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Different systems, similar challenges: humor and free speech in the United States and Europe

<https://doi.org/10.1515/humor-2021-0121>

Received November 3, 2021; accepted January 7, 2022; published online July 19, 2022

Abstract: The United States and Europe are often contrasted with each other regarding their approach to freedom of expression. Yet, despite the differences between their respective judicial systems, courts from both regions inevitably face similar interpretive challenges when dealing with humor. Our paper conducts a comparative discussion of humor-related jurisprudence from the US and Europe, mostly (but not exclusively) focusing on two landmark cases – namely *Hustler v. Falwell* (US Supreme Court, 1988) and *Vereinigung Bildender Künstler v. Austria* (European Court of Human Rights, 2007). In particular, our analysis foregrounds two aspects: 1) How courts deal with the complex relations between humor, exaggeration and factual reality; 2) The role of objective harm (as opposed to subjective offence) in distinguishing between lawful and unlawful expression, and how the subjectivity of humor interpretation can undermine this criterion. On both levels, we argue that insights from literary and linguistic theories of humor – from Simpson’s work on satirical discourse to Attardo and Raskin’s General Theory of Verbal Humor – can set the basis for a more fine-grained and systematic approach to humor across different judicial systems.

Keywords: exaggeration; harm; humor; law; satire

1 Introduction

What is the difference between the United States and Europe when it comes to freedom of expression? One might first observe that democratic countries are sensitive to the importance of free speech – and that both the US and Europe on the whole share this fundamental value. Several observers, however, add that Europe is more inclined to restrict offensive material than the United States. Most

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notably, Europe – especially the European Court of Human Rights – is often considered a “centre of gravity” for liberal democracies such as Australia, Canada and New Zealand, in their tendency to restrict various types of speech that may be deemed harmful to human dignity or public order; on the other hand, the United States is seen as the main exponent of a more permissive view, granting a higher level of protection to most forms of offensive expression (Heinze 2016: 181; see also Mchangama and Alkiviadou 2021; Kuhn 2019).

Our study focuses on the European Court of Human Rights (ECtHR) and the US Supreme Court, namely the two highest authorities for free speech adjudication in Europe and the United States respectively. We stress that the legal frameworks and jurisdiction of the ECtHR are quite different from those of the US Supreme Court. Most obviously, for example, the US Supreme Court is the highest court in a federal system, interpreting a national constitution ratified by the constituent states. On the other hand, the ECtHR is a transnational court that interprets a treaty, the European Convention on Human Rights. That being said, the ECtHR and the Supreme Court provide a meaningful comparison of free speech jurisprudence in Europe with that in the US, as shown by a growing body of scholarship (Hare and Weinstein 2009; Heinze 2016; Stone and Bollinger 2018). However, no comparative study has yet specifically analyzed how both judicial systems handle offensive humor – with the remarkable exception of Alkiviadou (2022), whose discussion of selected key cases shows how (also in the case of humorous content) the ECtHR has a significantly more restrictive approach than US courts.

While Alkiviadou (2022) highlights the divergences between Europe and the US with regard to speech regulation, in this contribution we take a different and complementary approach. Our focus does not lie on contrasting jurisprudential and cultural attitudes towards freedom of expression, but rather on the similar interpretive challenges presented by humor across distinct liberal-democratic systems – regardless of the latter’s possible dissimilarities on a juridical level. These shared challenges are mostly due to humor’s inherent elusiveness; specifically, its tendency to blur the line between factual and non-factual communication, and to lend itself to multiple interpretations. Both features are well illustrated by the famous adages: “Many a truth is said in jest” and “One person’s joke is another person’s offense.”

Evaluated from this perspective, the ECtHR and the Supreme Court lend themselves as an ideal start for comparative analysis, based on a ‘most different systems’ design (Anckar 2008). Such a comparative analysis can be a useful first step towards identifying the shared issues posed by humor across different judicial contexts. In addition to identifying these common challenges, we will illustrate how literary, rhetorical and linguistic approaches to humor – with their special focus on the forms and functions of humorous communication – can provide a

transferable theoretical framework for *understanding* the problems courts face, *comparing* cases across different systems, and *reflecting* on the implications of the courts' approaches. While recent studies have already taken a similar perspective on humor-related cases in either the United States or Europe,¹ this article attempts to illustrate how specific insights from humor studies can apply to cases from both legal systems.

More precisely, our analysis focuses mostly on two judicial decisions that grapple with offensive, purportedly humorous communications, namely *Hustler v. Falwell* (1988, henceforth abbreviated as *Hustler*) and *Vereinigung Bildender Künstler v. Austria* (2007, henceforth *VBK*).² Both are landmark cases in their respective courts, and the facts of both cases overlap: *Hustler* establishes whether US courts may impose damage liability against a magazine for purporting to describe a public figure's first time having sex with his mother in an outhouse; similarly, *VBK* evaluates whether Austrian courts may enjoin the exhibit of a painting depicting public figures and public officials in sexual positions. *VBK* treats the painting in the case as "satire," while *Hustler* treats the depiction there as satire in the form of an "ad parody."

For the words used above ('humor,' 'satire,' 'parody'), a preliminary terminological clarification is in order. Throughout our paper, we adopt a working definition of humor as communication meant as facetious or non-serious, and/or interpreted as such by at least some of its addressees. Needless to say, while being play-oriented in its form, humor can be employed to ultimately make a serious point, as widely acknowledged by humor scholarship.³ Within this framework, satire can be defined as a form of humor seeking to convey social or political criticism. Satire is therefore a stance or mode of humorous discourse, using humorous techniques with the aim of denouncing a given problem, criticizing a person's flaws, and the like (Quintero 2007). Lastly, our working definition of parody follows the characterization often (but not always) embraced in US cases: a "work that imitates the characteristic style of an author or a work for comic effect or ridicule."⁴ This definition is compatible with literary theory's view that parody is a specific intertextual device, consisting of imitating a previous text for humorous or playful purposes (Genette 1997); 'text' being used here in its broad

1 Cf. in particular Godioli (2020), Little (2019), Todd (2016), and Gavins and Simpson (2015). Another relevant study, focusing on Brazilian cases, is Capelotti (2015). See also Little's and Capelotti's chapters in Milner Davis and Roach Anleu (2018).

2 Respectively, 485 U.S. 86 and ECtHR application no. 68354/01.

3 See for instance the notion of serious "super-goals" in humorous communication, as discussed in Dynel (2018).

4 See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003). Regarding juridical approaches to parody, see also Breemen and Breemen (2022) in this special issue.

semiotic sense, covering both verbal and non-verbal media. From this perspective, one can use parody to engage in satire – we see this in the *Hustler* case, which focused on a cartoon employing parody for satirical commentary on a public person. That being said, courts often use these terms interchangeably even within the same opinion, with ‘parody’ used as a shorthand for ‘satire’ or even ‘humor’ at large. This terminological inconsistency is one of the areas where a closer dialogue between humor studies and the law might be beneficial for judicial practice. For this study, we will stick with our working definitions.

Although important to understanding the two opinions, highlighting differences in background legal doctrine, legal procedure, and factual context is not this study’s primary focus. While remaining mindful of those differences, we ultimately seek to identify how humanities-based humor studies can shed light on the common interpretive problems that the United States and Europe face in drawing a line between legal and illegal humor. With this main focus in mind, we settled on two aspects for our analysis:

1. When describing the relation between satire and factual reality in the selected cases, both the US Supreme Court and the ECtHR place special emphasis on the notion of *exaggeration* – so much so that the latter seems to become the predominant, distinguishing feature of satire. What are the implications of this? To what extent does humor theory justify the courts’ positions?
2. Both courts recognize how a given humorous text can lend itself to multiple (subjective) interpretations; however, they set out to assess humor’s potential to cause (objective) harm. How do the two courts assess the harm in satirical expression? Do the opinions focus on harm to society, to individuals, or both? And to what extent does humor complicate the courts’ attempt to measure harm objectively?

These two sets of questions will be tackled soon. But first, let us provide a more detailed background for the two cases.

2 Case details

2.1 Hustler

The suit’s target was an ad parody in the US magazine *Hustler*, depicting a national evangelical Christian leader, Reverend Jerry Falwell, whose case went to the US Supreme Court to evaluate whether he could recover for intentional infliction of emotional distress. As stated earlier, the ad suggested that Falwell’s first sexual experience occurred with *his mother* in an *outhouse*. For our comparison with *VBK*,

we note that in most – if not all – US states a defendant is found liable for intentional infliction of emotional distress only “where the conduct in question is sufficiently ‘outrageous’” (*Hustler*: par. 53).

Denying liability for Falwell, the US Supreme Court exalted the role of satirical cartoons in US history and culture. While stating that the *Hustler* parody was a far cry from its more noble ancestors, the Court reasoned that the US Constitution’s protection of free expression applied in this context. Moreover, Falwell’s status as a public figure demanded proof that *Hustler* published the advertisement with knowledge of its falsity or reckless disregard for its falsity. Significantly, the Court made clear that their decision could not be based on merely subjective criteria, such as the parody’s perceived “outrageousness” or “adverse emotional impact on the audience” (par. 55). The question instead was whether the parody seemed to make any claims regarding factual reality. Was *Hustler* suggesting that Rev. Falwell losing his virginity to his mother in an outhouse was “reasonably believable”? The answer was “no.” For this reason, evaluating whether the magazine had reckless disregard for the truth was essentially irrelevant: one could not reasonably interpret the ad parody as asserting “actual facts about [Falwell] or actual events in which he participated” (par. 57).

In addition to reciting settled US First Amendment doctrine, the *Hustler* decision is notable as a celebration of satirical commentary, stating that, in the United States, “our political discourse would have been considerably poorer” without parody cartoons (par. 55).

2.2 VBK

Approximately 10 years after the *Hustler* case, an Austrian exhibition in 1998 gave rise to the VBK dispute. Sponsored by an artists’ association called Vereinigung Bildender Künstler Wiener Secession, the exhibition included the satirical painting “Apocalypse” by Austrian painter Otto Mühl. The painting featured photomontages showing members of the right-wing conservative Austrian Freedom Party as well as religious figures engaging in graphic sexual acts. One public figure portrayed was Walter Meischberger, an Austrian National Assembly member and a former general secretary of the Austrian Freedom Party. In the painting, Meischberger was depicted holding another public official’s penis while being touched by two other Freedom Party politicians and ejaculating on Mother Teresa. The painting was vandalized during the exhibition, with red paint obscuring much of its offensive parts pertaining to Meischberger.

Meischberger sued the artists’ association in Austrian courts, arguing that the painting debased him and suggested that he indulged in loose sexual activities.

During this national litigation, the Austrian courts fined the artists and issued a permanent injunction (prior restraint) against further display of the painting. The case ultimately went to the ECtHR, which found by a divided vote that the national courts' decision violated the artists' freedom of expression rights, and was neither necessary nor proportionate in a democratic society. Building on the paradigm established by the seminal *Handyside v. United Kingdom* judgment (1976), the ECtHR observed that certain information or ideas publicly expressed may "offend, shock or disturb the state or any section of the population"; but nevertheless, no democratic society could exist without a free exchange of ideas and opinions, nor could the demands of "pluralism, tolerance and broadmindedness" (*VBK*: par. 26).

Rejecting that preserving public morals required a contrary result, the majority then focused only on protecting Meischberger's individual rights. While describing the painting as "somewhat outrageous" (par. 32), the Court made clear that the painting neither reflected nor suggested reality. Given that the painting used only blown-up newspaper photos of the public figures' faces (with eyes hidden behind black bars and with exaggerated representations of their bodies), the Court concluded that the painting projected only a "caricature of the persons concerned using satirical elements." From this premise, the Court considered carefully the artist's right to freedom of expression because "satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate" (par. 33). Ultimately, the ECtHR majority ruled that the permanent injunction was disproportionate and not necessary in a democratic society. The Court also ordered Austria to pay pecuniary damages related to the costs of the domestic judgments as well as other costs and expenses related to the litigation.

While *Hustler* was a unanimous decision, two separate dissents were filed in *VBK* – one by Judge Loucaides, the other by Judges Spielmann and Jebens. The opinion of Judge Loucaides is particularly striking. Echoing the Austrian domestic courts, he found the painting to undermine Meischberger's reputation and dignity without legitimate justification. Judge Loucaides reasoned that simply classifying a work as "art" should not allow one to avoid liability for insulting others. Judge Loucaides further submitted that one could not consider every image produced by an artist as "artistic," and that the Court should not view images to be satirical if "the observer does not comprehend or detect any message in the form of a meaningful attack or criticism relating to a particular problem or a person's conduct."

VBK and *Hustler* come from different time periods and cultural settings, as well as disparate jurisdictional structures and legal traditions. Nevertheless, they show remarkable similarities as well. It is these similarities that we found most salient – particularly in the two courts' treatment of the role of *exaggeration* in

(satirical) humor, and in their search for objective criteria to assess the *harm* in humorous communication. From this perspective, humor research contributes insights equally applicable to both cases (and, more generally, both judicial systems). To these subjects we now turn.

3 Satire v. factual reality: the role of exaggeration

In their approach to satirical expression, both courts seem to assign a key role to exaggeration. This notion is used in two senses in both *Hustler* and *VBK*. Firstly, it refers to a specific rhetorical device typical of satire, whereby a humorous effect is achieved through the hyperbolic distortion (caricature) of the target's physical traits, behavior or beliefs. Secondly, courts also use the concept of exaggeration more generally, alluding to satire's propensity to 'aesthetic excess' – namely challenging the boundaries of good taste (as negotiated within a given society) through extreme imagery. This section will explore the implications of the courts' emphasis on exaggeration on both levels, in light of ideas coming from humor studies.

3.1 Satire as exaggeration of the target's features

Both courts explicitly evoke the first level of hyperbole (exaggeration or caricature of the target's features) in their respective analyses of the *Hustler* parody ad and Otto Mühl's painting (our emphasis):

Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by *exaggerating* features or mannerisms for satirical effect." ... The appeal of the political cartoon or caricature is often based on *exploitation* of unfortunate physical traits or politically embarrassing events. (*Hustler*: par. 53)

The painting used only photos of the heads of the persons concerned, their eyes being hidden under black bars and their bodies being painted in an unrealistic and *exaggerated* manner. ... The Court finds that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that satire is a form of artistic expression and social commentary and, by its inherent features of *exaggeration* and distortion of reality, naturally aims to provoke and agitate. (*VBK*: par. 33)

In their insistence on hyperbole as a defining feature of satire, *Hustler* and *VBK* reflect a much broader trend within US and ECtHR jurisprudence. Drawing on the

US Supreme Court's previous use of the concept,⁵ US lower courts have referred to hyperbole as a synonym of humor in a broad spectrum of cases, both before and after *Hustler*.⁶ An Indiana state court judge well illustrated this inclination in his concurrence to *Hamilton v. Prewett*: "I use parody, satire, humor, caricature, rhetorical hyperbole, and other references to 'humorous' statements synonymously."⁷ Similarly, ECtHR cases tend to define satire primarily in terms of exaggeration (albeit in combination with distortion), often with an explicit reference to the *VBK* judgment.⁸

Exaggerating the target's defining traits is indeed one of satire's most frequent and recognizable features. Not by chance, the word *caricature* itself derives from the Italian verb *caricare*, i.e., to 'charge' or exaggerate someone's features (Quintero 2007: 312). Nevertheless, as literary and linguistic theories of humor show, hyperbole is only one among several rhetorical or compositional tools at the satirist's disposal. A particularly useful overview is offered by Paul Simpson, whose typology of satirical devices distinguishes between 'metonymic' and 'metaphoric' strategies (Simpson 2003: 125–149). The former category encompasses the following processes: 1) *Saturation*, namely caricature and other forms of exaggeration; 2) *Attenuation*, i.e., subtle allusion achieved by way of withholding information; 3) *Negation*, that is reversing the usual perception of a given person or situation into its opposite. Metaphoric strategies, instead, are based on the decontextualization, merging or juxtaposition of elements coming from different conceptual domains (e.g., portraying a politician as a musician or an athlete).

5 See *Greenbelt Cooperative Publishing Association v. Bressler*, 398 U.S. 6, 14 (1970).

6 See, e.g., *Keller v. Miami Herald Publ'g Co.*, 778 F.2d 711, 716 (11th Cir. 1985) (evaluating an editorial cartoon by reference to "hyperbole, exaggeration and caricature"); *Newman v. Delahunty*, 681 A.2d 671, 683–84 (N.J. Super. Ct. Law Div. 1994), *aff'd*, 681, A.2d 659 (N.J. Super. Ct. App. Div. 1996) (evaluating campaign literature for defamation liability by reference to whether it expressed facts or was "rhetorical hyperbole"); *Ferreri v. Plain Dealer Publ'g Co.*, 756 N.E.2d 712, 721–722 (Ohio Ct. App. 2001) (explaining that a cartoon may be defamatory only if a reasonable person would conclude that it contained a factual assertion rather than "exaggeration and hyperbole"); *Levitt and Levitt Law Firm v. Felton*, LC No. 2014-011644-NZ (Michigan Ct. App. 2016) (discussing satire in terms of "rhetorical hyperbole").

7 *Hamilton v. Prewett*, 860 N.E.2d 1234, 1249 n.9 (Ind. Ct. App. 2007) (Najam, J., concurring in result). This passage is also convincingly discussed in Todd (2016).

8 *VBK's* definition of satire is directly quoted, for example, in *Lindon, Otchakovsky-Laurens and July v. France* (21279/02 36448/02, 2007), *Aguilera Jimenez and Others v. Spain* (28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06, 2009), *Eon v. France* (26118/10, 2013), *Ziemiński v. Poland* (1799/07, 2016), *Instytut Ekonomichnykh Reform, Tov v. Ukraine* (61561/08, 2016), *Grebeva and Alisimchik v. Russia* (8918/05, 2016), *Sousa Goucha v. Portugal* (70434/12, 2016), *Sinkova v. Ukraine* (39496/11, 2018), *Kaboğlu and Oran v. Turkey* (1759/08 50766/10 50782/10, 2018), *Handzhiyski v. Bulgaria* (10783/14, 2021), *Z.B. v. France* (46883/15, 2021).

In short, according to Simpson's model, exaggeration is embedded within a much broader array of discursive strategies. This is also the case with one of the most influential linguistic models describing humorous communication, i.e., Attardo and Raskin's General Theory of Verbal Humor (GTVH), which was later extended to non-verbal humor as well. A central aspect of the GTVH lies in the notion of *logical mechanisms*, namely the fundamental principles determining the functioning of a humorous text (Attardo et al. 2002). Within the GTVH, exaggeration is part of a vast range of logical mechanisms, including among others 'missing link' and 'reversal' (comparable to Simpson's attenuation and negation) and juxtaposition (partly overlapping with Simpson's metaphoric strategies).

With this in mind, one more easily notices how, in the cases under discussion, exaggeration is not the most relevant analytical lens. Despite the courts' emphasis on hyperbole, both the *Hustler* ad and Mühl's painting are based on a logic of *reversal*. The *Hustler* ad portrays Jerry Falwell Sr. – a conservative televangelist – as a vulgar, incestuous alcoholic. Similarly, Otto Mühl's "Apocalypse" depicts exponents of a notoriously conservative party as they engage in obscene sexual acts with members of the Church. This 'world-upside-down' logic is quite typical of satirical and comical discourse across different cultures, and is a central feature of what Russian literary theorist Mikhail Bakhtin described as the *carnavalesque*. In Bakhtin's definition, since classical antiquity, the carnivalesque is characterized by: 1) An emphasis on the human body, especially in its 'lower' functions (ingestion, sexuality, evacuation); 2) A merging or juxtaposition of opposites (the high and the low, the sacred and the profane, etc.); 3) A temporary reversal of political and moral hierarchies by means of blasphemy or obscenity, unveiling the "relativity of all structure and order" (Bakhtin 1984: 122–125).

Through the lens of the carnivalesque, the *Hustler* ad and Mühl's painting can be fruitfully reconsidered as modern descendants of a century-long satirical tradition, whereby representatives of the political or religious establishment are degraded and reduced to vehicles of elementary bodily functions. Crucially, the aim of carnivalesque profanation (as defined by Bakhtin) is not to slander specific individuals, but to criticize or relativize a hegemonic ideology or power structure. From this standpoint, Falwell or Meischberger are not targeted as individuals, but as symbols of a moral order deemed by the authors as artificial or hypocritical.

In sum, the notion of carnivalesque reversal – as opposed to mere exaggeration or distortion – would have allowed both courts to consider their satirical texts within a broader historical-cultural framework, thus setting the basis for a more articulate interpretation. In both judgments, in fact, the courts limit themselves to a rather cursory discussion of the possible meaning of the ad or painting:

The ... parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. (*Hustler*: par. 48)

The Court does not find unreasonable the view taken by the court of first instance that the scene in which Mr Meischberger was portrayed could be understood to constitute some sort of counter-attack against the Austrian Freedom Party, whose members had strongly criticised the painter's work. (*VBK*: par. 34)

The 'carnavalesque' reading of Mühl's painting proposed above might also offer a valid response to the position taken by one of the dissenting judges (Judge Loucaides), who goes as far as denying that the painting has any meaning at all: "It is my firm belief that the images depicted in this product of what is, to say the least, a strange imagination, convey no message. ... Personally, I was unable to find any criticism or satire in this 'painting'" (*VBK*: Loucaides, Dissenting). Loucaides' stance exemplifies a phenomenon described by Simpson (2003: 173), whereby the perceived inappropriateness of a given satirical text 'blocks' the reader from even trying to find a meaning in the text. By framing the painting in terms of carnivalesque inversion, Loucaides might have partly overcome this interpretive block – regardless of his personal opinion about the artistic quality of Mühl's work.

On a practical level, in both *Hustler* and *VBK*, the courts' lack of interpretive nuance does not have any substantial consequence on the judicial outcome. A more fine-grained interpretation of the satires under discussion, focusing on reversal rather than exaggeration or distortion, would have only reinforced the courts' final decision to consider the ad parody and Mühl's painting as protected (*qua non-factual*) speech. However, in other cases, the court's exclusive focus on exaggeration as a humorous device significantly affected the decision-making process. A pertinent example is provided by two inter-related ECtHR cases, *Aguilera Jiménez v. Spain* (28389/06 et al., 2009) and *Palomo Sánchez and Others v. Spain* (28955/06 et al., 2011), focusing on a cartoon published by a group of Spanish delivery workers on the newsletter of their trade union. The cartoon depicted two co-workers (who had testified against the union in a previous trial) preparing to engage in sexual activities with the company's HR manager. Both in the first round (*Aguilera Jiménez*) and in the Grand Chamber judgment (*Palomo Sánchez*), the ECtHR interpreted the cartoon as a "harmful" and "vexatious" attack on the honor and reputation of the two co-workers, and therefore ruled against the unionists-turned-cartoonists. Yet, in light of the theories discussed above, one could argue that the cartoon is not based on *exaggerating* actual traits of the co-workers' behavior (e.g., their purportedly loose sexual habits), but rather on a *metaphoric* link between the sexual sphere and the co-workers' alleged servile attitude towards their manager. Compared to exaggeration, metaphor clearly has a less direct relation to factual reality, as it creates an imaginative association

between its target (e.g. the workers' professional behavior) and an image coming from a different sphere (e.g. sex). By failing to consider humorous mechanisms other than exaggeration, the Court arguably interpreted the cartoon in an overly literal way, which had a serious impact on the final outcome. This shortcoming was explicitly denounced by the Grand Chamber minority in their dissenting opinion:

As regards the cartoon on the newsletter's cover, it is a caricature, which, while being vulgar and tasteless in nature, should be taken for what it is – a satirical representation. In other cases, the Court has recognised the satirical nature of an expression, publication or caricature. ... The harsh criticism did not relate to the intimacy of the individuals or to other rights pertaining to their private lives. It was directed exclusively at the role of certain colleagues in the industrial dispute and their professional attitude in the legal debate over the recognition of rights afforded by law to workers.⁹

As suggested by *Hustler*, *VBK* and even more clearly by *Palomo Sánchez*, a stronger awareness of the variety of humor's rhetorical tools – as opposed to the courts' usual focus on exaggeration – could set the basis for a more systematic and consistent approach to evaluating humorous expression.

3.2 Satire as aesthetic excess

Moving back to *VBK* and its dissenting opinions, Loucaides' disgusted reaction to Mühl's painting also prompts us to reflect on the link between satire and exaggeration in its broader (aesthetic) sense, which is relevant for both *VBK* and *Hustler*. When analyzing the courts' approach to satirical excess, some useful insights are offered by the notion of 'humor ideology' or 'metapragmatic beliefs,' which humor scholars define as implicit ideas about the social role and limits of humor.¹⁰ In other words, having different metapragmatic beliefs means (among other things) responding differently to questions such as 'What is the social function of humor and satire?' or 'What are the acceptable limits of humor?.' In this regard, one can identify two different positions in our two cases. On one hand, *VBK*'s dissenting judges seem to believe that there should be *aesthetic* limits to humor. From this perspective, exceeding the perceived limits of good taste – like Mühl's painting did in the dissenting judges' view – means transgressing the boundaries of humorous expression:

The "painting" is just a senseless, disgusting combination of lewd images whose only effect is to debase, insult and ridicule each and every person portrayed. ... Why were Mother Teresa

⁹ *Palomo Sánchez* (Tulkens, Björgvinsson, Jočienė, Popović and Vučinić, J., Dissenting, par. 11–12).

¹⁰ For a recent overview of the bibliography regarding these concepts, see Tsakona (2020).

and Cardinal Hermann Groer ridiculed? Why were the personalities depicted naked with erect and ejaculating penises? To find that situation comparable with satire or artistic expression is beyond my comprehension. (*VBK: Loucaides, Dissenting*)

It is permissible to consider that [the painting] sought to convey a message by means of caricature and satire ... However, in the present case the painting in question, even if it is an expression of what is known nowadays as “committed” art (*art engagé*), does not deserve the unlimited protection of Article 10 of the Convention, precisely because it interferes excessively with the rights of others. In other words: There are ... limits to excess: one cannot be excessively excessive. (*VBK: Spielmann and Jebens, Dissenting, par. 6–7*).

While concurring with the majority that Mühl’s “Apocalypse” might well have a satirical meaning, Judges Spielmann and Jebens side with Loucaides in arguing that the painting’s *excessive* vulgarity results in an unlawful violation of Meischberger’s dignity. The idea that satire cannot be “excessively excessive,” and that there should be *aesthetic* limits to how vulgar satire can be, is not exclusive to *VBK* within ECtHR jurisprudence. A similar humor ideology can be found, for example, in the dissenting opinion to *Ziembinski v. Poland* (1799/07, 2016):

Must satire “naturally,” necessarily, be also *insulting*? *Must* that exaggeration, distortion, provocation or agitation “naturally” be *personality-debasing*? ... The majority is satisfied that “a degree of exaggeration or even provocation is permitted” and that “a degree of immoderation is allowed.” *What* degree? ... The bottom line of our approach is that neither the context of the expressions, nor the genre chosen by the author, can by itself whitewash personality-debasing nature of the expressions used in the article. (*Ziembinski: Wojtyczek and Küris, Dissenting, par. 9 and 14–15*)

On the other hand, the ECtHR majority (in both *VBK* and *Ziembinski*) and the US Supreme Court in *Hustler* clearly take a different stance on satirical excess, thus reflecting a different humor ideology. In their view, most forms of satirical humor are bound to be perceived as ‘outrageous’ or ‘excessive’ by someone, since exaggeration (broadly meant as aesthetic excess) is a natural component of satirical discourse. Consequently, the perceived outrageousness or vulgarity of a given satirical expression is not, by itself, a valid reason for restricting it:

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. ... “Outrageousness” in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. (*Hustler: par. 54–55*)

The Court ... notes that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and

agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care. (*VBK*: par. 33)

This position taken by the Supreme Court and the ECtHR majority is certainly more aligned with the findings of humor research. As argued by literary scholar Robert Phiddian, the fundamental social function of satire is not really to speak truth to power or contribute to debates of public interest, but rather to serve as a collective pressure valve by “licensing public expression of harsh emotions defined in neuroscience as the CAD (Contempt, Anger, Disgust) triad” (Phiddian 2019: iii). Aesthetic excess is a necessary tool to achieve this basic function:

Satirical force can be surgical, but it is only ever surgical as well as prolonged and excessive. Knowingly going further and longer than is strictly necessary is so widespread a characteristic of satire as to be functionally (if not quite absolutely) universal. A comedy of manners might stop before it goes too far, but a satire almost never does. (Phiddian 2019: 52)

This by no means suggests that satire should never be regulated. Rather, the point is that restricting satirical expression just because of its perceived ‘outrageousness’ is contrary to the satire’s very nature. In other words – as concluded by the US Supreme Court and the ECtHR majority – satire cannot be regulated merely through subjective aesthetic criteria, such as vulgarity or bad taste *per se*. But if these are not valid criteria, how else can judges define and restrict satirical excess? The next section will discuss how both courts set out to assess the ‘objective’ harm in satirical expression, as well as how the courts’ search for objectivity might be undermined by humor’s ambiguity or elusiveness.

4 Determining harm in satirical expression

As shown above, in both *Hustler* and *VBK* the courts refused to base their decision on ostensibly subjective criteria, such as the perceived outrageousness or vulgarity of the satirical piece under discussion. In contrast to that, both the Supreme Court and the ECtHR tried to establish a more objective criterion for humor regulation – thereby focusing on (objective) harm rather than (subjective) offense.

This section will start by discussing the different ways in which US and European courts define harm in the context of free speech regulation. Whereas the US adopts a relatively narrow view of harm and is therefore more liberal in its approach, Europe tends to embrace a broader definition. That being said, both US and (albeit more tentatively) Europe share an emphasis on harm – as opposed to simple offense – when establishing what constitutes unprotected speech. In both *Hustler* and *VBK*, the respective courts had a relatively easy time excluding the

presence of any objective harm in the satirical works under examination. However, as will be shown later in this section, humor can actually make it particularly difficult to distinguish subjective offense from harm. In this case too, insights coming from humor studies and literary theory can help us reflect on the common challenges experienced by judges across different systems.

4.1 Defining harm: jurisprudential differences between the US Supreme Court and the ECtHR

As a general jurisprudential matter, the US litigation system focuses on a process of ritualized battle between adversaries targeted on the goal of remedying individual harm suffered by individual entities.¹¹ Nonetheless, in the framework of constitutional litigation, the US system often deviates from this standard trajectory for other civil lawsuits, becoming more focused on collective harm and curing societal problems than in other areas of civil litigation. This is particularly evident in US First Amendment jurisprudence – where one routinely reads about such matters as protecting public debate’s contribution to proper operation of democratic society, avoiding imminent harm to public safety, and fostering a marketplace of ideas. Importantly for our purposes, however, when it comes to offensive speech, US constitutional doctrine is remarkably disinclined to regulate, with a few (relatively narrow) exceptions. As summarized by one First Amendment scholar:

The [Supreme] Court has generally taken an ‘all-inclusive’ approach to the protection of speech, asserting that all speech receives First Amendment protection unless it falls with certain narrow categories of expression ... – such as incitement of imminent illegal conduct, intentional libel, obscenity, child pornography, fighting words, and true threats. (McDonald 2005)

In contrast to the US system, free speech regulation in Europe tends to adopt a broader definition of harm, including “hateful expression” aiming to “diminish the equal respect and equal citizenship due to all members of society” in ways “powerful in their impact, even if inaccessible to demonstrable causation” (Heinze 2016: 9 and 125). This broader notion of harm rests on Europe’s greater emphasis on protecting human dignity as a counterweight to freedom of expression, as epitomized by the ECtHR’s words: “Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society.”¹² The concept of dignity is certainly present in US law as well, and plays a significant

¹¹ See, e.g., Laycock and Hasen (2019).

¹² *Gündüz v. Turkey*, ECtHR, Judgment number 59405/00 (2006), par. 56.

role within First Amendment jurisprudence (Glensy 2011; Heymon 2008). Scholars have also skillfully unearthed the notion as reflected in dignity torts (such as privacy, defamation, false light, and the right of publicity) and criminal law.¹³ Yet, dignity is undeniably assigned a more central position in European approaches to free speech regulation, thereby justifying a more extensive definition of harm as objectively diminishing an individual or a group's status in a given community.

Despite these remarkable differences, the US and Europe converge in attempting to identify *objective* criteria for establishing the boundaries of protected speech. Whether defined narrowly (as in the US) or more broadly (as in Europe), harm tends to be used across different systems as an objective test, as opposed to subjective offense. This attitude is clearly reflected in both *Hustler* and *VBK*; and although the ECtHR is less consistent in this sense, and occasionally resorts to more subjective notions such as “gratuitous offense” as a reason for restricting speech (Alkiviadou 2022; Kuhn 2019), the distinction between harm and offense remains a crucial and desirable one for the Strasbourg Court as well. However, to what extent can a court really achieve objectivity, when interpreting offensive humor?

4.2 Harm, objectivity and humor

In *Hustler*, the Court concluded that the parody ad should not be construed as a false statement of fact about Falwell, or an immediate (objective) threat to his safety. In explaining this approach, the *Hustler* Court explicitly disavowed the “inherent subjectiveness” of the standard generally applied to the legal claim at issue in the case: intentional infliction of emotional distress. In the Court's view, relying on a subjective approach in a case implicating free expression values would improperly allow the jurors to “impose liability on the basis of [their] tastes or views” (*Hustler*: par. 55). Likewise, the ECtHR majority argued that Mühl's painting did not objectively damage Meischberger's public standing, citing two factors in addition to the fact that the painting clearly constituted a “caricature of the persons concerned.” First, the Court observed that Meischberger “was certainly one of the less well known amongst all the people appearing on the painting and nowadays, having retired from politics, is hardly remembered by the public at all.” Second, the ECtHR noted, “the part of the painting showing him had been damaged [and] the offensive painting of his body was completely covered by red paint” (*VBK*: par. 35–36). Using these two observations to support its reasoning,

¹³ For an exploration of the concept in tort, see Bloustein (1964) and (more recently) Rosenthal Kwalla (2009). With regard to criminal law, see Raymond (2010).

the Court effectively cast aside any concern regarding objective damage to Meischberger's social status or human dignity.

The observations in *Hustler* and *VBK* allowed the courts to exclude the presence of harm in a convincing and relatively objective way – although the Court was split in *VBK*, which might suggest that more disagreement surrounds the definition of legally cognizable harm within the ECtHR than in the United States' legal system. In fact, one might describe both cases as 'easy' from this perspective: offensive as they might be, both satirical pieces can hardly be interpreted as inflicting objective harm, whether in the US or in the European sense.

Nonetheless, as other cases show, humor has a way of undermining objective criteria for speech regulation, thereby blurring the lines between unlawful harm and mere offense. Two recent examples are *Thilakawardhana v. The Office of the Independent Adjudicator* (England and Wales High Court, 2015) and *Z.B. v. France* (ECtHR 46883/15, 2021), focusing respectively on potential harm to individuals (especially "true threat") and to society at large. The claimant in *Thilakawardhana* was a medical student at the University of Leicester. After a fellow student ('PS') shared explicit photographs of a mutual friend, the claimant retaliated by posting a meme on PS's Facebook wall, featuring "a well-known actor in a popular film" (Liam Neeson from the film *Taken*) with the caption "I will look for you, I will find you. And I will kill you" (Figure 1).¹⁴

In addition to posting the meme above, the claimant also sent a private Facebook message to PS "containing about 170 words some of which were offensive and when taken in conjunction with the meme, could be construed as threatening." Following a complaint by PS, the University examined the claimant's conduct and established that he was not fit to practice medicine. His registration as



Figure 1: The meme at the center of the *Thilakawardhana* case.

¹⁴ A meme is defined by media scholars as a digital item which is "circulated, imitated and/or transformed via the Internet by many users" (Shifman 2014: 8).

a medical student was therefore terminated. Despite the claimant's insistence that the meme was "meant to convey humor," the High Court eventually confirmed the University's decision, since "PS felt sufficiently concerned at the time to raise the issue with the university and the police and ... 'any recipient' of such a message would have a real and justified fear of violence" (*Thilakawardhana*: par. 25).

Irrespective of the High Court's final decision, *Thilakawardhana* shows how humor can problematize the notion of objective harm, and prompt courts to consider different possible interpretations of the same text (often beyond the author's original intention). Similarly, in *Z.B. v. France*, the ECtHR reflected on the different meanings that could be attributed to a message originally meant as a joke – namely a T-shirt with the text "Jihad, born on September 11" and "I am a bomb" that the applicant had given his three-year-old nephew, referring to the child's actual forename (which is rather common in the Arab world) and date of birth. The applicant had then asked and obtained from Jihad's mother to have the child wear the T-shirt at least once at preschool. The Court eventually accepted the outcome of the national proceedings (two-month suspended sentence with a €4,000 fine to the applicant, as well as a one-month suspended sentence with a €2,000 fine to Jihad's mother), based on the argument that the T-shirt could reasonably be interpreted as a glorification of terrorism.

Some aspects of the ECtHR's reasoning in this latter case have been convincingly criticized (Nugraha 2021). At this stage of our analysis, however, we would just like to highlight the interpretive problems generated by humor in both *Thilakawardhana* and *Z.B.* In literary-theoretical terms, humor made it necessary for both courts to operate not only on a *hermeneutic* level (i.e. trying to identify the original intention and 'correct' interpretation of a given text), but also on a *meta-hermeneutic* one (i.e. reflecting on the possible different interpretations of the same text, and the rationale behind each different interpretation). As defined by Korthals Altes (2014), taking a meta-hermeneutic stance towards a given text means addressing questions such as the following: What can the text mean to different readers? What are the textual features and the contextual variables that might shift the interpretation in one direction or another?

As previously argued by Godioli (2020), the interpretive tools offered by literary meta-hermeneutics can be a valuable resource for judges in their attempt to consider the same humorous expression from a variety of perspectives. Unlike literary theorists, however, judges cannot limit themselves to mapping out different interpretations of the same text. After identifying alternative readings, they are also called to determine to what extent the author is liable for those readings. Returning to *Thilakawardhana*, for example: even if the Claimant intended it as a joke, to what extent is he responsible for the meme being interpreted as a threat? When dealing with such questions, courts normally resort

to the ‘reasonability’ test: in other words, the author is liable for any harmful interpretations that a *reasonable* reader could come up with (McDonald 2016). This criterion is adopted – more or less explicitly – in *Hustler* and *VBK*, as well as *Thilakawardhana* and *Z.B.* In other cases, however, humor’s evasiveness can go as far as undermining the wisdom of using the ‘reasonability’ test, thereby prompting courts to adopt a different approach.

From this perspective, the ECtHR case *Féret v Belgium* (15615/07, 2009) is particularly telling. Far-right politician Daniel Féret had been convicted by national courts for a series of anti-Islam leaflets and jokes, including most famously a photomontage blaming the “Couscous Clan” [= Muslims at large] for 9/11. According to the ECtHR majority, these jokes could indeed be construed as incitement to hatred – not by a ‘reasonable’ public, but rather by the ‘irrational’ audience allegedly constituting a significant portion of Féret’s voters. On these grounds, the majority found Féret liable for the harmful (hate-inciting) interpretation of his jokes:

Such a discourse is inevitably bound to create in the public, especially among the less informed (*moins averti*), sentiments of contempt, rejection, and hate towards foreigners. (*Féret*: par. 73)

In this case, the Court’s majority decided to abandon the usual reasonability test, in order to also consider the perspective of an allegedly irrational public, which could have interpreted Féret’s jokes and slogans as a call to arms. The dissenting judges’ opinion heavily criticized the majority’s deviation from the reasonability standard:

The judgment considers some human beings and a whole sector of society as “simpletons” incapable of responding to arguments and counterarguments due to the irresistible pulsion of their irrational emotions. (*Féret*: Sajó, Zagrebelsky and Tsotsoria, Dissenting; our translation)

The disagreement within the ECtHR in *Féret* further illustrates how humor can muddle the seemingly objective distinction between mere offense and harm. Being open to a broad range of interpretations and emotional reactions, humor forces courts to engage in a meta-hermeneutic exercise, comparing different responses (whether reasonable or not) and their respective contexts. From a literary-theoretical standpoint, the *Féret* majority decided not to focus exclusively on the ‘reasonable reader,’ but rather on the ‘presumed addressee’ – namely the public among which the author can rightfully expect their work to be circulated (Schmid 2013). While far-right extremists are not necessarily considered by the Court as a ‘reasonable public,’ they can definitely be counted among Féret’s ‘presumed addressees.’

To conclude, *Hustler* and *VBK* show how both the US Supreme Court and the ECtHR resort to relatively objective criteria in order to assess the harm in humorous

speech. Yet, our detour into *Thilakawardhana, Z.B.* and *Féret* exemplifies how humor can undercut those objective parameters, thus prompting judges to extensively consider different perspectives on the joke under discussion. As suggested in this section, literary theory can help us better understand the challenges courts face when assessing humor's potential harmfulness – in particular, the concept of 'presumed addressee' sheds light on the majority's reasoning in *Féret*. In contrast to that, the *Z.B.* decision could perhaps have taken the presumed addressee into greater account, since a preschool class (which was the only context in which the child ever wore his T-shirt) can hardly be seen as a politically inflammable audience, prone to being influenced by the applicant's purported glorification of terrorism; and the same could be argued about the only two adults – the preschool director and a teacher – who saw the T-shirt while helping the child get changed in the school bathroom.

5 Conclusion

This article analyzed and compared two landmark cases from the US Supreme Court and the European Court of Human Rights – namely *Hustler v. Falwell* (1988) and *Vereinigung Bildender Künstler v. Austria* (2007). Both are high-profile cases dealing with offensive satire, which were handled by the highest judicial authorities in the United States and Europe respectively. Our paper first discussed substantial differences between United States and European judicial systems, with particular regard to free speech regulation. Due to these differences, and the chronological distance between the two cases, *Hustler* and *VBK* stood out as an ideal starting point for a comparative analysis of humor-related jurisprudence, based on a 'most different systems' design. Our driving hypothesis was that, differences aside, courts in United States and Europe face similar challenges when grappling with humor.

These shared challenges are mostly caused by the elusive nature of humorous communication. More precisely, compared to other modes of communication, humor is particularly prone to blurring the line between the factual and the non-factual ("many a truth is said in jest"), and to generating widely different subjective interpretations ("one person's joke is another person's offense"). These two issues are addressed in the two core sections of our paper. In the first section, we discussed how – when describing the relation between satire and factual reality – both courts place special emphasis on exaggeration. In the second section, instead, we highlighted the necessity for judges to take different perspectives into consideration, when assessing whether a given joke can be deemed harmful to its target or society at large.

In both sections, we showed how insights from humor studies can provide a shared vocabulary to describe, compare and possibly improve the courts' behavior across different systems. For example, in light of our interdisciplinary approach, we argued that the courts' disproportionate emphasis on exaggeration (as opposed to other humorous devices, such as reversal or metaphor) can prevent judges from adequately reconstructing the underlying mechanisms and possible meaning of a given humorous text. Similarly, the notions of 'humor ideology' or 'metapragmatic beliefs' allow us to rationalize the differences between judges' stances towards satirical excess, while the literary practice of meta-hermeneutics – and the related concept of 'presumed addressee' – can be valuable for courts when attempting to step into the shoes of different readers/recipients of a given joke.

Inevitably, our findings are only a starting point. To properly map how humor research can provide transferable insights for analyzing humor-related jurisprudence, more comparative surveys are necessary, possibly expanding our scope beyond the United States and Europe. In future comparative work, it would be particularly interesting to also focus more specifically on recent cases, with a view to assessing how courts confront humor's interpretive challenges in the digital age: for example, what happens to the notions of 'reasonable reader' or 'presumed addressee' in a time of growing fragmentation between "irony-laden subcultures" (Nagle 2017: 7), where the line between e.g. racist satire and satire of racism is increasingly hard to define (Greene 2019)? Such issues clearly transcend the scope of this study; however, our approach will hopefully set the basis for future research in this direction.

Acknowledgment: We extend our gratitude to the participants of the Yale Law School Spring 2021 Freedom of Expression Scholars Conference and of the Temple Law School faculty colloquium, where we presented earlier versions of our work. Their thoughtful comments and suggestions have been extremely useful in the drafting of this article.

Research funding: This publication is part of the project "Forensic Humor Analysis: Rethinking Offensive Humor and Its Legal Regulation" (Principal Investigator: Dr Alberto Godioli, VI.Vidi.201.111, NWO Talent Programme Vidi SSH 2020) which is financed by the Dutch Research Council (NWO).

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