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Just saying, just kidding: Liability for accountability-avoiding speech in ordinary conversation, politics and law

Abstract: Mobsters and others engaged in risky forms of social coordination and coercion often communicate by saying something that is overtly innocuous but transmits another message ‘off record’. In both ordinary conversation and political discourse, insinuation and other forms of indirection, like joking, offer significant protection from liability. However, they do not confer blanket immunity: speakers can be held to account for an ‘off record’ message, if the only reasonable interpretations of their utterance involve a commitment to it. Legal liability for speech in the service of criminal behavior displays a similar profile of significant protection from indirection along with potential liability for reasonable interpretations. Specifically, in both ordinary and legal contexts, liability depends on how a reasonable speaker would expect a reasonable hearer to interpret their utterance in the context of utterance, rather than on the actual speaker’s claimed communicative intentions.

Never write if you can speak; never speak if you can nod; never nod if you can wink.¹

– attributed to Martin Lomasney, Boston ward boss

Indirect speech is often communicatively effective. And when it is, this is often not in spite of but precisely because it leaves its main point unstated. Among other things, relying on implicit interpretive assumptions enables speakers to communicate messages that are complex or imprecise without needing to articulate them explicitly. It also enables speakers to deny having meant messages that are risky.

¹ <https://thewestendmuseum.org/the-life-legend-and-lessons-of-martin-lomasney-ward-boss-west-end-icon/>.

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Indeed, such deniability is possible even when communication succeeds, so that all parties involved know that the speaker did mean what they deny having meant.

In §1, I offer a quick tour through some varieties of such accountability-avoiding speech, focusing especially on political discourse, and in particular on utterances by Donald Trump. In §2, I offer a brief theoretical characterization of insinuation and some of its accountability-avoiding cousins, and explain why they display the puzzling profile of deniability in the face of successful coordination. In ordinary and political discourse, indirection makes it more difficult to hold speakers accountable for what they meant. But it does not confer blanket immunity: speakers can sometimes be liable for messages they communicate indirectly. In §3, I argue that the same dynamic holds for legal liability, modulated to incorporate higher evidential standards and – especially in the United States – a concern for free speech.

1 Insinuation and its accountability-avoiding cousins

Agents who are interested in risky forms of social coordination and coercion often achieve those goals by saying something that is overtly innocuous but transmits another message ‘off record’. Messages that are insinuated in this way can underwrite communication that is successful, at least in the sense that the speaker’s target audience identifies the intended message, and often also in the sense that it produces the speaker’s desired cognitive and practical effects. But even when communication succeeds, such a speaker preserves “plausible deniability” about their message, so that they can avoid accountability for the consequences that would have been entailed by a direct, explicit utterance of it. So, for instance, Henry II is famously reputed to have uttered something along the lines of

(1) Will no one rid me of this meddlesome priest?²

in 1170, as a veiled command for his knights to assassinate the Archbishop of Canterbury, Thomas à Becket. After Becket was brutally killed at the cathedral altar, Henry denied any intention to incite murder, and his defenders continue today to insist that the question was merely a rhetorical expression of exasperation.

² Although this is the most famous formulation, historical sources suggest that an alternate articulation may be more accurate: “What miserable drones and traitors have I nourished and brought up in my household, who let their lord be treated with such shameful contempt by a low-born cleric?” (Schama 2002, 142).

More recently, mobsters have taken up the mantle of intimidation by insinuation. Among early documented cases, *The Ludington (MI) Daily News* reported in 1926 that “Detroit Bandits Use Psychology in Bank Robbery. Pick Cashier Up on Street and Bring Him to Verge of Hysteria with Questions,” where those questions included superficially innocuous inquiries about family life, such as

(2) How are your children now? You think a lot of them, don't you? You have a nice little family, haven't you? Wouldn't it be a pity if anything happened to break it up?³

By the late 1960s, the trope “Nice X you've got here; it'd be a shame if something happened to it” had morphed from a locution of actual gangsters into a cultural meme. However, the technique of issuing directives via rhetorical questions and expressions of sentiment has persisted.

In particular, former President Donald Trump is often said to communicate “like a mobster.” As Michael Cohen testified before the House Oversight Committee, Trump “doesn't give you questions. He doesn't give you orders. He speaks in a code.”⁴ One amply discussed example is Trump's utterance to then FBI Director James Comey of (3):

(3) I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go.

Asked during Senate Intelligence Committee hearings whether he took the President's utterance of (3) “as a directive,” Comey agreed, adding that it “rings in my ears” as akin to Henry II's utterance of (1). In response to Comey's interpretative testimony, Senator James Risch and others denied that Trump had meant any such thing, insisting that he had merely expressed his personal feelings, something he'd also repeatedly done explicitly and in public.

While Trump's utterance of (3) was notably one-on-one, he has also regularly deployed insinuation in public speech. Thus, while campaigning in August 2016, Trump commented on Russia's 2014 annexation of Crimea,

(4) This was taken during the administration of Barack Hussein Obama, OK?⁵

While it is not obvious precisely what motivation Trump is imputing to Obama with (4), his emphatic use of the President's middle name strongly suggests that Obama avoided a more forceful response to Russia's violation of international law because he was motivated by Islamist sympathies. While this imputation is wildly

3 https://www.barrypopik.com/index.php/new_york_city/entry/nice_place_you_got_here_be_a_shame_if_anything_happened_to_it.

4 <https://www.congress.gov/event/116th-congress/house-event/LC63709/text?s=1&r=64>.

5 <http://transcripts.cnn.com/TRANSCRIPTS/1608/11/ebo.01.html>.

false, what Trump actually said is undeniably and uncontroversially true. Because any further interpretations are ‘off record’, the responsibility for identifying them is borne at least in part by the hearer, and can be disclaimed by Trump or his allies.

Examples (1) through (4) illustrate the characteristic structure of insinuation. A speaker *S* produces an utterance *U* of a sentence with an innocuous encoded message *L*, in order to communicate an unstated, risky message *Q*. Faced with the accusation of having meant *Q*, the speaker can demur that they were “just saying” the unobjectionable message *L*. When insinuation succeeds, all parties know, and know that the others know, that *S* did mean *Q*. Nonetheless, *S*’s denial of having meant *Q* sticks: they avoid being held accountable for *Q*, and often thereby for its ensuing practical consequences.

This combination of effective transmission with plausible deniability makes insinuation a useful tool in the rogue’s kit, or indeed for anyone navigating risky forms of social coordination. Sarcasm, figurative speech, and jokes offer distinct but related opportunities for accountability-avoiding communication. Thus, a speaker who says

(5) How about another small slice of pizza?

to someone who has conspicuously eaten more than their share (Kumon-Nakamura 1995, 4) can legitimately deny having asked or claimed anything at all, while still effectively rebuking the addressee for violating the norms of politeness that are evoked by their utterance (Camp 2012). Where the speakers in (1) through (4) do mean what they say, and can potentially be held to account for its (uninteresting) message *L*, a sarcastic speaker can disclaim having meant *L*, or indeed for having really claimed (or asked, or ordered) anything at all.

Jokes often function in a similar way to sarcasm. Consider the following exchange between President Richard Nixon and the formidable UPI reporter Helen Thomas at a 1973 press gaggle:

(6) NIXON: Helen, are you still wearing slacks? Do you prefer them actually? Every time I see girls in slacks it reminds me of China.

THOMAS: Chinese women are actually moving toward Western dress.

NIXON: This is not said in an uncomplimentary way, but slacks can do something for some people and some it can’t. But I think you do very well. Turn around . . . How does your husband like your wearing pants outfits?

THOMAS: He doesn’t mind.

NIXON: Do they cost less than gowns?

THOMAS: No.

NIXON: Then change. [grinning, to roaring laughter]⁶

The joking nature of Nixon's speech puts Thomas in a conversational bind. On the one hand, Nixon's speech clearly presupposes and enforces a set of potent gender norms. As such, it effectively conveys a message that would have been controversial if articulated explicitly, even in 1973. On the other hand, it would have been tactically unwise for Thomas to respond by directly challenging those norms or Nixon's embrace of them: doing so would simply have compounded the humiliation being enacted on her by revealing her to be a typically thin-skinned, literalistic female, incapable of "taking a joke."

With classic insinuation, the speaker can disavow having meant the risky message *Q* and fall back on the claim that they were "just saying" the innocuous encoded content *L*. With sarcasm and jokes, the speaker can likewise deny having meant *Q*; but they can also insist they were "just kidding" about *L*. Metaphor and hyperbole offer a slightly different profile of deniability. A speaker of metaphor or hyperbole cannot deny having claimed (or asked, or ordered) *something*, but they typically retain at least some wiggle room about just what that claim was (Camp 2006, 2017a). So, for example, erstwhile Trump advisor Steve Bannon was widely condemned for saying (7) on his podcast in November 2020:

(7) Second term kicks off with firing [FBI Director] Wray, firing [NIAID Director] Fauci . . . No, I actually want to go a step farther but the president [Trump] is a kind-hearted man and a good man. I'd actually like to go back to the old times of Tudor England. I'd put their heads on pikes, right, I'd put them at the two corners of the White House as a warning to federal bureaucrats, you either get with the program or you're gone.

In response to those condemnations, Bannon's spokeswoman insisted that "Mr. Bannon did not, would not and has never called for violence of any kind," on the ground that his comments were "clearly meant metaphorically" and alluded "for rhetorical purposes" to a comment from the day before about Thomas More's trial for treason in Tudor England.⁷

Rudy Giuliani employed a similar disclaimer in response to accusations of having incited violence at the January 6, 2021 rally preceding the Capitol attack by uttering (8):

(8) If they ran such a clean election, they'd have you come in and look at the paper ballots. Who hides evidence? Criminals hide evidence. Not honest people. Over the next 10 days, we get to see the machines that are crooked, the ballots that are fraudulent, and if

⁶ *The Evening Bulletin* [Philadelphia] (1973); cited in Goffman (1979), 1–2.

⁷ <https://www.reuters.com/article/us-usa-election-facebook-idUSKBN27S35P>.

we're wrong, we will be made fools of. But if we're right, a lot of them will go to jail. Let's have trial by combat.

Speaking to a reporter the following day, Giuliani claimed that his utterance was a reference to the HBO series *Game of Thrones*, and “the kind of trial that took place for Tyrion in that very famous documentary about fictitious medieval England.”⁸ Later, in a motion to dismiss a lawsuit against him for incitement to insurrection, Giuliani's lawyers declared,

(9) The statement is clearly hyperbolic and not literal and, even if it were to be perceived literally, Giuliani is clearly referring to an event in the future after evidence of alleged Election fraud is collected. No one could reasonably perceive the “trial by combat” reference as one inciting the listeners to an immediate violent attack on the Capitol, which could have nothing to do with Giuliani's allegorical “trial by combat” over evidence of fraud in the Election.⁹

In both cases, representatives for the original speakers deny, plausibly enough, that the utterances were intended literally. Further, they use this denial to disclaim any responsibility for inciting violence – even though it is also highly plausible that those utterances contributed significantly to a violent public attempt to overthrow the duly elected President of the United States.

In paradigmatic cases of insinuation, the speaker says and asserts *U*'s encoded message *L*, but this is merely a means for communicating their main message *Q*. In this sense, while they do commit to *L*, they don't really care about it. Something similar obtains with paradigmatic cases of sarcasm, jokes, and figurative speech, with the difference that the speaker avoids even minimal commitment to *L*. But often with accountability-avoiding speech, *L*'s role is less instrumental and its status as meant more unsettled. For instance, while Nixon's final utterance in (6) is unquestionably a joke, it also communicates genuine endorsement of its literally encoded message, in an elegant illustration of what Al Franken (2004) calls “kidding on the square.” That is, Nixon is *not* actually “just kidding” – he also really means *L*, even if he could use its status as a joke to get away with claiming that he doesn't.

Speakers also sometimes avoid accountability for *L* by claiming that their utterance was joking or non-literal when it is ambiguous or doubtful whether this is so. Thus, at the same August 2016 rally at which he uttered (4), Trump also said (10):

⁸ <https://deadline.com/2021/01/rudy-giuliani-game-of-thrones-trial-by-combat-capitol-violence-1234673891/>.

⁹ https://storage.courtlistener.com/recap/gov.uscourts.dcd.228356/gov.uscourts.dcd.228356.13.1_1.pdf.

(10) President Obama, he is the founder of ISIS. He is the founder in a true sense.

When invited to clarify whether he really only meant that Obama “created the vacuum” that helped ISIS take power, Trump repeatedly insisted that he’d meant what he actually said, saying “No, I meant he’s the founder of ISIS. I do.” Facing criticism for (10)’s obvious falsity, however, he pivoted to claiming that his utterance had been sarcastic, for instance tweeting:

(11) Ratings challenged @CNN reports so seriously that I call President Obama (and Clinton) ‘the founder’ of ISIS, & MVP. THEY DON’T GET SARCASM?¹⁰

A similar dynamic circulated around his July 2016 utterance of (12):

(12) Russia, if you’re listening, I hope you’re able to find the 30,000 emails that are missing. I think you will probably be rewarded mightily by our press. Let’s see if that happens.

Although Russian operatives took (12) seriously enough to begin hacking Hillary Clinton’s email, Trump demurred, saying “Of course I’m being sarcastic,” while Giuliani and Newt Gingrich said that he was “telling a joke.” Eventually, by 2019, Trump was claiming that the media had willfully distorted their representations of his original utterance:

(13) Remember this thing, ‘Russia, if you’re listening?’ Remember, it was a big thing, in front of 25,000 people. ‘Russia if you’re . . .’ It was all said in a joke. They cut it off right at the end so that you don’t then see the laughter, the joke. And they said, ‘He asked. He asked for help.’

Trump’s claims in (13) about his utterance of (12) are verifiably false: (12) occurred during a small press conference and occasioned no laughter, only an inquiry about whether he seriously condoned foreign interference in US elections.¹¹ However, this falsity is not something the audience of (13) can immediately determine, nor is it something they are likely to be motivated to believe. Further, bracketing these claims about (12)’s objective context, Trump’s claims about his original communicative intentions cannot be directly falsified, because they concern the black box of his inner psychology.

In (11) and (13), Trump disclaims responsibility for what he actually said in (10) and (12) by insisting that he was sarcastic or joking. A speaker can also take the opposite tack: of avoiding accountability for a message *Q* that results from

¹⁰ <https://www.cnn.com/2016/08/12/politics/donald-trump-obama-clinton-isis-founder-sarcasm/index.html>.

¹¹ <https://www.politifact.com/factchecks/2020/mar/02/donald-trump/donald-trump-rewrites-history-about-his-russia-if-/>.

interpreting *U* as sarcastic, joking, or figurative, by insisting that they “just” meant *U* literally and sincerely. So, for instance, in his February 2019 State of the Union address, Trump uttered

(14) We must reject the politics of revenge, resistance and retribution and embrace the boundless potential of cooperation, compromise and the common good.

On the dais behind him, House Speaker Nancy Pelosi clapped alongside her Republican colleagues, but in a way that was conspicuously slow, with outstretched arms and a pointed gaze.¹² This is widely taken to be sarcastic, and hence to communicate something like scorn for Trump’s hypocrisy in uttering (14). In defense, Pelosi denied being insincere:

(15) It wasn’t sarcastic. Look at what I was applauding. I wanted him to know that was a very welcome message.

While Pelosi’s claim to endorsing (14)’s encoded message might well be sincere, her denial of sarcasm, and her denial of having meant that Trump was contemptibly insincere in uttering (14), are dubious. Indeed, in a remarkable display of filial disloyalty, Pelosi’s daughter Christine clapped back at her mother’s clap-back, while offering an elegant articulation of the sort of mutual knowledge that can be achieved through implicit meaning:

(16) Oh yes that clap took me back to the teen years. She knows. And she knows that you know. And frankly she’s disappointed that you thought this would work. But here’s a clap. #youtriedit.¹³

In some of these cases of joking, sarcasm, and figurative speech, the utterance *U*’s encoded content *L* is risky, while in others it is innocuous. In some of these cases, the speaker claims that it is determinately true (or false) that they meant (only) *L*, where this claim about their meaning is probably or certainly a lie. In other cases, it is genuinely ambiguous or unsettled whether they meant *L* or were just kidding; indeed, they may not be entirely clear on the matter themselves. All of these variations in the relationship between *L* and *Q*, and in what a speaker is prepared to admit having committed to with *U*, make a difference to the specific contours of liability and responsibility that speakers undertake in conversation. These differences matter; and other articles have (and will) detail these variations in loving detail. For current purposes, though, what matters

¹² <https://www.youtube.com/watch?v=gaq4tV72tlk>.

¹³ <https://www.usatoday.com/story/news/politics/2019/02/07/nancy-pelosi-says-clapping-trump-state-union-wasnt-sarcastic/2806817002/>.

is just that all these varieties of accountability-avoiding speech exemplify the more general structure characteristic of paradigmatic insinuation: they all afford some sort of interpretive deniability in virtue of some form of (putative) indirection, which enables speakers to disavow responsibility for something that they clearly did mean, even when all parties involved know that they did mean it.

This structure is *prima facie* puzzling. First, at a general level, insinuation is a form of strategic communication: speech that doesn't just superficially appear to, but actually does flout the principles of cooperation that have long been treated as fundamental to communication (Asher and Lascarides 2013, Camp 2018a). But what could determine the contents of non-encoded meaning in situations where cooperative principles have been abrogated? Second, it is unclear why the speaker should manage to get away with such a denial, given that, as Christine Pelosi says, everyone involved knows what's really going on. Can such denials really be taken seriously? And if so, what are their limits?

I have focused on cases of political discourse, especially recent cases by Trump and his allies, because they are familiar, clearly exemplify the relevant phenomenon, and hold obvious import for civic life. These cases push the boundaries of deniability (as well as other boundaries). In that sense they are atypical. Further, there are important systematic differences between speech directed at individuals and at general audiences; and political discourse operates under a distinctive profile of incentives and costs. Nonetheless, the communicative strategies employed in these political cases are fully continuous with those that govern accountability-avoiding speech in ordinary conversations; and they have provoked similar responses to those offered by ordinary hearers in response to those more ordinary conversational cases. Thus, in both their continuity with and difference from the ordinary, such political cases illuminate the structure and limits of accountability-avoiding communication in general.

2 How insinuation works

In this section, I'll use the term 'insinuation' in a broad sense, to refer to utterances with the basic structure outlined above: an utterance U of a sentence with literal meaning L communicates a distinct message, Q , implicitly and in a way that preserves deniability about having meant Q or L or both. In addition to illuminating the dimensions of variations in the relationships between L and Q outlined in §1, (1) through (14) also display other dimensions of variation. First, both L and Q can vary in *illocutionary force*: (1) and (2) encode questions and communicate directives; (3) encodes an assertion (or an expressive) and

communicates a directive; and (4) and (10) encode assertions and communicate (false) information. Second, *Q* can vary in *determinacy*: Trump’s ‘ask’ in (3) is quite specific, while the bandits’ threat in (2) and Trump’s innuendo in (4) are quite vague.

Third, *U* can vary in the *publicity* of its occasion of utterance and the *specificity* of its target audience: Trump’s conversation with Comey was conspicuously private, while his criticism of Obama occurred at a political rally. Subsequent denials *D* of an insinuated meaning *Q* can also vary in context and audience, and in their relationship to *U*: they can occur in public or private, and at the time of the initial utterance or long after; they can be addressed to the original target or a third party; and they can be issued by the original speaker, the original target, or a third party, who may or may not have been present at *U*.

Finally, while most of the examples in §1 are nefarious in some way, insinuations need not be malicious, oppressive, or even manipulative (Camp 2018a). Speakers also regularly advert to insinuation for praiseworthy, potentially cooperative purposes: for instance, to express romantic interest or float the possibility of a promotion or raise; or to criticize a partner’s performance of a household task or to back away from a burgeoning romance. In such cases, the primary motivations for indirectness are more likely to center around politeness, and sparing the speaker’s and/or hearer’s feelings and social status (Goffman 1979, Brown and Levinson 1987).

All of these differences affect what kinds of deniability are feasible. But the core phenomenon remains: insinuation affords speakers a significant measure of protection from accountability for an implicit message even when all parties know that the message has been successfully identified, and when they all know that it has achieved its intended cognitive and practical effects. This is the puzzling profile of successful coordination with plausible deniability that we need to explain.

Sometimes the gap between what is actually said and what is meant is absurdly narrow, as when evolutionary psychologists refer to “the Four F’s” of “fighting, fleeing, feeding and mating,” or when Trump said of Megyn Kelly’s role as moderator during the Republican debate,

(17) She gets out there and she starts asking me all sorts of ridiculous questions, and you could see there was blood coming out of her eyes, blood coming out of her . . . wherever.¹⁴

¹⁴ <https://www.cnn.com/videos/us/2015/08/08/donald-trump-megyn-kelly-blood-lemon-intv-ctn.cnn>.

And yet: even in these cases, refraining from actually tokening an expression makes a genuine difference, and can afford a measure of deniability. Thus, Trump resisted calls to apologize for (17) by pointing out that he didn't actually say the imputed content, and insisting that he never intended to evoke it and was bewildered why anyone would think he had:

(18) If I had said that, it would have been inappropriate . . . I didn't even finish the answer, because I wanted to get on the next point. If I finished it, I was going to say ears or nose, because that's just a common statement – blood is pouring out of your ears.¹⁵

(19) I cherish women . . . I said nothing wrong whatsoever. Do you think I would make a stupid statement like that? You almost have to be sick to put that together. Only a deviant would think anything else.¹⁶

As these and many of the other examples from §1 illustrate, meaning denials are often quite strained; as Pinker et al. (2008, 836) put it, “[a]ny ‘deniability’ in these cases is really not so plausible after all.”¹⁷ Indeed, in many cases, those denials amount to bald-faced lies, and repeated denials constitute a form of gaslighting. Nevertheless: in ordinary conversation and political discourse we regularly allow speakers to get away with them, and fail to hold them directly responsible for their insinuated message. We impose forceful sanctions on deceptions enacted through lying, for instance, that we do not for misleading, even when the misleading message is highly obvious and the practical and moral effects are arguably on a par (Saul 2012).

How is deniability in the face of manifestly successful communication possible, despite being implausible? The basic reason is that the process of identifying the implicit message *Q* on the basis of *U* requires appealing to interpretive presuppositions *I* that are implicit, nuanced, and local, in the sense of not being uncontroversially and ubiquitously shared. (Camp 2018a). These sorts of contextually-laden interpretive factors are endemic to what Fricker (2012, 89) aptly calls the “dodgy epistemics” of pragmatic interpretation. The competence of ordinary adult speakers to discern and attune to these factors, in an intuitive,

¹⁵ *Today*, August 10 2015.

¹⁶ *CNN State of the Union*, August 8 2015; “Donald J. Trump Statement on RedState Gathering,” August 8 2015.

¹⁷ In this respect, insinuation tracks other instances of plausible deniability. The term originated in a National Security Council Paper issued by President Harry Truman in 1948 (NSC 10/2) defining covert operations as those “which are so planned and executed that any US Government responsibility for them is not evident to unauthorized persons and that if uncovered the US Government can plausibly disclaim any responsibility for them.”

flexible way in real time, is essential to the flow of conversation; and our deployment of these interpersonal, social, and cultural competencies is so ubiquitous, fundamental, and automatic that we often fail to notice it. However, when they are diminished or absent, as in conversations with computers, children, or adults with markedly divergent neurological or cultural profiles, conversation becomes dramatically less efficient and more effortful.

A skillful insinuator exploits this general competency for attuning to implicit, nuanced, context-local interpretive factors to craft an utterance whose message is simultaneously intuitively comprehensible and also deniable. For the sake of achieving deniability, it is especially useful to exploit assumptions that are amorphous or interpretively perspectival, as in (4) or (6) (Camp 2017a). It is also useful to exploit features of *U* beyond the actual words uttered, such as un informativeness through repetition, as in (2); the use of marked expressions rather than more common default alternatives, as in (10); unusual prosody, including intonation, focal stress, and/or pauses, as in (17); and facial expressions and bodily gestures, as in (14). Speaking “with a wink and a nod” by exploiting non-verbal and contrastive aspects of *U* signals to the hearer that there is an implicit message to be discerned and points toward a structure of relevant interpretive alternatives, but in a way that cannot easily be extracted from the original conversational context via testimonial report.

If this explains why an insinuated message *Q* is deniable, when does denial work? Fricker (2012) claims that a speaker “can be nailed as having stated that *P*; [but] never as having insinuated that *P*.” “Given [the] complex epistemics” required to identify *Q* given *L*, she says, “it is not epistemically feasible to pin undeniable specific commitment onto a speaker: she can always wriggle out of it.” In particular, Fricker argues that claims about insinuated meaning turn on claims about “private intentions,” and that lies about such attitudes “may be suspected, but cannot be refuted” (2012, 87–9).

I disagree: while a competent insinuator retains at least some wiggle room as to what they meant by *U*, some denials are out of bounds, and some designedly indirect messages can be pinned on a speaker. More specifically, I think, a speaker retains “plausible deniability” when *U* admits of at least one alternative interpretation *Q'* which cannot be ruled out as a candidate meaning for *U*. For *Q'* to be an admissible alternative to *Q*, it must be *reasonable* to calculate *Q'* on the basis of the conversation thus far, the uttered sentence’s encoded meaning *L*, and some alternative set of interpretive presuppositions *P*, such that having meant *Q'* would render *U* at least minimally cooperative as a contribution to the conversation (Camp 2018a).

In effect, the meaning denier “plays to a virtual audience” (Goffman 1967, cited by Lee and Pinker 2010, 7896), by pretending that *U* was performed in an alternative conversational context *C'* that would have generated *Q'*. Meaning

denials are highly frustrating, because their hearers typically know that they have indeed identified *I* as the maximally relevant set of presuppositions, and they know that the speaker also knows this. But the implicit, nuanced, local nature of those presuppositions makes it difficult to prove that *I* is maximally relevant. In a fully cooperative conversation, the mutual obviousness of the fact that the presuppositions in *I* are operative would suffice to establish *Q* as *U*'s meaning, and to render *I'* and *Q'* irrelevant. But the insinuator, and in turn the meaning denier, are not being fully cooperative: they act strategically, by refusing to overtly acknowledge what is in fact mutually obvious, at least among participants in the actual conversational context *C*.

In order for their communicative strategy to succeed, then, the insinuator must walk a fine line. On the one hand, they must produce a signal that is robust enough to induce confidence in their hearer that they meant *Q* – and often, to motivate their hearer to act on that basis. To accomplish this, they must rely on presuppositions *I* that are in fact maximally accessible, and whose maximal accessibility is mutually obvious. But on the other hand, they must also produce a signal that is veiled enough to preserve deniability. And to accomplish this, they need to construct *U* so that *I'* is also accessible, albeit not maximally so. Moreover, in many cases, the insinuator also expects and intends their audience to identify both of the presupposition sets *I* and *I'*, and for it to be mutually obvious both that *I* is in fact more accessible than *I'*, and that *S* is prepared to pretend that *I'* is more accessible than *I*. This is a delicate operation; but it is one that skilled insinulators manage to perform regularly. When they succeed, insinuations amount to a kind of conversational *jiu jitsu*, shifting a significant portion of the interpretive responsibility for *Q* away from the speaker and onto the hearer.

Faced with an insinuation, how should a hearer respond? Once the conversational hot potato of an insinuation has landed in their hands, they must do something with it; but all of their options are problematic. The most straightforward option is to allow the conversation to evolve on the basis of the assumption that the speaker meant *Q*. But doing so accommodates that assumption, so that it, and often *Q* itself, become part of the common ground (Stalnaker 1978, Lewis 1979). And this may not be something the hearer is happy to do.

In some cases, such as (4), (6) or (7), this may be because the hearer finds *Q* itself objectionable. However, they cannot straightforwardly object to *Q*, because the normal explicit mechanisms of rejection, like “That’s not true” or “I refuse,” will target the focal, at-issue content of *L* instead. They can actively block *Q* by redirecting the conversation with something like, “Hey wait a minute! Are you saying that *Q*? But that assumes *I*, which is false!” (von Stechow 2004, Langton 2018).

However, such a response risks playing into the insinuator's hands, in at least two ways. First, *Q* still ends up introduced into the explicit conversation, but now by the hearer and in a way that enables the insinuator to issue a demurral to having meant *Q*, as in "You said it, not me" or "Only a deviant would think that." Second and more fundamentally, any response that engages with *Q*, even without explicitly mentioning it, thereby confirms *Q*'s accessibility, and in turn the reasonableness of entertaining its supporting presuppositions *I*. Especially in cases like (4), (7) or (14), where *I* evokes an intuitive interpretive perspective and/or visceral imagery, the mere fact of getting the hearer to entertain, and to be seen to entertain, these presuppositions can engender unwelcome cognitive and conversational complicity (Camp 2013, 2017a).

In other cases, such as (1) or (3), the hearer may be willing to go along with *Q* but want to confirm the speaker's commitment to it. But here too, normal forms of explicit agreement, like "I agree" or "Sure!", will target *L*'s focal, at-issue content. More generally, any form of response that engages *Q* directly, such as "So the Archbishop should be eliminated?," transfers responsibility for *Q* onto the hearer. Worse, in cases where an insinuated proposal's success hinges on its being covert, a direct response purchases communicative clarity at the cost of practical success.

Given these risks, it is often strategically wiser for the hearer to avoid catching the conversational hot potato altogether. This can be done in various ways, with different risks and payoffs. One option, likely to be attractive to recalcitrant hearers, is to engage in *flat-footed pedantry* (Camp 2006, 2007, 2018a). Just as the meaning-denying insinuator can feign ignorance of the mutually obvious fact that they meant *Q*, so too can the hearer focus narrowly on the encoded content *L*, perhaps while requesting clarification about its conversational relevance. An alternative option, likely to be attractive to compliant hearers, is to engage in *reciprocal insinuation*. Just as the insinuating speaker manifests their communicative intentions and attempts to advance their goals without undertaking a risky explicit commitment, so too can the hearer respond in a way that makes their comprehension of *Q* manifest while preserving their ability to deny having done so. Repeatedly iterated reciprocal insinuation can end up constituting a "shadow conversation" of increasingly robust implicit coordination (Camp 2018a, 57) – or in more tragicomic cases, of increasingly sustained misinterpretation.

In this way, insinuations, meaning denials, and responses can constitute a complex dance of strategic interactions erected on an edifice of implicit, nuanced, context-local assumptions, which may be reliably coordinated, even mutually

obvious, without ever being acknowledged as such. The discussion of (3) during Comey's testimony before the Senate Intelligence Committee provides an especially rich and elegant illustration of the resulting conversational opportunities and liabilities.¹⁸ Here is one revealing exchange, between Comey and Senator James Risch:

(20) RISCH: I want to drill right down, as my time is limited, to the most recent dust-up regarding allegations that the president of the United States obstructed justice . . . You put this in quotes – words matter. You wrote down the words so we can all have the words in front of us now. There's 28 words there that are in quotes, and it says, quote, "I hope" – this is the president speaking – "I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go."

COMEY: Correct.

RISCH: And you wrote them here, and you put them in quotes?

COMEY: Correct.

RISCH: Thank you for that. He did not direct you to let it go.

COMEY: Not in his words, no.

RISCH: He did not order you to let it go.

COMEY: Again, those words are not an order.

RISCH: He said, "I hope." Now, like me, you probably did hundreds of cases, maybe thousands of cases charging people with criminal offenses. And, of course, you have knowledge of the thousands of cases out there that – where people have been charged. Do you know of any case where a person has been charged for obstruction of justice or, for that matter, any other criminal offense, where this – they said, or thought, they hoped for an outcome?

COMEY: I don't know well enough to answer. And the reason I keep saying "his words" is I took it as a direction.

RISCH: Right.

COMEY: I mean, this is the President of the United States, with me alone, saying, "I hope" this. I took it as, this is what he wants me to do. Now I – I didn't obey that, but that's the way I took it.

RISCH: You – you may have taken it as a direction, but that's not what he said.

In questioning Comey, Risch insistently focuses on the gap between Trump's words and Comey's interpretation, and thereby insinuates – without saying outright – that Comey's interpretation is ill-founded. Other commentators offered alternative minimalist interpretations of the pivotal Trump-Comey exchange:

¹⁸ https://www.nytimes.com/2017/06/08/us/politics/senate-hearing-transcript.html?_r=2. My discussion here of Comey's testimony extends Camp (2017b).

Senator Roy Blunt paraphrased it as “So he said, “He’s a good guy.” You said, “He’s a good guy.” And that was it”; while Senator James Lankford commented, “If this seems to be something the president’s trying to get you to drop it, this seems like a pretty light touch.” Governor Chris Christie explained the conversation in terms of broader cultural differences: “What you’re seeing is a president who is now very publicly learning about the way people react to what he considers to be normal New York City conversation.”¹⁹

In response to these skeptical questions and reinterpretations, Comey in (20) justifies his interpretation by appealing to precisely the sorts of interpretive capacities, contextual factors, and hearer responses identified above. He invokes “a gut feeling,” based on “a lot of conversations with humans over the years,” as applied to “the circumstances – that I was alone, the subject matter, and the nature of the person that I was interacting with and my read of that person.” He cites non-verbal gestures (and non-gestures) as features of the context: “I didn’t move, speak, or change my facial expression in any way during the awkward silence that followed. We simply looked at each other in silence.” And he reports his own insinuating response: “I remember saying, I agree [Flynn] is a good guy, as a way of saying, ‘I’m not agreeing with what you asked me to do.’”

At the same time, Comey also consistently avoids putting himself on the testimonial hook for any further assessment of (3). He demurs that “it’s not for me to say whether the conversation I had with the president was an effort to obstruct”; that it’s not his job to “sit here and try and interpret the president’s tweets.” Instead, he “just says” how he in fact took (3) at the time, and offers at least the appearance of letting the facts ‘speak for themselves’ – where these ‘facts’ include that of a methodical, experienced hearer interpreting Trump’s utterance as a directive to perform an action of at least questionable legality. He thereby provides his audience with the evidential ammunition they need to justify the conclusion that Trump obstructed justice, without assuming responsibility for that conclusion himself.

3 Insinuation under the law

In his questioning of Comey, Risch doesn’t merely insinuate that Comey misinterpreted Trump; he also insinuates that insinuated messages are not subject to criminal liability. If so, this would provide concrete empirical support for Fricker’s

¹⁹ <https://www.cnn.com/2017/06/08/chris-christie-trumps-pressure-on-comey-was-normal-new-york-city-conversation.html>.

claim that a speaker “can be nailed as having stated that *P*; [but] never as having insinuated that *P*,” because the “dodgy epistemics” of interpretation hinge on “private intentions,” where lies about such attitudes “may be suspected, but cannot be refuted” (2012, 87–9).

Fricker’s contention is significantly stronger than my central claim, which is that insinuation makes it harder to hold speakers to account for unstated messages but does not confer blanket immunity. For one thing, Fricker posits a universal, qualitative difference²⁰ between explicit statement and implicit implicature²⁰, which I reject. On the one hand, many of the same contextual interpretive factors operative in insinuation are also present in strategic communication exploiting lexically encoded context-sensitivity, as in indexicals like ‘here’ and ‘now’, or the scope for tense (Camp 2018a, 60): (recall Bill Clinton’s infamous defense that he didn’t lie in testifying that “There is no sexual relationship,” because “It depends on what the meaning of ‘is’ is” (Saul 2000, 2012; see also Chapters 1, 8, 14). And on the other, it is not obvious that all indirect utterances are deniability-affording insinuations: in fully cooperative conversations, for instance, an indirect response to a question can entail commitments in a way that cannot be denied, and that arguably constitutes assertion (Soames 2008).

More importantly, even restricting attention to insinuations in the sense of deniable indirect messages, I want to reject both the claim that a speaker can never be nailed for meaning *Q*, and that meaning is constituted by inaccessible private intentions. In §2, I said that deniability is possible when it would be *reasonable* to attribute a minimally cooperative meaning *Q*’ to *U* on the basis of *L* plus an accessible set of interpretive presuppositions *I*. This affords a skillful insinuator some wiggle room. But by the same token, if the only reasonable interpretation of *U* is one on which it means *Q*, or if any of the interpretations in the range of reasonable meanings {*Q*₁, *Q*₂, *Q*₃ . . . } would also entail the same objectionable consequence as *Q*, then a speaker can be held responsible for it.

This is a high epistemic bar to clear. Moreover, in ordinary conversations and in political discussions, it is often not exactly clear what “holding responsible” amounts to, and so hearers often roll their eyes and let the interpretation of *U* go, even if they also hold the speaker to account for a broader pattern of behavior to which *U* contributes.

By contrast, the law is a system for levying specific consequences for specific actions. And especially in the United States, it relies on an argumentative, analytic process grounded in ordinary intuitions about responsibility. This makes it a valuable case study for analyzing the workings of speech as a form

20 Cf. also Lee and Pinker (2010) and Asher and Lascarides (2013).

of action, and specifically of insinuation. In this section, I argue that legal accountability for insinuation displays the same basic contours as ordinary and political discourse, but implemented with greater precision and a heightened standard. As in ordinary speech, insinuation affords speakers significant protection from liability, but not blanket immunity. The law recognizes that interpretation turns on context-local interpretive factors and on communicative intentions and responses. But those intentions and responses are not treated as ineluctably private; rather, they are filtered through the attitudes that a reasonable, suitably informed audience would attribute to the speaker, and/or that a reasonable speaker would anticipate such an audience to have, in that context.

Legal systems formalize liability for speech in different ways. A key initial distinction concerns what kinds of messages can be regulated by law. English common law and its descendants distinguish between speech that expresses an idea and speech that performs an action – between what J. L. Austin (1962) called *constatives* and *performatives* – and take the former to merit protection from legal regulation in a way the latter does not. However, it is also generally recognized that utterances that are declarative on their face can constitute performatives in virtue of the circumstances and consequences of their utterance. As J. S. Mill (1859/1985, 119) wrote,

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard.²¹

In the United States, the First Amendment protects speech that expresses opinions, even when those opinions are highly noxious and are expressed in a manner that foreseeably causes, and is intended to cause, significant harm.²² However, the mere fact of expressing an opinion still does not automatically confer protection, if the utterance's primary purpose is to perform an action that is subject to legal regulation. The difficult, and theoretically interesting, question is how to treat

²¹ The Corn Laws were repealed in the face of widespread opposition in 1846, not long before Mill completed *On Liberty* (Jaconelli 2018, 259).

²² For instance, in *Snyder v. Phelps* (2011), the Court held that Westboro Baptist Church members could not be held liable for invasion of privacy and emotional and physical distress produced by picketing the funeral of a military veteran while displaying signs and chanting messages like “Thank God for 9/11” and “Semper Fi Fags,” because those activities occurred in a public venue and “addressed matters of public import,” like the presence of homosexuals in the military.

utterances that *prima facie* do express ideas while simultaneously performing speech acts that do not warrant First Amendment protection.

The most thoroughly analyzed cases of this involve threats; other types of unprotected speech include obscenity, defamation, fraud, and “speech integral to criminal conduct” (*United States v. Stevens*, 2010). Very roughly, the Supreme Court has established three (rough, contested, and overlapping) categories of threats.²³ First, *fighting words* “by their very utterance inflict injury or tend to incite an immediate breach of the peace,” where this category is fixed by appealing to “what men of common intelligence would understand would be words likely to cause an average addressee to fight.”²⁴ Second, *incitement* is advocacy “directed to inciting or producing imminent lawless action and likely to incite or produce such action,” where “mere advocacy” using violent rhetoric is protected unless it poses a “clear and present danger” of immediate, serious lawless action or violence.²⁵ Third, *true threats* are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,” where the speaker need not have intended to actually commit the violent act, only to “plac[e] the victim in fear of bodily harm or death.”²⁶

All three categories focus on the imminence, probability, and specificity of the danger created by a threatening utterance. This might seem to suggest that the Court is implicitly employing a causal model of threats. On this sort of model, threatening words would encode threats in such a way that the target audience’s very hearing of those words either predictably causes in them a visceral psychological state that is inherently harmful, such as intense fear; or

²³ For helpful discussion of threats and the First Amendment, see Karst (2006), Carnley (2014), and Pew (2015).

²⁴ *Chaplinsky v. New Hampshire* (1942). The Court assumed without argument that “the appellations ‘damned racketeer’ and ‘damned Fascist’ are epithets likely to provoke the average person to retaliation.”

²⁵ *Brandenburg v. Ohio* (1969). The defendant, a member of the Ku Klux Klan, said at a rally, “If our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken.” Echoing and amplifying Mill, the Court overturned conviction on the ground that the resulting risk was not imminent: “[As we have stated], ‘the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.’ A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.”

²⁶ *Virginia v. Black* (2003).

else (or thereby) predictably causes them to act in a way that poses a “clear and present danger” – much as “natural tendency and reasonably probable effect” of someone’s shouting fire in a theatre is to cause mayhem.²⁷ Conversely, one might then think, in cases where the connection between utterance and effect is indirect – say, when the utterance expresses an abstract proposition representing the speaker’s opinions, hopes, or fears – then any downstream effect in the hearer must result in significant measure from their own powers and processes of reasoning, and hence should not be something for which the speaker is liable. And in this case, it would seem to follow that insinuating utterances like (1) through (3) would be immune from legal liability.

A causal model along these lines does appear to have dominated the Court’s early thinking about incitement (Pew 2015), and it does currently govern the regulation of obscenity.²⁸ In other areas, however, and especially with respect to threats, the Court has employed a much more nuanced treatment of the relationship among utterance, meaning, and effect.

The clearest cases in support of Risch’s contention that “words matter,” in his narrow insinuated sense that speakers can only be held legally liable for what they actually utter, occur within the courtroom itself. Thus, the Court has held that a witness who engages in “lie by negative implication,” by responding to a question in a way that is literally true but not maximally relevant, does not commit perjury, “so long as the witness speaks the literal truth.”²⁹ However, the Court’s grounds for this conclusion turned on how the circumstances of the courtroom, and specifically its formal, antagonistic structure, affect how it would be reasonable for interlocutors to act. That is, under the “pressures and tensions of interrogation,” in contrast to “casual conversation,” it is not surprising for witnesses to answer in ways that are not “entirely responsive”; given this, the burden falls on attorneys, who are highly trained and financially

²⁷ *Schenck v. United States* (1919).

²⁸ Thus, the Court has upheld the government’s right to regulate even isolated tokenings of “indecent” terms, including mere mentionings (as in George Carlin’s comedy routine “Filthy Words”) and used as expletives (*FCC v. Pacifica Foundation*, 1978; also *FCC v. Fox Television Stations, Inc.*, 2009). Such speech is not protected because it is both “low-value” – expressing no substantive ideas or opinions – and inherently harmful. Because the damage inflicted is immediate and involuntary, “[t]o say that one may avoid further offense by turning off the radio . . . is like saying that the remedy for an assault is to run away after the first blow.” Further, because broadcast media are so ubiquitous, the Court held that it would be unduly burdensome for audiences to protect themselves – and crucially, their children – from such “blows” in the absence of governmental regulation.

²⁹ *Bronston v. United States* (1973). For discussion, see e.g. Solan and Tiersma (2005), Asher and Lascarides (2013), and Robbins (2019), as well as Chapters 1, 8, and 14.

compensated, to “recognize the evasion” and “bring the witness back to the mark,” to clarify exactly what they are committing themselves to. The limitation of liability to literally encoded speech also extends to other courtroom roles. So, for instance, the Court held that a prosecutor who merely insinuated that the defendant had perjured himself, by saying things like

(21) He gets to sit here and listen to the testimony of all the other witnesses before he testifies . . . That gives [him] a big advantage, doesn't it?

did not infringe on the defendant's right to due process.³⁰ Conversely, legal liability has also been held to apply to literal courtroom speech even when the speaker plausibly did not mean to commit to its encoded content; for instance, a judge was disqualified for an utterance he claimed was a joke.³¹

So courtroom speech provides some support for Risch's and Fricker's focus on explicit, literal content. By contrast, the standard governing legal liability for speech that occurs outside of the courtroom is much less literalistic, and much closer to Comey's characterization. First, a speaker *S* is typically *not* liable for *U*'s encoded message *L* if a reasonable hearer would take *S* not to have meant *U* literally and sincerely in the context of utterance *C*. Thus, in the decision defining ‘true threats’, the Court overturned a draft protester's conviction for threatening the President in saying (22):

(22) If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.

on the ground that he was engaging in “political hyperbole.” And they justified this analysis by citing context-specific features: that (22) is a conditional, that it occurred at a political rally, and that it elicited laughter.³² Likewise, in a decision excluding defamation from First Amendment protection, the Court noted that

³⁰ *Portuondo v. Agard* (2000).

³¹ *Brofman v. Florida Hearing Care Center., Inc.* (Florida District Appellate Court, 1997). Unfortunately, the decision is silent as to the specific joke uttered: “We see no need to reproduce the text of the joke here. While the joke was not particularly offensive to race or religion, it was not particularly funny either.” In rendering its judgment, the Appellate Court invoked the ‘reasonable hearer’ standard: “While the trial judge may have meant the remark to be a joke, rather than a reflection on his belief as to the merits of the petitioner's complaint, the standard is the reasonable effect on the party seeking disqualification, not the subjective intent of the judge.”

³² *Watts v. United States* (1969). Similarly, in *NAACP v. Claiborne Hardware* (1982), the Court held that when the NAACP Mississippi Field Secretary, Charles Evers, said at a rally “If we catch any of you going in any of them racist stores, we're gonna break your damn neck,” he engaged in speech that was “impassioned” and “emotionally charged,” but rhetorical, and so did not rise to the level of incitement – again citing the contextual circumstances and audience reception to justify their interpretation.

“imaginative expression” is integral to robust civic discourse, and that “statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual” should not be treated as defamatory.³³ More recently, the use of a ‘:P’ emoticon to represent a face with its tongue sticking out, was judged to “make it patently clear” that the commenter was making a joke, and so that “a reasonable reader could not view the statement as defamatory.”³⁴ At the same time, however, a speaker’s mere claim to have meant *U* in a non-literal or non-serious way does not confer automatic immunity. Thus, as early as 1894, an appellate court held that “Where a person’s conduct and conversation is such as to warrant a reasonably prudent man to believe that he is in earnest, he will not be permitted to say . . . that he was ‘coddling’ and joking.”³⁵ Rather, a legitimate claim of “just kidding,” or of otherwise not meaning *L* by uttering *U*, requires the speaker to demonstrate that a reasonable person would have understood *U* as a joke, and that it was in fact understood in this way.³⁶

Second, and conversely, a speaker *can* be held liable for meaning something other than *L*, when it can be demonstrated that a reasonable person in those circumstances would have interpreted *U* to have meant *Q*, and that the actual hearer did interpret *U* as meaning *Q*. More specifically, the Court has found that speech can constitute a “true threat” even when its *prima facie* encoded message would be protected, and even when the speaker disclaims having intended any implicit message. Thus, anti-abortion activists were held liable for having threatened doctors who provided abortions, on the ground that they had distributed posters with titles like “Nuremberg Files” and “Guilty of Crimes Against Humanity” listing those doctors’ names and addresses, accompanied by the legend “Black font (working); Greyed-out Name (wounded); Strikethrough (fatality).” In holding the activists liable, the Court relied heavily on contextual factors to justify their interpretation of those speech acts. Among other such factors, one of the defendants had written a book, *A Time to Kill*, articulating Biblical justifications for murdering abortion providers; the previous three years had seen multiple murders of abortion providers; and “the poster format itself had acquired currency as a death threat.”

³³ *Milkovich v. Lorain Journal Co.* (1989). Earlier, in *Greenbelt Cooperative Publishing Association v. Bresler* (1970), the Court had held that a newspaper’s quoted reports of a real estate developer’s negotiations with public officials over a land sale as “blackmail” did not count as libel, because “even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [his] negotiating position extremely unreasonable.”

³⁴ *Ghanam v. Does* (Michigan Court of Appeals, 2014).

³⁵ *McKinzie v. Stretch* (Illinois Appellate Court, 1894); *Ragansky v. United States* (1918).

³⁶ E.g. *People v. Barron* (Illinois Appellate Court, 2004).

Although each one of the elements of the poster individually might count as protected speech, the Court concluded that given the totality of these circumstances, “No one putting [these names] on a ‘wanted’-type poster . . . could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed.”³⁷ Similarly, animal rights activists who maintained a website listing “Top Twenty Terror Tactics” along with information about employees for an animal testing company were held liable for making “true threats” despite having issued only veiled exhortations and tongue-in-cheek disclaimers like

(23) [We are] excited to see such an upswing in action against Huntingdon and their cohorts. From the unsolicited direct action to the phone calls, e-mails, faxes and protests. Keep up the good work!

(24) Now don’t go getting any funny ideas! . . . We operate within the boundaries of the law, but recognize and support those who choose to operate outside the confines of the legal system.³⁸

Given the state’s vested interest in preventing violence and the fear of violence, it is not surprising that the Court would carve out an exception to First Amendment protection for veiled threats. Otherwise, the Court noted, insinuation would effectively constitute a literal “get out of jail free” card: “[R]igid adherence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render the statute powerless against the ingenuity of threateners who can instill in the victim’s mind as clear an apprehension of impending injury by an implied menace as by a literal threat.”³⁹

Beyond threats, legal liability for indirect meaning also extends to other types of communication. For instance, in a case strikingly similar to Trump’s utterance in (3), the National Labor Relations Board found that a supervisor’s mere statement of personal feeling, in (25),

(25) Well I hope you won’t continue to be an agitator or antagonize the people in the newsroom.

³⁷ *Planned Parenthood v. American Coalition of Life Activists* (2003). Earlier, *Madsen v. Women’s Health Clinic* (1994) held that “threats to patients or their families, however communicated, are proscribable under the First Amendment.” So, for instance, *United States v. McMillan* (United States District Court, S D Mississippi, 1999) upheld the conviction of a protester who repeatedly stated “Where’s a pipe-bomber when you need him?” every time he saw a particular Mississippi abortion provider. See Cohen and Cannon (2015), esp. ch. 9, for discussion of threats to abortion providers and legal responses to those threats.

³⁸ *United States v. Fullmer* (2009).

³⁹ *United States v. Malik* (United States Court of Appeals, 2nd Circuit, 1994).

constituted unlawful coercion because it had a “chilling effect” and “interfered with [the employee’s] exercise of rights” to advocate for improved working conditions and wages. Here too, the Board relied on the words and the context in justifying its finding, noting that (25) was uttered during a required meeting, alone in the supervisor’s office, and in lieu of a requested meeting with the employee committee.⁴⁰ Liability for bribery follows the same pattern: establishing liability requires demonstrating that the parties achieved a “meeting of the minds” on a “clear and unambiguous” *quid pro quo* exchange of professional benefit for personal reward, rather than just a “vague expectation of future benefit.” However, the parties’ agreement on those terms may be entirely implicit; and in determining whether it was achieved, the Court may “consider both direct and circumstantial evidence, including the context in which a conversation took place.”⁴¹

Thus far in this section, we’ve seen that legal liability for speech occurring outside the courtroom tracks ordinary standards for accountability. Speakers are liable for what their utterances mean, as distinct from what their uttered words mean. And utterance meaning is determined by a reasonable audience’s interpretation and/or a reasonable speaker’s expectation of a reasonable audience’s interpretation given the particular circumstances of utterance, rather than by the speaker’s private communicative intentions.⁴² However, legal liability requires more than establishing just that the reasonable, contextually-grounded message conveyed by an utterance would be liable. It also requires demonstrating an actual harm. Moreover, it arguably requires demonstrating culpability or “*mens rea*”: a speaker’s knowledge that their action will produce that harm. In the remainder of this section, I offer a bit more detail about what the law considers to be a “reasonable interpreter,” what contextual factors are relevant to their judgments, and what role is played by the actual addressee’s responses and the actual speaker’s intentions in establishing liability.

It might seem anodyne to hold, as the Court once did, that “written words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published.”⁴³ The problem is that employing “the common experience of

40 *KNTV, Inc. and American Federation of Television and Radio Artists, AFL-CIO*. Case 32-CA-12732 (1995). For discussion, see Liberman (2017).

41 *United States v. Tomblin* (1995). *United States v. Ring* (2013) likewise upheld conviction for bribery under the public sector honest-services fraud statute for merely implicit agreement, considering both direct and broader circumstantial evidence.

42 Different courts have focused to different degrees on the responses of a reasonable hearer and on the effects foreseen by a reasonable speaker. See Crane (2006), Karst (2006), Principe (2012), and Pew (2015) for discussion of speaker-centered and hearer-centered versions of the ‘objective’ reasonableness standard for threats.

43 *United States v. Prochaska* (1955).

society” as the measure of reasonable interpretation would ignore exactly the sorts of context-local factors that competent insinuator deploy to communicate with deniability. At the same time, at the opposite extreme, if we include *all* contextual factors within the relevant context of interpretation, including all of the speaker’s and hearer’s possibly idiosyncratic assumptions and preferences, then we undermine the notion of a reasonable interpretation as distinct from actual intention and reception. The question, then, is which context-local factors should be abstracted away from, and which should be admitted as interpretively relevant.

Generally, courts accept evidence concerning a broad range of “objective” facts about the circumstances of utterance. This may include publicly accessible information about other related events, as in the case of the “Nuremberg Files” posters. (In a similar vein, a protester’s parking two Ryder trucks in front of two abortion clinics was deemed a true threat, given that Timothy McVeigh had recently used a Ryder truck to bomb a federal building in Oklahoma City.⁴⁴) It may also include information about highly specific, non-public past interactions between speaker and addressee. For instance, a defendant’s writing (26)

(26) You are my most desired goal, and I will Stop at nothing to reach you.

to a judge was held to constitute a true threat, given such contextual factors as his having met her only once, at a hearing; his having written her more than sixty letters over seven years, some including poems describing rape; his phoning her home and traveling to try to meet her; and his violating an agreement to avoid contacting her in exchange for dropping harassment charges.⁴⁵

By contrast, “subjective” facts are typically not admissible in establishing what constitutes a reasonable interpretation, but instead only in demonstrating the occurrence of an actual harm or an actual intent. Thus, courts have consistently rejected the admissibility of expert testimony about the speaker’s mental state and predicted actions. For instance, in determining whether a series of letters containing sentences like

(27) 17 little Angels Murdered by Beast Blythe and his 666 Molesters . . . William Jefferson Blythe 3rd, Mr. buzzard’s feast, WANTED For MURDER, DEAD OR ALIVE.

constituted threats against President Clinton, the Court held that testimony from Secret Service agents had rightly been excluded, because admitting such evidence would pose “a significant danger of misleading the jury into believing that

⁴⁴ *United States v. Hart* (8th Circuit 2000); cited by Cohen and Connon (2015), 260.

⁴⁵ *United States v. Whitfield* (8th Circuit, 1994); discussed in Karst (2006).

it should judge [the] letters from the perspective of a highly trained Secret Service agent instead of from the perspective of an average, reasonable person.”⁴⁶

The implicit assumption governing these standards for admissibility appears to be that any relevant objective facts can be entered directly as evidence, and that admitting experts’ interpretive judgments inappropriately infringes on the jurors’ appointed role as “reasonable interpreters.” However, the distinction between objective facts and subjective interpretation is not always clear. It becomes especially murky when determining how a reasonable audience would respond to *U*, especially in cases where the response itself constitutes the potentially liable harm, as with true threats. In many cases, as we’ve seen, the “totality of circumstances” relevant to determining whether it would be reasonable to feel fear upon hearing *U* is both quite rich and highly specific, and involves something more like an open-ended intuitive perspective than a fixed set of assumptions and preferences.

For these reasons, in their discussion of threats against abortion providers like the “Nuremberg Files” posters, Cohen and Cerrone (2015, 264) propose an alternative “reasonable abortion provider” standard, on the ground that only someone who shares the “collective memory” of violence against abortion providers is in an epistemic position to judge the reasonableness of experiencing fear in response to those acts. Their proposal extends a strand of theorizing about workplace discrimination to the criminal domain. The standards governing workplace discrimination differ significantly from those for threats, both because the liability is civil rather than criminal, and because the accusation is typically that an employing company knowingly permitted a pervasively hostile environment rather than that a specific employee made one or a few harassing utterances. Nonetheless, liability for speech in workplace discrimination manifests the same basic profile of responsibility as we have found for ordinary speech and criminal law. It is neither necessary nor sufficient that speakers utter words that are inherently offensive.⁴⁷ Rather, what matters is the “objective severity of harassment,” as

⁴⁶ More generally, “without additional assistance, the average layperson is qualified to determine what a ‘reasonable person’ would foresee under the circumstances,” *United States v. Hanna* (1990).

⁴⁷ Thus, “mere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII,” *Meritor Savings Bank v. Vinson* (1986). Rather, “[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed” *Oncala v. Sundowner Offshore Services, Inc.* (1998). And “mere jokes” have a social impact that constitutes harassment, even unaccompanied by more ‘direct’ forms of harassment such as slurs, graffiti, or images *Swinton v. Potomac Corporation* (9th Circuit, 2001). For discussion of racial jokes in workplace harassment, including application to the “reasonable person” standard, see Hughes (2015).

determined “from the perspective of a reasonable person in the plaintiff’s position,” where this “requires careful consideration of the social context in which particular behavior occurs and is experienced.”⁴⁸

As with the criminal cases the question is how to determine “the perspective of a reasonable person in the plaintiff’s position.” Early definitions of workplace harassment relied on the norms operative at the particular company being investigated, on the ground that in jobs where “humor and language are rough hewn and vulgar” and “[s]exual jokes, sexual conversations and girlie magazines abound,” it is not reasonable to be offended by those things.⁴⁹ But this created a Catch-22: the very evidence required to demonstrate the existence of a pervasive pattern of hostile, abusive behavior also thereby undermined the reasonableness of being offended by it. Moreover, it is plausible that not just the male employees at that company, but many ‘regular guys’ more generally, would not feel offended by (or even notice) behaviors which it would be reasonable for a woman to feel fear in response to or to interpret as harassing, simply because they have not experienced being raped, groped, catcalled, repeatedly propositioned, and/or belittled, and hence lack the attunement to those behaviors that typifies many women’s experiences and perspectives.

Given such a systematic gender-based perspectival disparity, some courts and theorists have advocated an alternative, “reasonable woman” standard for workplace harassment.⁵⁰ However, most courts and legal theorists have been reluctant to adopt a gender-based standard of reasonableness, either because they take it to presuppose an objectionable essentialism, on which women as such are different from and more delicate than men,⁵¹ or because it sets up a slippery slope that ultimately transmutes the objective, universally accessible standard of reasonableness into a subjective, individualistic one.⁵²

⁴⁸ *Oncala v. Sundowner Offshore Services, Inc.* (1998).

⁴⁹ *Rabidue v. Osceola Refining* (1986).

⁵⁰ *Ellison v. Brady* (9th Circuit, 1991).

⁵¹ This echoes earlier rulings that it is not reasonable to regulate behavior that is rude but culturally ubiquitous. Thus, *Swentek v. USAIR, Inc.* (4th Circuit, 1987) argued that “The workplace is not a Victorian parlor, and the courts are not the arbiters of etiquette.” Employing such a standard would attempt to protect women from everyday insults “as if they remained models of Victorian reticence,” *DeAngelis v. El Paso Municipal Police Officers Association* (5th Circuit, 1995).

⁵² An alternative interpretation of the “reasonable woman” proposal retains a univocal standard grounded in the perspective of a reasonable person, but construes the proposal as imperative for the person rendering the assessment to imagine those systematic gender-based experiences as part of the “totality of circumstances” that constitute the context, analogously to the way in which, in *Roberts v. State* (Louisiana Appellate Court, 1981), the court appealed

These challenges in defining what constitutes a reasonable interpretation of and response to a pervasive pattern of behavior or a specific action are both substantive and complex. They arise whenever we decide whether to hold someone accountable for their actions, whether legally or informally. They are especially endemic to the interpretation of speech, especially in cases where speakers have a vested interest in avoiding accountability, and especially when the accountability in question is legal. Nonetheless, they are challenges that interpreters, including judges and juries, must – and actually do – address.

The final component in establishing legal liability for speech returns from the utterance’s “objective,” “reasonable” meaning to the psychological states of the parties involved. Here again the law employs a heightened and precisified version of standards implicit in ordinary practice. In general, a speaker is potentially liable for meanings and responses that any reasonable person would have attributed to *U*. The vicissitudes of contextual interpretation entail that this typically covers a range of possible meanings $\{Q_1, Q_2, Q_3 \dots\}$ and responses $\{R_1, R_2, R_3 \dots\}$. In some cases of ordinary speech, it is sufficient for liability that a reasonable audience *would* have interpreted and responded to *U* in one of these ways, even if nobody actually did respond in those ways, and even if the speaker didn’t intend anyone to so respond. For instance, we may justly criticize someone who uses a slur like ‘midget’ even if they are ignorant of its offensive connotations and it provokes no anguish or stereotype threat in its hearer (Camp 2016, 2018b); similarly for a misgendering use of a pronoun, or a culturally insensitive joke. However, in ordinary life, actual effects also matter, as do actual intentions: intentional infliction of harm is worse than damage caused via neglect, and both are worse than a lucky miss. Likewise in law, liability requires actual harm, and culpability requires knowing or at least anticipating that the harm will ensue.

On the side of the harm done, we’ve seen that it is not necessary that the audience actually suffer physical, financial, or other damage in order for an utterance to count as a liable threat, because the fear of such damage is itself inherently harmful and engenders further harmful effects. Indeed, for workplace discrimination, it suffices that the victim reasonably “subjectively perceives” the work environment as abusive, because this perception itself makes it harder for them to perform their duties, even if does not “seriously affect [their] psychological well-being” in other ways.⁵³

to reasonable behavior for a blind person in deciding what counted as negligence. For discussion of the ‘reasonable woman’ standard and the balance between “objective” and “subjective” standards for reasonableness, see Treger (1993) and Peterson (1999).

⁵³ The reasoning here about psychological effects echoes that for the Catch-22 about company-specific norms above. A requirement of actual trauma would turn psychological resilience into a

On the side of the speaker's awareness of that harm, we've seen that the dominant principle has been that it suffices to establish an utterance as a true threat that a reasonable person in the speaker's position would foresee that the audience would perceive the utterance as a serious expression of intent to harm.⁵⁴ However, it should be noted that a minority strand of more recent decisions apply the general criterion of *mens rea* for criminal culpability to speech, in order to require that a speaker specifically intend harm,⁵⁵ or at least that they "kn[e]w the threatening nature of [their] communication"⁵⁶ and produced it with "reckless disregard" for its likely effect. Thus, the specific relevance of actual speaker intent to liability for threatening speech is currently somewhat unsettled. However, none of the candidate criteria for establishing liability follow Fricker in accepting that a speaker's claims to communicative intent are definitive and unchallengeable. Rather, a speaker must provide publicly accessible evidence about their intent or lack thereof – for instance, by arguing that they were drunk at the time they made the utterance.⁵⁷ So, for instance, returning to Trump's utterance of (3), the fact that he cleared the room prior to speaking to Comey constitutes relevant circumstantial evidence that he knowingly intended to pressure Comey to drop the Flynn investigation and induce fear of retribution. While other sorts of evidence might also be relevant to establishing Trump's intent in uttering (3), Trump's claims about his private intentions do not automatically trump them, as Fricker maintains.

4 Conclusion

Insinuation enables speakers to effectively navigate risky waters of social coordination and coercion while preserving deniability about their communicative intentions: they can insist that they were "just saying" the message literally encoded by the sentence they uttered, while demurring about having intended their main message. Other forms of indirect speech, including sarcasm, jokes, hyperbole, and metaphor, offer distinct but related profiles of deniability: the speaker can insist that they were "just kidding" or "speaking rhetorically," including in cases where they really did mean what they said.

liability, because someone who managed to continue working at the company without being incapacitated would risk undermining their claim to harm (*Harris v. Forklift Systems, Inc.*, 1993).

⁵⁴ *United States v. Hanna* (1991).

⁵⁵ *Virginia v. Black* (2003).

⁵⁶ *Elonis v. United States* (2015).

⁵⁷ *United States v. Bagdasarian* (9th Circuit, 2011).

The puzzling question is why hearers accord speakers “plausible deniability” for those risky messages even when all parties involved know what the speaker really meant, on any independently plausible sense of ‘know’. The reason is that indirect speech trades on the “dodgy epistemics” of interpretation, and specifically on assumptions that are implicit, nuanced, and context-local. This affords a crafty insinuator significant wiggle room. Especially in the context of political discourse, and especially during the candidacy and presidency of Donald Trump, it can indeed seem as if such speakers can “never be nailed” – that they can get away with even the most outlandish denials and alternative interpretations.

However, at least in the cases of ordinary conversation and of law, insinuation and related forms of accountability-avoiding speech do not confer blanket immunity. Speakers can be held liable for their unstated messages when any reasonable, suitably informed audience would have interpreted them as meaning something within the range of liable messages. “Words matter,” as Senator Risch says, because they constitute the initial common denominator from which interpretation proceeds (Camp 2006, 2016). But an utterance’s meaning also depends, as Comey says, on “the circumstances, the subject matter and the person” making the utterance.

The law is a system designed to hold actors to account by imposing specific, enforceable consequences when certain substantive and evidential thresholds have been met. In private interactions and politics, it is typically much less clear what “holding to account” amounts to, or how it should be levied. Further, at least in private interactions, the decision whether to pursue liability, and how far, involves performing a complex calculus on strategic costs and benefits. Should a hearer accommodate an objectionable insinuating message, push back in equally insinuating terms, or opt out of the conversation, and perhaps the relationship, altogether?

The same issues beset political discourse, which also brings along its own distinctive set of motivations, challenges and rewards. Who is the target audience? What difference does it make how non-target audiences respond? What sorts of consequences can effectively be levied on speakers who willfully attempt to avoid accountability; and what longer-term effects will those consequences have? Further, much of our discourse, in ordinary life and especially in politics, is not centered on disseminating information, but is rather directed at arousing emotion and exercising power (Stanley 2015). To the extent that political utterances function not merely, or not at all, to convey specific messages, forms of direct and indirect response aimed at effecting coordination on a common ground of information and plans risk being irrelevant and ineffectual.

In particular, to the extent that political utterances function primarily to construct and enforce partisan tribal identities, the question of what assumptions

and preferences should be relevant for determining “the perspective of a reasonable person in the [hearer’s] position” becomes much more unsettled, even unstable. So does the question of how to respond to utterances from across the perspectival divide, and what institutional structures and conversational techniques might foster genuine civic coordination across social groups. Unfortunately, these are pressing questions for another day.

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