 23 April 1979, 4943 (Mr Ken Gabb).
17 *Offences in Public Places Act 1979* (NSW) s 5.
18 David Brown, David Farrier, Sandra Egger and Luke McNamara, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (2001), 954.
19 New South Wales Bureau of Crime Statistics and Research, *New South Wales Summary Offences Act 1988,* (1989) 16.

the offender was approached by the police for some matter not connected with the offence".[20] Aboriginal reserves were declared to be "public places" within the meaning of the 1979 Act. Thus, when a police car patrolled through a Reserve after midnight, the man who called out, "You cunts, fuck off out of this Reserve, you have no right to be here", was charged and convicted.[21] It seemed that the law was predominantly used by police as an instrument of authority rather than a means of protecting the public.

In 1987 the law was amended to increase the penalty to $500.[22] The Attorney General cited increasing "loutish, violent and alcohol-induced crime", particularly hooliganism, as well as inflation since 1979, as reasons for the increase.[23] The law only remained in force in this form for one year.

The Summary Offences Act of 1988

In 1988, after a change in government following a "law and order" platform during the election, the government "brought back" the *Summary Offences Act* and, with it, the express recriminalisation of offensive language. Section 4(b) of the *Summary Offences Act 1988* (NSW) ("the 1988 Act") prohibited the use of "offensive language in or near, or within hearing from, a public place or a school" without reasonable excuse. Three months imprisonment was re-introduced as a sentencing option. This was, the Attorney General, John Dowd, said, an "important aspect" of the legislation, because it meant that:

> The community will have confidence that this legislation will adequately deal with public order, and the police will have confidence that it can be properly enforced.[24]

However, the Attorney General went on to say that the law should be enforced by police "with care and responsibility", in light of indications of the problems with prison sentences, particularly for Aboriginal people:

> It has been shown that Aborigines or those of Aboriginal descent have serious problems coping with custodial sentences. As well as cases of violence that have occurred to them, a significant number of Aborigines or persons of Aboriginal descent cannot handle custody, resulting in suicides in prisons . . . Police must be extremely careful, especially in areas where there is a persistent record of alcoholism and violence, particularly in some of the large country towns, where a significant number of Aborigines are arrested.[25]

The Attorney General expressed his concern that arrest should be the last resort, and stated that the law was directed to that end:

20 New South Wales Anti-Discrimination Board, *Study of Street Offences by Aborigines* (1982) 42.
21 Ibid.
22 *Offences in Public Places Act 1979* (NSW) s 5.
23 New South Wales, *Parliamentary Debates,* Legislative Assembly, 25 March 1987, 9425.
24 New South Wales, *Parliamentary Debates,* Legislative Assembly, 31 May 1988, 804.
25 Ibid, 807.

> All I ask is that arrest be the last resort. That is the structure of this measure. Though penalties are provided to back up the authority of the police, I ask the police and others in the community to understand that putting people in prisons is the last resort. 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.[26]

From its inception, the ideals by which the law was justified were not matched by reality. Despite the comments made by the Attorney General, there was nothing in the "structure" or the text of the 1988 Act which provided that arrest should be a last resort. While emphasising the problems associated with imprisonment and arrest of Aboriginal people, the Attorney General increased the powers of the police to do just that. Indeed, the Attorney General's speech was remarked upon by the report of the International Commission of Jurists, which noted that two of the first four persons in the state gaoled under the new offensive behaviour provision were Aboriginal.[27] The enforcement of the offence under the law continued to disproportionately impact on Aboriginal people. In 1991, the Royal Commission into Aboriginal Deaths in Custody ("the Royal Commission") revealed that the majority of deaths investigated had occurred after the deceased were incarcerated for minor street offences.[28] A study conducted in 1997 confirmed that the highest rates of Local Court appearances for offensive language occurred in the towns in the northwest—Brewarrina, Walgett, Bourke and central Darling—which had the highest percentages of Aborigines in their populations.[29]

According to the theories of Habermas adopted by this essay, the consequence of a divergence between a law's norms or ideals and the reality of its operation, particularly where its operation is inequitable, is a loss of legitimacy.[30] It is apparent that the operation of the 1988 Act was inequitable and at odds with the norms of "care and caution" expressed at its enactment, and it may be argued that the law did in fact suffer a loss of legitimacy. This loss of legitimacy in offensive language laws led to their subsequent amendment in 1993.

The Summary Offences (Amendment) Act of 1993

The 1993 amendment retained the offence of offensive language, but removed imprisonment as a sentencing option.[31] It introduced as a

26 Ibid.
27 International Commission of Jurists, Australian Section, *Report of the Aboriginals and the Law Mission* (1991), citing New South Wales Bureau of Crime Statistics and Research, *New South Wales Summary Offences Act 1988* (1989) 16.
28 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into New South Wales, Victoria and Tasmania*, (1991) 278, 299.
29 Robert Jochelson, "Aborigines and Public Order Legislation in New South Wales" (1997) 34 *Current Issues in Crime and Justice* 1, 9–11.
30 Habermas, above n 2, 129, 447.
31 *Summary Offences (Amendment) Act 1993* (NSW) s3 substituting s 4A.

sentencing option up to 100 hours of community service. This is the form in which the law currently stands.[32] Explaining the change, the Attorney General and Minister for Justice cited the Royal Commission's criticism of the offensive language provisions and their disproportionate enforcement in relation to Aboriginal people.[33]

Since the law's amendment, studies have shown continuing patterns in the enforcement of offensive language charges against Aboriginal people in three main respects. The first identifiable pattern is the *rate* at which Aboriginal people are prosecuted for offensive language. A study based on 1998 court statistics found that Aboriginal people continued to be over-represented in offensive language and offensive conduct charges in New South Wales, making up twenty per cent of all people prosecuted despite forming less than two per cent of the population. This meant that Aboriginal people were, on average, fifteen times more likely to be prosecuted for offensive language or conduct.[34] While the distribution of over-representation was state wide, local courts in the northwest, north and far south coast showed particularly high levels of over-representation. In their evaluation of the implementation of the Police Service's "Aboriginal Strategic Plan" (a key objective of which was the reduction of over-representation of Aboriginal people in offensive language charges), Chan and Cunneen found that arrest rates for public order offences had not significantly declined. In many of the Local Area Commands where the Strategic Plan had been rolled out, arrests actually increased.[35] Court statistics for 2003 suggest a continuation of the pattern of over-representation: it showed that the areas with the highest per capita incidence of offensive language charges were the Murray, the Far West and the Northwestern statistical divisions,[36] all areas with high Aboriginal populations. And, despite the removal of imprisonment as a sentencing option, charge procedures for the offence commonly result in persons being held in police custody for processing.[37]

A second ongoing pattern in the enforcement of offensive language charges against Aboriginal people is the large number of charges which

32 In a minor legislative amendment in 1999, the *Crimes Legislation Amendment Sentencing (Act) 1999* (NSW) amended the provisions of the *Summary Offences Act 1988* (NSW), changing sentencing guidelines in relation to community service orders (ss 4A(3), (4), and (5)).
33 New South Wales, *Parliamentary Debates*, Legislative Council, 16 November 1993, 5630 (Mr John Hannaford MLC).
34 Aboriginal Justice Advisory Committee, New South Wales Attorney General's Department, *Policing Public Order: Offensive Language and Conduct, The Impact on Aboriginal People*, (1999) 1.
35 Carrie Chan and Chris Cunneen, New South Wales Police Service and New South Wales Ombudsman, *Evaluation of the Implementation of New South Wales Police Service Aboriginal Strategic Plan Report* (2000) 215, 219. See also, New South Wales Bureau of Crime Statistics and Research, *Race and Offensive Language Charges* (1999) 1; New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) [1.7].
36 New South Wales Bureau of Crime Statistics and Research, Statistical Division, *Recorded Criminal Incidents, 2001 to 2003: Offensive Language*, (2003).
37 Jochelson, above n 29, 8–9.

result from confrontations *initiated* by the police.[38] According to Egger and Findlay, in up to two thirds of prosecutions the police were the only victims.[39] As Cunneen remarked, police both initiate the confrontation and become the victims of the offence.[40] The common scenario is illustrated by the 1990 case of *Stutsel v Reid*.[41] At one in the morning, police officers found some men in the front yard of a Bourke residence involved in a "wrestle-type affair" about three metres from the street. From the yard, an Aboriginal man called out to the police, "Why don't you fuck off, you dog-arse cunts". He was charged with using offensive language "within hearing from a public place". The magistrate dismissed the charge on the basis that, apart from the police, there was no one who could have heard the words, but this reasoning was rejected on appeal. It was held that the presence of people other than the police to hear and be offended was not a requirement of the offence. The fact that, other than the police, there was no one in the street was material only to the severity of the penalty.

The police practice of initiating confrontation with Aboriginal people and then charging for offensive language is a source of discontent. Chan and Cunneen recounted the typical complaint, made at a community meeting in Bourke:

> My problem with the police and their relations with youth—it's the harassment factor. I've seen it—the kids stand on a corner. The police keep driving by and keep doing it until the kids say "fuck off" or "what are you're looking at" and gets worse and worse—so get them (the kids) for offensive language.[42]

A third continuing pattern in enforcement is the incidence of the "*trifecta*". In more than a quarter of cases where Aboriginal persons were charged with offensive language or conduct, they were also charged with one or more offences against the police (known as a "quinella" or "trifecta").[43] The trifecta typically occurs when offensive language charges escalate to resist arrest and assault police officer. In 1997, Jochelson found a statistically significant positive correlation between the percentage of Aboriginal residents in Local Government Areas and the incidence of "trifectas" and "quinellas". The greatest number occurred in Walgett, Central Darling, Brewarrina and Bourke local government areas, which had rates eight times the state average.[44] Chan and Cunneen identified

38 Chan and Cunneen, above n 35, 227; Jochelson, above n 29, 9.
39 Sandra Findlay and Mark Egger, "The Politics of Police Discretion" in Mark Findlay and Russell Hogg (eds), *Understanding Crime and Criminal Justice* (1988), 218. See also, Simon Bronitt and George Williams, "Political Freedom as an Outlaw: Republican Theory And Political Protest" (1996) 18(2) *Adelaide Law Review* 289.
40 Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (2001), 3.
41 20 NSWLR 661.
42 Community workers' meeting, Bourke, 25 February 1999 quoted in Chan and Cunneen, above n 35, 217.
43 Aboriginal Justice Advisory Committee, New South Wales Attorney General's Department, *Policing Public Order: Offensive Language and Conduct, The Impact on Aboriginal People* (1999) 1.
44 Jochelson, above n 29, 4.

the "trifecta" as an ongoing pattern.[45] They quoted the comment of an Aboriginal community worker:

> The trifectas everytime when an Aboriginal person is arrested. That's a common thing. There's been no changes—it's pretty constant thing . . . It could be someone without a criminal record, they're given a trifecta and you wouldn't believe this person would have done it. The resist arrests are coming from males and females.[46]

This was a common view in the interviews Chan and Cunneen conducted.[47] Some police interviewed downplayed the incidence of the trifecta, saying it was used only as a "last resort", but one senior police officer said that the trifecta was "probably" still used, commenting:

> A lot comes back to education and how much police is prepared to put up with before they react. Police are not known to be forgiving.[48]

Although the practice has been criticised by magistrates and the courts, and in some cases, charges dismissed for improper policing, trifectas still happen.[49] As another Aboriginal community worker said"

> Trifectas happen when no one else is around . . . a 15 or 16 year old, police pulled him over and spat on him and made him walk to...(Police) do this when no one's around. Got worse. It's not improving. Never goes away that racism.[50]

Punishment for the use of offensive language thus continues to fall disproportionately on Aboriginal people. In practice, the offence continues to lead to police custody (whether due to the processing of charges, or imprisonment for more serious offences committed during confrontation over the initial charge), an outcome clearly at odds with the intended purpose of the 1993 reforms. While the ideal face of the law is that people no longer end up in gaol for swearing, the face of the law that is seen by those affected by the law is quite different. In the eyes of those it affects, the inequality in the law's application seriously undermines its legitimacy.

"I don't see them doing their job as policemen"

The disproportionate enforcement of offensive language laws *against* Aboriginal people, and the way this has undermined the law's legitimacy, has been discussed above. There is another aspect of the inequality in the law's operation which also undermines its legitimacy, and that is

45 Chan and Cunneen, above n 35, 216–22.
46 Interview with male Aboriginal community worker, 19 February 1999, quoted in Chan and Cunneen, above n 35, 215.
47 Interview with New South Wales Police Service Aboriginal Community Liaison Officers, 7 April 1999 and interview with solicitor, 15 April 1999 quoted in Chan and Cunneen, above n 35, 216, 218.
48 Interview with Crime Manager, New South Wales Police Service, 22 April 1999, in Chan and Cunneen above n 35, 218.
49 *Police v Shannon Thomas Dunn* (Unreported, Dubbo Local Court, Magistrate Heilpern, 27 August 1999); *Police v Lance Carr* (Unreported, Wellington Local Court, Magistrate Heilpern, 8 June 2000).
50 Interview with male Aboriginal community worker, 22 April 99 quoted in Chan and Cunneen, above n 35, 218.

its failure to enforce the laws in relation to offensive language *directed to* Aborigines.

In contrast to the punishment meted out to Aboriginal people, offensive remarks made by both the police and the general community towards Aborigines often go unpunished. For example, in a dispute over refusal of service at a country hotel, recounted by Kevin Kitchener:

> While the police were present and after they had left it is alleged that the licensee of the hotel called out to the Aboriginals assembled outside the hotel "why don't you go home you black cunts". Requests for police to take action on the licensee's use of such words resulted in no action by the police, yet a number of those Aboriginals later charged with offensive behaviour were arrested for the use of offensive language.[51]

Similarly, the Royal Commission Regional Report commented on complaints at Wilcannia of discrimination in the enforcement of the offensive language laws with regard to the failure by police to arrest non-Aboriginals for swearing.[52] The discriminatory enforcement of the laws against offensive language was highlighted in the Quayle report:

> A prominent white citizen who used offensive racist language to Aboriginals, including Mark Quayle's brother, and abused a police sergeant over a period of time, was treated with tolerance and allowed to go home uncharged. Yet on another occasion another of Mark's brothers was arrested for an isolated offensive remark made when he was so intoxicated that he could not be given bail, and held for six hours in the cell in which his brother hung himself.[53]

It has often been commented that the police themselves often swear, sometimes at Aboriginal people. The injustice of the enforcement of offensive language laws by a police force known for their swearing is a source of discontent. The Royal Commission condemned the "hurtful" and "offensive" language often directed by police at Aboriginal people, and the "hypocrisy often involved when police purport to take offence at language they commonly use themselves".[54]

Police often seem oblivious to the offence they may cause Aborigines in their dealings with them, even, for example, by the disrespectful and overly familiar use of a nickname. For instance, the Royal Commission report into the death of Joyce Thelma Egan noted that Joyce, who died after her arrest for indecent language, disliked the fact that the police called her "Thelma".[55]

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51 Kevin Kitchener, "Street Offences and the *Summary Offences Act* (1988): Social Control in the 1990s" in Chris Cunneen (ed), *Aboriginal Perspectives on Criminal Justice* (1992) 19, 23.

52 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into New South Wales, Victoria and Tasmania* (1991) 285.

53 Quayle report cited in Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into New South Wales, Victoria and Tasmania* (1991) 284.

54 Ibid, 283.

55 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Joyce Thelma Egan* (1990) 10–11. The report found the varying accounts of Joyce's death a "somewhat bewildering conflict of evidence", at best "a lamentable series of non hearings and misunderstandings" presaged by Joyce herself during the journey to the police station, when she recited a couplet recognised by the police officer,

In a Bourke Local Court case reported by the International Commission of Jurists, a young man charged with offensive language and resisting police claimed that he was provoked by the police calling him "Hoppy". The man had a withered leg from polio and walked with the aid of crutches.[56]

The selective non-enforcement of offensive language laws when the offended person is Aboriginal is part of a broader pattern of "under-policing" crimes against Aboriginal people. As Kitchener wrote,

> A not uncommon situation reported by Aboriginal people who have approached police in either police stations or on the street alleging offences against them by non-Aboriginals is that they are told "if you don't piss off you'll get charged" or "go home or I'll lock you up for being drunk".[57]

The failure to take action when the offence is to Aboriginal people is a source of discontent in Aboriginal communities. For example, Cunneen and Robb found that an immediate cause of the 1986 riot in Bourke was the dissemination of racist literature in the town in the week prior. The letter, highly offensive to Aboriginal people in general (continually referring to "coons"), and to Aboriginal women in particular, was distributed to Aboriginal organisations in Bourke.[58] According to Cunneen and Robb:

> What particularly upset Aborigines who were interviewed was the fact that racist literature could be disseminated with its author well-known in the community and nothing done about the situation . . . [59]

As one Aboriginal woman interviewed said:

> . . . it was shown to the police and they just said to tear it up . . . A lot of the things could be prevented from happening if the police were to do their duty properly . . . When they go into these jobs that's what they're trained to do. I don't see them doing their job, what they should be doing as policemen.[60]

Aboriginal people thus experience the punitive face of offensive language laws, while at the same time being prevented access to its protection. This pattern of enforcement is inequitable, and is at odds with the rhetoric of successive offensive language laws of protecting the vulnerable from verbal abuse. As the sentiments expressed above show, this experience seriously undermines the perceived legitimacy of the law.

No "gentle old ladies or convent schoolgirls"

There is a further point to be made about the loss of legitimacy in offensive laws caused by the failure to punish offence to Aboriginal people. It concerns the law's operation in respect to Aboriginal women.

"O, what a tangled web we weave / When first we practice to deceive": 33, 36.

56 "Case 39" (Unreported, Bourke Local Court, Magistrate Linden, 5 November 1990) cited in International Commission of Jurists, Australian Section, *Report of the Aboriginals and the Law Mission* (1991) 25.

57 Kitchener, above n 51, 24.

58 Chris Cunneen and Tom Robb, New South Wales Bureau of Crime Statistics and Research, *Criminal Justice in North-West New South Wales* (1987) 237.

59 Ibid, 187.

60 Interview with "JH2", an Aboriginal woman in Bourke, quoted in Cunneen and Robb, above n 58, 270.

When making decisions about whether language is in fact "offensive", police and judges often have regard to the presence of women and children as a factor. Implicit in this reasoning is the belief that women and children have a peculiar sensitivity to swear words. This was evident in the 1996 case of *Commissioner of Police v Anderson*. In that case, the complaint of offensive language was dismissed on the grounds that it did not occur in a public place. Meagher JA of the Court of Appeal reasoned that there was "no evidence that persons in the public area were ever offended, nor that the public area was frequented by gentle old ladies or convent schoolgirls."[61] Implicit in this comment was the common belief that women are particularly susceptible to being offended by swearing. Yet it seems that when such language is directed at Aboriginal women, it is often held to be inoffensive.

The presentation of the facts in the case of *Anderson,* mentioned above, illustrates the way this occurs. Meagher JA observed that Sergeant Anderson had allegedly shouted at his subordinate, Constable Cowin, for her failure to keep his telephone messages up to date, "Fuckin' get over here to me. Why aren't these fuckin' messages on the fuckin' pad?" Meagher JA commented that, in any event, although the Anderson's language was unchivalrous, it was not offensive "in any legal sense":

> The evidence discloses that Sergeant Anderson habitually used the word "fuck" or its derivatives; that everyone else did also; that Constable Cowin herself did so regularly. It was, a witness said, part of what oxymoronically is called "police culture".

Meagher JA imputed special sensitivity to offence to "gentle old ladies" and "convent schoolgirls", but he accorded no significance to the circumstances of Constable Cowin as an Aboriginal female working at a junior level in the police force (Cowin's Aboriginality is not mentioned in the judgment).[62] Yet there are sound reasons why offensive remarks directed towards Aboriginal women by policemen are, in light of historically located relations of power, arguably *more* culpable.[63] As JH Wootten QC wrote in his Regional Report for the Royal Commission, responding to reports of the consistent abuse of Aboriginal women by police officers with terms such as "black slut", "whore", etc, "[t]he attitudes expressed by police in these instances refer directly to an historical stereotype which maintains that Aboriginal women can be regarded as available for the convenience of those in power, and accorded little, if any, respect."[64]

In stark contrast to the law's failure to punish offensive remarks directed to them, it is Aboriginal women who are sometimes most over-represented

61 *Commissioner of Police v Anderson* (Unreported, New South Wales Court of Appeal, Mahoney ACJ, Meagher and Beazley JA, 21 October 1996).
62 See "Black officer accuses police", *Sydney Morning Herald* (Sydney) 26 September 1995, 2.
63 See Mari Matsuda, "Public Recourse to Racist Speech: Considering the Victim's Story" (1989) 87 *Michigan Law Review* 2320, 2631.
64 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into New South Wales, Victoria and Tasmania*, (1991) 275–81.

in charges for offensive language. The Royal Commission commented on the alarmingly high rate of arrest of Aboriginal women for street offences,[65] and Chan and Cunneen found that the over-representation of Aboriginal women was sometimes even greater than that for Aboriginal males. The most significant over-representation was in Darling River Local Area Command (including Bourke) where Aboriginal females were 103 times more likely to be charged than non-Aboriginal women. On the Mid-North Coast (including Kempsey), and in Barwon (including Moree), it was close to 27 times.[66] A recent study showed that a large proportion of women who died in custody had been detained for public order offences.[67]

It is thus in the law's treatment of Aboriginal women where the difference between the law's "Janus faces" is most apparent. The ideal face seen by legislators is that the law protects the vulnerable, whether women or racial minorities, from verbal abuse. The face of the law seen by Aboriginal women is that of severe punishment, on the one hand, and a callous disregard of their experiences of offence on the other. This sharp disjuncture between fact and norm is part of the broader historical pattern of the application of law generally to Aboriginal women, in a way that under-polices crimes perpetrated against them while over-policing the crimes they commit.[68] Applying the conditions of legitimacy proposed by Habermas—that the law must do what it says, and do it equally for all—it is an indictment of the offensive language law that it is most harshly applied against those who, in the terms of the law's rhetoric of care and protection, are most in need of being protected.

The persistent rhetoric of protection

It has rightly been pointed out that laws against offensive language are at least capable of being used to punish racially motivated insults.[69] There are cases where the law has been used in this way. For example, a man who shouted at a rabbi and his family in a shopping centre car park, "all you Jews should have been slaughtered" and "you should have been turned into lampshades" was convicted of using offensive language in a public place and fined $400.[70] But it seems that, on balance, cases such as this one are the exception rather than the rule. The law has more commonly been used as an instrument of racism than as a legal means of punishing racist expression.[71] As this paper has sought to show, the ideals of the law are not matched by the reality of its enforcement, a failure which, theoretically and in fact, seriously undermines its legitimacy.

65 Ibid. See also, Lisa Collins and Jenny Mouzos, Australian Institute of Criminology, *Deaths in Custody: A Gender-Specific Analysis*, Report No 238 (2002) 5–6.
66 Chan and Cunneen, above n 35, 212.
67 Collins and Mouzos, above n 65, 5–6.
68 Cunneen, above n 40, 164. See also Human Rights and Equal Opportunity Commission, *Rural New South Wales Consultation* (2001).
69 Brown et al, above n 18, 978; Wojciech Sadurski, *Freedom of Speech and its Limits* (1999) 116.
70 Brown et al, above n 18, 965, 967.
71 Ibid, 978; Sadurski, above n 69, 116.

And yet, despite all indications about the way laws against offensive language really operate, the rhetoric of protection persists. In 2004, the High Court considered a constitutional challenge to a Queensland law against insulting language. In deciding that there was no implied requirement in the law that a breach of the peace be occasioned or intended, Gleeson CJ gave the hypothetical example of the mother in the park:

> 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.[72]

This image expresses the recurring ideal of offensive language laws, that they protect decent people, particularly women, from verbal abuse, enabling their quiet enjoyment of public space. Later in his judgment, Gleeson CJ returned to the same example of the mother who takes her children to play in the park in reasoning why the freedom of political expression should not be allowed to impinge on the freedom of others:

> Suppose that she and her children are exposed to threats, abuse and insults. Suppose, further, that the mother is an immigrant, that the basis of such threats, abuse and insults includes, either centrally or at the margin, an objection to the Federal Government's immigration policy, and that the language used is an expression, albeit an ugly expression, of an opinion on that matter. Why should the family's right to the quiet enjoyment of a public place necessarily be regarded as subordinate to the abusers' right to free expression of what might generously be described as a political opinion?[73]

In using the immigrant mother in the park as his example, Gleeson CJ was relying on the persuasive power that the rhetoric of protection has in justifying laws that criminalise insulting or offensive speech. The argument is seductive. However, Gleeson CJ makes no reference to the weight of evidence that suggests that such laws are, as Sadurski commented, "more often than not, enforced in a biased and partial way which tends to exaggerate the seriousness of the insults against majority members (in particular, against enforcement agents themselves) and to undervalue insults against members of disadvantaged minorities".[74] The rhetoric of protection persists; the ideal face of the offensive language laws seen by legislators and judges remains remarkably unmarred by reality.

Conclusion: Reform of offensive language laws

The use of a law's own ideals as a yardstick offers a strategic means by which to critique the legitimacy of a law on its own terms. Applying the notion of legitimacy proposed by Habermas, the measure of a law's legitimacy is the extent to which its operation in fact diverges from the

72 *Coleman v Power* (2004) 209 ALR 182 [9].
73 Ibid [32].
74 Sadurski, above n 69, 116.

law's ideals, and whether it operates equally with respect to all. The value of this approach it that it enables the constructive use of, rather than defeat by, the distance that often exists between law and justice.[75] While the notion of legal legitimacy drawn from Habermas is of itself an ideal and will therefore never be wholly realised, it nevertheless provides an effective measure by which to critique the law.

Applied to New South Wales laws criminalising the public use of "unseemly" and "offensive" language, Habermas' notion of legitimacy reveals a disjuncture between fact and norm, or operation and expressed intent. The intention to ensure the protection of those vulnerable to verbal abuse expressed in successive legislative reforms and the case law has been belied by, in particular, the law's operation to Aboriginal people. The law disproportionately punishes Aboriginal people for offensive language while undervaluing the offensiveness of language directed to them. Further, the intended effect of the 1993 reforms, to stop Aboriginal people from going to gaol for offensive language, has been diluted by ongoing patterns of policing. Nowhere is the difference between the law's ideal face and its actual face greater than in its application to Aboriginal women. The ideal face of the law seen by legislators and judges is that of the protection of women and vulnerable groups in society. The reality is that Aboriginal women are perhaps the most disproportionately punished under the laws, while their own experiences of offence are ignored.

In spite of the clear evidence that the law punishes rather than protects marginalised groups in society, the rhetoric of protection persists, finding expression in the comments of Gleeson CJ regarding the hypothetical immigrant "mother who takes her children to play in a park". Despite the evidence of the way offensive language laws operate, the law in this area thus continues to be "Janus-faced", presenting its ideal face to lawmakers and its real face to those it criminalises.

Habermas' notion of legitimacy predicts that a divergence between the intention and operation of a law, like that evident with offensive language laws, would undermine the law's legitimacy. Offensive language laws have in fact suffered a loss of legitimacy. The manifestly discriminatory operation of offensive language laws is a source of resentment and a cause of confrontation between individuals and police, particularly in towns with high Aboriginal populations. The loss of legitimacy was reflected in the 1979 and 1993 reforms, although the reforms did not solve the problems.

The law's operation with respect to Aboriginal people must also be seen as part of the general historical pattern of the law's interactions with Aboriginal people, and the role played by police in this process. There are

75 "If defeatism were justified," wrote Habermas "I would have had to choose a different literary genre, for example, the diary of a Hellenistic writer who merely documents, for subsequent generations, the unfulfilled promises of his waning culture": Habermas, above n 2, xiii.

many laws in the history of government control over Aboriginal people that exhibit a similar disjuncture between rhetoric and effect. Take, for instance, the paradox that, as Cunneen observed, Aboriginal people "were to be treated as British subjects, yet their land could be taken without compensation."[76]

Pastoral leases were, officially, "not intended to deprive the natives of their former right to hunt over these districts or to wander over them", yet the security of title they gave to squatters caused a land-grab.[77] Similarly, the *Aborigines Protection Act 1909*, phrased in the language of protection, "utilised the institutions of the criminal justice system through extensive police participation in the process" to impose "essentially penal sanctions built around the deprivation of liberty."[78]

Such examples demonstrate what was, as one legal historian dubbed it, a "rubbery" attitude to the law,[79] by which Aboriginal people were assimilated into the Anglo-Australian legal system whilst being denied many of its rights and protections. This broader pattern might also lend itself to an analysis in terms of Habermas' notion of legitimacy, although such an analysis is outside the scope of this essay. It suffices to say that the divergence between the protectionist sentiment and punitive operation of offensive language laws is indicative of a wider incoherency in the application of the law to Aboriginal peoples.

In any event, the fact that the disjuncture is ongoing suggests that the problem is inherent to the offence, and will not be remedied by a re-draft of the provision. Calls for repeal of the offensive language law have emphasised this in calling for its repeal.[80] As the Aboriginal Justice Advisory Council (AJAC) observed:

> Public order statutes have been redrafted on at least 4 occasions in the past 20 years and the impact on Aboriginal people remains the same. The problem appears to be not the wording of the offences but the offences themselves.[81]

Recommending that the offensive language and offensive conduct laws be repealed in their entirety,[82] AJAC pointed out that the provisions "deal exclusively with language and conduct which is merely offensive, not

76 Cunneen, above n 40, 52.
77 Ibid.
78 Ibid 65.
79 Bruce Kercher cited in Cunneen, above n 40, 52.
80 Chan and Cunneen, above n 35, 227; Australian Institute of Criminology, *Recommendations: Practical Steps Toward Sovereignty and Royal Commission Recommendations*, proceedings of a conference held 23–25 June 1992 (1993).
81 Aboriginal Justice Advisory Committee, New South Wales Attorney General's Department, *Policing Public Order: Offensive Language and Conduct, The Impact on Aboriginal People* (1999) 1.
82 The fact that charges for "unseemly words" continued under the offensive conduct provision of the *Offences in Public Places Act 1979* (NSW), despite the lack of a specific language offence, suggests that a repeal of the offensive language section alone may not be effective. See also, Jochelson, above n 29, 15.

threatening, alarming or dangerous," and that police have other powers to deal with threats to people or property.[83] The report argued that:

> With the mountains of evidence now available which clearly show that these offences provide no tangible benefit to the general community but act to further alienate Aboriginal people, there can be no justifiable reason for maintaining them on the statute.

The conclusion of this paper, that the legitimacy of the law is undermined by its failure to fulfil its promises does not, of itself, answer the question of whether we ought to have such laws. Whether or not there is a "justifiable reason" for maintaining the laws is a matter for debate. But what is clear is that, in this debate, offensive language laws may not be uncritically justified by reference to their protective function, without acknowledgment of the historically based ways in which their protection is discriminately applied and withheld. In this way, the unfulfilled promises of the law documented herein might "provide a certain coherence to" arguments for reform.[84]

83 E.g. *Crimes Act 1900* (NSW) s 93C (Affray), s 199 (Threatening to destroy or damage property), s 200 (Possession etc of explosive or other article with intent to destroy or damage property), s 352 (Person in act of committing or having committed an offence), s 60 (Intimidate police officer); *Summary Offences Act 1988* (NSW), s 11A (Violent disorder); *Racial Hatred Act 1995* (Cth) s 3; *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW) s 20C.

84 Habermas, above n 2, 444.