The Funny Business

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Abstract

Good attorneys are clowns. Or, at least, they should be. In this Article, I compare clowning and legal ethics. In so doing, I review elements of the ethics of clowning and the clown rules, and the lessons those provide to attorneys. I also consider aspects of clowning, such as world-creation, norm-inversion, clown logic, and the mythical matrix, all of which are instructive for the legal profession. Each of these elements contributes to an understanding of lawyering as a clown-like narrative project. This project provides a better lens for ethical analysis and reflection than past attempts at analogizing the lawyer's role.

I therefore conclude that clowning offers the best comparison for Law as narrative, rather than acting or writing. Lessons from clowning provide attorneys with a provocative example by which they may address various issues in legal ethics, as well as engage more intimately with semiotics in practice.

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"St. Genesius is the patron saint of clowns and lawyers . . . Clearly, the Lord doesn't always work in mysterious ways."
John Alejandro King[1]

"The clown is not a hero, but she is heroic in her courage,
in being available to the possible,
no matter how absurd and unlikely.
Pleasure, joy, and fun in this context are not spectacle or escape,
but rather the deadly game of living with loss,
living despite failure,
living even despite the humiliation of trying endlessly."

Julie Salverson, Clown, Opera, The Atomic Bomb and The Classroom (2009).[2]

INTRODUCTION

Attorneys are clowns. At least, they should be.

Regrettably, the legal world often uses the term "clown" derogatorily to demean practitioners and judges alike.[3] These criticisms ignore the parallels between attorneys and clowns, and what those parallels mean for ethical practice. Clowns exist in a remarkably similar professional space to attorneys. Both work through generating, rather than rehearsing or meaning; both integrate their audiences into their performance; both wrestle with similar ethical questions; and both function within a pre-existing framework that dictates the limits of their performance. Beyond the comparisons in overall narrative and performance, attorneys and clowns share similar semiotics: both must grapple with having "two faces," and both function simultaneously as commentators/critics and participants within their cultural frameworks.

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1. The Cover Comic (@covertcomic), TWITTER (Sept. 25, 2020, 7:48 PM), https://twitter.com/covertcomic/status/1309640980002463744 [https://perma.cc/QS2F-AYHE].

2. Julie Salverson, *Clown, Opera, the Atomic Bomb and the Classroom, in* THE APPLIED THEATRE READER 38 (Tim Prentki & Sheila Preston eds., 2009).

3. There is an entire category on Above the Law, a popular legal blog and journalism site, called "State Judges Are Clowns." It contains tens of articles about judges behaving badly because they are incompetent or bad. *State Judges Are Clowns,* ABOVE THE L., https://abovethelaw.com/state-judges-are-clowns/page/3/ [https://perma.cc/R9MU-Q8TG] ((last visited Feb. 2, 2022).

In the past, legal scholars have compared the field to that of actors and writers. These comparisons fail. As a former clown and current attorney, I feel confident in saying the two professions share a good deal. In this Article, I endeavor to correct past failed comparisons by offering clowning in their stead. By thoroughly comparing the two professions and gleaning lessons therein, I hope to supplant current literature on the narrative experience of lawyering and role morality.

In Part I of this Article, I begin by discussing identity as narrative and the ethical implications carried with it. After discussing narrative identity broadly, I consider the truth-generative properties of both lawyering and clowning and the responsibilities they create for candor. Then, I discuss the problem of hyper-zeal in both professions. Taking knowledge from clowning, I suggest that a nuanced and audience-specific approach to the problem of hyper-zeal is likely best. I then turn to audience and norm inversion, clown logic, and micro-narratives, all of which display the ways in which norms and expectations may be pushed, so long as they exist within a broader agreed-upon framework (whether that be the common law or the clown's mythical matrix). In Part II of this Article, I briefly discuss clowning semiotics in reference to the dual role problem faced by attorneys.

At its core, lawyering is absurd. We have much to learn from the Bozos and Buffoons if we want to survive it.

I. NARRATIVE AND LEGAL ETHICS

Narrative is in many ways central to questions about ethics. The philosopher Paul Ricœur writes about the intersection of narrative and ethics. Narratives are important, according to Ricœur, because they create meaning even at the merely textual level.[4] For Ricœur, personal identity *is* narrative identity, and so the stories we weave and the truths we create have immense ethical significance.[5] The legal world met with this notion in the law-as-literature movement of the 1980s and 1990s,[6] and again when the scholarly community began to acknowledge lawyers as artisans or performers like musicians or actors.[7] By viewing attorneys as performers, scholars have attempted to draw a more realistic picture of "law in action" by which the profession may be taught, understood, and analyzed.[8] Beyond its usefulness pedagogically, scholars like J.M. Balkin and Sanford Levinson have discussed the ethical implications of such a comparison:

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4. PAUL RICŒUR, THE PHILOSOPHY OF PAUL RICŒUR: AN ANTHOLOGY OF HIS WORK 17 (Charles E. Reagan & David Stewart eds., 1978) [hereinafter RICŒUR ANTHOLOGY]. This paper will not discuss selfhood, the primary focus of his work, but rather the function of discourse and storytelling as applied to the ethical aim of being a good self.

5. *Id.*

6. *See, e.g.*, Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 273 (1982); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 783 (1987).

7. J.M. Balkin & Sanford Levinson, *Law as Performance*, *in* LAW AND LITERATURE 729–51 (Michael Freeman & Andrew D. E. Lewis eds., 1999).

8. *Id.*

> Like music and drama, law takes place before a public audience to whom the interpreter owes special responsibilities. Legal, musical, and dramatic interpreters must persuade others that the conception of the work put before them is, in some sense, authoritative. And whether or not their performances do persuade, they have effects on the audience.[9]

So, beyond providing a useful tool to instruct law students on how law works, using performance to explore law gives us a distinctive lens through which we can look at the duties lawyers have to others.

A lawyer, like any individual, participates in identity and community formation through narrative. For example, we participate in identity and community formation each time we give a personal anecdote to a stranger that allows them to relate to us a bit more. Lawyers do a bit more than that, though. They create legal truths and meanings that impact individuals and society in an explicit, outsized way—it is, in fact, their whole job.[10] The work of an attorney is binding on other individuals in a way recognized by the state and the individuals' private communities.[11] For example, when an attorney writes an enforceable contract, they create a legal relationship. Similarly, when an attorney at trial successfully argues a case of detrimental reliance, even if a contract had not been formally created before the trial, one is formed in equity as a result. In that case, their success can serve as precedent for future claimants. Attorneys are therefore responsible as caretakers of narratives that affect not only themselves, but all parties to their work, and any parties that may in the future be affected or bound by that work.

The ethical role of the attorney consequently carries with it a set of exceptions and nuances not quite captured by a traditional deontology. Take as an example Kant's universal maxims.[12] For general members of society, "do not tell a lie" as a rule sounds great. But you certainly don't want your attorney to always and, in every setting, live by that creed while they work. You want your attorney to say you're not guilty even if you are, to say you were paying attention while you were driving your motorcycle when you distractedly wreck it into a store window, or that $20,000 is the lowest you would take on an offer when you are actually okay with $10,000.[13] How do we account for these exceptions, and what

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9. *Id.*

10. *See, e.g.*, Franklin G. Snyder, *Nomos, Narrative, And Adjudication: Toward A Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1654 (1999); HANS KELSEN, AN INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY §§ 28, 30(A), 31(A) (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Oxford University Press 1992); Steven L. Winter, *Confident, But Still Not Positive*, 25 CONN. L. REV. 893, 897 n.19 (1993).

11. *See* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 92 (2010).

12. *See generally* Christine M. Korsgaard, *Kant's Formula of Universal Law*, 66 PAC. PHIL. Q. 24–47 (1985).

13. Some scholars criticize these characterizations of "cardboard clients," but they assume a thick line dividing moral and immoral clientele. The notion of a client is more complicated than, for example, Kruse may believe. While it is true that clients are not in general "impervious to ordinary moral considerations, unconcerned with preserving their relationships with others and indifferent to their reputations in the community,"

do we make of them? *Should* attorneys be exceptional as it pertains to ethics, just because they have the opportunity to make something true on behalf of a client who paid them to do so?[14]

Analogizing the profession may prove helpful in explaining the discrepancy between what is good for lawyers to do versus what is good for the general public to do. Unfortunately, not many professions mirror lawyering in meaningful ways. Even just the threshold matter of loyalty to a client over dedication to truth or kindness knocks out the commonly compared teachers, medical professionals, and plumbers.[15] Perhaps a useful additional fact is that lawyers perform. They occupy a role in our judicial system and society that requires them to advocate for their client loyally and zealously, regardless of their own sincerely held knowledge or beliefs, for the purpose of convincing a group or individual of something either privately or publicly significant to the relevant parties.[16]

This is the profession of a clown. It may be easier on palate and pride, though, to see lawyers as actors. While this comparison is tempting, it ultimately fails. Both actors and lawyers perform, write "scripts," and attempt to make their audience feel things. Seeing a lawyer as an actor has several implications. It implies that an attorney has a different role in each "play;" that the attorney is either pretending or method acting (that is, inhabiting the role while performing); and that they perform on a "four-wall" stage. What is due from an actor to their audience? Don't upstage another performer unless it's on-script, memorize lines but be flexible just in case, and stay in character.[17] These are things that actors also owe their fellow performers—if one of them messes up, it has the potential to throw everyone else, too.

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they are equally not impervious to their own needs and the needs of those who rely upon them. *See* Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 104 (2010). Clients can recognize (and even feel guilty for) their wrongdoing, while simultaneously advocating their desire for freedom from liability or undue hardship. *Id.*

14. Of course, even these recharacterizations should comport with the Professional Rules of a jurisdiction. For example, although the *Model Rules* contain rules regarding honesty (Rules 3.3, which requires candor toward the tribunal; 4.1, which requires honesty in dealing with non-clients; and 8.4, which states in part that misrepresentation is misconduct), these rules must be met with an attorney's duties of loyalty and confidentiality. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3, 4.1, 8.4 (2018) [hereinafter MODEL RULES]. Furthermore, although misrepresentations of the sort implied above may violate the *Model Rules*, our ethical inquiry cannot begin and end with the *Model Rules*. Instead, we must actually grapple with why we deem certain things to be more or less "good" when committed by an attorney rather than a lay person. In this way, when I discuss ethical questions faced by attorneys, my inquiry is not limited to the *Model Rules*, but rather legal philosophy writ large.

15. The last in this trio may just be from personal experience, but it seems like every month someone in my life tries to compare attorneys to plumbers. Both proffer a specialized trade, neither has a dazzling cultural image, and both seem to charge you more than they're worth (but you pay it all anyway, because when you need them, you really need them). I particularly like this comparison because it upsets my Ivy-league-alumni friends who don't think we attended a trade school.

16. MODEL RULES pmbl.

17. *See* MIRIAM NEWHOUSE & PETER MESSALINE, THE ACTOR'S SURVIVAL GUIDE 78 (5th ed. 2010).

It's exactly this rigidity, both in character and in lines, that causes the attorney-as-actor paradigm to fail. Attorneys cannot so easily predict how trial, negotiations, or even general communications will go. Nor can they either pretend to be someone else in each new case, nor take on the attorney identity in every aspect of their life. The trial-as-play also ignores the nature of the common law and the role of the attorney within it. An attorney acting as a thespian does an ethical disservice to their clients, colleagues, and the tribunal because they are playing pretend without open self-awareness or the ability to change course when presented with new evidence. And yet, there is something alluring about the comparison for the reasons described above. How can we hold on to the performative quality of lawyering that demands a separate ethic, while rejecting the problematic aspects of acting as an analogy?

The solution is clowns. That's no joke: clowns as performers offer a much richer lens through which we can look at the practice of lawyering and what is due from lawyer to others. Clowns, like lawyers, are subject to a unique moral standing: clowns are "immune to the usual retributions that sanction[] the transgressions of the rules according to which the body politic sustains its consistency and permanence, because the [clown] is already excluded."[18] The narrative of clowning, clown semiotics, and the application of clown ethics have much to teach us about the role morality of lawyering.

A. CLOWNING, LAWYERING, AND CREATING A WORLD

Clowning is a project of generating or establishing meaning—rather than rehearsing meaning—from a factual context.[19] Within this distinction is a clear parallel to the practice of law. Attorneys take circumstances and from them argue standards, patterns, and resolutions to issues of law and fact.[20] This process, whether for a judge and jury or for an audience, must be responsive to changes in circumstance or strategy as they arise from other players or the environment. Inflexibility is weakness in each profession.

In clowning, "be flexible" is one of the clowning commandments.[21] Much of clowning on a micro-level is improvisation—playing with audience and setting. This doesn't mean that clowning is without practice. But the practicing that is necessary to clown well is much less like a book with lines set for repetition.

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18. PAUL BOUISSAC, THE SEMIOTICS OF CLOWNS AND CLOWNING: RITUALS OF TRANSGRESSION AND THE THEORY OF LAUGHTER 175 (2015) (ebook).

19. *Id.* at 175–76.

20. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1102–03 (1988); *see also* Takao Tanase, Luke Nottage & Leon Wolff, *Invoking Law as Narrative: Lawyers' Ethics and the Discourse of Law in the United States*, *in* COMMUNITY AND THE LAW (2010).

21. What I refer to as the "clowning commandments" are actually known, simply, as "The Rules." Originally consolidated by renown clown teacher Richard Pochinko, The Rules have evolved over time. A version is included in the appendix to this work. Jaqueline Russell, Feminist Clowning: Serious Pleasures and Strategic Possibilities 2 (July 3, 2020) (unpublished Master's thesis, University of Calgary), http://hdl.handle.net/1880/112320 [https://perma.cc/7ZL5-PRBD].

Instead, meaning is generated not only by dialogue and staging (which may be prepared ahead of time, but often rely on responsiveness and improvisation around pre-planned themes or conflicts), but in relationship with past meaning, standards to be upheld, and standards to be broken.[22]

When a person merely rehearses meaning—as one does with a traditional play—the value of establishing truths is less prescient, since the burden is shifted to the author of the script to create truths rather than the players.[23] Lawyers, by contrast, actively construct truth through their work constructing arguments, responding to the arguments of others, and creating or negotiating terms.

Although attorneys rely on precedent, to do this alone is insufficient, since at the very least attorneys are called to apply that precedent to their current facts. By applying new facts to old law, lawyers endorse or "act out" new and changing interpretations of precedent. They tell a story about how the law is or should be, even in cases in which no story has yet been squarely told. Accordingly, attorneys are more similar to clowns in their need for flexibility and world-generation.

B. IMPULSE SIX AND HYPER-ZEAL

By creating truths and generating meaning, clowns, like attorneys, are drawn into ethical questions of validity and zeal. These are less a product of the drama or case itself, and more a product of active choices and strategies employed by the performer during their performance in relation to others.[24]

Dare and Smith have written extensively about the problem of hyper-zeal and mere zeal within role morality—that is, how zealous is too zealous for attorneys?[25] Is it appropriate to get your client all that they could get, even if by "icky" means? Smith writes about the zealous advocacy she believes may often be required to defend her clients.[26] By way of example, she discusses her experience defending a client accused of raping a young girl, who was put on the stand to testify.[27] The attorney crossed the girl ruthlessly, rather than comforting her:

> I wanted to tell her I was sorry, so sorry - about what had happened to her, what my client had done, and what I was doing now. I wanted to tell her she was going to be okay, that she would get through this and have a good life, that

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22. BOUISSAC, *supra* note 18, at 331.

23. *See id.* at 1708. *See generally* JON DAVISON, CLOWN: READINGS IN THEATRE PRACTICE (2013).

24. Here, again, we can return to the work of Ricoeur, whose understanding of self was drawn out in terms of actions and potentiality for actions/narrative, rather than static being. *See also* Patrick Crowley, *Paul Ricœur: The Concept of Narrative Identity, the Trace of Autobiography*, 26 PARAGRAPH 1, 12 (2003).

25. It should be noted that the *Model Rules* themselves discuss zealous advocacy. However, the *Rules* do not help us in answering this question. For example, comment 1 to Rule 1.3 states that "[a] lawyer is not bound . . . to press for every advantage that might be realized for a client," and that how much zeal is really a professional exercise in "discretion." MODEL RULES R. 1.3. If anything, this rule makes the question of "how much zeal is too much" *more* difficult, because it puts the ball squarely in the lawyer's court to determine for themselves.

26. *See generally* Abbe Smith, *Representing Rapists: The Cruelty of Cross Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255 (2016).

27. *Id.* at 277.

> she was strong and resilient . . . I would have done all this if only I was not the *lawyer on the other side*.[28]

This kind of hyper-zeal may mean playing off a jury's biases, even if doing so is sexist or homophobic.[29] It may mean getting a plaintiff millions of dollars more than justice requires on a bunk tort claim. In any case, it means that the lawyer must "bend what purports to be the truth to the lawyer's own purpose."[30]

Attorneys justify this zeal by appealing to the duty of loyalty to their client, and the idea that their client should be autonomous in decision-making about their desired outcomes. As attorneys, we may nonetheless feel that our personal virtues differ from those that apply to normal people. But this seems wrong. Are we not still causing harm? And if anything, shouldn't we be less inclined to hyper-zeal than the average person, given that one of the jobs of an attorney is to redress or prevent harm?

Clowns face an analogous problem. This is explored through the literature on clowning as a care practice. There has been a recent uptick in scholarship on clowns as caregivers and the ethics of performance for people who are elderly, disabled, and even for children in hospitals.[31] Other scholarship has explored the issue as it pertains to the ethics of breaking the fourth wall.[32] Sometimes, some argue, a clown's performance can go too far—even far enough to trigger liability.[33] This is a threat in forms of performance in which performers incorporate audience members into their physical experimentation. Consider, for example, the clown who pours a bucket of water on an audience member after others received glitter or flower petals. The audience member receiving the bucket of water *might* think it's funny. They might just as easily, however, take offense, become embarrassed, or even hurt themselves slipping on the water. The surprise of the water bucket is a prime example of surprise in clowning and will often lead to laughter frpm an audience. But that does not always translate into immunity from liability or harmfulness.

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28. *Id.*

29. *Id.* at 284.

30. *Id.* at 281.

31. *See generally* Ruud Hendriks, *Clown's View as 'Respicio'*, 20 MED. HEALTH CARE & PHIL. 207 (2017).

32. The "fourth wall" is the imaginary wall that separates the performers from their audience. The fourth wall is the reason why actors seem to ignore their audience. *See* S.C. Lannom, *Breaking the Fourth Wall: Definition, Meaning and Examples*, STUDIOBINDER (June 21, 2020), studiobinder.com/blog/breaking-the-fourth-wall [https://perma.cc/4CMG-TBN6]. Clowns do not often have a fourth wall. *See, e.g.*, Vanessa de la Torre, *For Clowns, Ethics Are a Serious Business*, ST. PETERSBURG T. (Nov. 28, 2005) (on file with Gale Online) (highlighting self-imposed rules clowns use to avoid crossing boundaries with audiences/participants); Nick Keppler, *Inside a Clown's Insurance Policy*, MENTAL FLOSS (June 9, 2015), https://www.mentalfloss.com/article/64829/inside-clowns-insurance-policy [https://perma.cc/6HY9-JPPC] (describing the emerging need for clowns to get insured to protect against liability resulting from audience interactions).

33. Mary LaFrance, *The Disappearing Fourth Wall: Law, Ethics, and Experimental Theatre*, 15 VAND. J. ENT. & TECH. L. 507, 509 (2013).

That being said, excessive silliness or over the top physicality are essential to the profession of clowning, even as they may not be appropriate for all audiences.[34] Other ethicists, primarily in the medical field, argue that clowns serve as an excellent example of how care can be interactive, energetic, and even a little humorous.[35] That is, so long as the audience is understood.[36] A clown's zeal is therefore in part due to an attention to audience, as well as a respect for a form that often requires performers to go above expectation.

A clown may approach this problem of hyper-zeal from the reference of "impulse six." Impulse six is one of the clown commandments, or The Rules.[37] The clown commandments are a series of practical ideals that clowns ought to follow while performing. For clowns, there are six energy levels, one being the lowest and six being the highest.[38] A clown's impulse is supposed to be six—a go big or go home mentality that serves to increase humor as well as play into the absurdity of whatever the clown is critiquing or embodying. For example, when you think about a clown, you may think about large shoes, an overdone face, and big sweeping gestures. Perhaps you may think about contortion or extreme emotion. These are just some small examples of impulse six in various aspects of performance.

Now, while the default is meant to tend toward six, in practice, good clowns engage the entire scale. What makes six so powerful is the peppering of two or three or four, the in-between levels that humanize the clown or draw us into the reality of their world. In these moments, we see sincerity, honesty, and humanity in the clown where we may have previously just seen a dumb, happy klutz. For example, a classic clowning bit is for the clown, in the middle of what appears to be a manic episode, completely over-the-top in physical comedy, to freeze and calmly, slowly turn her head to the audience, shake it in disapproval or disappointment, and turn back to resume the chaos. The true clown, rather than the caricature of a clown we may draw in our minds, is relatable.

There is a time and a place for six—perhaps that time and place are more often than not—but where it becomes impossible for the clown to differentiate the six from base levels, or where it becomes impossible for the clown to respect their audience or co-participants, then it becomes not only unethical, but effectively

34. That being said, one of the clown commandments is to "keep the audience safe." *See* Russell, *supra* note 21, at 85. A clown who ignores that commandment is a bad clown, and maybe should try for a field more content to upset or betray its patrons, such as dentistry or auto repair.

35. Katharina Molterer & Patrizia Hoyer, *A Serious Matter: Clowning as an Ethical Care Practice*, *in* BUSINESS ETHICS AND CARE IN ORGANIZATIONS (M. Fotaki, G. Islam & A. Antoni eds., 2019).

36. *Id.*

37. For a discussion of the application of The Rules in other areas of life, see Elaine Smookler, *What Clowns Can Teach Us About Building Resilience*, MINDFUL (Oct. 20, 2020), https://www.mindful.org/what-clowns-can-teach-us-about-building-resilience/ [https://perma.cc/R2P6-PMLB].

38. Russell, *supra* note 21, at 2.

useless.[39] It is indisputably wrong, as I note below, to clown too excitedly or loudly around audience types for whom such a performance might cause them severe mental harm. Similarly, this principle applies to instances in which clowns physically interact with audience members who may by harmed by such interaction, such as some chronically ill patients (one of the most written-about ethical quandaries of hyper-zeal in clowning).[40]

The difficulty clowns may experience in matching energy levels to audiences speaks to the problem of hyper-zeal. Perhaps it is true that attorneys should be as zealous as possible in some situations, and that the duty to be loyal to a client does in fact supersede other legal values such as candor. But that normative imperative ends where the duty to both a functional narrative and the respect for audience begins. This principle relates back to the discretionary approach endorsed by legal philosopher William Simon. Simon believes that legal ethicists often fall into the trap of separating the generally moral individual from a separate set of morals they hold themselves to as attorneys.[41] Instead of arguing for a role morality that excuses "icky" behavior on behalf of a client in any situation, Simon proposes that "[t]he lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice."[42]

While "promoting justice" is complicated and perhaps unrealistic in our actual legal context, Simon's proposal may be contextualized by our pragmatic clowning examples. It doesn't make *sense*, even as a clown, to scream at a terminally ill patient with PTSD: it would be counter-productive to your goal of reducing harm, and you lose credibility as a performer. It doesn't make sense, too, to be constantly at a six even with more standard audiences: you will be boring and predictable despite your intensity, and as such, you will fail in your purpose towards not only your own performance, but also to the nuanced and complicated stories you want to tell. The discretionary approach creates better artisans of the craft of lawyering not necessarily because attorneys are morally superior to role morality, but precisely because the discretionary approach offers a nuanced perspective about what the role of an attorney requires.

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39. *See* de la Torre, *supra* note 32. De la Torre describes a clown who developed a set of ethics around being appropriate in the profession. The clown discusses how "mimic clowns" are "bad" and "have a bad attitude," and therefore shouldn't be considered true clowns, since the goal of the clown is "to provide others, principally children, with clean, clown comedy entertainment." The clown from the article illustrates that bad clowning that results in embarrassment or inappropriate behavior with audience members (and thus a misuse of impulse six, which may tend *toward* such behavior if unchecked) often is the result of alcoholism and drunkenness. Much has been written about a similar problem facing attorneys. *See, e.g.,* Amanda Griffin, *Attorneys Have Problems with Drinking*, JD J. (Feb. 5, 2016), https://www.jdjournal.com/2016/02/05/attorneys-have-problems-with-drinking/ [https://perma.cc/RX39-JN9R]. Addressing these similarities is beyond the scope of this Article. Regardless, de la Torre's article expresses an attitude that disrespectful clowns are not only bad at clowning, but not really clowns at all, thereby unable to perform the duties of a clown in performance and are thus, are useless in the role. *See* de la Torre, *supra* note 32.

40. *See, e.g.*, Kathleen Le Roux, *From Pochinko to Pediatrics*, 10 HOSP. CLOWN NEWSL. 1, 1 (2005).

41. *See* Simon, *supra* note 20, at 1103.

42. *Id.* at 1090.

C. AUDIENCE AND NORMS

Who is an "audience" to an attorney? That is, to whom does an attorney owe a duty, and for whom does the attorney perform? This likely depends upon the setting. Lawyers are not always in a courtroom—some never enter one again after they are sworn into the bar.

For a clown, the notion of audience is broad, and its lines are often blurred with co-performers. Part of the beauty of clowning is its interactivity: audience members become participants, and clowns often, too, become the audience to the absurd realities of those around them, flipping the paradigm of a traditional play. As Bouissac writes, "[b]y its very nature, humor is dialogic and interactive. A solo performance does not mean that the clown is absolutely isolated in the ring. The clown constantly relates to the surrounding public."[43] Clowns draw their audience into performing alongside them. The creation of a relationship between an audience member and a clown makes the audience member into a performer. In this way, those drawn into the performance are not merely pawns, but are active and autonomous participants whose agency likewise drives the experience of the performance itself.

By way of example of the participation of audience in the formation of meaning, Bouissac describes a performance by solo clown Andre.[44] In it, the stage lights rise on Andre, alone, standing solemnly at a microphone. He begins to sing operatically—with all the appropriate gestures and facial expressions. The audience at first is confused: isn't this guy supposed to be funny? Why is he such a good, if not severe, singer? Since when did I buy a ticket to a variety show?

The mood shifts when a high soprano voice is heard—the audience realizes that he was lip syncing all along, and laughs. Andre, concerned by their laughter, sees a mop at the side of the stage, removes the top, and uses it as a wig, continuing his charade as a woman. He toggles between the voices and manifestations of their characters with increasing speed until, eventually, they begin singing together, when Andre eventually runs off the stage (he does return to bow at the end of the song, of course).[45]

Bouissac breaks this performance down further in an analysis of the implicit "contract" between the audience and Andre:

> Andre addresses himself to the audience, which is one of the two poles of the communication arc. There is always an implicit contract between an artist and the public that has paid to see the show. Therefore, Andre is bound by the circus code to deliver some valuable experience . . . the first few seconds appear to demonstrate his competence. But this is the story of a deceiver. The audience laughs when the female voice is heard. The lie is revealed and the illusion

43. BOUISSAC, *supra* note 18, at 1953.
44. *Id*. at 1956.
45. *Id*. at 1956–64.

> collapses. The first rule of felicitous performance, the principle of accountability, has been flouted . . . Although he has been unmasked, he will persist in making desperate efforts to remain credible by impersonating both the male and the female singers engaged in their love duo. He is not apologetic and ignores the etiquette regulating the rapport between performer and spectator, thus transgressing the social congruence of the performance. The principle of semanticity—that is, the cultural consistency of the act—is tainted by the prop he uses as a wig . . . [46]

Bouissac describes a scenario in which the normative "rules of performance," usually taken for granted and "therefore . . . invisible," are completely inverted.[47] In doing so, however, they make what was once unknown or assumed known. Sometimes this knowledge comes from a critique of the norms that are exposed; other times, the inversion illuminates the necessity of the norms in question. Playing with the rules is central to the project of the clown.

Understanding clowning procedure and societal rules is "a necessary element in establishing the particular quality of attention that is clowning."[48] Clowning exists between rules and standards of behavior/performance, and is therefore dictated by those rules, perhaps ironically. A clown's attention to rules is "the tension between safety and risk."[49] Clowning "specifically involves heightening our consciousness of the rules and the myriad ways that they work" through the inversion of some norms (that you can still pretend to be both singers ardently at the same time) and participation in others (that the female singer ought to look different from the male singer).[50] While from the outside, this seems random, at its core there is an underlying goal of critique and illumination served by selective participation and erosion of standards.

Clowns participate in this erosion alongside their audience, rather than in front of their audience. This is because clowns don't have a fourth wall, as discussed above.[51] The fourth wall refers to the imaginary wall that divides the performers from the audience in traditional play acting.[52] The fourth wall distances the audience so that they are merely looking in on the performance. Actors who break the fourth wall address the audience (either physically or verbally) in a break of character. A clown's character, unlike a play actor's, is often *dependent* upon their shared secrets and jokes with the audience.

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46. *Id.* at 1964.

47. *Id.*

48. Julia Lane, Impossibility Aside: Clowning and the Scholarly Context (Mar. 14, 2016) (unpublished Ph. D. dissertation, Simon Frasier University) (on file with author).

49. *Id.*

50. *Id.*

51. LaFrance, *supra* note 33, at 509.

52. *Id.*

Without a fourth wall, performers have a greater duty toward audience.[53] For a clown the fourth wall does not exist, because there "often isn't even a first, second, or third wall in clown theatre. The clown's performance takes place in a world, but it is a world that is not necessarily bound by the walls (physical or invisible and imaginatively created) of the performance space; it is a world that includes both clown and audience sharing the same space, intimately."[54] Sharing this space means engaging those around you, helping them buy into your reality, and playing off their reactions and identities.

Attorneys do this all the time in litigation. They play with rules and procedure, and selectively break from both as it serves their case in a way that would be most persuasive or effective to the audience with whom they engage.[55] Their work is constrained by the operation of these rules and norms, but not to such a degree that some creativity and movement are impossible. Even the use of hypotheticals in argument and instruction points toward the clowning technique of playing with rules and their application to various factual scenarios.

Hypothetical argumentation, like norm inversion, blurs the binaries of social and cultural ideologies and discourses. Accordingly, both attorneys and clowns can strategically exploit the ways in which the "disruption of the mimetic conventions usually implies disruption of cultural norms, and the . . . difficulty with the cultural norms often leads to . . . disrupting the mimetic convention."[56] Put simply: playing with the norms changes the performance, but the performance also changes the norms. This is essential to the common law, in which we must both respect precedent and develop it.[57] And yet, it also requires a sort of tethering to principles that are more essential to social and cultural ideologies and discourses, since it often replaces the defunct with the operable by stark comparison. For this reason, clowns and attorneys both must handle these critiques or comparisons with care—they have the power to shift instrumentally future performances and outcomes.

The normative dialectic clowns and attorneys engage by the blurring of binaries is mirrored, too, in feminist ethics and critical theory. Feminist clowns consider this exercise to be one of reclaiming power to criticize and rewrite toward equity.[58] Some claim that it is imperative on the modern clown to engage

53. *Id.*

54. Lane, *supra* note 48, at 62.

55. *See, e.g.*, Snyder, *supra* note 10, at 1654; HANS KELSEN, AN INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY §§ 1, 27, 30(A), 31(A) (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992); Steven L. Winter, *Confident, But Still Not Positive*, 25 CONN. L. REV. 893, 897 n.19 (1993).

56. DONALD MCMANUS, NO KIDDING! CLOWN AS PROTAGONIST IN TWENTIETH-CENTURY THEATRE 13 (2003).

57. For example, legal scholar Roscoe Pound famously stated that "law must be stable and yet it cannot stand still." ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

58. *See, e.g.*, Russell, *supra* note 21, at 66.

with the art in such a way.[59] These calls are echoed in calls for clowns to care more broadly about the people they serve.[60] Of course, the same is argued by feminist legal ethicists—attorneys who adhere to an ethic of care similar to the one described above participate in a "way of knowing" that prioritizes others and expands the scope of to whom a lawyer owes a duty.[61] In short, a feminist clown may look at the attorney and say, "you have the power to change the rules of the game, or at least what those rules mean. So you must do it." This is, of course, not as straightforward as a performer deciding to illuminate injustice through a show. It is difficult to imagine a sufficiently feminist or critical mediation of an equipment contract dispute. However, the concern of feminist clowns is broader than simply how clowns act, but rather how they are regarded. To that end, the analogous call to attorneys would ask that attorneys use their positions in such a way that reflects change in the profession as a whole towards greater care. Here, too, the audience/performer dynamic expands, and the lawyer's role broadens beyond a mere individual and into the character type as shared by other attorneys. This is only possible, however, to the extent that attorneys have liberty to bend and massage the "rules of the game."

D. ABSURDITY AND CLOWN LOGIC

Playing with rules is a kind of creative problem solving often lauded in the legal community. This, too, is borne out in clowning through an analogous "clown logic." Jaqueline Russel eloquently describes clown logic in her thesis on feminist clowning:

> Clown logic is a way of viewing the world that disrupts apparent realities. A clown may look down and realize that her shoes are on the wrong feet. Rather than taking off her shoes, she might solve the problem quickly by switching the position of her feet, which is funny and also complicates the notion of "wrong" feet. It may still look "wrong" to the audience but to the clown it looks right. *In this way the clown solves problems by viewing the world in a different way. . . . 'The solution can redefine the problem.'*[62]

Using the solution to redefine the problem places power in the hands of the performer when, otherwise, vulnerability and failure are immanent. It grants non-

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59. It is little surprise that both clowning and lawyering share in a historic lack of women taking visible roles (or any role at all). Feminist critiques of both professions are also, strikingly, similar, and call for shifts in policy, narrative (both on and off stage), and employment. The feminist critique of clowning echoes the sentiments of Abbe Smith. She discusses the perceived dissonance in her defense work with her feminism while maintaining that it is precisely her feminism that requires her to recognize the vulnerabilities of those within the criminal process: "It is captivated by and committed to working to change the dynamics that perpetuate subordination—of the poor and those labeled 'criminals,' as well as women." Smith, *supra* note 26, at 309. The literature on this is incredibly valuable, but outside of the scope of this work.

60. BOUISSAC, *supra* note 18, at 3775.

61. Stephen J. Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2668 (1992).

62. Russell, *supra* note 21, at 7.

clown participants a level of autonomy in determining the extent of their harm or benefit. Instead of becoming victims of circumstance, clown logic permits performers to become agents and apologists of circumstance.[63]

Bouissac refers to clowns holding this power as agents outside the norm while participating in its structures. It is perhaps this anarchic logic that makes clowns seem ridiculous or absurd. As "an ancient form of theatrics rooted in physical comedy, clowning transcends language and cultural barriers" through "finding the absurd in the everyday."[64] This absurdity lends itself to humor, with the goal of clown performance to create joy or laughter. But through farce, audiences are sometimes led to laugh at what in other situations would be tragedies.

Take, for example, the classical "broken mirror" clowning act. This act has been performed and remixed for hundreds of years.[65] While its specifics change in their instantiations in micro-narratives, the myth itself has some core elements. Two movers, often both seemingly unintelligent, are moving furniture into a wealthy person's house. One carries too much in his hands; we hear a crash, and we see him standing, horrified, with only the frame of a mirror, its glass apparently shattered. The clown proceeds to pretend to be the reflection, rather than admit to his clumsiness. This expresses the stark differences in class and education between the clown and the homeowner, which the audience finds funny enough, despite the depressing nature of inequality and servitude. But then, the clown is found out, by the man, the wife, or the mistress (should the narrative weave that long), and he is put to death. Or, in some tellings, chased out of town. Or, in other, more "tame" acts, he is never discovered but instead fakes a heart attack and runs away after the others are *convinced* that their mirror has died. Each ending is horrific by the text. Each time, we laugh. We laugh because we know we are supposed to, but also because the result is so shocking. We aren't happy someone died. We're delighted to find that such a small issue—breaking a replaceable mirror amidst a ton of other furniture in front of no-one who could punish you—requires such a dramatic resolution, and all by the manufacture of increasingly greater dilemmas by the clown as he attempts to solve each preceding one in turn. It is completely absurd, and it is everything we love about clown logic.[66]

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63. Performers can become agents of circumstance by actively engaging in the development of the plot based on their circumstances. Performers can become apologists of circumstance by retrospectively explaining away bad facts and honing in on good ones in order to inform their present or future actions.

64. *Working in the Theatre: Clowning*, AM. THEATRE RING (Dec. 21, 2016), https://americantheatrewing.org/working-in-the-theatre/clowning/ [https://perma.cc/KB4A-JEB9].

65. *See* BOUISSAC, *supra* note 18, at 2157 (explaining that one of the earliest recorded uses of this act was in Spain in the seventeenth century, but like many clown acts, its specific origins are unknown, and its evolutions are many).

66. *Id.*

Lawyering, too, is absurd. It is perhaps more so because we take it so seriously. Here, I don't just refer to the silliness of "indicting a ham sandwich,"[67] or folk sayings and jokes, like the thematic "I busted a mirror and got seven years bad luck, but my lawyer thinks he can get me five."[68] Instead, lawyering is absurd because by attempting to prevent and address harm, we engage in behavior that is, frankly, silly. We use language indiscernible to the public whom it affects, as if our legalese and gibberish should work upon and bind those who need it most and understand it the least. We try to force old ideas that have lost integrity over time with increasingly diverse and changing realities into new situations, using the precedent from bookstores and town squares to decide cases about AOL and Facebook,[69] as if the framers could have imagined the development of these new forums or their uses. We play a constant game of hopeful pretend.

Then there is the hierarchy of the legal profession. Our judges wear long, black, flowing robes, which in any other setting may be regarded as cultish or choral (depending on the venue). We give these judges outsized respect, treating them as the demi-gods of the legal world because, in a way, we have made them such in our cartoonish attempt to get what we want out of a hearing. There aren't a lot of professions where an old person in a long robe (in some countries even wearing an antiquated wig), sitting at a throne with a small wooden hammer and ubiquitous at-will power to rule goes almost entirely unquestioned—that is, outside of monarchies and religions. And while attorneys are arguably those most equipped to speak truth to power, they are in some ways least able to do so to a judge presiding over their case. It is, with its props and its costumes, *ridiculous*, and we buy into it wholesale.

But we *must* buy in. To be good attorneys, we must play along, break the mold where it serves our narrative, and appeal to the procedure and precedent that have informed our profession for centuries. We play the part; we make a fool out of ourselves by submitting to a bizarre legal training that feeds off of pedagogies of cold-calling, centered around forcing students to improvise performances every day to the shock and dismay of professors;[70] we list our silly little awards from decades ago on our professional bio page, as if to say "when I was twenty-two, I studied the rule against perpetuities so hard I cried every day for a month,

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67. Oddly enough, the judge who coined this phrase was himself indicted by a grand jury at the hands of a district attorney years after lamenting this fact, bringing the wacky sentiment full circle. *See* Josh Levin, *The Judge Who Coined "Indict a Ham Sandwich" Was Himself Indicted*, SLATE (Nov. 25, 2014), https://slate.com/human-interest/2014/11/sol-wachtler-the-judge-who-coined-indict-a-ham-sandwich-was-himself-indicted.html [https://perma.cc/KX9C-U37P].

68. *E.g., Jokes by Stephen Wright*, WRIGHT HOUSE, http://www.wright-house.com/steven-wright/steven-wright-Ef.html [https://perma.cc/2FXN-N9PU] (last visited Jan. 3, 2022).

69. *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019); Packingham v. North Carolina, 137 S.Ct. 1730 (2017); Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

70. *See generally* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1983).

CALI'd, and now I practice in a completely unrelated area in a state where RAP doesn't even exist. So, you can trust me!" How completely bizarre.

Our legal education, much like learning clown logic, forces us to see problems in a radically different way. Words and actions take on new meaning. We begin to spot issues before they arise, play with the interpretation of facts, and attempt to convince people that the problems are problems that we can solve, even if we manufactured them to begin with through complaint and reply.[71] This is the job of the clown, and the function of clown logic, reimagined in a legal setting—and it's how every exam, every paper, and every moot functions to train attorneys. It is the "transformative possibility" of the liminal nature of the clown and attorney to transgress the traditional boundaries of the mimetic space in the theatre, while all the while illuminating those boundaries for the audience.[72]

Lawyering is also absurd because these boundaries—the ones we care so much about, the rules we study and flout and dissent from—are arbitrary. They are made up. We can give excuses and justifications for these laws and regulations and standards, but go too far in asking "Why? Why these words? Why draw the line here?" and you will end up at "because we needed to draw the line somewhere."[73] But as we know from the clown, "even the most arbitrary conventions are integral parts of a whole, and there are no truly innocuous violations."[74] And so, even though we recognize the arbitrariness, we also must grapple with its necessity for a functional society.

The absurdity of the law is further shown in the debate between the Compte de Clermont-Tonnerre and the Abbé Maury in *Executioner of Paris*:

> Clermont-Tonnerre: . . . Whatever the law requires is good. It requires the death of a criminal. The executioner simply obeys the law. It is absurd that the law should say to a man: do that, and if you do it, you will be abhorrent to your fellow men.

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71. Take, for example, the classic law school exam. A professor provides a five-paragraph story, laden with facts of harm and context. Then, the professor asks at the bottom of the page for the student to "spot all issues and legal arguments." So, that's what you have to do. Make up problems that might arise from the facts you've been given and their likely arguments and conclusion at trial. Let's say the facts are that a shopkeeper fails to clean the floors, and a boy slips and falls. He's fine until a well-meaning lady tries to help him up, breaking his wrist in the process. What are the issues? Who is liable? What are their best arguments? And what is a court likely to decide? One issue is whether the store will be liable for his broken wrist. The extent to which they are will depend on other facts and laws, and in their absence, a student may speculate for different possibilities. Attorneys do something similar. A client comes to them with a set of facts, hoping that their attorney can spot the specific legal issues implicated, the best arguments and counterarguments, and how to convey those to opposing and ruling parties.

72. MCMANUS, *supra* note 56, at 71–72.

73. My first-year torts professor told me this, and it became the title of my outline for the course. Law students who forget this maxim are at danger of glorifying codes, he explained, but we need to draw lines to help people who need it. The rules may be arbitrary, but they aren't useless.

74. BOUISSAC, *supra* note 18, at 1984.

> Maury: The exclusion of public executioners is not founded on a mere prejudice. It is in the heart of all good men to shudder at the sight of one who assassinates his fellow man in cold blood. The law requires this deed, it is said, but does the law command anyone to become a hangman?[75]

In addition to the problem of arbitrariness, therefore, the law as-written sometimes conflicts with notions of justice—exactly that which the law purports to promote. But justice and rightness come apart in the law. This debate points to the difference between the law's function in an actual society rather than an ideal society.[76] It also, again, implicates a necessary moral distance from actions the lawyer may in their personal life deem wrong, even if as a professional they admit to their importance (or even, as the case in *Executioner*, legally required). Unlike the clown or her audience, however, attorneys don't get to laugh at the ridiculousness. We are more like the ardent executioner than the mover who broke the mirror: the consequences of our actions are real and often far-reaching. In this way, our analogy falters: lawyers may have to think like clowns and act like clowns professionally, but we are not often afforded the levity that comes with playing pretend.

Even so, some continue to describe lawyering as a game—a strategy for overcoming the solemnity of being the executioner, so to speak.[77] Being an attorney "has the impersonal character of a game—a game that demands both special strategy and an understanding of its special ethics."[78] If this were true, though, we'd be having more fun. While describing lawyering and business as a "game" has its allure, it ignores the plain fact that indicting someone shouldn't be fun. Sentencing someone to death isn't hilarious; we shouldn't be saying, "Whew! Can't wait to do that again!" when a life sentence is delivered. Attorneys may enjoy their jobs, find happiness in their work, and not feel remorse—but that is altogether different from playing a game where the pawns are people's lives. It is precisely the starkness of the absurdly horrific in clown acts and narratives that illuminates this fact. *That* is what is shocking—that in any other scenario, if it weren't a clown, we'd be crying instead. The clown even in their play and creation of joy recognizes the limits of that play.

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75. Arthur I. Applbaum, *Professional Detachment: The Executioner of Paris*, 109 HARV. L. REV. 458, 463–64 (1995).

76. As Bradley Wendel discusses:

> In a democracy, laws can be legitimate not because they are just, but because they have been enacted using procedures that satisfy criteria of fairness, representativeness, and so on. Legitimate laws may be substantively unjust, as long as the injustice is not sufficiently severe or pervasive to call into question the fairness of the system.

BRADLEY W. WENDEL, LAWYERS AND FIDELITY TO LAW 82 (2010).

77. *See id.* at 33.

78. Albert Z. Carr, *Is Business Bluffing Ethical?* 46 HARV. BUS. REV. 144, 145 (1968) (explaining that people involved in business negotiations, though not explicitly or only attorneys, play "games" when negotiating).

E. THE MYTHICAL MATRIX AND MICRO-NARRATIVES

Attorneys in the United States operate within what is known as the common law system. The common law is distinguished from the civil law system, which operates around written laws passed by legislatures or executives.[79] By contrast, the common law system engages with written law through judge-made laws and interpretations. These judge-made laws are called "precedents." Doctrines like stare decisis mean that past precedents inform future decisions. That means that when a case with certain facts is decided in a certain way, cases with similar facts should use the same rules from that past case (and, in theory, should come out in a predictable way). The common law is a continuous process of developing current law from past law in new scenarios, to apply it to future scenarios.[80] Attorneys are bound to the common law; in litigation, arguments are made and broken on past case law.

Clowns have their own "common law." Clowning occurs within a "mythical matrix" in which certain identities and situations take on canonical value.[81] For example, the conflicts, rules, and agreements typical of a relationship between two kinds of clown character tropes (e.g., the Il Dottore and Pantalone types from Commedia dell'Arte[82]) carry over into all performances including those types. Further, many clown acts are unoriginal. They are borrowed and remixed from a rich history of acts and lore spanning hundreds of years and influenced by many cultures, religions, and settings.[83] The story lines of clowns are complex yet predictable and exist within this common matrix of mythology and agreed circumstance.[84] In the modern tradition, particular clowns are known for personalities and narratives specific to their identity. In fact, a clown can copyright their face if they are well-known so that other clowns do not infringe on their carefully built character.[85]

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79. *See The Common Law and Civil Law Traditions*, UNIV. CAL. BERKELEY (2017), https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf [https://perma.cc/GH7A-KTU8].

80. *See id.*

81. BOUISSAC, *supra* note 18, at 1336.

82. Commedia dell'Arte is one of the oldest continued traditional forms of clowning in the Western world. Commedia dell'Arte employs a set of stock characters, known by their masks and mannerisms, who embody the same persona, fears, and flaws across different *commedie*, or scenes. The stock characters are the same even today. For example, Il Dottore is always an old know-it-all. Il Dottore is the comic foil for Pantalone, an old wealthy merchant who, unlike the Doctor, doesn't care to know a thing above how much money he has made today. *See Commedia dell'Arte*, BRITANNICA, https://www.britannica.com/art/commedia-dellarte [https://perma.cc/4DAU-MEUT] (last visited Jan. 3, 2022).

83. *See* BOUISSAC, *supra* note 18, at 1336.

84. *See id.*

85. *See* Dave Fagundes & Aaron Perzanowski, *The Fascinating Reason Why Clowns Paint Their Faces on Eggs*, BBC: FUTURE (Dec. 6, 2017), https://www.bbc.com/future/article/20171206-the-fascinating-reason-why-clowns-paint-their-faces-on-eggs [https://perma.cc/V9K4-UAT6]. The identifying aspects of a clown's face are called their "signatures." For example, in European white-face clowning, the makeup of eyebrows is used as a signature. BOUISSAC, *supra* note 18, at fig. 1.10.

Micro-narratives exist within the mythical matrix in which clowns play with their own individual circumstances and relationships in performance.[86] Micro-narratives are often gags.[87] Gags are the building blocks of a clown's performance. They are often jokes, bits, and instances of physical comedy that take on meaning when embedded within a larger social context and conversational structure. And yet, a clown's act is not merely made up of gags. It is a larger performed narrative in dialogic form.[88] A gag works only in the instant in which it works: for example, "[a] collapsing chair is in itself neither comic nor tragic. It depends on who is the victim and what kind of situation frames the event."[89] The timing of gags is of the utmost importance. The response they elicit from an audience is central to the dialectic of the clown act: as micro-narratives, gags form the baseline conversation between the clown and their audience, even as gags are often nonessential elements of the overarching narrative or matrix. The gag is what causes the effect in the audience, and it must sit in balance between possibility and unpredictability lest it fall flat.[90]

The overarching norms of the clown mythos inform the story, but the micro-narratives produce the reaction. They are analogous to the arguments of fact and law that litigation attorneys make in relation to ruling precedent and written law. Attorneys, too, must create effects in clients, juries, and even negotiations outside of litigation practice through micro-narratives that serve to make their case more compelling, without showing the attorney's hand. Knowing the rules simply isn't enough. Convincingly applying them in dialogue with your audience and co-participants is required for deal making and trial alike. While the clown common law is certainly less rigid than that of the attorney, their goals and functions within it are similar in affect and effect. In creating an effect, clowns allow for micro-narratives to stray from expectation to get a laugh. Consider, again, the variations on the ending in the classic mirror scene. The scene has been played many times over, across several continents. Why does it still succeed, even in its predictability? Because in the end, the clown may use its bones as a baseline for new flesh—building micro-narratives here and there, changing the ending, etc., so that it is tailored to particular audiences at particular times. So, too, is good argumentation and persuasion from legal authorities. The clown's use of micronarratives to tailor performances shows us the value in tweaking details and application of bones to the body of an argument for a specific audience or goal. This, too, is the heart of negotiation, where attention to the needs and desires of the other side of the table is paramount to achieving success for yours.

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86. BOUISSAC, *supra* note 18, at 288.
87. *Id.*
88. *Id.* at 331.
89. *Id.* at 339.
90. *Id.*

II. SEMIOTICS AND IDENTITY IN CLOWNING

Briefly, I will turn to the semiotics of clowning and identity formation. Attorneys, like clowns, must grapple with the equivalence of their identity with work, wearing many hats (sometimes at once), and functioning simultaneously as a commentator and participant in the system they serve.

Attorneys are bound by more than just precedent. They participate in a "living history."[91] This is because being a lawyer "constitutes a central identity in our society," one that carries with it the baggage and mythical consciousness of generations of experience with those within the profession.[92] Attorneys do not escape this identity, even when they're off the clock. The identity is deeply rooted in metaphor and trope. When you become an attorney, you take on the baggage of that title. The title has a dense cultural meaning. Over a study of thousands of non-lawyers on how they view the character "attorney," three identities emerged to form the stereotype: the trickster,[93] the hero, and the helper.[94] These images relate back to discrete qualities, such as helpfulness or aggression, that the surveyed adults identified with attorneys.[95]

There is a dissonance here between how the public views the identity of a lawyer and how attorneys view their own identity. The public seems to consider "lawyer" a representation of the entire self—as an existence.[96] Attorneys, in particular with regard to moral decision-making, instead draw thick lines between their Self and their occupation—the occupation being the ethical exception to their overall moral outlook.[97]

Clown semiotics must grapple with the "two in one, one in two" identity in performance. Clowns have the performative option of either performing *univocally*, or *multivocally*, such as the act in which a clown performs both as a soprano and as a tenor. The identities are defined by reference not only to how they present, but to the opportunities for transgressions that they provide the clown.[98] If a clown decides to have one identity, then there are two ways in which that identity

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91. Marvin W. Mindes & Alan C. Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 7 AM. BAR FOUND. RSCH. J. 177, 178 (1982).

92. *Id.*

93. "The Trickster," of course, is an actual clowning trope, too.

94. Mindes & Acock, *supra* note 91, at 180.

95. *Id.* at 191–92.

96. *See id.* at 178.

97. TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 74 (2009) ("Lawyers who calibrate their professional efforts according to their own view of the good—or indeed according to any particular view of the good—not only 'privilege' the view they favour and disenfranchise the view of the client, they undercut the strategy by which we secure community between people profoundly divided by reasonable but incompatible views of the good.").

98. Opportunities to transgress are opportunities for tension and comedy. For more on playing with tension, see Jan Henderson, *The Art and Philosophy of Clowning and Jacques Lecoq's Seven Levels of Tension*, CULTURESLICE (Jan. 19, 2016), https://cultureslice.wordpress.com/2016/01/19/the-art-and-philosophy-of-clowning-and-jacques-lecoqs-seven-levels-of-tension/ [https://perma.cc/EUG4-R23D].

can be transgressed: "one identity with two or more appearances," such as the transgression from the mirror act, or "one appearance with two or more identities," such as the opera act.[99] Each represents a strategic "wrong" that a clown may employ for the purposes of their comedy.

Finding an analogous "wrong[ness]" in lawyering is difficult. However, the two identity transgressions illuminate the issue attorneys face with inhabiting dual roles.[100] For example, a lawyer is called to compartmentalize his or her professional role from their private role, or other professional roles, where the duties of loyalty or confidentiality may conflict.[101] On the other hand, taking on a client does not translate into an endorsement of that client's beliefs, political or otherwise.[102] That being said, the lawyer cannot fully escape either their personal or professional roles when out in the world—especially in a profession that carries so much cultural baggage.[103]

Although both clowning identity transgressions point to an underlying inescapability of identity (they are funny precisely because we know that the clown cannot be multiply identifying at once), they also raise the possibility of opportunistic embodiment. If assuming an identity serves a strategic purpose—even if all parties involved are aware that it may transgress a norm—then that identity can be rightfully worn. The wearer is not absolved of criticism, but instead offers the theatrical excuse: "hey, I'm just trying to do my best." Bouissac calls these transgressions "semiotic crimes" necessary to taking up the identity of clown in the first instance.[104]

That is to say: if you know you're going to be a clown, then you must take on the knowledge, too, of *what that means to everyone else*, and use that knowledge to the advantage of your performance without harming the people who paid to see you. This may be what attorneys must recognize about their own duality. Perhaps attorneys may commit their own "semiotic crimes," acknowledging that leaning into their professional roles and grappling with difficult questions of dual identity is a more honest way to not only address issues of professional responsibility, but also personal accountability. Severing the identity of an attorney is impossible at base, just as it is with the clown. The clown is a clown, when she pretends to sing as both man and woman, and when she pretends she isn't a

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99. BOUISSAC, *supra* note 18, at 2119.

100. *See, e.g.*, TIM DARE & W. BRADLEY WENDEL, PROFESSIONAL ETHICS AND PERSONAL INTEGRITY 120 (2020) ("Professional roles will at least occasionally make demands role-occupants would, in their private personas, rather avoid.").

101. *See* MODEL RULES R. 1.2, 1.6.

102. *Id.* at 1.2(b).

103. One need only look to the centuries-old tradition of unflattering lawyer jokes to understand the cultural weight of the role as a title, from the quaint "why did the lawyer's chicken cross the road?" (he had an easement), to the insulting "why were the blinds drawn after the lawyer's surgery?" (because there was a fire outside, and they didn't want him to wake up and think he'd died).

104. BOUISSAC, *supra* note 18, at 2253. *See generally* LOUISE PEACOCK, SERIOUS PLAY: MODERN CLOWN PERFORMANCE (2009).

person at all. It is precisely because we recognize her as a clown that the bit succeeds. Taking this lesson to heart as attorneys does *not* mean abandoning decorum or bar-drawn lines. Instead, it requires a recognition that people view attorneys in certain ways (trustworthy, untrustworthy, wise, strategic, argumentative, greedy, etc.), but that even *those* identities can be used to serve a greater purpose in lawyering when utilized within the broader structures in the profession.

CONCLUSION

I fell in love with clowning for the same reason I went to law school: to gain the power to constrain powerful actors through narrative, and to have every excuse to serve the people I'm around. That's not a noble transition; it's a practical one. Clowning is certainly more fun, and the people in it are even a bit less upsetting to be around overall. However, law is a process of puzzle-solving, dialogue, and social critique that can be borne out with a larger impact. Lawyers play within and outside the rules in a way that means more than a gag—even when some still think of it as a game. Lawyers can learn a lot from clowns. Even outside of the lenses through which attorneys can reconsider narrative, audience, and identity as they pertain to ethical lawyering, the clown has an additional lesson to teach: don't take yourself too seriously, and make more room for joy in a world of pain.

APPENDIX

I. THE RULES[105]

Breathe
Surprise Yourself
Let us affect you
More, more, more
Rule of three
Be honest
Have fun
Get yourself off
Make contact
Know when to leave
Keep the audience safe
Play with the rhythm
Keep the conversation going
Up and out
Believe
Drop the script
. . . (you can always go back to it)
Follow the impulse
Trust
Surprise us
Take us into your world
Clown
Logic
Think out there the gods
Go for the unknown
Physicalize
Visualize
Follow the rhythm
Be zany
Impulse 6
Listen to us
Listen to yourself
Be specific
Be visceral
Take a risk
Be flexible
Break all the rules!

105. Russell, *supra* note 21, at 2.