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Hands up, Bozo! The difficulties of arresting humour

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Abstract

Humour is an elusive topic within the legal sphere. Contemporary discourse frequently struggles with whether comedians should be legally accountable for their often-controversial humour, juxtaposing the intricacies of humour's nature against the principle of free speech. This article aims to demonstrate the inadequacy of judicial resources in addressing humorous expressions. Initially, I examine the varied judicial treatments of humour across different legal systems. Subsequently, I highlight the inherent difficulties in criminalizing humour, whether through aesthetic judgments or evaluations of the comedian's intentions, as both tend to result in an excessive interpretation of the performer's expression and motives. In the third section, I critique the models proposed by Godioli and Mosaka, discussing the benefits and limitations of these frameworks in establishing a legal standard for assessing when humour crosses the line and its adjudication in court. Ultimately, I contend that humour, particularly that of comedians, ought to be evaluated from a societal perspective, exempting it from legal constraints. I propose alternative solutions to confront offensive humour that bypass formal justice systems, such as enhancing media literacy, endorsing comedians who champion social values, and deterring the patronage of certain comedic genres.

Keywords: comedy, disparaging humour, legal regulation, free speech, intent.

1. Introduction

Despite being the most popular and influential comedian in America, during the 1960s, Lenny Bruce was constantly harassed by law enforcement. Starting in 1961 until the end of his days, he was arrested and prosecuted on multiple occasions for obscenity and disturbing the peace. Every time, Bruce refused to acquiesce to the charges against him and instead chose to represent himself in court, arguing for his right to free speech. Ultimately, Bruce was found guilty of obscenity and sentenced to four months in a workhouse in 1964. Allegedly, his act included profane words such as 'motherfucker', 'cocksucker', 'fuck, 'shit' and 'ass' (Garbus, 1971, p. 100). He was set free during the appeals but died untimely in 1966 just before his conviction was overturned.

Today, Lenny Bruce's style of comedy is a little outdated, but so is the controversy around his jokes. For most of us it is hard to even understand what all the fuss was about. Nonetheless,

Bruce's legacy has never been so alive. He has become a sort of martyr of humour inspiring comedians to cultivate their craft against any political and social censorship. As Jason Zinoman wrote for the New York Times, "his comedy has been obscured by his reputation as a truth-telling social critic and boundary-pusher who became a symbol for free speech after being arrested multiple times" (Zinoman, 2016).

Bruce's unfortunate conviction highlights how troublesome the regulation of humour is. His is such a far-fetched case for our times that it calls into question our competence to legally assess disparaging humour. In the following pages, I will argue that our judicial resources to deal with it are deficient for they disregard the nature of humorous expressions or because they reduce the judicial functions to mere aesthetic opinions. For this purpose, I will first outline what has been the historical judicial approach to humour –independent from any judicial system. Then, I will point out the main challenge when criminalizing humour; namely, proving intent, and I will put forward a probative model for doing so. Third, I will argue why humorous expressions resist being ascribed a secondary intent and how the proposed model fares when trying to judicially establish a malicious intent to humour. Finally, I will claim that humorous expressions, customarily regarded as so, should be left off the hook of any legal regulation, just as other expressions are.

At the end of the day, it is crucial to recognize that humour can be offensive or even harmful, as scholars like Lockyer and Pickering (2006) have noted. This paper does not deny the moral dimension of humour but rather highlights the deficiencies in the legal tools used to regulate it. While legal intervention may sometimes be necessary, it should be applied sparingly. I do not argue that humour is always innocuous or inoffensive, nor that it should escape regulation altogether. It is clear that some humorous expressions can rightfully be deemed derogatory and offensive. Moreover, it is important to take a moral stand on indecent or offensive humour. However, we should seek alternative mechanisms to address disparaging humour, as legal regulation often risks becoming a form of censorship, given the inherent difficulty of criminalizing humour.

For the sake of feasibility, I will mainly refer to one specific genre of humorous objects (i.e. jokes or humorous expressions). My decision to focus on verbal humour is because most of the comedians who have faced any legal charges used this kind of jokes and because verbal humour is the kind in which humorous intent is most easily confused with declarative intent. Nevertheless, I think that the claims I will put forward in this paper are also true for other forms of humour, such as physical or visual humorous expressions.

2. Humour in the courtroom

Humour is an innate capacity of human beings. We can create humorous objects as well as recognize them, perceive them, and laugh at them. Ironically, our understanding of humour is problematic. Most of the time, we deal with humour in an intuitive, but deficient way. We have a hard time articulating our most basic beliefs on it, such as, why we find something humorous or not, and what is humour at all.

Defining humour is just the starting problem. Although there are plenty of definitions of humour, most of them seem somehow inadequate. For each one of humour's definitions, it is possible to find a myriad of phenomena or situations that it is either omitting or dubiously including. It just seems that there is no way around. In fact, most scholars have abandoned the idea of finding a single definition for humour (Roeckelein, 2002, pp. 14-24). It just seems weird trying to put humour's essence into a rationale. As Laura Little (2009) puts it: defining humour makes us act as a wet blanket. "After all, defining humour is about as ironic as defining

postmodernism: the object to be defined mocks precise exposition. Humour itself rejects attempts to capture the essence of anything" (p. 1240).

In spite of the lack of a legal definition of humour, whenever it has been taken to the courtroom, it has been regarded as a matter related to freedom of expression and the limits or scope of its exercise. The two highest authorities for free speech regulation and protection are the US Supreme Court and the European Court of Human Rights. The former "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" (Godioli & Little, 2022, p. 306). They substantially differ in how they handle offensive humour. "Europe is generally considered to be more likely than the United States to restrict offensive material" (p. 307). This implies a greater proclivity of the (ECtHR) to restrict some types of speech that may be considered harmful to human dignity or public order, whereas the United States is generally considered to be the most protective of freedom of expression and its various forms. Although the legal frameworks vary in their strictness, the fundamental difficulty of regulating humour—particularly in discerning intent and sanctioning offensive humour—remains a challenge across all legal systems. For humorous expressions are "particularly prone to blurring the line between the factual and the non-factual", and "to generating widely different subjective interpretations" (p. 323). I will mostly refer to cases related to the US Supreme Court, and I will only refer to a European case for the sake of the argument.

Historically, the charges against disparaging humour (verbal or non-verbal) have taken one of two forms: obscenity or hate speech. On the one hand, some humorous expressions have been accused and ruled as obscene for regarding them as indecent or excessively offensive under the moral standards of the time. In 1978, the Federal Communications Commission (FCC) fined a radio station for airing George Carlin's comedy routine that included a list of seven words considered to be vulgar. The Supreme Court upheld the FCC's decision finding that the broadcast of the "seven dirty words" was justifiably restricted because it was indecent and could be harmful to children (Tremblay, 2003, pp. 218-233). Obscenity refers to expressions or acts deemed indecent "based on its patent offensiveness and prurience in the locale at a given time" (Garner, 2009, p. 360). Most of the time, this characteristic is associated—but not exclusively—with the depiction of sexual or excretory functions that lack any scientific or artistic merit. However, regulating controversial humorous expressions under this category is problematic for different reasons.

> First, a court may apply a standard of taste that deviates from mainstream or consensus views. Mainstream views may be difficult to identify and subject to varying interpretation; indeed, the striking indeterminacy in the trademark cases suggests difficulties in identifying a uniform standard of propriety. A second, related problem is the strong likelihood in a pluralist society that tastes differ across social strata and that courts systematically prefer one social class's tastes over another.
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> (Little, 2009, p. 1287).

A third problem is the fact that aggressive humour and comedy have an artistic value that may seriously be hindered by a regulation based on taste. Considering this, it's reasonable to question whether the exercise of a fundamental right, such as freedom of speech, can be subject to such an inconsistent and risky criterion. As Lenny Bruce (1992) questioned back in the day: "What does it mean for a man to be found obscene in New York? This is the most sophisticated city in the country. This is where they play Genet's The Balcony. If anyone is the first person to be found obscene in New York, he must feel utterly depraved" (p.155).

On the other hand, comedians have also been charged of hateful speech for considering that some of their jokes incite violence, discriminate, or hate on others. For example, in 2009

Dieudonné M'bala M'bala was convicted of "public insult of people of Jewish faith or origin" for a comedy show he performed with Robert Faurisson, a Holocaust denier. The show, which was called "Dieu est grand, je suis pas raciste!" (*God is great, I'm not racist!*), included jokes and comments that were considered to be anti-Semitic. M'bala M'bala was fined €10,000. He appealed the conviction, but the Paris Court of Appeal upheld the judgment in 2011. The European Court of Human Rights dismissed any violation to his right to freedom of expression in 2015 (ECHR, 2015). Hate speech is usually defined as a speech with no other meaning than to express hatred for some groups or incite violence. The *International Covenant on Civil and Political Rights* (1966) warns against "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (999 UNTS 171, part III, art. 20). Whilst the UN Strategy and Plan of Action on Hate Speech defines hate speech as "any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor" (United Nations Strategy and Plan of Action on Hate Speech, 2020). In all cases, there seems to be no agreement on what hate speech amounts for. Instead, the idea of hate speech is still quite subjective and dependent on the referee's opinion. Even the UN, despite offering the broadest definition of hate speech, arbitrarily leaves out of the definition several possible offensive speeches specifying that "hate speech can only be directed at individuals or groups of individuals. It does not include communication about States and their offices, symbols, or public officials, nor about religious leaders or tenets of faith" (United Nations, 2023). Which raises the question of who determines what is hateful and what is not? What makes political and religious leaders immune to hate speech, but not social or religious groups?

In an attempt to increase objectivity in regulating vicious forms of speech, some courts have introduced the notion of harm (Godioli, 2020; Godioli & Little, 2022). This way of assessing humour is seemingly more objective, since it rules humorous expressions based on the tangible impact they actually or potentially have. This includes physical harm, such as bodily injury or property damage; economic harm, such as financial loss or damage to ones' business or reputation, and emotional harm, such as severe emotional distress or psychological trauma. Hate speech would then be a specific type of harmful speech that targets a person or group because of their protected characteristics. Notwithstanding, limiting humour based on its harmfulness doesn't make things easier since any humorous expression can hardly meet the requirements of this type of offense whenever it is rigorously applied.

In the US Supreme Court case of Hustler Magazine, *Inc. v. Falwell* (1988) when the harm standard was followed to resolve the controversy surrounding a comic cartoon, it turned out into an exoneration of a clear-cut pejorative expression. The Hustler Magazine had published a parody of a Campari ad that featured Jerry Falwell, a conservative televangelist. The parody depicted Falwell as having an incestuous relationship with his mother while drunk on Campari. Falwell sued Hustler Magazine, Inc. and its publisher, Larry Flynt, for invasion of privacy, libel, and intentional infliction of emotional distress. The Court ruled unanimously in favour of Hustler Magazine, Inc. holding that the parody did not contain a false statement of fact about a public figure, even if the parody was outrageous and caused the public figure to suffer embarrassment or shame (Brewer, 2003). By dismissing that the magazine ad was a statement of fact about Falwell, or an objective threat to his safety, "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" (Godioli & Little, 2022, p. 319). The case of *Hustler v. Falwell* highlights the challenges in proving that humour can be legally regarded as harmful. For in order to prove a joke as offensive it requires evidence of both an objective harm suffered and a causal link that attaches the humorous expression to the undesirable outcome. Except in cases involving injuries caused by pranks or physical jokes, the task of establishing a

connection between a humorous expression and an alleged harm is highly difficult. How can a joke be sufficiently pinned to an unfortunate event, in the midst of other relevant factors? The best shot at doing it is by establishing the comedian's intent to produce a vicious effect on the victim. Otherwise, a verbal act cannot be reasonably signalled as the cause of an objective harm. However, if the harmful intent underlying a joke cannot be sufficiently proven, then charging it as harmful or disparaging becomes just a subjective value judgment. This raises a technical difficulty common to all legal systems, namely, how to prove intent in court, which is magnified in the case of presumably harmful humorous expressions.

3. Proving intent

Intent plays a crucial role in both common law and non-common law jurisdictions, as it distinguishes between criminal and non-criminal conduct. A person cannot be held criminally liable for an act unless they had some form of intent to commit that conduct. Consequently, intent can either define a specific criminal offence (e.g., murder or burglary) or serve as a mitigating/aggravating factor in the commission of a crime (e.g., first or second-degree homicide).

The importance of intent in determining the legality of conduct is only matched by the difficulty of proving it in criminal and civil courts. The difficulties in proving intent start from an ambiguity itself about what it means to intend something. The legal meaning of intent is hardly established by any statute, but it is generally agreed upon that it means a state of mind or mental resolution (*mens rea*) accompanying a forbidden act (*actus reus*). In other words, intent is someone's purpose to produce an effect as a result of his conduct. Most jurisdictions have a broad array of legal concepts to assess different kinds of *mentes reae* that may entail some kind of legal accountability for prohibited actions, including actions leading to undesired consequences:

> several jurisdictions have adopted disaggregated approaches that break down intention into several smaller concepts such as knowledge, foresight, willingness, belief, hope, desire, purpose, suspicion, awareness and the like. These smaller intermediate concepts are also typically conceived of in hierarchical terms. For example, while civilian jurisdictions are known for their binary models (*dolus* and *culpa*) of fault, *dolus* is sub-divided further into three hierarchical levels, namely: *dolus directus* [direct intent], *dolus indirectus* [indirect intent] and *dolus eventualis* [consequent intent]. Among common law jurisdictions, the U.S. model consisting of purpose, knowledge, recklessness, and negligence is widely embraced. In either case (common law or civil law), intention in its 'purposive' or 'desirous' form sits at the very top of the hierarchy of fault.
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> (Mosaka, 2023, p. 9).

In spite of the deep repertoire of legal instruments we have to legally assess intent, the task of proving any kind of it is still quite challenging. The difficulty of this legal task arises from two facts: the subjectivity of the intentions and the universal proclivity of the accused to deny the charges against them along with the intention of transgressing the law. On the one hand, there is a disproportion between the object to be proved and the means to do so. Whilst intention is a state of mind—whether it includes desire or not—, "the evidentiary facts from which intentionality inferences are drawn and the probative standards against which they are evaluated are 'external' and 'objective'" (Mosaka, 2023, p.3; Coffey, 2009, p.394). Judges or juries—depending on the judicial system—must inferentially determine what was going on in the defendant's mind at the moment of his actions. Although the process of proving intent is based on the Law of Evidence, it is still quite a tentative and discretionary undertaking. Trying to discover the inner world of a person based on the interpretation of extramental phenomena,

inevitably, faces "the danger of drawing inferences that are too far stretched (not immediate) between antecedents and consequents that are too remote (i.e. without an inferential universal or common ground)" (Mosaka, 2023, p.3). On the other hand, the fact that the defendant always denies his intent by exercising his right against self-incrimination, increases the argumentative responsibility of the plaintiff. In criminal courts—except in cases of blazing wrong-doing—the defendant's bare denial of his intent is enough to provisionally fix the burden of proof on the plaintiff's side. This implies, among other things, that to prove deviant intent the plaintiff must offer sufficient reasons and evidence that not only suggest the plausibility of intent, but also falsifies the testimony of the agent who performed the action—the only one, by the way, to whom the mental phenomenon is accessible.

Added to this is the difficulty that almost no behaviour corresponds linearly and univocally to a single intention. Put simply, human actions are always pluri-intentional. Our external acts are motivated by a variety of ends or purposes, many of which are not even transparent to ourselves. Or are we certain why we do everything we do? Of course, in deliberate actions, the existence of guiding motives or clearer intentions is presumed, which, in principle, are cognizable from the third person viewpoint and could be reasonably presumed based on some relevant extramental elements. However, possible prohibited effects do not follow exclusively from deliberate conduct; and second, even when this is the case, legal intentionality—understood as the mental resolve to perform an action knowing the possible prohibited consequences and possibly desiring them—overestimates the human ability to dissect and decode other people's mind and explicitly oversimplifies the motivational complexity of human actions.

Naturally, the law simplifies complex human behaviours to ensure the legal system remains functional. In practice, it relies on various mechanisms to infer the intention behind actions, primarily based on context. For example, a joke told during a stand-up comedy routine is generally understood as an attempt to entertain. However, the same joke, if delivered in parliament or during a news broadcast, might be interpreted quite differently—potentially as a serious statement or even an offensive remark. While context helps clarify intent, it also introduces the risk of subjective interpretation in judicial proceedings. This subjectivity can lead to inconsistent rulings, where the same expression may be judged differently depending on how the context is perceived, thereby threatening the principle of free speech. Our experience shows that professional comedians are often put on trial for an alleged intent to harm or discriminate, while offensive statements made in public—without any suggestion of humour—regularly go unnoticed.

Thus, the subjective nature of intentions poses an enormous probative challenge for the law. The problem is not whether judges or legal theorists believe or not that it is possible to inferentially know people's minds, the real hurdle appears when jurisdictions adopt this conviction as part of the procedural justice. For by doing so, they either impose a monumental burden on plaintiffs or as happens in most cases, they become complacent with inconsistencies in the administration of justice. "[I]t is one thing to hold a substantive commitment towards an individualised and subjective conception of fault [i.e. as a mental aspect of the individual that can and must be grasped], but quite another to be able to prove it" (Mosaka, 2023: p.8).

The fundamental structure of an argument aiming to establish legal intent follows the form of a *modus ponens*. This entails a logical structure composed of an antecedent, representing the evidentiary facts, and a consequent, representing the fact needing to be proved. However, when dealing with intentions, this inference cannot rely on purely deductive or inductive reasoning. Instead, it must be framed within a defeasible logical framework that permits qualifying the conclusion using a modal operator. Since there are two fundamental variants of criminal intention – deliberate (direct) and non-deliberate (oblique) – the intermediate proposition allowing the inference of intentionality from evidentiary facts must differ in each case.

> The inference for both the deliberate and non-deliberate (oblique) forms of intention is presumptive (using the 'plausibility,' →, quantifier). The major difference lies in the nature of the antecedent evidentiary facts. The inference for the deliberateness model (desire or purpose) of intention is drawn from knowledge (K) and desire (D), whereas for the expanded non-deliberateness model (oblique intention) the inference is drawn from knowledge and control (C). These intermediate propositions (knowledge, desire and control) are in turn inferred from the kinds of evidentiary facts (antecedents) […].
>
> (Mosaka, 2023, p. 13)

As outlined by Mosaka (2023), a probative argument concerning intention typically consists of two preliminary arguments. The first argument establishes the plausibility that the defendant could have been aware of the undesirable consequences, while the second argument establishes the plausibility that the defendant desired, or at least could have avoided, such consequences.

The underlying concept here is that in order to presume intent leading to a prohibited effect, two critical aspects must be proven. First, it must be demonstrated that the defendant could have known about the effect, as without this knowledge, intent cannot be inferred. Second, it should be reasonably assumed that the defendant either desired to achieve the effect or, failing that, had the control to prevent it.

It is important to note that both elements (knowledge + desire or control) need to be established to presume either type of intent. In any case, the validity of these tests hinges on the relevance of the evidence presented and its ability to reasonably support the respective conclusions, even though they remain subject to revision.

Once the plausibility of the knowledge and desire for a given deviant intention is established, the probative argument for a direct intention would take the form: "1. Consequences that are Known and Desired (K.D) plausibly are Intended. 2. Consequence X was Known and Desired. 3. ∴ Consequence X plausibly was Intended" (p.14). In turn, having established that it is reasonable to believe that defendant could have known of the prohibited consequence and done something to avoid it, oblique intent would be proved as follows: "1. Consequences that are Known and Controlled (K.C) plausibly are Intended. 2. Consequence X was Known and Controlled. 3. ∴ Consequence X plausibly was Intended" (p.14).

4. Fugitive humour

Of course, in all legal systems there is some regulation of humour. Not even in the US, humour enjoys absolute immunity under the First Amendment. However, it is noteworthy that most of these regulations address the content and circumstances of the humour while ignoring the intentionality of the expression. For example, under the US First Amendment, humour that is deemed to pose "a clear and imminent threat to public safety" (Little, 2014, p. 447) may be restricted, such as when someone pranks of bombing an airplane. Similarly, "the First Amendment does not prevent the government from implementing reasonable time, place, and manner restrictions on humorous expressions" (Little, 2014, p. 447), such as limiting the reading of jokes from a sound truck late at night. These regulations focus on content and context, not on the humourist's intent to amuse or offend.

Internationally, legal systems in places like Europe and Latin America impose stricter limits on humorous speech, especially to prevent harm related to hate speech, discrimination, or defamation. While these limits aim to protect vulnerable groups or maintain public order, they often result in inconsistent rulings or the selective protection of certain institutions, figures, and groups. Thus, while legal restrictions vary, the core issue of regulating humour remains universally challenging. For there is a thin line to walk between making justice and censoring

others by imposing aesthetic criteria. For example, sanctioning indecent or obscene humour—as in Lenny Bruce's case—seems to involve some kind of control over language.

> The right to decide what constitutes "true" language and thereby the right to police it has always been reserved by the ecclesiastical and feudal powers. Therefore, if obscenity in expression, a distinctive trait of the "impure language" of the "common people", delivers offence, it does so to the proponents of the "truest" forms of expression. The mental territory threatened by obscenity here being the right to the "correct" use and exclusive ownership of language. […] Obscenity in any form of expression, be it art or language, is a process of these exclusive rights being revoked, a facilitation of the recovery of ownership of language from the elite and the powerful.
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> (Revi, 2015, p. 101)

Instead, implementing indirect restrictions on humour through civil lawsuits for alleged harm caused by jokes or other humorous communications present deeper challenges for the legal concepts and models available to regulate humour. Humorous expressions are a unique form of communication—whether verbal, like a joke; visual, like a meme; or physical, like someone slipping on a banana peel. But what makes humorous expressions different from others? A speech act is a joke or humorous expression if its main intent is to be funny and make people laugh. Without it any given expression cannot be regarded as humorous, even if it is in fact funny or laughable. As when John F. Kennedy stated in his famous speech to West Germans, *Ich bin ein Berliner* ("I am a Berliner") trying to express American solidarity with the people of Berlin, but also unintentionally implying that he was a jelly doughnut. As funny as the ambiguity was, Kennedy did not tell a joke, nor it should be thought as if he used any kind or form of humour to reassure and encourage Berliners since the intent of being funny is missing in his words. Consequently, humorous expressions can be described as speech acts whose illocutionary act is to make people laugh—whether they achieve the corresponding perlocutionary act or not. In this paper, I will focus on verbal humour because it is the form of humour more susceptible of being legally targeted and because verbal humour is the kind in which humorous intent is most easily confused with declarative intent. Nevertheless, I think that the claims I will put forward are also true for other forms of humour, such as physical or visual humorous expressions.

The possibility of legally regarding a joke as hateful or harmful speech depends on whether we can attribute to that speech act a second malicious or deviant illocutionary act. The juridical problem in this respect lies in the evidence with which such a further illocution can be proved, or, in other words, in the evidence available to prove that a humorous expression is a complex speech act that harbours a vicious intent in addition to the illocution of making someone laugh.

It is particularly difficult to ascribe a secondary intent to humorous expression for when we regard a speech act as humorous, we defuse their potential assertiveness relinquishing the presumption that the humourist aims to convey their thoughts, feelings, or beliefs. Humour is inherently ambiguous, but more important is that humour cannot be considered seriously about its propositional content (Kuipers, 2008). Humorous expressions are not declarative statements in any form; they lack propositional truth. In a sense, jokes are akin to questions: speech acts with propositional content, yet devoid of any belief or moral commitment on the part of the speaker or writer. This lack of commitment is not because it does not exist at all, but because the speech act doesn't provide enough grounding to presume a potential underlying intent. Presuming such an intent amounts to overinterpretation. Just as when a reporter questions a politician or artist, it does not imply that the reporter intends to advance an opposing or unfavourable opinion regarding the interviewee or their actions; similarly, a malicious joke does not imply that the comedian aims to pass judgment on the subject of the joke. Humour is inherently ambiguous and non-serious about its propositional content. In essence, the concealed

intention behind a controversial humorous expression is something we cannot infer about the speech act itself based on circumstantial evidence. In fact, the comedian's secondary intent might be completely contrary to the way the message is interpreted.

Does the context or audience change this? No. Not only because nowadays it is hard to confine the audience to those physically present when the joke is told. But also, because the comedian's expression doesn't transform into a declarative statement or alter its intent based on the audience. A joke remains a joke, irrespective of the interpreter or their perspective. While a joke can fall short of eliciting laughter and be a 'bad joke,' this does not change its intent: to amuse. As Dave Chapelle—a famous and controversial comedian—pointed out in his 2017 special, *The Bird Revelation*, "Sometimes, the funniest thing to say is mean. […] So, I say a lot of mean things, but you guys got to remember. I'm not saying it to be mean. I'm saying it because it's funny" (Chappelle, 2017: 00:15-00:30). Attempting to attribute any further intent to a joke is inappropriate and misleading. No matter how overt a joke's underlying message may appear, it should never be definitively ascribed to the comedian as a belief, feeling, or desire. Admittedly, this might be somewhat counterintuitive in some cases, but even if we all collectively believe that Clark Kent wears red underwear, that does not allow us to definitively conclude that he is Superman.

We can refer to Mosaka's (2023) probative model of legal intention and assert that it's not necessary to fully understand the comedian's second-order intentions to hold him accountable for his words. On the surface, it might suffice to find the disparaging interpretation plausible to establish some level of liability. Nonetheless, merely loosening the argumentative standards to legally infer intent does not provide a solution. If we acknowledge that humorous expressions are primarily characterized by an intent to provoke laughter, then, we cannot straightforwardly ascribe direct intent to any joke that is alleged to be malicious in nature. As soon as we deem a speech act as humorous, we assume the comedian is deliberately trying to be funny and his main desire is to elicit laughter. Perhaps, then, humorous expressions can indirectly aim to something else. While it is reasonable for this to be the case, it is difficult to prove in court without infringing on freedom of expression to some degree. For to do so, under the Mosaka model, it would be necessary to infer that the comedian was able to anticipate the harmful consequences imputed to him or that it was within his control to avoid them. However, this has several problems for the specific case of humour. First, there seems to be an ambiguity in the probative model regarding what foreseeing means. Even the broadest meaning of it, as a brief awareness of the possible prohibited consequences of someone's act, is troublesome. As Mosaka acknowledges, there are multiple possible prohibited consequences to a single action making it hard to reasonably expect the actor to foresee them all and be accountable of all of them "the range of prohibited consequences is not coextensive with the scope of the opponent's intention" (p.4). It seems, then, that only the most immediate or probable consequences are expected to be known and, henceforth, may be imputable to the defendant. However, the mere awareness of possible consequences should not amount to any kind of intentions for "it is the degree of foresight that is important" (Parsons, 2000: p.12). As the probative model stands, the actual occurrence of the result and the opinion that the outcome was clearly foreseeable based on the actor's actions and circumstances, is enough to prove the agent's virtual certainty of those prohibited consequences. However, relying solely on objective outcomes can be problematic because it does not account for variations in individual perceptions and mental states. For instance, a person's actions might lead to an unintended outcome that seems 'virtually certain' to an observer, but the actor may genuinely not have foreseen it in the same way. Appealing to the 'general experience' does not seem to tackle the issue for it oversees the fact that people have different levels of foresight and perception. What seems virtually certain to one person might not be so for another. This creates challenges in applying a uniform standard for determining intent based on the foreseeability of outcomes. A comedian may anticipate that

making a joke about a sensitive topic may produce discomfort in some individuals. But should he be expected to foresee that some of them would feel discriminated, humiliated or suffer of a mental distress? Should he anticipate, he may be charged of hateful speech? Well, the general experience may suggest that joking about human disabilities will rough some feathers. What if the same routine or joke of a comedian has worked on other audiences? Wouldn't his experience be more significant than what a jury or a judge deemed to be the general expectation? Don't get me wrong, the joke may be morally despicable, but should a comedian be acquainted with the possibility of someone allegedly suffering a mental breakdown, a tainted reputation or for someone feeling harassed by his words?

This is even more problematic when we consider that humour is inherently excessive and provocative, even the most disingenuous humorous communications, such as getting slapped with a cake on the face or getting hit in the crotch, are a hyperbole about fortuitousness. Although it may seem this kind of humorous expressions would hardly be charged of any crime, the physical or slapstick comedy has also been criticized for promoting violence or misrepresenting unfortunate events (Brody, 2013). In any case, criminalizing some humorous expressions for its perceived outrageousness, i.e. for not complying to the consequences deemed acceptable by the 'general experience', is almost to charge a comedian for doing his job. The recklessness or negligence of a comedian's jokes is part of his toolkit. Some comedians even think that it's their responsibility to be reckless (Chappelle, 2017) to accomplish humour's critical function. "Much humor is based on the transgression of societal boundaries, and such transgression can cause offense as well as amusement." (Kuipers, 2008, p. 382)

Accordingly, Lenny Bruce (1992) described his own comedy as a "derisive shock therapy" (p.114) for it was an effort to deliberately take the audience to scary places to make them laugh. But even if they fail to drive the audience to the promised land of fun with their outrageous jokes, the "perceived outrageousness or vulgarity of a given joke seems to not be, by itself, a valid reason for restricting it" (Godioli, 2022: p.316). Around 1964, Lenny Bruce told one of his most controversial skits:

> Are there any n****rs here tonight? Can you turn on the house lights, please, and could the waiters and waitresses just stop serving, just for a second? And turn off the spot. Now what did he say? "Are there any n****rs here tonight?" I know there's one n****r here; because l see him back there working. Let's see. There's two n****rs. And between those two n****rs sits a kike. And there's another kike. That's two kikes and three n****rs. And there's a spic, right? Hm? There's another spic. Ooh, there's a wop. There's a Polack. And then, oh, a couple of greaseballs. There's three lace-curtain lrish Micks. And there's one hip, thick, hunky, funky boogie. Boogie, boogie. Mm-mm. l got three kikes. Do l hear five kikes? I got five kikes. Do l hear six spics? Six spics. Do l hear seven n****rs? l got seven n****rs. Sold: American! I'll pass with seven n****rs, six spics, five Micks, four kikes, three guineas, and one wop. You almost punched me out, didn't ya? l was trying to make a point and that is it's the suppression of the *word* that gives it the power, the violence, the viciousness. Dig. lf President Kennedy would just go on television and say l'd like to introduce you to all the n****rs in my cabinet. And if he'd just say "n****r, n****r, n****r, n****r, n****r" to every n****r he saw, boogie, boogie, boogie, boogie, boogie, n****r, n****r, n****r, n****r, n****r till n****r didn't mean anything any more! Then you'd never be able to make some six-year-old black kid cry because somebody called him a n****r in school
>
> (Bruce, 1964 in V. Nova, 2014)[1].

I guess, most of us would hardly find it funny and, instead, many would feel somehow aggravated by such reckless joke. Anyhow, none of our interpretations of the joke change the

[1] Needless to say, I in no way endorse the language used in the joke or any of the racial connotations it may have. I refer to it in the text, solely, as an example of a clearly controversial humorous expression, from which we can hardly presume a perverse intention in spite of its recklessness.

fact that his monologue intends to produce laughter—even in the actual recordings one can still hear the audience laugh. "Whereas the overt intention of the persona can be read as insulting, humiliating, reducing, maligning, deriding and stereotyping, this is precisely not the speech act the comedian intends and not the effect on the audience that he has planned. The intention of the comedian is to completely defuse the power of racist terminology" (Aarons & Mierowsky, 2017, p. 164). Lenny Bruce was deliberately being outrageous and profane. He obviously foresaw that some people would feel offended and could certainly have avoided such consequence by refraining himself of telling the joke. Nevertheless, if we acknowledge his speech as humorous, we cannot assume that Bruce's desire was to humiliate, discriminate, or ridicule Afro-American people, nor to expect him to be legally accountable for whatever consequences that subjectively or customarily may be regarded as forbidden. Moreover, if there is any underlying intent to his jokes, it is quite the opposite: to ridicule racial attitudes and to defuse the power of derogatory words, respectively—although, interpreting the joke as such is also an overreach. Laura Little (2009) describes this phenomenon as "humour's bipolar nature". According to her, humour is paradoxical for it "can be simultaneously confining and liberating, emotional and cerebral, as well as loving and aggressive" (p. 1289). Humour's aggressiveness is sometimes necessary to accomplish its policing functions.

5. Is it humorous?

Given the difficulties to ascribe a secondary and imputable intent to humorous expressions, in order to judicially deal with them it is necessary to question their humorous nature itself. Laura Little (2009) distinguishes between two groups of case law: "instances in which the court's decision to regulate turns on whether the disputed communication is humorous and those in which the court regulates the communication irrespective of whether it is funny" (p. 1238). However, I do not consider it trivial that the second group of cases arbitrarily dismiss the nature of the communication at trial. The humorous nature of the communication is key to imputing the possible harm of the expression. Otherwise, the assessment of whether the harm is sufficient to stifle the communication is flawed, since to impute potential harmful effects to the communication in question it is necessary to establish the intent of the communication. For this reason, although Laura Little is correct that humorous expressions are often judged in this way, it seems to me that this does not change the fact that there is something odd or wrong in doing so.

The matter is not if a humorous expression is harmful or not, but whether the speech act at hand is humorous at all. At first glance, this may seem to simply push back the problem of how to legally prove intent. For how can we determine if we are dealing with a humorous speech act—i.e. that expression has the primary intention of being funny? In forensic humour studies, it is common to speak of humour markers that help us identify the humorous intent of a text or image. These are linguistic or visual cues that seemingly help to identify humorous expressions. Humour markers can be either explicit or implicit—also called overt and covert indicators, respectively. Explicit indicators are statements or expressions that directly state the comic intent of the speech act. These markers are more frequent in colloquial situations and are frequently used to ease or transition from joke to joke. For example, Lenny Bruce (1992) mocked the fact that some judges in Miami punished homosexual behaviour, such as kissing in public: "Ironically, the way homosexuals are punished in this country is by throwing them into jail with other men" (p.82). The explicit marker announces to the audience that Lenny Bruce does not intend to state a legal fact nor is he advancing a moral opinion on the alleged policy, but rather that he intends to highlight a contradiction to produce a humorous effect. Thus, the humour marker reliefs the expectancy of truth in Bruce's words. It may well be the case that Bruce lies

or that he is simply wrong about the penalty imposed to such practices. However, the lines should still be regarded as a joke for the incongruity is funny, even *sub specie hypothesis*. On the other hand, covert markers are subtle cues that the listener or reader needs to interpret in order to understand that a statement is meant to be humorous. Examples of covert humour markers include some literary devices such as sarcasm, irony, or hyperbole; or they can be visual and audible cues such as a shrugging shoulder, winking, changing the tone of voice or phrasing. Take for instance Lenny Bruce's one-liner: "People are leaving the church and coming back to God" (Bruce, 1992: p.114). In this case, the covert humour marker is the paradox of depicting the Church and God, as if they were at odds. This apparent contradiction appears when the second part of the joke falls short of the expectations generated by the first, thus provoking the surprising or humorous effect. By identifying what Bruce wants to do with these words, then, we can disregard the temptation to presume that Lenny Bruce was an anti-clerical (although maybe he was), since its humorous nature prevents us from attributing it as a claim.

In theory, the presence of these markers of humour suggest that we are dealing with humorous discourse. Alberto Godioli assembled a model for identifying these markers, based on the works of Wayne C. Booth and Paul Simpson (Godioli, 2020: 22-29). It is a four-step procedure that starts with the recognition of humour markers, which can be overt or covert irony markers, metonymic or metaphoric satirical devices, or other indicators of humour. The idea is to reject the surface meaning of a speech and identify incongruities or illogicalities that signal irony. The second step is the dialectic phase, where the humour markers are discussed and analysed. In this moment, the audience must try out alternatives to the surface meaning, which can flood in and provide new insights. According to Godioli, these first two steps alone cannot confirm that a statement is ironic. Instead, the audience must try to reconstruct the beliefs and intended meaning by considering the humour markers and contextual clues. Finally, considering both the surface and deeper meanings of the text, as well as any contextual clues, the audience must come up with a coherent interpretation that aligns with their hypotheses about the text's intended meaning. All in all, this procedure supposedly facilitates the systematic detection and discussion of humour indicators in a given text, to elucidate the text's aim and message. Detecting (or failing to detect) a humorous intent may orientate the Court's assessment of whether the text constitutes a statement of fact, an opinion or just a joke and therefore, set the basis for determining the aims of the text (offend or amuse) and its possible effects (damage to dignity, threat to public peace, elicit laughter) (Godioli, 2020, pp. 11-12).

While the model is certainly useful for interpreting allegedly humorous speech in some contexts, it is still highly unreliable for judicial purposes. According to the proposed model, to determine whether a controversial utterance is humorous, explicit, or implicit markers are not enough; it is still necessary to reconstruct the speaker's intention and possible effects. This brings back the aforementioned problem; namely, that the probative elements of a legally imputable intention, on many occasions, are deliberately sought by the comedian to achieve a humorous effect. Thus, the jury or judge would ultimately rely on aesthetic criteria to determine whether an expression—possibly with clear humorous markers—could be deemed harmful or hateful. This may seem reasonable at first glance, but in essence, it means turning courtrooms into something like *Last Comic Standing* with the exception that if the judge does not find the expression funny, the alleged comedian must pay a fine or even go to jail.

To free judges and juries from the task of assessing the funniness or lack of funniness of an expression, at least partially, it would be best to delegate this task to the different institutions and social structures. And instead, reserve for the courts the task of determining only doubtful cases. For example, if a controversial expression is uttered in a comedy show, that should be enough to recognize that it is an expression intended to entertain and, therefore, of which no judicial intent can be proven. For there is an "implied" between the audience and the performer, in which "the audience agrees to give the performer license" to do their best to entertain, and

"the performer takes that license" as far as they wish. Of course, this contract is not permanent, and the audience can leave or express their dissatisfaction at any time, but the failure of the comedian to entertain should not result in any judicial or political consequences. (Aarons & Mierowsky, 2017) However, if a disparaging expression occurs in circumstances where humorous intent cannot be manifestly presumed, then we should resort to the judicial mechanisms to determine its intent. Thus, Mosaka's probative model of intention and Godioli's guide to determine whether such a speech act is humorous or not should be implemented only to judge speeches that have not been formally and socially recognized as humorous.

Indeed, the main beneficiaries of such a measure would be professional comedians, regardless of the genre of their comedy. For the expressions of those whose trade or profession consists in this form of entertainment would be, almost automatically, off the hook. This may be found troublesome for different reasons. On the one hand, it would seemingly leave the rest of the population in a vulnerable situation because of their respective humorous expressions. On the other hand, it could be considered a privilege for a guild that would have the license to offend without legal consequences. However, it should be stressed that neither is exactly the case. Ordinary citizens—i.e., no professional comedians—are the least likely to be taken to court for our jokes or pranks. Hardly anyone will ever be accused of hate speech for a corny joke at the bar or in our workplaces. Not only that, but if that were the case, there would still be the task of proving intent and/or harm followed by our bad jokes. Professional comedians, on the other hand, are the ones most likely to face legal trouble for trying to make people laugh. So, it is reasonable to think of a special privilege for comedy professionals that would allow them to practice their trade, without fear of legal repercussions, similarly, to how we socially and legally grant artists. Any art form is a kind of communication with an aesthetic intent that can, also, happen to be offensive, reckless, or distasteful. Let us take, for example, Dana Schutz's painting called "Open Casket", Andres Serrano's "Piss Christ" or any of the mainstream music with explicit misogynist and violent lyrics. In all cases, we readily attribute an artistic intent based on the institutions and social actors who validate them as some form or art entertainment (i.e. museums, galleries, critics, publishers, record labels, producers, etc.). Although, some artists have also faced legal troubles, socially and legally speaking, we are more prone to acknowledge the artistic intent of a song or a photograph than that of a joke or a comedy set. While the 'it's just a joke' defence may fail to justify offensive humour on moral grounds (Lockyer & Pickering, 2006), in legal contexts, this defence remains crucial due to the challenges of proving malicious intent in humour. Legal regulation should therefore approach humour with caution, considering its ambiguity and artistic latitude. Perhaps we should try to socially deal with this kind of controversial expressions and relieve the legal systems from policing artists and comedians, all around.

6. Final remarks

Although, all legal systems regulate humour to some extent, the judicial tools for assessing disparaging humour are problematic, as they either judge controversial expressions based on mere aesthetic criteria or require to acutely determine the intentions of the agent; in which case, they inevitably run the risk of either overinterpreting humorous expressions or imposing on judges and juries the task of determining the funniness (or lack thereof) of an expression. It is a hard task to legally prove the intent of an acknowledged humorous expression since some of them deliberately incur into what a probative model demands. However, if the humorous nature of a controversial expression is dismissed, then it is up to the authorities to determine whether there was a humorous intent or not before sanctioning it. In any case, it results in a highly subjective and inconsistent method to assess every similar case that risks silencing transgressive

humour. Certainly, we cannot overcome human limitations and the current conceptual resources of law are the best we have. However, insisting and forcing the judicial systems to take care of the disparaging humour may not be the best strategy.

Perhaps, we can think of better ways to deal with these expressions, even if this does not involve formal justice systems. There are some societal measures that can be taken to deal with reckless comedians and entertainers, ranging from promoting and educating in different spaces about media literacy, to supporting other comedians whose work is better aligned with social values, to discouraging consumption and collectively condemning those whose humour we believe to be harmful.

Of course, these measures do not entail the kind of retaliation we might socially wish for against harmful humorous expressions and, for different reasons and circumstances, this may be leaving a good number of malicious expressions unpunished. But, if we are honest, we are also not doing a great job of catching perverse comedians via our legal systems. At the end of the day, we must bear in mind that formal censorship is a slippery slope, and it may be preferable to tolerate some mean-spirited jokes than to muzzle excessive comedic expressions. All proponents of policing humour because it is potentially offensive should remember that most of the obscene words that led to Lenny Bruce's convictions nearly 60 years ago are now part of the mainstream products (i.e. songs, shows, books) and are even included in the content of preschool and elementary school education. It is not a good strategy to make our tastes into laws because someday they may turn sour. As Capelotti (2015) claims: "Demanding that humour should always adhere to standards of healthy criticism, well-done satire, [and] refined irony limits humourists' art and freedom of expression and assumes that the tastes of the intended audience are the same as those of the judge" (p.39).

References

Aarons, D., & Mierowsky, M. (2017). How to do things with jokes: Speech acts in standup comedy. *The European Journal of Humour Research*, *5*(4), 158–168. https://doi.org/10.7592/EJHR2017.5.4.aarons

Brewer, E. (2003). Hustler Magazine, Inc. v. Falwell. In R. Parker (Ed.), *Free speech on trial: communication perspectives on landmark Supreme Court decisions* (pp. 264–280). University of Alabama Press.

Brody, R. (2013, June 28). The demise of physical comedy. *The New Yorker*, https://www.newyorker.com/culture/richard-brody/the-demise-of-physical-comedy.

Bruce, L. (1992). *How to talk dirty and influence people*. Simon and Schuster.

Capelotti, J.P. (2015) Defending laughter: An account of Brazilian court cases involving humor, 1997–2014. *Humor. International Journal of Humor Research,* 29(1), 25-47.

Chappelle, Dave (Writer) & Lathan, S. (Director). (2017). *The bird revelation*. Netflix.

Coffey, G. (2009). Codifying the meaning of 'intention' in the criminal law. The *Journal of Criminal Law, 73*(5), 394–413. https://doi.org/10.1350/jcla.2009.73.5.590

Garbus, M. (1971*). Ready for the defense*. Farrar, Straus and Giroux, p. 100.

Garner, B. A. (Ed.). (2009). *Black's law dictionary*. (9th ed.). West.

Godioli, A. (2020). Cartoon controversies at the European court of human rights: towards forensic humour studies. *Open Library of Humanities*, *6*(1), 1-35. https://doi.org/10.16995/olh.571

Godioli, A. & Little, L. (2022). Different systems, similar challenges: Humour and free speech in the United States and Europe. *Humor. International Journal of Humor Research*, *35*(3), 305–27. https://doi.org/10.1515/humour-2021-0121.

Kuipers, G. (2008). The sociology of humor. In V. Raskin (Ed.), *The primer of humor research* (pp. 361-398). De Gruyter Mouton. https://doi.org/10.1515/9783110198492.361

Little, L. (2009). Regulating funny: Humour and the law. *Cornell Law Review*, *94*(5), 1235-1292. Available at: http://scholarship.law.cornell.edu/clr/vol94/iss5/9

Little, L. (2014). Legal restriction and protection of humor. In S. Attardo (Ed.), *Encyclopedia of Humor Studies*. Vol. 2 (pp. 448-450). Sage Publications.

Lockyer, S., & Pickering, M. (2006). *Beyond a joke: The limits of humour*. Palgrave Macmillan.

M'Bala M'Bala v. France (2015, October 20). App. No. 25239/13. In ECtHR. https://hudoc.echr.coe.int/eng?i=002-10948

Mosaka, T.B. (2023). A probative argument of intention. *The Journal of Criminal Law, 87*(5–6), 329–343. https://doi.org/10.1177/00220183231187610.

Parsons, S. (2000). Intention in criminal law: Why is it so difficult to find? *Mountbatten Journal of Legal Studies, 4*(1-2), 5-19.

Revi, R. (2015). Understanding obscenity and offensive humour: What's funny? *The European Journal of Humour Research, 2*(3), 98–114. https://doi.org/10.7592/EJHR2014.2.3.revi

Roeckelein J.E. (2002). *The psychology of humour: A reference guide and annotated bibliography*. Greenwood Press, 14-24.

Tremblay, R. W. (2003). FCC V. Pacifica Foundation. In R. Parker (Ed.) *Free speech on trial: communication perspectives on landmark Supreme Court decisions* (pp. 218–233). University of Alabama Press.

United Nations (2023, December 6). *What is hate speech?*. United Nations. https://www.un.org/en/hate-speech/understanding-hate-speech/what-is-hate-speech.

United Nations (2020, September). *United Nations strategy and plan of action on hate speech. Detailed guidance on implementation for United Nations field presences.* United Nations. https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf

United Nations. (1966, December). *International Covenant on Civil and Political Rights*. United Nations. 999 UNTS 171, part III, art. 20.

V.Nova (2014, January 24). *Lenny Bruce - are there any niggers here tonight?* [Video]. Youtube. www.youtube.com/watch?v=IaRqDc41IFQ&t=3s

Zinoman, J. (2016, August 10). Lenny Bruce shattered taboos, but was he funny? *New York Times*. https://www.nytimes.com/2016/08/10/arts/lenny-bruce-shattered-taboos-but-was-he-funny.html?hpgrp=ar-abar&smid=url-share.