

Class Eleven: McGowan on Discriminatory Speech

Doing Things with Words - Ryan Simonelli

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1 The “Free Speech” Defense

- **Speech Acts and Free Speech:** We saw with Langton the claim that, because of what speech can *do*—the actions that it can itself constitute—there is reason to think that certain kinds of speech might not be legitimately covered by free speech. Langton’s target was pornography. McGowan’s target is certain kinds of non-institutionalized racist speech.
 - **Note:** It’s well acknowledged, legally, that certain kinds of speech acts are not covered under free speech, such as the act of hiring an assassin, extorting someone for money, threatening someone life, and so on. These are all kinds of speech acts, but not covered under free speech. What’s interesting about the claims of Langton and McGowan is that they’re considering speech that is widely thought to be properly covered under free speech.
- **“Whites Only” Signs and Illegal Acts of Racial Discrimination:** A “whites only” sign on an establishment is a kind of speech, but it’s *illegal* and actually not treated as speech under the law. Why? Because certain acts of racial discrimination is illegal, and this act constitutes an act illegal of racial discrimination.
 - **Similar Such Acts:**
 - * A restaurant owner says to his hiring department “From now on, we only hire whites.”
 - * A landlord who refuses to rent out an apartment to black tenants.
 - **More Subtle but Still Illegal Acts of Racial Discrimination:**
 - * A blanket refusal to hire anyone with a criminal record, when this disproportionately affects minorities.
- **McGowan’s Key Claim:** Seemingly “ordinary” acts of racist speech, for instance, a white person’s saying “We don’t like your folk around here” to a black person in a social space consisting of all white people can function to do the very same thing that the “White’s Only” sign does, and, as such, there’s some reason to think it should be treated the same, legally.

2 Enacting Permissibility Facts

- **Exercitives and the Enactment of Permissibility Facts:** What do “Whites Only” signs do? They enact a certain kind of *permissibility fact*, making it impermissible for non-whites to enter a certain space. As such, they’re classified by Austin as “exercitives,” as Austin says, an exercitive speech act is such that:
 - “Its consequences may be that others are ‘compelled’ or ‘allowed’ or ‘not allowed’ to do certain acts,” (155).
 - **Side Note:** It seems that Austin’s using language he shouldn’t be using, by his own criteria, classifying the illocutionary force of an exercitive in terms of its “consequences.”

- **Contextualization in Kukla’s Framework:** Recall Kukla’s framework which distinguished between the *input* of a speech act—its entitlement conditions—and the *output* the normative statuses that it strives, as part of its function, to bring about. For a speech to enact permissibility facts is for it to have a certain kind of output.
- **Norms:** Both Kukla and McGowan talk a lot about *norms*. A norm is something that determines a standard of correctness, according to which performances can be evaluated as *correct* or *incorrect*, *appropriate* or *inappropriate*, *in order* or *out of order*, *in bounds* or *out of bounds*. There are different kinds of norms:
 - **Implicit Social Norms:** These norms are *implicit* in the sense that they’re not codified by explicit rules. For example:
 - * **Greeting:** There are certain implicit norms around greeting. If you meet someone new, it’s appropriate to do certain things—such as shake their hand, or, in some contexts, hug—and inappropriate to do other things—such as bow (in America at least), intentionally step on their foot while making direct eye contact, and so on. The greeting norms that one is by default bound by are also shaped by gender, ethnicity, social class, and the like. In *some* contexts, greeting norms are explicitly codified, but, generally, they’re not.
 - **Explicit Institutionalized Norms:** There are certain explicitly codified institutional norms. For example:
 - * **Certain Religious Rituals:** In Catholic mass, there is a norm to do the sign of the cross when one enters the pew, to say “Amen” after the priest says “In the name of the Father, and of the Son, and of the Holy Spirit,” and so on. If one’s performances are out of line with these norms, they are out of order in the sense of violating explicit rules laid out, for instance, here: <https://universalis.com/static/mass/orderofmass.htm>
 - * **Games:** In chess, there is an explicit set of rules that determine which moves, in which states of the game, are legal or illegal. Here, there is an interesting sense in which *constitutive*
 - **Note:** Often, there’s both kinds of norms at play at once. For instance, not only is it against implicit social norms to stomp on someone’s foot upon meeting them, but it’s also explicitly illegal, as a case of assault. Likewise, in (high-level) chess, there’s an implicit social norm that one should resign if one’s down a queen, though nothing in the rules legally requires one to do so.
- **Deontic and Normative Statuses:** Beyond just speaking about what is “in bounds” or “out of bounds” according to different norms, there’s different kinds of “deontic” or “normative” statuses that we use to describe the standings of certain people who are bound by certain norms in a certain context with respect to certain actions. Kukla, following Brandom, talked primarily in terms of *commitment* and *entitlement*. McGowan talks about *permission*. These all belong to the same category of modal statuses used to talk about *norms* and the ways people are situated with respect to norms:
 - **Bearing a Status with the Normative Force of “Must”:** Being *committed* to doing something, *obligated* to do something, or otherwise normatively *compelled* to do something.
 - **Bearing a Status with the Normative Force of “Can”:** Being *entitled* to do something, *permitted* to do something, *allowed* to do something, or otherwise normatively *able* to do something.
 - **A Kind of Normative or Deontic “Can’t”:** Being *precluded from being entitled* to do something, *not being permitted* to do something, or otherwise normatively *precluded from being able* to do something

These different terms all have slightly different senses in English, but they are all used to articulate these different ways of being situated with respect to the norms.

3 Standard and Covert Exercitives

- **Standard Exercitives:** Enact permissibility facts *directly* through a paradigmatic “exercitive,” a speech act which aims at enacting permissibility facts.
 - **Example:** A judge says “Silence in the court!” This enacts a permissibility fact, making it *impermissible* for anyone to talk.
 - * **Authority:** The ability of the judge to enact this permissibility fact depends on her having *authority* over the domain over which it is enacted (the courtroom). If some random person stands up and says “Silence in the court!” while everyone is talking, it might have the same effects as the judge’s utterance, but it won’t enact a permissibility fact in the same way.
 - **Example:** Plausibly, the “Whites Only” sign in a restaurant functions in the same way. On the basis of the authority of the owner, it makes it impermissible for non-whites to enter.
 - **A Potential Example?:** Though one *might* think that a non-institutionalized act of racial discrimination functions as a standard exercitive in the same way, this seems somewhat hard to maintain.
 - * **Issue One:** It’s not obvious that the speaker of racist remarks themselves have the sort of authority that’s analogous to the judge or restaurant-owner in the above two examples.
 - * **Issue Two:** It’s not obvious that the speaker of the racist remark aims to be enacting a permissibility fact—his speech act does not seem, on its face, to be a standard exercitive.
- **Covert Exercitives:** In some cases, one does not need to issue a (standard) exercitive speech act, but a certain type of “move” in a norm-governed practice can, without itself being a standard exercitive, *function like* an exercitive, enacting a permissibility fact.
 - **Example:** I move my bishop to b5, putting your king in check. You might *want* to play Bc5, but you *can’t*. My playing Bb5 makes it impermissible for you to make any move other than one that gets you out of check. It enacts this (im)permissibility fact.
 - * **The “Authority” is in the Practice, not Me:** Unlike a standard exercitive, I don’t possess a distinctive authority. Rather, the authority that my move, stems from the fact that we’re both bound by the rules of the game.
 - **A Key Claim:** All moves in norm-governed practices enact *some* permissibility facts, for what the moves *are*, as Kukla tells us, is determined by their normative “output” which can be characterized using deontic statuses of *permission* and *obligation*. So, all moves in norm-governed practices are “covert exercitives.”
 - * **Important Consequence:** Given this characterization, covert exercitives are clearly much more pervasive in our lives than standard exercitives. Indeed, every speech act and, indeed, *all* of our actions that play a role in social practices are covert exercitives.
 - * **Sidenote:** In my opinion, the picture has gone far enough from Austin at this point that the Austinian vocabulary is a bit strained now, but we’ll stick it, following McGowan.
 - **The Norm-Governed Practice of Racism and Discriminatory Acts:** McGowan claims that racism itself is a norm-governed practice, and so, on this account, all acts that constitute “moves” in the practice of racism (e.g. all acts of racist hate speech) are covert exercitives.
 - **Returning to the Main Example:** Insofar as the elderly man’s speech act constitutes a move in the practice of racism (which clearly seems to be the case, given the kind of speech act that it is), we can ask *which* permissibility facts it enacts, and, plausibly, it enacts just the same kind of facts that the “White’s Only” sign does.
- **Question:** If McGowan’s analysis succeeds, what do we think of the potential legal upshot?