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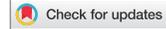
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Regulating speech: harm, norms, and discrimination

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ABSTRACT

Mary Kate McGowan's *Just Words* offers an interesting account of exercitives. On McGowan's view, one of the things we do with words is change what's permitted, and we do this ubiquitously, without any special authority or specific intention. McGowan's account of exercitives is meant to identify a mechanism by which ordinary speech is harmful, and which justifies the regulation of such speech. It is here that I part ways. I make three main arguments. First, McGowan's focus on harm is misguided; that ordinary speech is harmful is harder to support, and in turn does not less to support conclusions about whether it is wrong and warrants regulation, than *Just Words* suggests. Second, if the speech is harmful, McGowan's account of exercitives is ill-suited to explain why; the relevant instances of ordinary speech seem to express speakers' views about moral norms, not change social norms. Third, McGowan's argument for why ordinary speech should be regulated because it is a form of discrimination presupposes a great deal that is controversial about what makes discrimination wrong and legally actionable, and even if it is right it may license the regulation of more speech than many, including McGowan, would deem acceptable.

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Words are very unnecessary
They can only do harm
–Depeche Mode, 'Enjoy the Silence'

One of the things we can do things with words is change what's permitted. This has been part of speech act theory since J.L. Austin, who described the category of *exercitives* as 'the exercising of powers, rights, or influence',¹ the consequences of which can include that 'others are "compelled" or "allowed" or "not allowed" to do certain acts'.² But the standard view is that we can't all issue such exercitives, and we can't

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¹Austin (1962, 150). Austin's initial list of examples was 'appointing, voting, ordering, urging, advising, warning' (150), with a longer list appearing later in the book (154–155).

²Austin (1962, 154).

do so without intending to. Sergeants can compel privates to act, but not vice versa. A CFO can change what middle management are allowed to do by saying 'From now on, we cannot allow overtime to be approved by middle management', but not if they were just venting personal frustration.³ Some pivotal contributions to feminist philosophy of language – especially Rae Langton's work on pornography (1993; 2011) – have sought to explain why aspects of ordinary speech are wrong by treating them as exercitives. But in doing so they've faced persistent challenges. The relevant speakers often seem to lack the requisite authority and intentions to fit the mold of Austinian exercitives.⁴

One central contribution of Mary Kate McGowan's *Just Words* is to show that not all exercitives need to fit this mold. One of the things we do with words is change what's permitted, and we can do this without any special authority or specific intention. This isn't just something we *can* we do; we do it ubiquitously. McGowan calls cases like the sergeant and CFO 'standard exercitives', but it turns out that they're a special instance of a very general phenomenon. *Just Words* explains this subtle and hidden mechanism by which ordinary speakers in ordinary speech change what's permitted.⁵

But the book isn't just a project in philosophy of language. It's philosophy of language in service of moral and legal philosophy. With this account of exercitives, McGowan aims 'to identify a previously overlooked mechanism by which ordinary speech by ordinary speakers under ordinary circumstances enacts harmful norms and thus constitutes, rather than merely causes, harm'.⁶ Because this mechanism is 'subtle and obscured', the harm is hidden. Hence the subtitle: *On Speech and Hidden Harm*. Importantly, McGowan does not think the fact that such harms are hidden obviates us from responsibility: the subtlety of the mechanism both 'conceals the harm constituted and masks our complicity in it'.⁷ So, I think it is fair to say, McGowan's view is that this is a subtle mechanism by which ordinary speakers often *wrong* each other. And McGowan's project is not just concerned with interpersonal morality, but with legality. According to McGowan, identifying this way in which speech has hidden harms 'matters to the law', as it 'opens up potential justifications for

³This example is McGowan's (2019, 58).

⁴See, inter alia, Green (1998) and Saul (2006).

⁵Of the seven chapters in the book, the first three offer the account of conversational exercitives, and the fourth generalizes this into an account of covert exercitives.

⁶McGowan (2019, 2).

⁷Id.

further speech regulation’,⁸ as such speech is ‘harmful enough to warrant its regulation’.⁹

So what are these instances of ordinary speech? It’ll focus on two of the core examples.

Call the first *ORDINARY SEXISM* (2019, 110):

Suppose that Steve and John are co-workers at a workplace in the contemporary United States. Further suppose that there are very few female employees at this workplace and the following exchange takes place in the employee lounge:

JOHN: So, Steve, how did it go last night?

STEVE: I banged the bitch.

JOHN: [smiling] She got a sister?

And call the second *ORDINARY RACISM* (2019, 156):

Imagine that an African American man boards a public bus on which all the other passengers are white. Unhappy with the newcomer, an elderly white man, turns to the African American man and says, ‘Just so you know, because I realize that you’re not very bright, we don’t like your kind around here, ... boy. So, go back to Africa!’

Sexists and racists aside, the verdict that these instances of ordinary speech are harmful isn’t likely to surprise many. But McGowan’s takes the harms in question to be very serious. In the first case, McGowan claims, the ‘offhand mark oppresses’.¹⁰ And the second, McGowan claims, warrants regulation.¹¹ McGowan defends the latter claim with the novel argument that ‘the reasons for regulating [such speech] are exactly the same as the reasons that justify the regulation of other uncontroversially regulable categories of speech’,¹² in particular discrimination. McGowan’s position is often framed in terms of a distinction between speech that *causes* harm and speech that *constitutes* harm, where the latter is just a special case of causation (2019, 2, 23). This can sound opaque, but the underlying idea is familiar enough. It’s close to John Stuart Mill’s position that only some harmful speech warrants legal

⁸McGowan (2019,, 3).

⁹Id. The view is not that speech regulation is all things considered justified. But it’s not completely clear what this weaker claim amounts to. As Berman recently noted, “warranted” can be a waffle when not clearly defined in terms of more familiar normative notions as ‘good,’ ‘reason,’ ‘duty,’ and ‘ought’ (2023, 10, n. 16).

¹⁰McGowan (2019: 1, ch. 5).

¹¹Others have typically defended this view by arguing for the legal regulation of hate speech. McGowan contrasts the argumentative strategy in *Just Words* with other approaches in ch. 7 (see especially 163–164).

¹²McGowan (2019, 1).

intervention. To modify Mill's example, it is one thing to declare that an election was stolen in an op-ed, and quite another to scream this on a podium in front of an angry mob gathered outside Capitol Hill; arguably, in the latter circumstances, such speech can 'constitute [in its] expression a positive instigation to some mischievous act', and so 'may justly incur punishment'.¹³ That's roughly McGowan's stance about speech like ORDINARY RACISM.

I'm sympathetic to many of McGowan's conclusions. I'm persuaded that we should understand exercitives to be a much broader category than standard accounts allow. And I agree that many instances of ordinary speech by ordinary speakers under ordinary circumstances can be wrong, in ways that are subtle and obscured.¹⁴ But I'm skeptical of how much McGowan's philosophy of language supports the relevant views in moral and legal philosophy. To explain why, I'm going to push back on three fronts. First, I'll push back on the central role that harm plays in McGowan's explanation of what's wrong with such ordinary speech, and why it warrants legal regulation. Second, I'll argue that there's a significant obstacle for McGowan's account of the mechanism of how we harm by enacting social norms. I'll argue that cases like ORDINARY SEXISM are instead better understood as involving speech that changes others' moral beliefs.¹⁵ And finally, I'll turn to McGowan's argument that cases like ORDINARY RACISM warrant regulation because they are like paradigm instances of racial discrimination. I'll argue that McGowan's 'parity' argument needs to engage with the significant debate about what makes racial discrimination wrong and actionable, and that McGowan's method of looking at these issues through the eyes of the law risks generating odious verdicts.

1. Conversational and covert exercitives

To start, though, we need a sketch of McGowan's view of how ordinary speech changes what's permitted via *conversational exercitives* and

¹³Mill (1859: ch. 3) took this to be so with regard to claims that corn dealers starve the poor.

¹⁴The examples I've considered most involve generics, gender pronouns, and ordinary racial attributions: Wodak, Leslie, and Rhodes (2015), Wodak and Leslie (2017), Dembroff and Wodak (2018; 2021), and Wodak (2022).

¹⁵I appreciate that this second point may sound like I'm splitting hairs, at least until I delve into the details of McGowan's view. But to at least add some presumptive force to the point, compare Maitra, who distinguishes speech that *constitutes* subordination from speech that causes 'its hearers to form beliefs that, in turn, cause those hearers to treat others in ways that subordinate them' (2012, 97). If my diagnosis is right, ORDINARY SEXISM turns out to be an instance of the latter, not speech that constitutes subordination or constitutes harm.

covert exercitives. These are the subtle mechanisms by which ordinary speech will turn out to ‘constitute[] harm by enacting norms that prescribe that harm’.¹⁶

Recall the challenge. If speakers can only change what’s permitted by exercising some special authority and with some specific intention, exercitives can’t explain what’s wrong with many cases of ordinary speech. McGowan shows how this challenge can be overcome first by developing the account of conversational exercitives. Here McGowan builds on David Lewis’ way of framing conversations as governed by a distinct set of rules or norms, like baseball:¹⁷

Just as it is impermissible for a runner to walk after only three balls are thrown to him, it is unacceptable for a participant in a conversation to cite what is known to be entirely irrelevant to the topic at hand.¹⁸

But since a speaker’s conversational contribution can change whether a claim is known to be entirely irrelevant to the topic it hand, a speaker can thereby enact a new norm for the conversation. And the same phenomenon occurs with other norms or rules governing conversations: ‘Any conversational contribution that triggers one of these rules thereby enacts permissibility facts for the conversation in question’.¹⁹ And any conversational contribution, it turns out, triggers a change like this. So conversational exercitives turn out to be ubiquitous. When we contribute to a conversation there is usually some specific norm (*s-norm*) for that conversation that we enact via triggering some more general norm (*g-norm*) that governs all conversations. How does this address the challenge? Because it would be a mistake to think my conversational contributions can only change what’s conversationally permitted via my exercise of some special authority. I have no more authority here than you; our conversation has no equivalent to a C.F.O. towering over middle management. Likewise, it would be a mistake to think I can only change what’s conversationally permitted because I intend to do so via speaking. These changes can be opaque and unintentional.²⁰

This account is then generalized into a story about covert exercitives, which govern aspects of social interaction far beyond conversations.

¹⁶McGowan (2019, 26).

¹⁷Lewis (1983). As McGowan notes (2019, 31, 97fn. 11), Lewis framed this in terms of rules rather than norms.

¹⁸McGowan (2019, 31).

¹⁹McGowan (2019, 34).

²⁰McGowan (2019, 45).

That generalization looks natural once we note that conversations are just a special case to how the social world is norm-governed. There are socially appropriate and inappropriate ways to stand in elevators. Facing forward: tick. Facing backwards: big cross. Our actions can enact social s-norms, by *triggering* and *abiding by* social g-norms. So conversational exercitives turn out to be a special case of covert exercitives: an unobvious but ubiquitous way that ordinary speakers can unintentionally enact norms and change what's permitted.²¹

2. Speech and harm

That's the core of McGowan's account of how ordinary speech can enact norms. Important questions can be asked about the account itself.²² But I want to focus on how this contribution to philosophy of language contributes to moral and legal philosophy.

The connection to moral and legal philosophy that McGowan draws starts with the following observation. The mechanism of conversational and covert exercitives is itself morally neutral, since many of the norms we enact will be trivial. But, McGowan thinks, some such norms will 'proscribe harm'. Take oppression. It is 'a complex collection of human practices that unjustly ranks people according to their membership in social groups', where these 'ranking practices are norm-governed', and indeed governed by general norms, which means there will be 'oppressive g-norms operative in many of our social practices'.²³ Hence, McGowan aims to show 'that some utterances enact oppressive s-norms' by 'identify[ing] utterances that are moves in norm-governed activities that also abide by the oppressive g-norms governing those activities'.²⁴

ORDINARY SEXISM is McGowan's main attempt to identify such an utterance. McGowan claims that Steve's utterance *as a move in a conversation* 'makes it conversationally appropriate, in this particular conversational context, to use degrading terms for women'.²⁵ And *as a move in a broader social practice* Steve's utterance 'makes it permissible, in this immediate environment and at this time (here and now), to degrade

²¹ McGowan (2019, 90).

²² For example, McGowan holds (as I noted above) that it matters whether we *abide by* g-norms (see, e.g. 109–110). But it's unclear what it takes to abide by norms, and whether this will be consistent with McGowan's views that such exercitives do not require speakers to have specific intentions. See Mikkola (2021, 466) on this issue.

²³ McGowan (2019, 109).

²⁴ McGowan (2019, 110).

²⁵ McGowan (2019, 111).

women. By so doing, his utterance makes women count as second-class citizens (locally and for the time being)'.²⁶ The next passage is key:

How might enacting this s-norm harm actual women in that workplace? What tangible effect might result from the covertly exercitive functioning of Steve's remark? What behavioral changes would count as following the oppressive s-norm enacted? Actions potentially rendered appropriate by the s-norm enacted by Steve's utterance might include visually lingering on a woman's legs, expecting women to make themselves as attractive as possible, assuming that female employees ought to be more polite, undervaluing women's professional contributions, and/or expecting the women in the workplace to wipe the counters and clean out the communal refrigerator. By altering the normative landscape of the workplace in these ways, Steve's utterance enacts norms that prescribe behaviors that oppress women. As such, his remark constitutes an act of oppression.²⁷

This is where my skepticism starts. To be clear, I agree that Steve's utterance wrongs women. What I'm skeptical of is this explanation of the nature and basis of the wrong.

The main claim I want to consider in this section is whether we should think that the (most important) wrong-making feature of Steve's utterance involves harm. Something seems to have gone awry if to show that Steve's utterance is wrong we need to identify potential 'tangible effect[s]' like the ones above. To put this simply, I think the best moral objection to Steve's utterance is that it *degrades* women, not that it *harms* women.

This might seem like a strange distinction to draw. Can't McGowan say that by degrading women, Steve harms women? (McGowan doesn't say that. McGowan says that by making it permissible for others to degrade women, with tangible effects like those described above, Steve harms women. Though McGowan could say that.²⁸)

However, it's not obvious that being degraded is always harmful. Similar issues will arise for oppression and discrimination. McGowan does claim that these are harms. With oppression, McGowan's reasoning is as follows: 'oppression involves genuine disadvantage', so it involves being 'made objectively worse off (relative to others)', which 'means

²⁶McGowan (2019, 112). McGowan treats this claim as a 'hypothesis.'

²⁷McGowan (2019, 112).

²⁸Though it'd require McGowan to give up on the official account of how an utterance can constitute harm, which requires three things: 'The utterance enacts a norm; that norm is followed and harm results from following that norm' (2019, 24). This makes the harm of the utterance contingent on its results.

that one [who is oppressed] is harmed'.²⁹ Likewise, McGowan says discrimination is a harm because it involves being made worse off than others.³⁰ The problem with this reasoning, however, is that it is in tension with prominent accounts of harm. On the most prominent account, for example, harming you involves making *you worse off than you'd have otherwise been*, not making you worse off than others.³¹ McGowan never offers an account of the nature of harm,³² and seems to want to remain ecumenical on this front. But I don't see a way to show that degradation, oppression, and discrimination are always harmful without taking a contentious stand on that issue.

There's also a deeper issue here. It's one thing to say that degradation, oppression, and discrimination always involve harm. It's another to say that harm explains why they're wrong. Egalitarians like Elizabeth Anderson don't base their objection to oppression on the claim that it's bad for the oppressed – instead, they appeal to claims like oppressive social relations fail 'expressive demands of equal respect'.³³ Similarly, many prominent views in the literature on discrimination don't make harm central to explaining its wrongfulness. Katharina Berndt Rasmussen makes this point clearly:

If you ask philosophers why discrimination is wrong, chances are that they don't mention harm. One might of course argue that moral philosophers who typically understand discrimination in terms of 'disadvantageous treatment' thereby acknowledge harm (welfare-reduction in some sense) as one of the *defining* features of discrimination. But they only rarely consider it as its *wrong-making* feature.³⁴

To illustrate Rasmussen's point, in *When is Discrimination Wrong?*, Deborah Hellman defends the view that 'it is morally wrong to distinguish among people on the basis of a given attribute when doing so demeans any of the people affected', where 'to demean is to treat another in a way

²⁹McGowan (2019, 102).

³⁰McGowan repeatedly appeals to 'the harm of discrimination' (e.g. 2019, 24), and then later explains why it is harmful as follows: it is a 'relative harm with an implicit comparison class. To say that non-whites are discriminated against in the United States today, for example, is to say that they are disadvantaged *relative to whites* in the United States today' (167 n. 24, emphasis in original).

³¹This is the counterfactual account. Similar issues arise for most comparative accounts of harm. And as Rasmussen (2019) argues, prominent non-comparative accounts of harm provide a poor basis for explaining the wrong of discrimination.

³²As Maitra and McGowan (2021, 325) note, 'There are different accounts of harm in the philosophical literature.' There, and here, McGowan aims to remain fairly neutral between them. McGowan seems to understand harm in terms of results (2019, 24), though perhaps not 'bad effects' (176: 44).

³³Anderson (1999, 289).

³⁴Rasmussen (2019, 874). Rasmussen goes on to argue that harm can be both a defining and wrong-making feature, but only if we adopt a 'non-orthodox' account of harm.

that denies her equal moral worth'.³⁵ Hellman explicitly notes that 'this account of wrongful discrimination' does *not* ground its 'moral impermissibility' in 'the harm of discrimination'.³⁶ And one reason why it is relatively rare to consider harm as a primary wrong-making feature of discrimination is that doing so would seem to make the wrongness of discrimination highly contingent.³⁷

There may be no deep disagreement here, however. We could think the wrongness of Steve's speech is overdetermined. An explanation in terms of degradation and an explanation in terms of harm need not be rivals.³⁸ After all, McGowan never denies that speech can be wrong because it subordinates, which involves (*inter alia*) some people being 'ranked [...] as having inferior moral worth' on the basis of group membership.³⁹ But if we agree that Steve's speech is wrong for that reason, why place so much emphasis on harm? Why make *On Speech and Hidden Harm* the subtitle of the book? Why treat this speech as if so much hangs on its potential 'tangible effects'?

The answer, I think, requires us to look ahead to McGowan's goal of showing that ordinary speech is not just wrong, but wrong in a way that warrants legal regulation. McGowan writes that 'it is widely agreed that the prevention of harm is the only legitimate justification for state interference with individual liberty' (162), and for the regulation of speech in particular (3). This is also why McGowan focuses on whether speech *constitutes* rather than *merely causes* harm (2, 23): 'speech that constitutes harm is distinct in the eyes of the law' (3). I take it that McGowan's view is that we need to frame the issues in terms of harm to provide a basis for regulation in the eyes of the law. And by 'the eyes of the law', McGowan specifically means the eyes of *U.S.* law.⁴⁰

It's important to distinguish these goals carefully. A good account of why ordinary speech *can be legitimately regulated* may not make for a

³⁵Hellman (2008, 7–8).

³⁶Hellman (2008, 8). Similarly, for Eidelson, 'discrimination is morally troubling not simply because it gives rise to harm or unfairness, but because it manifests a form of basic disregard for the standing as persons of those who are discriminated against' (2015, 126).

³⁷Defenders of harm-based views accept this contingency. See Kasper Lippert-Rasmussen (2006, 174).

³⁸Though they may be rivals, in the following sense. If the relevant speech is only harmful in virtue of being degrading (or oppressive, or ...), and the degradation (or ...) is already sufficient for the speech to be wrong, I don't think harm can explain why the speech is wrong (for the reasons I offer in Wodak 2020). But harm could just be an aggravating factor – it could help make the speech more seriously wrong.

³⁹Langton (1993).

⁴⁰This comes up often. For example: McGowan 'aims to work within an actual free speech system (that of the U.S.) rather than argue for a new one' (2019, 181).

good account of why it is *morally wrong*.⁴¹ So perhaps we should consider McGowan to be primarily offering the former.

But if we do so, I'm skeptical that McGowan's framing in terms of harm provides such a close fit with widely accepted views about when speech can be legally regulated. It's true that many philosophers say that 'the harm principle' is widely accepted. But as James Edwards observed, 'in the philosophical literature there is no single such principle; there are many harm principles' (2014, 253), and no one harm principle is widely accepted. The specific harm principle that McGowan assumes here is actually very controversial. For McGowan, the principle operates as a *constraint*, and a constraint not just on *criminalization*, but on *legal regulation* in general. Some reject the harm principle as a constraint on criminalization.⁴² Many more reject it as a constraint on legal regulation in general (the Rawlsian project in political philosophy being perhaps the most famous example).⁴³ This is particularly striking since McGowan's main argument for legal regulation is to treat ORDINARY RACISM as an instance of discrimination. Anti-discrimination laws do not all involve criminal sanctions, and it is not widely agreed that the only legitimate justification for such laws is the prevention of harm. In other words, I don't see why McGowan needs to take speech to involve hidden *harms* to support the conclusion that such speech warrants legal regulation of some form.

Perhaps, then, the best way to read the project is as pursuing a very ambitious goal. On this reading, McGowan assumes not a view about constraints on the legal regulation of speech not because it is what's widely accepted, but because it is the strictest view that's widely accepted. Showing that even this strict constraint can be satisfied would be a huge deal. But especially on this reading, one problem is glaring. A harm principle can only operate as a clear constraint when we couple it with a clear account of harm. McGowan provides no account of harm, and McGowan's discussion of why ordinary speech is harmful doesn't fit with widely accepted accounts of harm, as I noted above. So I'm not sure about this route to explaining why such speech warrants regulation.

A final reservation before we move on. It's not quite clear to me what the payoff is meant to be for trying to view the issues of speech through the eyes of U.S. law on free speech and harm. U.S. courts have long

⁴¹See Gardner for an illuminating discussion of (in relation to discrimination) of how conflating these issues can yield 'egregious mistake[s]' (1996, 365–367).

⁴²See Feinberg (1984).

⁴³For Rawls (1972), we can legally regulate conduct to ensure justice is done. Gardner notes that this Rawlsian view and Millian doctrines about harm-prevention are 'cross-cutting' (1996, 365).

endorsed very philosophically dubious views about the value of free speech,⁴⁴ and its relation to harm.⁴⁵ Is looking through the eyes of U.S. law meant to be truth-tracking? Or is it meant to be somehow strategic? In any case, as I'll describe in the last section, I think this approach carries significant risks. If we take seriously looking through the eyes of U.S. law, we may not like what we see.

3. Harm via norm enactment

If we do want to follow McGowan's route to explaining why these cases of ordinary speech are wrong or warrant regulation, we need to zoom in on the mechanism that's meant to explain the relevant harms: norm enactment. The prospects for this explanation turn out to depend on subtle issues about *which* norms change and *how* those norms change. And this provides good reasons to doubt McGowan's explanation.

With ORDINARY SEXISM, McGowan briefly claims that '[a]rguably, Steve's utterance also makes it conversationally appropriate, in this particular conversational context, to use degrading terms for women'. But McGowan seems to put little weight on this, which I think is right.⁴⁶ Then McGowan claims that Steve's utterance enacts social norms: it changes facts about 'social permissibility'.⁴⁷ Here and elsewhere in *Just Words*, McGowan is especially concerned with 'the enacting of social norms', and follows Christina Bicchieri in taking social norms to be 'behavioral rules that are supported by a combination of empirical and normative expectations'.⁴⁸ McGowan's examples of covert exercitives involve changes in 'social norms',⁴⁹ and in ORDINARY SEXISM we're told that the changes in the 'normative landscape' involve changes in 'expectations'.⁵⁰

I don't think this works. Social norms aren't just *any* combination of empirical and normative expectations. An important aspect of Bicchieri's view (and many others like it) is that we are *conditionally* committed to social norms,

⁴⁴Much of U.S. free speech jurisprudence has been in the grips of the idea that a free marketplace of ideas is an optimal institution for promoting true belief, which Goldman and Cox (1996) note betrays a profound misunderstanding of the economic theory of what marketplaces maximize.

⁴⁵See Schauer's illuminating discussion of how 'much public rhetoric, academic commentary, and even legal doctrine seems to often deny' obvious truths about how speech can be harmful (2011, 81).

⁴⁶For one thing, Steve's utterance would also make it conversationally appropriate for John to *reject* the use of degrading terms for women. For another, McGowan ties oppression to broader social norms.

⁴⁷McGowan (2019, 111). We're also told that the case involves changes to 'harmful social norms' (125).

⁴⁸McGowan (2019, 25); Bicchieri (2006).

⁴⁹For some examples, see McGowan (2019, 69 n. 15, 88, 101).

⁵⁰McGowan (2019, 112).

which ‘marks an important difference between social and personal norms’.⁵¹ Bicchieri’s two examples to illustrate this are norms about brushing your teeth and not killing others. Our commitments to these norms are not conditional in the right way for these to be social norms – if we found ourselves in a Hobbesian state of nature, and one with appalling dental hygiene to boot, we wouldn’t give up on these norms in the way we’d give them up on paradigmatic social norms (like wearing black while mourning). As Bicchieri notes, moral norms usually aren’t social norms for this reason. Moral norms ‘demand [...] an unconditional commitment’ (2006, 20). I’m going to assume that social norms require conditional commitments,⁵² and that we can use this to test whether it’s really social norms that change in McGowan’s cases,⁵³ including the case of ORDINARY SEXISM.

In real-world cases like this, where the speaker’s utterance does change others’ expectations about women, is this really likely to be a change in social norms? I suspect not. Instead, I suspect ordinary sexist speech typically contribute instead to others having *false moral views* about how women should be treated. I think it’s typical for sexists to be committed to sexist norms even when they believe that few others share them – even when they don’t descriptively expect others to follow sexist norms, and don’t believe others normatively expect them to follow sexist norms. Misogynists remain misogynists when they are in the minority. Indeed, they often know they’re in the minority, and make up malarkey (e.g. about being red-pilled) that’s aggrandizes their minority status. Sexism just isn’t a conditional commitment. It’s a moral view.

We should expect this to right if we think more about degradation. In the last section, I noted that common views of what makes speech

⁵¹Bicchieri puts this in terms of conditional ‘commitments’ or ‘preferences’ (2006, 20). Brennan et al (2013) similarly demarcate social norms in terms of whether reasons are conditional (or ‘independent’).

⁵²McGowan could reject this view, but aside from being contentious and undefended, this’d risk giving us an overly broad account of social norms. For example, one way in which the conditional nature of social norms is important is that it helps distinguish them from collective habits. Bicchieri makes this point with the example of wearing warm clothes in winter (2006, 21–22): we might expect others to do this, descriptively and normatively, but that doesn’t make it a social norm because our expectations aren’t conditional on others in the right way. I should note that at times McGowan’s writing suggests some background assumption that any norms that govern social practices are social norms (e.g. 111). But that is inconsistent with Bicchieri’s view, and seems as dubious as the view that any norms that govern conversations are conversational norms. (Can’t moral norms govern both?)

⁵³For what it’s worth, I think this same issue arises with McGowan’s first case of a non-conversational covert exercitive (2019, 90–91). The example involves the speaker declaring that they are happy for Paul, to an audience who knows Paul bullied the speaker back in high school. McGowan writes that this is a move in a conversation and ‘a move in the norm-governed activity of social interaction.’ But not all of the norms that govern social interaction are social norms! It is plausible that the speaker’s ‘magnanimous’ way of talking about Paul ‘encourages taking the high road’, but does it do so via changing social s-norms, or via changing others’ personal moral norms?

degrading, demeaning, or subordinating specify that it involves denying others' equal *moral* worth, or ranking them as having inferior *moral* worth.⁵⁴ We should expect these mechanisms to involve changing *moral* views, which typically demand unconditional commitments.

If this is right, an explanation that appeals to how such speech enacts *social* norms seems off-track. We can agree with much of what McGowan says about Steve's case. We can agree that the utterance 'changes the normative landscape of the workplace', such that the 'actions potentially rendered appropriate' include

visually lingering on a woman's legs, expecting women to make themselves as attractive as possible, assuming that female employees ought to be more polite, undervaluing women's professional contributions, and/or expecting the women in the workplace to wipe the counters and clean out the communal refrigerator.

We can agree that these norms harm and oppress women. But all of this, it turns out, doesn't suffice to show that Steve's utterance is a harmful or oppressive *covert exercitive*. For that, we need to know whether these behaviors flow from s-norms Steve enacted, rather than changes to personal norms.⁵⁵

There's a further reason to doubt that McGowan's mechanism of covert exercitives offers the right kind of explanation here. It turns on the other issue I mentioned above: *how* norms change. Following a constitutionally mandated vote certification in Congress to elect a new President changes norms. So does staging a coup. But only the former enacts a norm. So norm enactment can't just be any norm change; it must itself be *norm-governed*.⁵⁶ It's easy to see how this occurs with conversational norms. We have clear examples of the general conversational norms (e.g. the Gricean maxim of relation) that speakers can trigger in a norm-governed way to make specific moves conversationally inappropriate (e.g. making some potential contributions irrelevant). But when we turn to McGowan's own main example of how speech harms via norm-enactment, we lack

⁵⁴Interestingly, in discussing Langton and West's position on pornography (1999), McGowan switches to whether pornography says women are 'socially inferior' (2019, 132), rather than just 'inferior', and of what's 'socially legitimate' rather than just 'legitimate'. This makes the point made above easy to miss. Subordinating women ranks them as *morally* inferior, not as *socially* inferior in some non-moralized sense.

⁵⁵I'm assuming here that social norms are constellations of normative judgments, but moral norms aren't. So if Steve's utterance makes others adopt sexist moral beliefs, it doesn't thereby make it morally permissible to treat women in sexist ways. That's why on my diagnosis it doesn't enact s-norms – my talk about changes in personal norms is needn't mean there are any changes in what morality permits.

⁵⁶McGowan doesn't say this, but does agree that not all norm change is norm enactment (2019, 19).

even a sketch of a hypothetical account of what social g-norms ‘I banged the bitch’ triggers to generate new s-norms like ‘female employees ought to be more polite’.⁵⁷

A comparison may help here. Consider Eleonore Neufeld’s recent discussion of how pornography essentializes women. The mechanism by which women are essentialized is largely that it serves to rationalize the viewer’s enjoyment of the depicted mistreatment of women (2020, 710–711). Rationalization plausibly involves the acceptance of false moral views (changing personal norms). It’s less plausible that it involves changing social norms – the same mechanism is in play when viewers consume pornographic material that they know to be extreme by society’s lights. Neufeld’s view might be wrong, but I think it’s at least easy to understand what rationalization would involve that’d get you from viewing such pornography to essentializing women. Likewise, I think it’s easy to see how others can rationalize enjoying Steve’s verbal mistreatment of women (or rationalize Steve’s enjoyment of it), and in so doing come to endorse the other negative attitudes that McGowan describes. The comparative difficulty of explaining these steps in terms of triggering social g-norms makes that diagnosis of the case look less plausible. While I won’t explore this, a similar challenge arises for McGowan’s claims about how pornographic speech silences and subordinates women via enacting social norms.⁵⁸ It seems more promising to say that such speech harms via changing moral beliefs. If so, McGowan has offered an important account of a neglected variety of exercitives, but one that’s ill-suited to explaining what makes cases like ORDINARY SEXISM harmful in these ways.

Of the main points I want to make here, I think this one is both the most subtle and the most central to McGowan’s project, so I’ll try and restate it in a more prosaic way. Compare the publication of Peter Singer’s *Animal Liberation* to the lecture I received at the international student orientation in graduate school. Both changed audiences’ attitudes about permissibility: you shouldn’t eat animals, you should shake people’s hands when you greet them. But the former changed attitudes about *moral* permissibility,

⁵⁷Steinhoff (2022) makes a similar criticism of the example. Worse yet, if these norms are so hard to identify, it’s unclear why we should think Steve is abiding by them, which McGowan’s account requires.

⁵⁸McGowan (2019: ch 6). The relevant ‘permissibility facts’ enacted are again meant to be social (e.g. on 141–142). A further note about McGowan’s claims here, which I owe to Eleonor Neufeld. McGowan is concerned with cases of *publicly* rather than *privately* consuming pornography – e.g. hanging a lewd poster at work where it’ll be seen by others (136), rather than surreptitiously viewing the same image at home. This is a subtle change of focus from much work on how pornography silences and subordinates.

and the latter changed attitudes about *social* permissibility. If we agree that in real-world cases like *ORDINARY SEXISM*, sexist speech changes audience attitudes about permissibility, is it more like *Animal Liberation* or the student orientation? I've argued that it's like the former – sexist speech changes others' beliefs about what's morally permissible. If this is right, such speech doesn't enact permissibility facts. (It doesn't enact social permissibility facts because moral beliefs aren't the right kind of normative attitudes to constitute social norms. And it doesn't enact moral permissibility facts because those aren't constituted by normative attitudes, period; mistreating women doesn't become morally permissible if enough people believe that this is so.) If this is right, ordinary sexist speech can change something about permissibility, and thereby harm. But the harm does not go via enacting permissibility facts. And that means McGowan's mechanism does not explain the relevant harms.

4. Speech and discrimination

Let's turn now to the legal regulation of speech. This is mainly discussed in chapter seven in relation to *ORDINARY RACISM*, which McGowan claims 'ought to be legally actionable even under the strict free speech protections of U.S. law', meaning that under U.S. law such cases involve 'sufficient grounds (in terms of harm protection) to justify legal intervention' (McGowan 2019, 157).⁵⁹ I've already noted some reasons to quibble with the role that harm protection plays in the argument. But we can leave that aside now, as the core argument in this chapter doesn't turn on that issue.

McGowan's main argument for why the speech in *ORDINARY RACISM* ought to be regulated is instead 'based on the simple idea that like cases should be treated alike'.⁶⁰ McGowan considers 'paradigmatic examples of verbal acts of discrimination' that are legally actionable, like 'hanging a "Whites Only" sign' in a restaurant in the South during Jim Crow.⁶¹ Since it's a 'like case', *ORDINARY RACISM* should be treated alike. If one is a legally actionable form of speech, the other must be too.

This is an interesting argument, but from the start we should be a little worried. While the idea that like cases should be treated alike is simple, it's too simple to do any heavy lifting. As Kenneth Wilson noted in 1974, that

⁵⁹McGowan does not claim that such speech should all things considered be regulated, noting the 'substantial practical challenges' that would need to be overcome for such a position to be defended (181).

⁶⁰McGowan (2019, 164).

⁶¹McGowan (2019, 169, 173).

idea is 'by itself incomplete': 'Until supplemented by criteria of likeness and difference, it remains empty'.⁶² This means the claim that ORDINARY RACISM and hanging a 'Whites Only' sign are like cases – that the reasons for regulating speech in both cases 'are exactly the same'⁶³ – does *all* the work. But McGowan offers little in the way of any explanation or defense of the general criteria of likeness or difference that we'd need for this argument to fly.

The reason for this seems to be that McGowan takes it to be very obvious what makes a case similar to or different than hanging a 'Whites Only' sign. McGowan thinks we have little difficulty in identifying the reasons why such cases legally actionable: indeed, 'we have perfect clarity with respect to why discriminatory speech is actionable'.⁶⁴ McGowan thinks this is true of the 'moral notion' and 'the legal notion of discrimination', and with the latter McGowan is again focused on 'the U.S. context'.⁶⁵

I want to contrast this position with the opening sentences of Hellman's 'Two Concepts of Discrimination': 'Equal protection jurisprudence is a mess. Its moral foundation is uncertain, its doctrinal structures are eroding, and its distinctiveness is in question'.⁶⁶ While the mess goes beyond this, Hellman's main goal in that paper was to expose how equal protection jurisprudence is 'animated by two normatively distinct and conceptually irreducible conceptions of discrimination', one comparative, and one non-comparative.⁶⁷ And this problem does not just arise with the Fourteen Amendment. It arises with other aspects of U.S. antidiscrimination law, and in the philosophical work on the foundations of anti-discrimination law.⁶⁸ Even within the camps of comparative and non-comparative views, there's precious little agreement on why discrimination (and hence discriminatory speech) is actionable. Reading this chapter in the context of that disagreement, the need for clear criteria for what makes a case similar or different to a restaurateur hanging a 'Whites Only' sign in the Jim Crow South is palpable.

To illustrate the kind of issues that will arise here by considering a point made by Lori Watson in response to McGowan: 'intentions do matter for

⁶²Wilson (1974, 5). Schauer provides a helpful overview of the history of the precept, and authors who've made this same point (2018, 437–438).

⁶³McGowan (2019, 1).

⁶⁴McGowan (2019, 165).

⁶⁵McGowan (2019, 167).

⁶⁶Hellman (2016, 895).

⁶⁷Hellman (2016, 896).

⁶⁸See, among others, Hellman (2008); Lippert-Rasmussen (2013); Eidelson (2015); Khaitan (2015); Solanke (2017); Moreau (2010, 2020); and Hellman and Moreau (2013).

legal purposes, against McGowan's suggestion that covert executives are potentially actionable irrespective of speaker intention'.⁶⁹ As Hellman notes, however, 'the focus on intent rests on the comparative account'.⁷⁰ In light of that, it's striking that McGowan seems to assume a comparative account.⁷¹ There's much more to be said here. But the general points that I want to illustrate is that different conceptions will generate different obstacles for treating ORDINARY RACISM as a case of discrimination. The devil will be in the details.

There will also be general obstacles for McGowan's position, since a feature of ORDINARY RACISM is that the speaker has no special authority. This is meant to be a benefit of the view, in contrast to views that appeal to standard executives. But on any conception of what makes discrimination wrong and actionable, we face a further question: who bears the duty not to discriminate? The options are familiar, and some are narrower than others. ('Governments? Individuals acting in what we might call a "public" capacity, such as employers or providers of goods and services? What about individuals when they make more personal decisions?')⁷² We don't have perfect clarity on the proper scope of antidiscrimination law. But only if we take the most expansive view of its proper scope can we seem to support McGowan's conclusion that ORDINARY RACISM and a restaurant proprietor hanging a 'Whites Only' sign are like cases.⁷³

As a final point, let's turn to what would make a case *different* from a restaurateur in the Jim Crow South hanging a 'Whites Only' sign. What about a restaurateur hanging a 'Blacks Only' sign? Are all such cases of 'reverse discrimination' (including affirmative action) different from cases of legally actionable discrimination? The analogous question for McGowan would be to take the facts of ORDINARY RACISM and preserve them as much as possible while flipping the races of the passengers. If ORDINARY RACISM is a legally actionable case of discrimination, would we have to say the same when African American passengers issue racial insults at white passengers?

I suspect McGowan and many readers will think the answers to these questions are obvious. But recall that part of the goal of *Just Words* is to look approach these issues through the eyes of U.S. law

⁶⁹Watson (2021, 533). Watson says that this is true 'under some of the relevant civil rights laws', but not all.

⁷⁰Hellman (2016, 899).

⁷¹McGowan (2019, 167, n. 24).

⁷²Moreau (2020, 210).

⁷³Watson (2021, 532–535) offers a great discussion of this issue for McGowan's argument.

and operate within its approach to regulating speech that constitutes discrimination. As I noted, there is no single accepted view about the foundations of racial antidiscrimination law in U.S. jurisprudence. But one prominent view rests on an anticlassificationist principle, which objections to differential treatment on the basis of any racial classification (subject to constraints).⁷⁴ Reva Siegal contrasts this with ‘the antisubordination principle [...] that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups’.⁷⁵ I don’t want to wade too far into the weeds of how we understand anticlassificationist views. My point is just this. If on an anticlassificationist view we hold cases like *ORDINARY RACISM* to constitute discrimination and be actionable, we should reach the same verdict when we flip the races of the parties; and we should hold this verdict even if the new version of the case involves no racial subordination.

This problem should be obvious, if you think about U.S. jurisprudence on whether race-based affirmative action is a legally actionable form of racial discrimination. Many have held that it’s actionable under the Fourteenth Amendment. And a similar conclusion can be supported on statutory grounds. To tease this out for a moment, recall Justice Gorsuch’s decision in *Bostock* – which was joined by Chief Justice Roberts, as well as Justices Ginsburg, Breyer, Sotomayor, and Kagan – for why differential treatment on the basis of sexual orientation violates Title VII. As has already been noted, the same (textualist) reasoning very directly supports the conclusion that affirmative action, as a form of differential treatment on the basis of race, violates Title VI.⁷⁶

This is what I meant earlier when I wrote that looking through the eyes of U.S. law carries significant risks. If McGowan can show that the regulation of speech should by the lights of the law extend further, there’s a real risk that by parity of reasoning it should extend further still – too far, I assume, even by McGowan’s own lights. This makes me question how much we should want to look through the eyes of the law, and U.S. law in particular. But it also further highlights my general point about the importance and difficulty of defending criteria for likeness and difference. If hanging a ‘Whites Only’ sign and *ORDINARY RACISM* are

⁷⁴The label comes from Siegal (2004), but the distinction was first raised in some form by Fiss (1976).

⁷⁵The label and definition are from Siegal (2004: 1472–1473).

⁷⁶*Bostock v. Clayton County*, 590 U.S. ____ (2020). This point is made by Berman and Krishnamurthi (2021) and Eidelson (2022). This article was original submitted in August 2022, prior to *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023).

alike, but both are different from cases where we flip the races of the parties (e.g. Black Student Unions; an African American denigrating a white passenger on a public bus), we need substantive criteria for likeness and difference to explain why. And the only way to get them is to roll up our sleeves and defend a specific stance about the basis for anti-discrimination law, and one that will be at odds with much of U.S. jurisprudence on the subject.

5. Conclusion

Just Words makes significant strides in showing how challenges for existing approaches in feminist thought about speech can be overcome. But approaching difficult issues in philosophy can be like a game of whack-a-mole, and all I've really tried to show here is that when we explore McGowan's view in depth, new challenges pop up. Whether they can be whacked back down is a question for another day. But this is clearly such an ambitious, important, and rewarding piece of philosophy that it's well worth trying.

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