

Brigitte Adriaensen, Andrew Bricker, Alberto Godioli* and Ted Laros

The difficulty of judging jests: introduction

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On 25 September 2012, in Sorgues, in Southeastern France, a three-year old child was sent to preschool with a T-shirt reading “je suis une bombe!” [I am a bomb!] on one side, and “Jihad, né le 11 septembre” [Jihad, born on September 11th] on the other. The T-shirt played on the child’s actual name (Jihad, which is common in the Arab world) and date of birth (which was actually September 11th). Jihad’s uncle had given him the T-shirt as a birthday present, and asked his sister (Jihad’s mother) to have the child wear it at preschool at least once. Both adults claimed that they only intended this as a joke. However, upon seeing the T-shirt while helping the child to change in the bathroom, the preschool’s director was anything but amused; she reported the incident to the local prosecutor, who then charged Jihad’s uncle and mother with glorification of terrorism (or “apologie de crimes d’atteintes volontaires à la vie” [apology for crimes of willful attacks on life]).

Should the T-shirt be ultimately considered as an off-color joke, as a deliberate insult to the victims of 9/11, or as an outright apology for terrorism? And provided that the uncle *did* mean it as a joke, to what extent should he be held accountable for those words being construed as a glorification of terrorism? Whose interpretation should be considered legally relevant in this respect, regardless of the original intention? This is just one example of the intricate questions posed by humor in the context of free-speech adjudication. According to the Appeal Court of Nîmes, the T-shirt could reasonably be interpreted as a glorification of the 9/11 attacks. As a result, Jihad’s uncle was given a two-month suspended prison sentence, which was accompanied by a €4,000 fine, while Jihad’s mother received a one-month suspended sentence and a €2,000 fine. Under the name *Z.B. v. France*, the case was subsequently brought to the European Court of Human Rights

***Corresponding author: Alberto Godioli**, University of Groningen, Groningen, Netherlands, E-mail: a.godioli@rug.nl <https://orcid.org/0000-0002-6147-2760>

Brigitte Adriaensen, Radboud University, Nijmegen, Netherlands; and Open University of the Netherlands, Heerlen, Netherlands, E-mail: Brigitte.adriaensen@ru.nl

Andrew Bricker, Ghent University, Gent, Belgium, E-mail: Andrew.Bricker@ugent.be <https://orcid.org/0000-0003-4972-1282>

Ted Laros, Open University of the Netherlands, Heerlen, Netherlands, E-mail: ted.laros@ou.nl

(ECtHR), which eventually confirmed this ruling in a decision dated 2 December 2021.

Irrespective of what one might think of this judicial outcome, both the national and supranational proceedings tended to overlook the complex and multi-faceted nature of humorous communication. For example, the fact that the joke did not apparently contribute to any “debate of public interest” was used to support the conviction of Jihad’s uncle and mother. However, such an argument inevitably penalizes all forms of controversial humor that do not convey an explicit political or moral message, but might nonetheless still be worth protecting in the name of freedom of expression (Nugraha 2021). After all, a vast body of humor research (from Dynel 2018; Freud 1960) shows that jokes can have several legitimate ‘super-goals’ on a social and psychological level, well beyond expressing a direct stance on matters of public interest. Far from being an isolated case, *Z.B. v. France* thus points to a more general problem: even within well-established liberal-democratic traditions that champion free speech as a fundamental human value, humor is often denied consistent or sufficiently nuanced treatment.

This issue is explicitly stressed, for instance, in the dissenting opinion of another ECtHR case, namely *Palomo Sánchez and Others v. Spain* from 2011. The case revolved around a cartoon published by a group of delivery workers on their trade union’s bulletin, featuring two employees of the same company engaging in sexual activities with the company’s Human Resources manager. The two employees depicted in the cartoon had testified against the trade union in a previous court case. Upon being fired as a result of the publication of the cartoon, the delivery workers took the company to court and evoked their right to freedom of expression. After a long series of proceedings, the Grand Chamber of the ECtHR ultimately ruled against them. According to the dissenting opinion, however, the Court’s majority did not pay adequate attention to the figurative and humorous nature of the cartoon:

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 [ECtHR] 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.

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

The majority’s approach to satire in *Palomo Sánchez* is indeed at odds with the ECtHR’s behavior in other partially comparable cases, such as *Vereinigung Bildender Künstler v. Austria* (discussed by Godioli and Little in this volume). A similar degree of inconsistency can be found in humor jurisprudence across

various geographical and political contexts – whether it performs a legitimate function (e.g., political criticism or defusing tension) or an undesirable one (e.g., either cloaking or normalizing hate speech), humor tends to be dealt with in a relatively unpredictable and unsystematic manner. For example, legal scholars focusing on the United States have convincingly shown how US case law regarding humorous expression currently suffers from a lack of “adequate terminology that is grounded in theory”, which could help to clarify and harmonize the different outcomes reached in court (Todd 2016: 69).

In order to better understand the juridical and interpretive challenges posed by humor while also potentially producing a more consistent approach to humor in court, a closer dialogue is needed between humor studies on the one hand and legal scholarship and practice on the other. While innovative in several respects, such a dialogue is naturally embedded in the broader interdisciplinary framework of Law and Humanities. Scholars of Law and Humanities traditionally distinguish between three approaches: the ‘Law *in*’, ‘Law *as*’ and ‘Law *of*’ Literature/Humanities. The cross-disciplinary endeavor reflected in this special issue is probably closer to the third type, which “typically investigates the dynamics of laws that regulate the production and circulation of literature [or other types of cultural production], whether obscenity laws or copyright restrictions” (Anker and Meyler 2018: 8). As part of this broader tradition, the articles collected here set out to explore more specifically how insights from literary, linguistic or semiotic humor research can shed new light on judicial practice.

In this regard, the present collection also builds on a recent but growing line of studies that focus on humor-related case law while fruitfully engaging with relevant findings from humanities research. From 2010 to the present, numerous scholars have analyzed the difficulties of judging jests within legal systems ranging from the United States (Little 2011, 2018, 2019; Todd 2016), South Africa (Laros 2018: 127–162) and Brazil (Capelotti 2015, 2018) to Australia (Condren et al. 2008a, 2008b), the United Kingdom (Gavins and Simpson 2015; McDonald 2016) and the ECtHR (Alkiviadou 2022; Godioli 2020, the latter also in comparison with the US). Many of these contributions employ specific concepts from humor studies as tools to explore the interpretive issues raised by humor in court. Little (2011), for example, highlights how the notion of incongruity – as defined by a long tradition of theorists, from Kant to Raskin and Attardo – can help courts to detect and assess the humorous qualities of a given controversial statement, especially in the context of defamation law. Capelotti (2018) engages with classic humor theories (from Aristotle to Bergson) and more recent work on the multiple functions of humor in the public sphere (Lockyer and Pickering 2009) to stress some ongoing issues in relevant case law from Brazilian courts – including, among others, the aforementioned idea that humor “must focus on matters of social interest” in order to be

worthy of protection (268). Gavins and Simpson (2015) mobilize Sperber and Wilson's definition of irony as 'echoic mention' to assess the racist utterance at the center of an infamous case involving two English footballers (Regina v. John Terry). To conclude this brief overview, Godioli (2020) analyzes ten ECtHR cases focusing on visual humor in light of various theoretical models mapping the forms and functions of irony and satire (from Booth 1974; Korthals Altes 2014; Simpson 2003). These theoretical coordinates can be particularly helpful to courts when addressing key interpretive questions around humor, such as: Does the utterance clearly signal its humorous or satirical intent? What is the aim or message hiding behind the humorous surface? And how can courts delimit the spectrum of 'reasonable' interpretations that the author/speaker of a given joke should be considered responsible for?

While building on the growing body of studies outlined above, this special issue constitutes the first collection of articles focusing on this topic and seeks to advance an interdisciplinary dialogue between humor and the law. With its special emphasis on the role that research in the humanities might play in the legal and jurisprudential analysis of humor, the approach underpinning the following contributions should be seen as complementary to other fruitful and innovative lines of research at the crossroads of legal scholarship and humor studies. These alternative approaches include, for instance: 1) Recent work on how historical and contemporary forms of humor and satire have been shaped by – and respond to – legal restrictions (Adriaensen et al. forthcoming; Bricker 2022); and 2) Synchronic and diachronic studies on humor *about* and *by* judges or lawyers (Milner Davis and Roach Anleu 2018; Urbatsch 2022, especially Parts I and II). As stated by Milner Davis and Roach Anleu (2018) in the Introduction to their seminal volume *Judges, Judging and Humor*, "humour and the judiciary intersect in a wide variety of ways" (1), and only by integrating these different perspectives is it possible to do justice to the complexity of these interactions.

Moving back to the subject matter of this *Humor* special issue, our Introduction will be followed by eight contributions. Together, the first three pieces take the reader on a tour of humor jurisprudence across widely differing contexts, including Europe and the United States (Godioli and Little), India (Gangwar) and Latin America (Pedrazzini and Royaards). Alberto Godioli and Laura Little center their analysis on 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), respectively. Building on the comparison between these cases, as well as on other relevant examples from European and US jurisprudence, the authors identify two areas in which insights from humor studies can prove particularly helpful – i.e., the complex relation between humor and factual reality, and the need to consider different interpretations when assessing

the potential harm caused by a given humorous expression. With regard to the former problem, Godioli and Little emphasize that courts should not only think about humor and satire in terms of “exaggeration and distortion” of reality, but also pay more attention to other key humorous devices, such as comic reversal and metaphor. Theoretical concepts from literary studies and linguistics – from Bakhtin’s carnivalesque to Attardo and Raskin’s General Theory of Verbal Humor – prove particularly useful in this sense. Likewise, with regard to the interpretation of humor and the assessment of harm, the authors argue that the courts could benefit from relevant notions from literary theory, such as the ‘presumed addressee’, as defined by Schmid (2013).

Shivangi Gangwar’s article also reflects on the line between offense and harm in humorous communication, with a special focus on an Indian example – namely a Public Interest Litigation petition submitted to the Supreme Court of India in 2015, concerning the online dissemination of so-called ‘Santa Banta jokes’ (i.e., ethnic jokes targeting the Sikh community). Following a definition of ethnic jokes and a thorough contextualization of the chosen case study, Gangwar proceeds to a series of comparative remarks on humor-related cases from different judicial systems. However, the Santa Banta case is unique in its attempt to seek a constitutional prohibition on a specific type of joke, as opposed to giving rise to a civil suit or a criminal complaint. Despite the lack of actual court litigation focusing on humor in Indian jurisprudence, the article convincingly shows how an interdisciplinary approach to humor and the law taps into highly topical societal issues in contemporary India.

A comparative angle is also taken by Ana Pedrazzini and Tjeerd Royaards in their discussion of the legal controversies generated by two cartoons in France and Ecuador respectively – more precisely, *Charlie Hebdo*’s cartoon on the earthquake in Amatrice (2016) and *El Universo*’s cartoon on a police raid on the journalist Fernando Villavicencio’s house (2013). On the one hand, the authors analyze both cartoons from a discursive perspective, drawing on linguistic and semiotic theories to explore the enunciative, thematic, modal, rhetorical, and pragmatic dimensions of the chosen case studies. On the other hand, Pedrazzini and Royaards also investigate the reception of both cartoons in two complementary ways – i.e., by discussing how the satirical images were interpreted by the parties involved in the respective legal proceedings, and by presenting the results of a questionnaire answered by 68 cartoonists from 33 countries. Through its comprehensive combination of discursive, legal and empirical perspectives, this article effectively captures the multilayered nature of juridical debates surrounding humorous expression while also offering a promising basis for future mixed-method research on humor and free speech.

While the opening triptych mostly focuses on (relatively) recent cases, the fourth and fifth article in the collection add more diachronic depth to the special issue, by investigating the legal treatment of satirical texts in the Netherlands in the eighteenth century (van Dongen and Veldhuizen) and in the Soviet Union in the 1960s (Kriza). Emanuel van Dongen and Martine Veldhuizen turn their focus towards the legal limits of free speech when it comes to humorous artistic works produced in the late-eighteenth-century Dutch Republic. They do so by analyzing a court case centering on the parodic item “Reports from Babel” in the anonymous Dutch journal *Ismaël* from 15 September 1788. This item was published only a year after the Patriotic Revolt – a revolt of so-called Patriots (a group of revolutionaries who embraced Enlightenment ideals) against Orangists (i.e., supporters of Stadtholder William V) – had taken place in the Low Countries, and was interpreted as targeting *inter alia* the Sovereign (William V) and a prominent Orangist official of the City of Utrecht. The local sellers of *Ismaël* were prosecuted for having committed the (Roman) private delict of *iniuria* (defamation). Employing literary and philosophical-linguistic theories by Austin and Grice among others, van Dongen and Veldhuizen analyze the arguments used by the prosecution and the defense, and determine how far parodic speech could go in the late-eighteenth-century Low Countries—that is, at a time when the ideal of free speech was on the brink of becoming a fundamental right enshrined in the Dutch constitution and other European nations.

Elisa Kriza’s article focuses on a different historical and geographical context. It analyzes the 1966 USSR trial of the Soviet writers Yuli Daniel and Andrey Sinyavsky, who had been charged with publishing satirical literary works that defamed the state and agitated the public so as to undermine the state. Kriza analyzes the trial’s proceedings and the debates that surrounded the trial in order to better understand the phenomenon called satire. Building on James E. Caron’s theory of satire, she identifies seven areas of tension that complicate the reception of satirical texts – issues surrounding ethics and aggression, seriousness and non-seriousness, truth and fiction, selective empathy, morality, political versus non-political stances, and the use of a fictional persona. Considering the growing relevance of these tensions in the reception of satire in the digital age – as recent cases in Europe, the US, and elsewhere demonstrate – Kriza’s effort to understand thoroughly the nature of satirical speech becomes ever more pressing.

The remaining sections broaden the scope of the collection in different ways. First, Kelly Breemen and Vicky Breemen’s contribution tackles the distinct juridical problems posed by a form of humor which deserves particular attention in the context of this special issue: parody. The authors analyze the European Court of Justice’s decision in the landmark case of *Deckmyn v. Vandersteen*, which centered on a parodic drawing modeled after a cover of the popular Belgian comic

book series *Suske & Wiske*. Juxtaposing literary theoretical positions (*inter alia*, of the literary theorist Gérard Genette) with the ECJ's reasoning and the preceding Advocate General's opinion in the case, they identify opportunities for an interdisciplinary dialogue between law and the humanities, with a view to clarifying how the concept of parody may be mobilized in a legal context. Moreover, as parody is today not only regulated by law, but also by technology, the authors address the conceptual challenges posed by parody in the digital domain.

After the article by Breemen & Breemen, we narrow our focus to German law. In an interview that we as editors conducted, the Frankfurt-based lawyer Gabriele Rittig narrates her experiences as legal counsel for the satirical magazine *TITANIC – Das endgültige Satiremagazin* (TITANIC – The definitive satire magazine). Having worked for the magazine since the 1980s, Rittig has dealt with powerful litigants, including the Vatican, multinational corporations, and high-profile German politicians. Based on her extensive experience, she sketches and explains the shifts in societal and judicial attitudes towards satire that took place in Germany over the last four decades. Moreover, she assesses the adequacy of German legal concepts, such as artistic freedom, and the sustainability of Germany's current judicial approach towards satire in an age of globalism, multiculturalism, and digitalization.

Last but definitely not least, the special issue ends with an afterword by Jessica Milner Davis, which takes the reader on a fascinating journey into the multiple interactions of humor and the law in Australia – from a 1962 case focusing on an allegedly obscene artwork to more recent debates on parody and copyright law. Drawing on these Australian examples and the author's own experiences as a leading humor scholar, this final piece highlights the need for terminological clarity when reflecting on how humor is approached in courts of law, while also making a compelling case for the importance of interdisciplinary research. Milner Davis's afterword perfectly captures the spirit underlying this issue of *Humor* as a whole, and we could not think of a more fitting way to wrap up the collection.

Needless to say, the texts collected here hardly exhaust all of the possible angles for interdisciplinary dialogue between humor studies and jurisprudential analysis. Not by chance, most of the articles end by outlining promising avenues for future research in this growing field – from empirical investigations into the reception of disparaging humor to qualitative and quantitative perspectives on the moderation of potentially harmful content in the digital age. Nevertheless, we hope that the papers featured in this issue will significantly contribute to consolidating this line of research while encouraging further collaboration between scholars from both law and the humanities (notably, both disciplines are well

represented in the collection, as shown by the authors' profiles). Most importantly, each contribution showcases different ways in which insights from humanities research can pave the way for a more consistent, nuanced and fair approach to humor in courts of law – not by forcing humor interpretation to comply with unattainable objective standards; but rather by suggesting a more systematic and theory-grounded approach to the inevitable, vital subjectivity of interpreting (and judging) jests.

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Bionotes

Brigitte Adriaensen

Radboud University, Nijmegen, Netherlands

Open University of the Netherlands, Heerlen, Netherlands

Brigitte.adriaensen@ru.nl

Brigitte Adriaensen is a Professor of Hispanic Studies at Radboud University and a Professor of Literary Studies at Open University. She was the principal investigator of the project “The Politics of Irony in Latin American Literature on Violence” (funded by the Dutch Research Council, 2011–2016, NWO Vidi grant) and published on this topic in journals like *The European Journal of Humor Research* and *Revista Iberoamericana*.

Andrew Bricker

Ghent University, Gent, Belgium

Andrew.Bricker@ugent.be

<https://orcid.org/0000-0003-4972-1282>

Andrew Bricker is an Assistant Professor of English in the Department of Literary Studies at Ghent University and a Senior Fellow at the Andrew W. Mellon Society of Fellows in Critical Bibliography at the Rare Book School at the University of Virginia. He is the author of *Libel and Lampoon: Satire in the Courts, 1670–1792* (Oxford University Press, 2022).

Alberto Godioli

University of Groningen, Groningen, Netherlands

a.godioli@rug.nl

<https://orcid.org/0000-0002-6147-2760>

Alberto Godioli is Senior Lecturer in European Culture and Literature at the University of Groningen, and program director of the Netherlands Research School for Literary Studies (OSL). He obtained his PhD in 2012 from the Scuola Normale Superiore of Pisa. He is currently Principal Investigator on two international projects on humor and the law, namely “Forensic Humor Analysis” (funded by the Dutch Research Council, 2022–2027, NWO Vidi grant) and “Cartoons in Court” (Network of European Institutes for Advanced Study, 2020–2023, Constructive Advanced Thinking grant).

Ted Laros

Open University of the Netherlands, Heerlen, Netherlands

ted.laros@ou.nl

Ted Laros is an Assistant Professor of Literary Studies in the Department of Literature and Art History at the Open University of the Netherlands. He is the author of *Literature and the Law in South Africa, 1910–2020: The Long Walk to Artistic Freedom* (Law, Culture and Humanities Series, Fairleigh Dickinson University Press, 2018; Open Access edition 2020).