

## **‘Discrimination Preferred’: How Ordinary Verbal Bigotry Harms**

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### **1. Introduction**

In “*Just Words: On Speech and Hidden Harm: An Overview and an Application*”, Mary Kate McGowan claims that ‘speech constitutes harm by enacting norms that prescribe that harm’ [2021: XXX]. This is to say that an utterance constitutes harm when it enacts norms that impose a duty to engage in harmful conduct<sup>1</sup>. McGowan’s central case is an example of public racist speech. An African American dad and his children are sitting at a restaurant table, when a white woman (WW) starts verbally abusing them. “‘Who do you think you are?’”, she yells, “‘That was my table... so you should just go back home, if you even have one, and eat your fried chicken on your stoop or whatever... and leave the rest of us good folks to enjoy a meal in peace, you rotten welfare-dependent piece of human garbage!’” [XXX]. WW’s tirade, McGowan claims, introduces local norms prescribing harm against black patrons, and thus constitutes harm<sup>2</sup>.

In this commentary, we’ll submit that the norms enacted by WW’s utterance are *not* prescriptive or mandatory in character. We outline a view according to which WW’s words enact a special kind of *permissive* norms (what we call ‘non-neutral permissives’) rendering racial discrimination locally permitted – and indeed preferred over equal treatment. We conclude by arguing that, although WW’s utterance, and ordinary verbal bigotry more broadly, enacts non-prescriptive norms, it can still constitute harm. The commentary focuses on McGowan’s theoretical proposal (her ‘constitution-of-harm-by-prescription’ thesis) rather than on her ‘parity argument’ for the legal regulation of public racist speech [XXX]. In the process, however, we’ll point out that reconceptualising the force of the norms enacted by utterances such as WW’s in terms of (non-neutral) permissives, as we do, doesn’t necessarily jeopardize McGowan’s legal argument.

### **2. On Speech and Norm Enactment**

In McGowan’s Lewisian-inspired framework, any conversational move changes the score of the conversation and of the broader social practice(s) to which it contributes. Since the score tracks all those elements that together determine what counts as acceptable in a given context, changing

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<sup>1</sup> This claim plays a pivotal role in McGowan’s model. See McGowan [2017: 42]: ‘To say that speech constitutes harm (...) is to say that it brings the harm in question about *via* the enacting of a norm (or norms) that prescribes the harm in question. (Clearly, the norms in question are prescriptive (...))’, and [2019: 23]: ‘To say that speech constitutes harm is to say that it causes harm *via* the enacting of a norm prescribing that harm’.

<sup>2</sup> On McGowan’s account, for speech to constitute harm, it must enact norms prescribing harm *and* those norms must be followed [XXX]. Thus, whether WW’s utterance constitutes harm depends not only on whether it enacts harmful prescriptions, but also on whether those prescriptions are adhered to. For the sake of simplicity, we leave this causal layer of McGowan’s definition of harm constitution aside.

the score therewith changes how people may or may not act. Suppose that Tim and Sarah are discussing their respective cars. Tim says, ‘My car is so run-down that it’s just not worth fixing’. By bringing up his car, Tim adjusts the salience component of the score, and in so doing, introduces a norm about how the phrase ‘the car’ is to be used in the ensuing conversation. From then on, and until salience facts change again, it will be appropriate for both parties to use ‘the car’ to refer to Tim’s car only. Like Tim’s, WW’s utterance adjusts the score and hence enacts norms for the activity to which it contributes – namely, interaction in a public space. But unlike Tim’s, WW’s adjustment, says McGowan, puts in place norms that prescribe racially discriminatory practices. WW’s utterance thus constitutes the harm of discrimination<sup>3</sup>.

It is worth clarifying that WW’s words impact on the normative context in two diverse ways. They are meant to constitute directive illocutionary acts, presumably orders (‘you should go back home... eat your fried chicken on your stoop... leave the rest of us good folks to enjoy a meal in peace’)<sup>4</sup>. A felicitous order imposes a duty on the addressee to do what the speaker ordered them to do. Since orders are felicitous only if the speaker has authority over the addressee, one might contend that WW’s orders misfire (and thus fail to have their distinctive normative upshot), for WW lacks the requisite authority. Even so, WW’s words would still enact norms by operating at a level other than the illocutionary – the level of ‘parallel acts’, as McGowan [2019: 94] puts it. Parallel to whatever it does illocutionarily, any contribution to a norm-governed interaction enacts score changes, and therefore norms, for that specific interaction.

Unlike illocutionary acts, parallel acts enact norms *without expressing their contents*. Consider Tim’s utterance, ‘My car is so run-down that it’s just not worth fixing’. Its locutionary content doesn’t match the content of the norm it parallelly enacts (roughly, ‘Currently, the only referent for the expression “the car” is Tim’s car’). This makes parallelly enacted norms quite difficult to spell out. McGowan leaves the precise content of the norms enacted by ordinary instances of verbal bigotry as an ‘empirical matter for others to settle’ [2019: 5-6]. Notice, however, that her account imposes a constraint on the form that those norms can take, for her key claim – harm-constituting utterances enact *prescriptive* norms – implies that the content of those norms is modalised by a deontic necessity operator (‘ought’). WW’s utterance is supposed to enact norms that impute an ‘ought’ upon black patrons not to enter the restaurant, and upon others to discriminate against them. This strikes us as hardly plausible, and indeed, McGowan herself acknowledges that WW’s tirade, unlike a ‘Whites Only’ sign, doesn’t seem to *prohibit* black people from entering the restaurant, but ‘merely renders [them] *unwelcome*’ [XXX]. One way to put this is to say that, contrary

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<sup>3</sup> A terminological note to avoid confusion. In McGowan’s parlance, ‘norm’ and ‘permissibility fact’ are synonymous. To say that speech enacts norms is to say that it enacts permissibility facts [XXX]. McGowan adopts a broad notion of permissibility, which ‘also include[s] prohibitions (and thus what is impermissible) as well as what is required (that is, what it is impermissible to refrain from doing)’ [2018: 186]. Permissibility, in her sense, is neutral between ‘proper permissibility’ and ‘prescriptivity’. In her view, speech routinely enacts (broad) permissibility facts, but it can only constitute harm when it enacts prescriptive norms. When it comes to harm constitution, McGowan restricts the domain of permissibility-fact-enacting speech to prescriptive-norm-enacting speech. We argue below that such restriction is implausible, and indeed unnecessary for her parity argument.

<sup>4</sup> See Kaufmann [2012: 58-64] for an investigation of *you should*-orders.

to a ‘Whites Only’ sign, WW’s utterance enacts non-prescriptive (‘ought-less’) norms. But if so, and if speech only constitutes harm when it enacts norms *prescribing* that harm, then by McGowan’s own lights, her conclusion that WW’s words constitute harm wouldn’t follow.

In Section 4, we explore the possibility that WW enacts permissive (rather than prescriptive) norms, and then advance an account of harm constitution that dispenses with prescriptions. Since our proposal is centred on the distinction between permissive and prescriptive norms, a preliminary investigation of permissives is in order.

### 3. Neutral and Non-Neutral Permissives

The domain of permissives is largely underexplored in the literature, due to a neglectful tendency to understand all norms as imputing obligations<sup>5</sup>. We begin to fill this gap by identifying two subclasses of permissives: what we name ‘neutral’ and ‘non-neutral’ permissives. Both introduce a ‘can’ (as opposed to an ‘ought’), but non-neutral permissives, in addition, mark the newly permitted course of action as preferable vis-à-vis contrasting options.

Let’s bring in two examples. Consider this piece of public transport regulation: ‘Passengers are allowed to use a single ticket for multiple journeys within 90 minutes’. The rule grants a ‘neutral’ permit leaving passengers with a neutral choice between alternative options. With a single ticket, they may take one or multiple journeys – neither option is presented as preferable. Now consider the following passage from a postdoc call: ‘Candidates can submit up to three publications in any area of philosophy (ethics preferred)’. If a candidate wants to meet the preferred qualifications, they’ll submit ethics papers (provided that they have any), although they are not obliged to. The job specification grants subjects a ‘non-neutral’ permit – it does *not* leave them with a neutral choice. Although various options are permitted, one is presented as preferable.

Interestingly, neutral and non-neutral permissives have a built-in prescription: they are systematically associated with a negative prescriptive that prohibits sanctioning those who engage in the newly permitted behaviour<sup>6</sup>. The public transport regulation affects different targets in different ways: it gives passengers a permission (within 90 minutes, they *can* use a single ticket to take as many journeys as they like), and imputes a negative prescription upon ticket inspectors (who *ought not* to fine passengers taking multiple journeys with a single ticket). In a similar vein, the call specification gives applicants a permission (they *can* submit papers in any area of philosophy), and imputes a negative prescription upon the selection committee (who *ought not* to desk-reject candidates solely because of the philosophical areas of their submitted publications).

While these are examples of overt (illocutionary) norm-enactment, we saw that norms can also be enacted in a covert manner, via parallel acts. This generalises to all sorts of norms, non-neutral permissives included. For instance, suppose that while discussing the office culture with her new

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<sup>5</sup> This tendency is acknowledged, among others, by Bulygin [2015: 324].

<sup>6</sup> Aienza & Manero [1998: 106] put forth a version of this claim: ‘If Parliament then issues a norm saying that “It is permitted for women to go topless on the beach”, that would be pragmatically equivalent to the issuing of a prohibitive norm addressed to the local authorities (...) in the sense that “It is prohibited to hinder, prohibit and/or sanction going topless”’.

colleague Juan, Anna says, ‘Cooper’s decision to promote his son-in-law instead of Rhonda is a detestable case of nepotism’. Anna’s utterance parallelly enacts a norm that makes it permissible for Juan to express criticism of his boss – something that wasn’t clearly permissible for him beforehand, especially given his new-guy status. Additionally, the norm seems to make it *preferable* for Juan to follow suit with Anna’s critical tone. Anna’s remark discourages Juan from expressing appreciation for their boss’ conduct, and gently pushes him to go along with her move<sup>7</sup>. Like any permission-enacting utterance, Anna’s move also has prescriptive consequences: once Juan accepts it, he ought not to blame Anna if she further criticises their boss’ nepotistic behaviours.

Anna’s case is similar to WW’s in many respects. They both take place in informal settings. Both Anna’s and WW’s utterances have interesting (whilst covert) normative implications for the social interactions they are a part of. Perhaps more importantly, WW’s words, as Anna’s, enact non-neutral permissives. To this claim we now turn.

#### 4. Unravelling the Tension

In Section 2, we brought out a tension between McGowan’s claim that WW’s tirade enacts norms that prescribe racially discriminatory practices and her rough characterisation of those norms as non-prohibitives. This tension is even more visible in the book on which McGowan’s article is based, where she claims both that public racist speech locally enacts the ‘same discriminatory norms’ as the hanging of a ‘Whites Only’ sign *and* that there is an ‘important difference’ between ‘Whites Only’ policies and public racist utterances – for the former prohibit non-white persons from certain public places, while the latter ‘merely’ render them unwelcome<sup>8</sup>. Such claims cannot be jointly held: if the norms enacted by public racist speech do not prohibit the presence of non-white persons, then they are non-prescriptive and thus *essentially different* from the norms introduced by a ‘Whites Only’ sign. To solve this tension, we’ll sketch a two-step proposal. First, we suggest that WW’s utterance enacts non-neutral permissive norms, thus saving McGowan’s intuition that it makes black patrons unwelcome, without also prohibiting their presence from the restaurant. Then, we argue for an account of harm constitution that does without prescriptivity, thereby preserving McGowan’s claim that WW’s words constitute harm.

To substantiate the intuition that WW’s tirade doesn’t prescribe discrimination, imagine that WW’s move goes unchallenged and the norms it enacts successfully update the context. Imagine moreover that nobody later engages in racially discriminatory behaviours. If WW’s utterance enacted a prescriptive norm (i.e. a norm rendering racial discrimination on the part of whites locally mandatory), then failing to actively discriminate black persons would constitute a norm *violation*. This sounds implausible: in failing to say or do discriminatory things, white patrons and staff wouldn’t be violating an ‘ought’; rather, they would be failing to engage in the kind of conduct that WW’s move (and silence, if not approval, on the part of bystanders) made permissible. Although racism is still pervasive, it is nowadays generally socially impermissible to verbally assault people

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<sup>7</sup> See Simpson [2021] on ‘gentle bullying’ in conversation.

<sup>8</sup> McGowan [2019: 172, 174].

because of their race. It is thus plausible that, before WW starts speaking, social interactions in that restaurant are governed by a ‘No Racist Assaults’ norm. Her outraging tirade has the potential to (provisionally) bend that norm, thanks to the (possibly tacit) complicity of bystanders – especially of relevant authorities, such as the restaurant manager, or its staff. WW acts *as if* it were permissible to verbally assault black persons, and renders it locally permitted, if others turn a blind eye to the assault or take WW’s side<sup>9</sup>.

The prescriptive correlate of such a permit would roughly be, ‘It is (socially) prohibited to penalize racist behaviours in this context’. This, we think, is the right result: once WW’s move has been taken on board (suppose a few white patrons explicitly take WW’s side, while the restaurant manager remains silent), anti-racist interventions would indeed sound like violations or exceptions of currently in-force discriminatory norms.

Since the precise content of parallelly enacted norms is difficult to spell out, it is arduous to tell whether a (parallelly enacted) permissive norm places options on a par or marks one as preferable. However, utterances like WW’s, which are typically loud enough to reach both the target of hatred and bystanders, seem to have an incitement component: not only do they assault their targets; they also implicitly invite others to follow suit<sup>10</sup>. Such a component can be captured by construing the norms that WW’s-like utterances enact as *non-neutral* permissives making discrimination not only locally permitted but preferred over non-discrimination.

Recall at this point that, in McGowan’s view, WW’s utterance constitutes harm *because* it enacts prescriptive harmful norms. Thus, if we are right and the norms enacted by WW are (non-neutral) permissives, then WW’s words shouldn’t be constitutive of harm. In the remainder, we argue for the possibility that speech constitutes harm *even if* it enacts non-prescriptive norms.

Consider McGowan’s example of the sexist CEO [XXX]. Jack, the CEO of Macho Co., pronounces a new policy for his company: ‘From now on, we only hire men. Women are too distracting’. Since this policy prescribes a discriminatory hiring practice, on McGowan’s account, it constitutes discrimination. Now imagine that John, the CEO of Bigot Co., pronounces a slightly different policy for his company: ‘If a Department Director finds that women are too distracting, they can exclude them from their departments’ hiring processes’. While Jack’s pronouncement enacts a prescription (the company *ought not* to hire women), John issues a permission (the company *can* systematically exclude women). This doesn’t substantially change things: the new hiring policy of Bigot Co. is discriminatory as much as that of Macho Co. Since John’s utterance enacts that policy, it constitutes discrimination, albeit the policy is permissive in nature. As one can see, making discrimination *permitted* is enough for speech to constitute harm.

The revised sexist CEO’s case also suggests that McGowan’s ‘parity argument’ for regulating public racist speech can do without appealing to the notion of prescription. John’s utterance, just like Jack’s, is discriminatory in the legal sense and thus actionable. Enacting norms that render discrimination permissible in public places (or even preferred relative to non-discriminatory

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<sup>9</sup> See Maitra [2012] and Langton [2018] on the role of silence on the part of bystanders.

<sup>10</sup> On hate speech functioning as propaganda, see Langton [2018].

alternatives) may suffice to constitute an actionable act of verbal discrimination. Since WW's utterance, in our view, does exactly that (it enacts a 'Discrimination Preferred' norm), parity considerations still suggest that it might be legitimate to regulate it.

In this commentary, we unravelled a tension that affects McGowan's view. While we followed McGowan in claiming that utterances like WW's constitute harm, we maintained that they do so without prescribing the harm in question. We sketched a view according to which ordinary verbal bigotry enacts non-neutrally permissive norms. Not only do racist (or otherwise bigoted) utterances make harmful behaviours permitted; they also incite, encourage, push individuals to take advantage of the permission they are given.

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