

NO LAUGHING MATTER: PHANTOM CLOWNS, MORAL PANIC, AND THE LAW

Nicholas Mignanelli¹;

Susan Siggelakis²

The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility.³

I. INTRODUCTION

In the summer and fall of 2016, people throughout the United States reported seeing clowns in unusual places.⁴ Standing silently along the side of a road, loitering on the outskirts of a playground, or wandering the center of town in the early hours of the

¹ Cracchiolo Law Library Fellow, University of Arizona College of Law; J.D., University of New Hampshire School of Law.

² Associate Professor of Political Science, University of New Hampshire.

³ *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (1929).

⁴ *Reports of Creepy Clown Sightings on the Rise*, FOX NEWS, Sept. 6, 2016, <http://video.foxnews.com/v/5114377911001/?#sp=show-clips>.

morning, many of these clowns were described as menacing, often dressed in the style of the “evil clown” archetype.⁵ However—in the vast majority of cases—they did not give chase, attack, or commit any offense *malum in se*.⁶

Despite this fact, the phenomenon was enough to induce a sense of terror in many people.⁷ An unlucky few bystanders and passersby directly observed this behavior.⁸ Many other people accessed trending photos and videos on social media sites, such as Facebook and Twitter.⁹ Consequently, police stations around the country received reports—most secondhand—of these terrifying sightings.¹⁰ While some people no doubt engage in this dress-up activity

⁵ BENJAMIN RADFORD, *The Unnatural Nature of the Evil Clown*, in BAD CLOWNS 20-30 (2016).

⁶ See *infra* Section III.

⁷ *Reports of Creepy Clown Sightings on the Rise*, FOX NEWS, Sept. 6, 2016, <http://video.foxnews.com/v/5114377911001/?sp=show-clips>.

⁸ *Id.*

⁹ Clown Sightings (@SpottingClowns), TWITTER, <https://twitter.com/SpottingClowns/media?lang=en>.

¹⁰ Christopher Mele, *Creepy Clown Hoaxes Lead to 12 Arrests in Multiple States*, N.Y. TIMES, Sept. 29, 2016, <https://www.nytimes.com/2016/09/30/us/creepy-clown-hoaxes-arrests.html>.

as a joke inspired by the social media frenzy, others may have more sinister, albeit unknown, motives.¹¹

This Article begins with a discussion of the history of the clown and the contours of coulrophobia, the clinical fear of clowns.¹² Next, this Article examines the possible criminal charges and civil actions that could be brought against these “evil clowns,” despite the absence of any overt criminal act or intent.¹³ Finally, this Article concludes by placing this phenomenon in the sociological context of “moral panic,” and warning against the temptation to use the powers of the state to punish these harlequin actors and others like them.¹⁴

¹¹ Jesse Walker, *We Have a Clown Crime-But It's Not That Kind of Clown Crime*, REASON.COM: HIT & RUN BLOG (Oct. 6, 2016), <https://reason.com/blog/2016/10/06/we-have-a-clown-crimebut-its-not-that-ki>.

¹² *Id.*

¹³ BENJAMIN RADFORD, *The Unnatural Nature of the Evil Clown*, in BAD CLOWNS 20-30 (2016).

¹⁴ Olivia B. Waxman, *The Surprising History Behind the Scary Clown Phenomenon*, TIME, Oct. 6, 2016, <http://time.com/4520149/clown-attack-sighting-craze-history>.

II. A BRIEF HISTORY OF THE CLOWN

The word “clown” did not enter the English language until the sixteenth century.¹⁵ The origins of the word are somewhat ambiguous, but the *Oxford English Dictionary* suggests that it is derived from Low German.¹⁶ Although the English utterance is only five hundred years old, countless societies throughout human history have described some version of the clown.¹⁷

As early as Egypt’s Fifth Dynasty (circa 2500 B.C.), records indicate the presence of an “African pygmy jester” in the court of Pharaoh Djedkare Isei.¹⁸ Dangas—as these sorts of clowns were known—danced in leopard skins and masks, imitating the Egyptian gods of dance and battle.¹⁹ Ancient China also had clowns. Performing for members of the Imperial Court, Yu Sze—the most

¹⁵ *Clown*, OXFORD ENGLISH DICTIONARY (2nd ed. 1991).

¹⁶ *Id.*

¹⁷ See Lucile Hoerr Charles, *The Clown’s Function*, 58 J. AM. FOLKLORE 25, 25-26 (1945).

¹⁸ CLOWNS OF AMERICA INTERNATIONAL, 20 YEARS OF LAUGHTER 12-17 (2006).

¹⁹ *Id.*

famous of those clowns—was said to be the only subject permitted to mock the plans of Qin Shih Huang (259 BC-210 BC), the first emperor of unified China, to paint the Great Wall.²⁰

The Greco-Roman world also took part in this tradition. Dressed in a short and heavily padded tunic and sporting a strap-on phallus of comically absurd length, the rustic buffoon character was a staple of Classical Greek theater.²¹ The Romans, known for their excesses, had several types of clowns: the *Scurra*, the *Moriones*, the *Sannio*, and the *Stupidus*.²² The first two were the lower forms of clown, denizens chosen for their unusual physical appearance or mental disabilities.²³ The *Sannio* did not wear masks, but were renowned for their ability to contort their faces and bodies.²⁴ The last type was the *Stupidus*.

He was usually bad-headed and wore
a long-pointed hat and a multicolored

²⁰ *Id.*

²¹ TOWSON, CLOWNS at 40.

²² CLOWN HISTORY, <https://www.clownbluey.co.uk/more-info/clown-history> (last visited Oct. 16, 2016).

²³ *Id.*

²⁴ *Id.*

outfit....[H]e mimicked the more serious actor and was famed for riddles and innuendo and the ability to rain down blows on his fellow performers in burlesque fights in typical slapstick fashion. In true clown style he used scandals of the day for his material and nothing was too sacred or sacrosanct to be the focal point of his humor.²⁵

The great families often kept “freaks and fools” for their own amusement as well.²⁶ Often they were seen as good luck charms.²⁷

Later, the medieval courts of Europe hosted jesters for entertainment.²⁸ Today, we would refer to these “fools” as “mentally disabled persons.”²⁹ Although their lives were better than the lives of their peers living in the greater realm, they were also objects of ridicule and exploitation at the hands of the court.³⁰ These proto-jesters were, perhaps, the earliest beneficiaries of “license to speak one’s

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ LEO KANNER, A HISTORY OF THE CARE AND STUDY OF THE MENTALLY RETARDED 5-6 (1964).

²⁹ *Id.*

³⁰ *Id.*

mind.”³¹ While it might seem a generous concession on the part of the monarch and the nobility, the fact that only “the mad” were permitted to engage in criticism served to reinforce the power of the elite and their positions of domination were never at risk³²

Later, during the Renaissance, most jesters were costumed comedians, sophisticated wits skilled in the craft of humor whose proximity to the throne gave them access to information and, hence, the ear of the powerful.³³ These “fools” were also vested with the privilege of free speech, while other subjects might face execution for an errant comment about the monarch, the nobility, or the Church.³⁴

A witness to this practice, William Shakespeare, created a host of proto-clown characters.³⁵ Three actors specialized in playing these roles: William Kemp, Richard Crowley, and Richard Armin.³⁶ Kemp, the first clown to appear with the Lord

³¹ RADFORD, *BAD CLOWNS* at 9.

³² *Id.*

³³ *An Interview with Beatrice K. Otto*, U. CHI. PRESS, <http://www.press.uchicago.edu/Misc/Chicago/640914in.html>.

³⁴ *Id.*

³⁵ TOWSON, *CLOWNS* at 59.

³⁶ *Id.* at 59-60.

Chamberlain's Men, played the rustic or the country bumpkin, a style that was later known as the "Auguste."³⁷ Armin played the court jester and wrote one of the first histories of clowning.³⁸

The American public has a long history of enjoying clowns. The American practice of clowning was usually specific to region or locality.³⁹ For instance, in the American South, circus clowns were skilled in the art of the "song and sally," a humor in tune with the South's rich oral tradition.⁴⁰ According to historian Gregory Renoff, this style of clowning was particularly appreciated by African Americans, both before and after the Civil War.⁴¹ Often illiterate and enslaved, or in close proximity to the institution of slavery, African Americans appreciated the clown's verbal dexterity, broad physical humor, and ability to come out on top, often at the expense of the Caucasian ringmaster.⁴² Many other types emerged

³⁷ See *Id.* at 59.

³⁸ *Id.* at 60.

³⁹ See GREGORY RENOFF, *THE BIG TENT, THE TRAVELING CIRCUS IN GEORGIA 1820-1930* (2008).

⁴⁰ *Id.* at 12.

⁴¹ *Id.* at 25.

⁴² *Id.*

in the United States, including tramp clowns, mummer clowns, English blackface clowns, and many more.⁴³

Given the multiplicity of practices, what one community's people find hilarious in a particular era may draw blank stares or polite yawns among outsiders. Individuals have constructed the art of clowning to suit, and sometimes challenge, their own culture, language, mores, class structure, and politics. The popularity of the various styles of clowns and their humor waxed and waned with the mood of the period, e.g., in the United States, during the Great Depression, when unemployment and vagrancy were rampant, the character of the "Tramp Clown" fit the zeitgeist perfectly.⁴⁴ Millions viewed this character through the relatively new medium of film.⁴⁵ The most renowned of these clowns was Charlie Chaplin, who emigrated from England and

⁴³ TOWSON, CLOWNS at 371-81.

⁴⁴ *Id.* at 282-83.

⁴⁵ *Id.* at 291.

made the seamless transition from appearing in silent films to acting in “talkies.”⁴⁶

Clowns have consistently pushed the boundaries of speech and decorum, empowered to do so by the public’s admiration for their talents. In several instances, clowns have been emboldened by their close relationships with those in authority, monarchs, and political leaders, who underestimated the clown’s threat to the established social and political order⁴⁷. For example, contemporary Cuba—faced with the Soviet Union’s fall as its main source of political-economic support and the United States’ recent decision to ease the embargo—is experiencing a new phase in its own history of clowning.⁴⁸ As one reporter for *The Economist* reveals:

A timid economic liberalization has created a small entrepreneurial class and attracted foreigners with money to spend on private displays of pranks

⁴⁶ *Id.*

⁴⁷ BEATRICE K. OTTO, FOOLS ARE EVERYWHERE: THE COURT JESTER AROUND THE WORLD 245 (2001).

⁴⁸ *The Red-Nosed Gold Rush*, THE ECONOMIST, Oct. 22, 2016, <http://www.economist.com/news/americas/21709077-theres-money-b>.

and pitfalls.⁴⁹ Clowning is among the 181 jobs that may now be done by self-employed workers [S]tingy with freedom and consumer goods, the communist system provides plenty of subjects for comedy, though clowns must be cautious in exploiting them.⁵⁰

Thus, even the most oppressive regimes often underestimate the subversive power of clowning.⁵¹

In modern America, clowning is both a profession and big business. Almost every American can recall seeing or interacting with a clown, whether at a parade, a circus, a birthday party, or a rodeo. Even the Cirque du Soleil, with its high prices and upper class clientele, uses clowns, although they have eliminated much of the slapstick humor associated with traditional circus clowns.⁵² Some

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Kate Vinton, *Circus on Ice, How the Billionaire Feld Family Is Reinventing Ringling Brothers*, FORBES, July 15, 2016, <http://www.forbes.com/sites/katevinton/circus-on-ice-how>. See also *Auditions, Jobs and Employment for Clowns*, CIRQUE DU SOLEIL, <https://www.cirquedusoleil.com/en/jobs/casting/disciplines/clowns/clowns.aspx> (last visited Dec. 12, 2016) (“We’re looking for clowns who are passionate about their craft, who carry their own unique world within them and are intent on inviting others into it night after

clowns make a good living; in fact, even as far back as 1862, one celebrated American clown, Dan Rice, earned \$1,000 per week, a salary greater than that of the American President.⁵³ Rodeo clowns, who put their lives at stake to distract bulls and broncos from trampling their fallen riders, earn an average salary of about \$51,000 per year.⁵⁴ Circus clowns employed by subsidiaries of the mammoth Field Entertainment Corporation, which includes *Disney on Ice* as well as Ringling Brothers, have been paid between \$85,000 and \$92,000 per year.⁵⁵

Clown trade organizations exist nationally and internationally, and the most prominent among these, in terms of membership, is the World Clown

night. So-called contemporary clowns and buffoons, representatives of the Russian School and the purest slapstick tradition, innovators who are pushing their limits and the boundaries of performance to delve into realms yet unknown. [A]ll are welcome." *Id.*)

⁵³ TOWSON, CLOWNS at 105.

⁵⁴ *How Much Does a Rodeo Clown Make a Year?*, THE ART OF CLOWNING, http://artofclowning.com/articles/how_much_does_a_rodeo_clown_make_per_year.shtml (last visited Dec. 12 2016).

⁵⁵ Aimee Picchi, *No laughing matter: Clowns are on the decline*, CBS MONEY WATCH, Feb. 18, 2014, <http://www.cbsnews.com/news/no-laughing-matter-clowns-are-on-the-decline/>.

Organization.⁵⁶ Others include: the Clowns of America International, the International Shrine Clown Association, and regional organizations in the Midwest, the South, and the Mid-Atlantic.⁵⁷ Clown organizations help their members by providing insurance policies, advising members on what rates to charge their clients, offering various workshops on clown skills, and helping clowns network, among other services.⁵⁸

Sadly, interest in clowning has declined over the past several decades, with membership in such organizations declining by roughly 30% since 2004.⁵⁹ One observer cites economic competition from “Chinese clowns, who will work for really cheap.”⁶⁰ Others lament the absence of a “cool factor” in the profession, which depresses interest

⁵⁶ *Clown Organizations*, JUST FOR CLOWNS, <http://www.justforclowns.com/clown-organizations/> (last visited Dec. 2, 2016).

⁵⁷ *Id.*

⁵⁸ *Membership Benefits*, CLOWNS OF AMERICAN INTERNATIONAL, <http://coai.org/?page=Benefits> (last visited Dec. 11 2016).

⁵⁹ See Natalie Musumeci, *Exclusive: National clown shortage may be approaching, trade organizations fear*, NEW YORK DAILY NEWS, Feb. 17, 2014, <http://www.nydailynews.com/news/national/exclusive-national-clown-shortage-approaching-article-1.1616801>.

⁶⁰ *Id.*

among youth.⁶¹ Compared with, for instance, a job in social media, many young people see clowning as undignified and unprofessional.⁶² Ringling Brothers, a major employer of clowns, reduced its number of clowns to fewer than 30 across its three circuses.⁶³ Even when the number of aspiring clowns have been plentiful, Ringling Brothers was exceedingly selective.⁶⁴ For example, it offered positions only to a small fraction of those who auditioned at its 14-day boot camp.⁶⁵ Of the 531 would-be clowns, who attended this program in 2014, only 11 were offered jobs.⁶⁶ In an economic blow to the availability of employment for professional clowns, Ringling Brothers announces in January 2017 that their final shows would take place in May of that year, citing declining ticket sales.⁶⁷

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Musumeci, *NEW YORK DAILY NEWS*, Feb. 17, 2014.

⁶⁶ *Id.*

⁶⁷ Leslie Gray Streeter, *Former Ringling Bros. clown: Circus closing will be "hard" on clowns*, MYPALMBEACHPOST, <http://www.mypalmbeachpost.com/entertainment/former-ringling-bros-clown-circus-closing-will-hard-clowns/9tCg4L9wRYwl2TU9ShCybK/> (last visited Feb. 13, 2017).

III. COULROPHOBIA

Despite the clown's ubiquity in societies throughout history, many people suffer a fear—in some cases a debilitating fear—of clowns. Coulrophobia, an excessive fear of clowns, is even contemplated in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition (the “DSM-IV”).⁶⁸ What distinguishes phobia from mere fear is the lengths to which sufferers will go to avoid the source of the phobia.⁶⁹ For example, someone suffering from coulrophobia might an event, such as a fair or parade, when he or she knows that a clown might be performing. One psychologist traces the roots of this phobia to childhood, at around age two, when most children are normally shy of any stranger.⁷⁰ She suggests that “at that age, children’s

⁶⁸ See Jordan Gaines Lewis, *Why Are Clowns Scary*, PSYCH. TODAY: BRAIN BANNLE (Oct. 30, 2012), <https://www.psychologytoday.com/blog/brain-babble/201210/why-are-clowns-scary>.

⁶⁹ Kevin Fleming, Specific Phobia DSM-5 300.29 (ICD-10-CM Multiple Codes), THERAVINE, [http://www.theravive.com/therapedia/Specific-Phobia-DSM--5-300.29-\(ICD--10--CM-Multiple-Codes\)](http://www.theravive.com/therapedia/Specific-Phobia-DSM--5-300.29-(ICD--10--CM-Multiple-Codes)) (last visited Feb. 13, 2017).

⁷⁰ Linda Rodriguez McRobbie, *The History and Psychology of Clowns Being Scary*, SMITHSONIAN.COM, July 31, 2013,

minds are still developing, there's a little bit of a blend and they're not always able to separate fantasy from reality."⁷¹ She estimates that about two percent of adults retain this fear, while the vast majority outgrow it.⁷² She maintains that adult "coulrophobics" are often unsettled by the clown's face paint, which makes it difficult to read emotions, as well as the apparent ability of the clown "to engage in manic behavior, often without consequences."⁷³

A psychiatrist at Harvard explains that creatures with almost human-like faces are the most "uncanny," a Freudian term roughly meaning "strangely familiar."⁷⁴ Another psychiatrist points out that "things are creepy when they invoke memories of a time when we believed...[uncanny] thing[s] to be true, for instance, magic or the

<http://www.smithsonianmag.com/arts-culture/the-history-and-psychology-of-clowns-being-scary-20394516/>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Olivia Goldhill, *A Freudian theory, now backed up by neuroscience, explains why so many fear clowns*, QUARTZ, Oct. 8 2016, <http://qz.com/804497/freud-on-why-so-many-people-have-a-fear-of-clowns>.

undead.”⁷⁵ The “fight or flight” response is a human’s natural reaction when confronted with the “uncanny,” and some evidence suggests that this unconscious impulse inhabits the more primitive areas of the brain, as opposed to the more rational, higher parts.⁷⁶ In fact, a recent study by Chapman University found that Americans are more afraid of clowns than climate change, terrorist attacks, and biological warfare.⁷⁷

In the last several decades, coulrophobia has been exacerbated, and perhaps become more widespread, through the negative depiction of clowns in popular culture.⁷⁸ Beginning in the 1980s, clowns took a more sinister turn, as presented in popular books, films, and true crime sagas.⁷⁹ John Wayne Gacy was a small business owner, who performed at charity

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ James Delingpole, *Americans More Scared of Clowns Than Climate Change*, BREITBART, Oct. 26, 2016, <http://www.breitbart.com/london/2016/10/26/americans-scared-clowns-climate-change/>.

⁷⁸ Olivia B. Waxman, *The Surprising History Behind the Scary Clown Phenomenon*, TIME, Oct. 6, 2016, <http://time.com/4520149/clown-attack-sighting-craze-history>.

⁷⁹ *Id.*

events as a clown named Pogo.⁸⁰ Between 1972 and 1978, he managed to sexually assault and murder more than 35 young men and boys in the Chicago area.⁸¹ “Bizarrely, he seemed to revel in his clown persona: While in prison he began painting; many of his paintings were of clowns.”⁸² Throughout his subsequent trial, imprisonment, and execution, the media consistently described him as “the Killer Clown,” selling papers and terrifying readers.⁸³

The 2016 events discussed in the introduction were not the first instance in which clown sightings gripped the attention of the American public. In the spring of 1981, reports of men dressed as clowns attempting to lure children into vans surfaced in cities across the Northeast and Midwest.⁸⁴ While, in retrospect, there is a tendency to attribute this phenomenon to the release of Stephen King’s

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ LOREN COLEMAN, *The Phantom Clowns*, in MYSTERIOUS AMERICA: THE ULTIMATE GUIDE TO THE NATION’S WEIRDEST WONDERS, STRANGEST SPOTS, AND CREEPIEST CREATURES 265-72 (2007); see also RADFORD, *The Phantom Clowns*, in BAD CLOWNS at 151-159.

popular horror novel *IT*, which features a demon clown named Pennywise who attacks children, the first edition of King's book was not published until 1986.⁸⁵ Some have speculated that these sightings were an extension of the "moral panic" over the highly publicized child abductions that took place during that decade.⁸⁶ Others assert that, under the clown's historically benign image, there has continually lurked a latent threat.⁸⁷

Andrew Stott, a professor of English at the University of Buffalo, believes that the earliest instance of the "evil clown" motif in English literature emerged in Charles Dickens's *The Pickwick Papers*, in which a clown is described as an emaciated drunkard when he's off stage "skulking in the lanes and alleys of London."⁸⁸

Long before Stephen King's *IT* (1990) came to television as a miniseries, all-American actor Jimmy

⁸⁵ COLEMAN, *The Phantom Clowns*, in MYSTERIOUS AMERICA at 270; see also JOSEPH A. CITRO, WEIRD NEW ENGLAND 133 (2005).

⁸⁶ Waxman, *The Surprising History Behind the Scary Clown Phenomenon*.

⁸⁷ RADFORD, *The Unnatural Nature of the Evil Clown*, in BAD CLOWNS AT 20.

⁸⁸ *Id.*

Stewart played a nefarious circus clown named Buttons in Cecil B. DeMille's *The Greatest Show on Earth* (1952).⁸⁹ Unnervingly, Buttons is never seen without his makeup.⁹⁰ Later in the film, he is revealed to have been a doctor hiding from the law after having murdered his wife in a "mercy killing."⁹¹ More recent films, such as *Killer Klowns from Outer Space* (1988) and *Clownhouse* (1989), have only increased the possibility that clowns will dominate our nightmares.⁹²

In 2014, in its fourth season, the popular FX series *American Horror Story* featured a grotesque and murderous, albeit misunderstood, clown named Twisty.⁹³ Reacting to the character, and characters in the media like him, the President of Clowns of America International Glenn Kohlberger opined: "Hollywood makes money sensationalizing the norm....They can take any situation no matter how

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *American Horror Story: Freak Show* (FX television broadcast 2014).

good or pure and turn it into a nightmare....We do not support in any way, shape or form any medium that sensationalizes or adds to coulrophobia or ‘clown fear.’”⁹⁴ Thus, professional clowns have begun to fight the media’s attempts to impugn their identity, which they fear could threaten their livelihood.⁹⁵

Given the general population’s predisposition to fear clowns and the recent occurrence of the abovementioned sinister sightings, several developments have occurred to address such inspired fear. In Canada, for example, an enterprising individual developed a smartphone application that allows users to track clown sightings, presumably so that users and their children can avoid these clowns.⁹⁶ The McDonald’s Corporation has suspended the use of its iconic clown mascot, Ronald

⁹⁴ Seth Abramovitch, *American Clown Club Attacks ‘American Horror Story’ Over Murderous Character*, THE HOLLYWOOD REP., Oct. 15, 2014, <http://www.hollywoodreporter.com/news/professional-clown-club-attacks-american-740768>.

⁹⁵ *Id.*

⁹⁶ Tim Sargeant, *Want to track down creepy clowns? There’s an app for that*, GLOBAL NEWS, Oct. 18, 2016, <http://globalnews.ca/news/3011200/want-to-track-down-creepy-clowns-theres-an-app-for-that/>.

McDonald, in marketing campaigns in order to remove any associations of its businesses with the threatening phenomenon.⁹⁷ Even the White House remarked on the phenomenon, stating that “the sinister sightings need to be taken seriously and the FBI and the Department of Homeland Security had been consulted on how to handle the scare.”⁹⁸ However, not all developments have been negative. As with most trends, the entrepreneurial among us always find a way to profit. Thus, and somewhat ironically, party stores around the country have seen as much as a 300% uptick in the sale of clown masks and costumes.⁹⁹

⁹⁷ Melissa Chan, *Ronald McDonald Is Laying Low Until the Clown Craze Is Over*, TIME, Oct. 11, 2016, <http://time.com/4526884/ronald-mcdonald-clown-craze/>.

⁹⁸ *Good clowns' in Toronto speak out against the creepy clown trend*, DAILY MAIL, Oct. 8, 2016, <http://www.dailymail.co.uk/news/article-3828774/It-s-unacceptable-for-people-to-jump-Good-c.>

⁹⁹ Jessica Guynn, *Halloween trick? Creepy clown costume sales up 300%*, USA TODAY, Oct. 6, 2016, <http://www.usatoday.com/story/money/2016/10/06/halloween-trick-creepy-clown-costume-sales-up-300/91675554/>.

IV. AN EXAMINATION OF CRIMINAL CHARGES

A menacing clown paces a sidewalk that lies adjacent to a playground. While some children are amused and others are perplexed, the clear majority is terrified. The parents are uniformly concerned. One parent, fearing for her child's safety, calls the police. A cruiser pulls up to the scene the officer exits his vehicle and walks to the clown. The clown is handcuffed and placed in the back of the vehicle. He is transported to the station where he is booked and spends the night in a cell. Is such an interaction likely to occur?

No doubt exists that a clown engaging in criminal activity, such as stalking a pedestrian, luring children into the woods in an attempt to kidnap them, or committing a violent act would be charged with harassment, kidnapping, and assault and battery, respectively. The more interesting question is whether a citizen dressed in the trappings of a clown may be arrested and charged criminally for merely idling in a public place.

A. Disorderly Conduct

In a widely-disseminated public service announcement released by the Dartmouth, Massachusetts Police Department on October 11, 2016, Public Information Officer Detective Kyle J. Costa cites a litany of offenses for which a so-called “evil clown” could be arrested.¹⁰⁰ These include “disturbing [the] peace, trespassing, and enticing of a child.”¹⁰¹ The video ends with a warning to would-be antagonists: “Remember that if you want to act like a clown, we have no problem treating you like one.”¹⁰²

Of the offenses mentioned above, the most applicable to our clown is the charge of disturbing the peace. Disturbing the peace or breaching the peace is a subset of disorderly conduct, for “one who commits a breach of the peace is guilty of disorderly conduct, but not all disorderly conduct is necessarily

¹⁰⁰ Dartmouth Community TV, *Dartmouth Police Clown PSA*, YOUTUBE (Oct. 12, 2016), <https://www.youtube.com/watch?v=1kyTwvIJ6FQ>.

¹⁰¹ *Id.*

¹⁰² *Id.*

a breach of the peace.”¹⁰³ Indeed, general laws against breach of the peace have fallen into disfavor since the Supreme Court decided *Cox v. Louisiana* was 1965.¹⁰⁴

In *Cox*, the defendant led a group of students on a peaceful march from the state capitol to a courthouse to protest segregation.¹⁰⁵ Consequently, defendant was arrested and charged with, *inter alia*, disturbing the peace under [Louisiana Revised Statutes] § 14:103.1.¹⁰⁶ This criminal statute read in relevant part that:

Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby...crowds or congregates with others...in or upon...a public street or public highway, or upon a public sidewalk, or any other public place or building...and who fails or refuses to disperse and move on...when ordered so to do by any law enforcement

¹⁰³ *Breach of the Peace*, BLACK’S LAW DICTIONARY (5th ed. 1979) (quotations omitted).

¹⁰⁴ *See* 379 U.S. 536 (1965).

¹⁰⁵ *Id.* at 539.

¹⁰⁶ *Id.* at 544.

officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person...shall be guilty of disturbing the peace.¹⁰⁷

Ruling for the defendant, the U.S. Supreme Court found this statute to be “unconstitutionally vague in its overly broad use.”¹⁰⁸

Section 250.2 of the Model Penal Code defines disorderly conduct this way:

A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (a) engages in fighting or threatening, or in in violent or tumultuous behavior; or (b) makes unreasonable noise or offensively coarse utterance, gesture or display or addresses abusive language to any person present; or (c) creates a hazardous or physically offensive

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 551.

condition by any act which serves no legitimate purpose of the actor.¹⁰⁹

Most states have adopted a modified version of this Section, with some states specifically enumerating the actions that constitute disorderly conduct, e.g. the California Penal Code articulates the nine acts that constitute disorderly conduct.¹¹⁰

Whether our clown's conduct can be construed as disorderly is a matter of state law. Under the Model Penal Code, our clown could be charged with "creat[ing] a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor."¹¹¹ However, a prosecutor would be unlikely to move forward with this charge alone, as it is unclear whether such an application of this section could withstand constitutional scrutiny under the precedent set in *Cox*.

¹⁰⁹ *Disorderly Conduct*, BLACK'S LAW DICTIONARY (5th ed. 1979).

¹¹⁰ CAL PENAL CODE ANN. § 647 (2016).

¹¹¹ *Disorderly Conduct*, *Black's Law Dictionary* (5th ed. 1979).

B. Anti-Mask Laws

A firmer ground for the prosecution of our hypothetical clown may lie in the anti-mask laws found in several state codes. In the mid-twentieth century, several states, primarily in the South, passed laws forbidding citizens from wearing hoods and masks in public.¹¹² While these laws do not single-out the Ku Klux Klan, the intended purpose was to prevent Klansmen and Klan sympathizers from wearing hoods and masks that preserved their anonymity and intimidated African American citizens and their Caucasian allies.¹¹³ The law did, however, make exceptions for the public use of hoods and masks in theatric productions, holiday parades, and the like.¹¹⁴

In 1990, Georgia's anti-mask statute was challenged by a Klansman on constitutional grounds. Georgia's anti-mask statute reads:

¹¹² See Ruthann Robson, *Anti-Masking Laws, the Ku Klux Klan, and the First Amendment*, CONSTITUTIONAL LAW PROF BLOG (July 1, 2015), <http://lawprofessors.typepad.com/conlaw/2015/07/anti-masking-laws-the-ku-klux-klan-and-the-first-amendment.html>.

¹¹³ *Id.*

¹¹⁴ GA. CODE ANN. § 16-11-38 (b) (2016).

(a) A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so.

(b) This Code section shall not apply to:

(1) A person wearing a traditional holiday costume on the occasion of the holiday;

(2) A person lawfully engaged in trade and employment or in a sporting activity where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade, or profession, or sporting activity;

(3) A person using a mask in a theatrical production including use in Mardi gras celebrations and masquerade balls; or

(4) A person wearing a gas mask prescribed in emergency management drills and exercises or emergencies.¹¹⁵

¹¹⁵ GA. CODE ANN. § 16-11-38 (2016).

In *State v. Miller*, plaintiff Shade Miller Jr. “was arrested for violating [Georgia Code] § 16-11-38 when he appeared in public wearing the traditional regalia of the Ku Klux Klan” on the premises of a county courthouse.¹¹⁶ He asserted, *inter alia*, that the Georgia anti-mask statute was unconstitutional because it was an impermissible repression of speech, and because it was overbroad.¹¹⁷ In a 6-1 ruling, the Georgia Supreme Court dismissed the plaintiff’s claim that his First Amendment rights had been violated.¹¹⁸ However, regarding its breadth, the Court construed the statute to apply only to “mask-wearing conduct when the mask-wearer knows or reasonably should know that the conduct provokes a reasonable apprehension of intimidation, threats or violence.”¹¹⁹

However, in 1999, Judge Kenneth J. Falk of the U.S. District Court for the Northern District of Indiana ruled that a municipal ordinance making it

¹¹⁶ 260 Ga. 669 (1990).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 671-73.

¹¹⁹ *Id.* at 674.

illegal for the members of the Klan to wear masks in a public assembly was unconstitutional.¹²⁰ Finding that members of the Klan have a First Amendment “right to anonymity when past harassment makes it likely that disclosing the members would impact the group's ability to pursue its collective efforts at advocacy,” the ordinance was rendered invalid.¹²¹

Indeed, some members of the legal community are eager and willing to see these laws struck down. As Giles Bissonette, legal director of the American Civil Liberties Union of New Hampshire, stated:

Banning a person from wearing a clown mask in public would raise free speech concerns. The government shouldn't ban expressive activity because it offends people's sensibilities. As the U.S. Supreme Court has made clear, American citizens must tolerate insulting, and even outrageous, expression in order to provide adequate breathing space to the freedoms protected by the First Amendment...[t]o the extent municipalities are concerned about

¹²⁰ *American KKK v. City of Goshen*, 50 F. Supp. 2d 835 (N.D. Indiana, 1999).

¹²¹ *Id.*

criminality, the best approach would be to enforce existing criminal laws to the extent they apply to how someone wearing a clown mask is behaving toward others.¹²²

However, some anti-mask laws have been upheld.

In 2004, the U.S. Court of Appeals for the Second Circuit reversed a district court ruling that would have invalidated New York's anti-mask law.¹²³ In *Church of the American Knights of the Ku Klux Klan v. Kerik*, the U.S. District Court for the Southern District of New York held that the statute was unconstitutional in that it: (1) violated the rights of citizens to engage in anonymous speech; (2) infringed upon protected expressive conduct or symbolic speech (i.e. mask-wearing is an integral part of the plaintiff's message); and (3) was facially invalid because it distinguished between types of expression (i.e. masks worn for entertainment

¹²² Kevin Landrigan, *NH clowns say fear is unwarranted*, N.H. UNION LEADER, Oct. 23, 2016, <http://www.unionleader.com/safety/NH-clowns-say-fear-is-unwarranted-10242016>.

¹²³ *Church of American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2004).

purposes and masks worn for other reasons).¹²⁴ The U.S. Court of Appeals for the Second Circuit found that: (1) the statute did not implicate the plaintiff's right to anonymous speech because "the individual's right to speech must always be balanced against the state's interest in safety;"¹²⁵ (2) the statute did not infringe upon protected expressive conduct or symbolic speech in this instance because—whereas the regalia of the Klansman is protected—the message of the mask is already conveyed by the rest of the ensemble, and mask-wearing among members is optional;¹²⁶ and (3) the statute was not facially invalid because the creation of exceptions is constitutionally legitimate in that the regulation upon wearing masks is itself constitutionally legitimate.¹²⁷

With these cases in mind, could our clown face prosecution under a state anti-mask statute? Given the use of these laws to combat intimidation at the hands of the Klan, it is conceivable that law

¹²⁴ *Id.* at 202-04.

¹²⁵ *Id.* at 209.

¹²⁶ *Id.* at 206.

¹²⁷ *Id.* at 210.

enforcement might utilize such a statute to achieve the same end as it relates to public intimidation at the hands of rogue clowns. To discourage this sort of behavior, a prosecutor might seek to make an example of our clown. In turn, the defendant might be inclined to challenge the charges against him on constitutional grounds.

While a court's willingness to strike down an anti-mask statute depends largely upon the jurisdiction in which that court sits, we can surmise from the abovementioned cases that a court is more willing to uphold an anti-mask statute where that statute is used to prevent intimidation and properly balances the individual's right to engage in speech against the state's interest in public safety. A court might be more inclined strike down an anti-mask statute where the language of that statute targets specific content or the statute infringes upon expressive conduct or symbolic speech for which the mask is truly integral. Thus, the best argument our clown may make is that his mask or face paint is an essential part of the message he is attempting to

convey. See below for discussion of whether our clown's conduct constitutes protected speech.

V. AN EXAMINATION OF CIVIL LIABILITY

A sinister-looking clown stands on the town common. He does not speak or move and he carries no weapon. He merely stands, gawking at passersby. A parent and young child pass him; the parent holds her child tight. Later, the child begins to have nightmares about the clown, suffers insomnia, and requires the attention of a pediatric psychiatrist. A man, who suffers from severe coulrophobia, drives by the clown on his way to work. The sight is debilitating and he immediately suffers a panic attack. Later, his therapist observes that the encounter reversed several years of treatment. Finally, a pregnant woman peers out her kitchen window and sees the same clown walking across the street. She is so frightened that she goes into premature labor. The baby is delivered safely, but not without complications and a lengthy stay in the maternity ward.

Assuming the identity of this clown can be ascertained, would any of these parties have a viable civil claim against him? Once again, there is no doubt that a clown engaging in tortious behavior, such as entering the property of another, holding someone captive, or committing a violent act would be liable for trespass, false imprisonment, or assault and battery, respectively. The more interesting question is whether a citizen dressed in the trappings of a clown may be civilly liable for the impact that idling in a public place has on others.

A. Intentional Infliction of Emotional Distress

The most compelling cause of action in a case like this would be intentional infliction of emotional defense (“IIED”). The Third Restatement of Torts describes IIED as: “An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily

harm.”¹²⁸ To make matters more difficult, this form of emotional distress is inherently “stand-alone” rather than “parasitic,” in that no other tortious conduct is present.¹²⁹

Thus, whether the above would-be plaintiffs could recover for their injuries depends upon whether: (1) dressing-up as an evil clown and appearing in public constitutes extreme and outrageous conduct; (2) such an action is deliberate or reckless; and (3) the would-be plaintiffs truly suffered severe emotional harm.

Regarding the element of extreme and outrageous conduct, the Restatement notes that:

The adjectives ‘extreme’ and ‘outrageous’ are used together in a fashion that might suggest that each merely emphasizes the other, rather than serving a distinct role. However, some conduct that may be outrageous...is sufficiently common that it could not be characterized as extreme. Similarly, some extreme conduct...is not outrageous. Thus, this double limitation, ‘extreme and

¹²⁸ RESTATEMENT (THIRD) OF TORTS § 46 (AM. LAW INST. 2012).

¹²⁹ *Id.*

outrageous,' requires both the character of the conduct to be outrageous and that the conduct be sufficiently unusual to be extreme.'¹³⁰

While dressing as an evil clown and standing in public might be “outrageous” in the traditional sense,¹³¹ a court would not likely find this conduct to be “extreme.”¹³²

More specifically, modern jurisprudence has used certain indicators to determine whether conduct is extreme and outrageous. Indicators include: (1) abuse of power or position; (2) taking advantage of or emotionally harming a plaintiff, who is known to be especially vulnerable; (3) repeating or continuing to perform undesirable acts, especially where the plaintiff cannot avoid them; or (4) committing acts of physical violence or threatening violence against the

¹³⁰ *Id.* at cmt. d.

¹³¹ RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (“...the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”).

¹³² RESTATEMENT (THIRD) OF TORTS § 46 cmt. d (AM. LAW INST. 2012) (citing “climbing Mt. Everest” as an example of extreme behavior that is not outrageous).

plaintiff, another person, or, in some instance, property.¹³³

Our clown (1) has no power or position of authority; (2) has no knowledge of the vulnerability of those around him; (3) does not—in this scenario—repeat the undesired behavior; and (4) does not commit or threaten to commit acts of violence against any individual or entity. Thus, these indicators suggest that his conduct is not outrageous under IIED. However, whether such conduct is “extreme” and “outrageous” is ultimately a jury question.¹³⁴

Assuming a reasonable jury could find our clown’s conduct to be extreme and outrageous, the plaintiff would next need to establish that our clown intentionally or recklessly caused the injury that he or she suffered. A plaintiff can prove intent through evidence that the defendant desired to accomplish the harm, his so-called purpose.¹³⁵ Alternatively, the

¹³³ DAN B. DOBBS, PAUL T. HAYDEN, ELLEN M. BUBLICK, HORNBOOK ON TORTS 708 (2d ed. 2016).

¹³⁴ *Id.* at 709.

¹³⁵ *Id.* at 707.

plaintiff can also offer evidence that demonstrates that the harm was substantially certain to occur.¹³⁶ If the plaintiff cannot establish intent, he or she can also propose evidence of the defendant's reckless or willful attitude.¹³⁷

Even with these various avenues available, this element too would be difficult to establish because nothing suggests that our clown intended to accomplish the harm caused. Furthermore, it is likely that the harm caused is too attenuated for the "substantial certainty" doctrine to apply. Furthermore, such a plaintiff would likely find recklessness closed to him or her as well. The bar for recklessness is higher than one might think. *Black's Law Dictionary* defines recklessness as: "the creation of a substantial and unjustifiable risk of harm to others and...a conscious (and sometimes deliberate) disregard or indifferences to that risk."¹³⁸ However antisocial, rude, and rash the actions of our clown might seem, appearing in public in a glorified

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Reckless*, BLACK'S LAW DICTIONARY (10th ed. 2014)

Halloween costume during the wrong season does not likely meet the threshold of “a substantial and unjustified risk of harm to others.”¹³⁹

Proving the element of severe emotional harm would also be difficult. The Restatement comments that:

[T]he law intervenes only when the plaintiff’s emotional harm is severe and when a person of ordinary sensitivities in the same circumstances would suffer severe harm. There is no liability for emotional harm suffered only because of the unusual vulnerability of a victim, unless the actor knew of that special vulnerability.¹⁴⁰

Although bodily harm caused by severe emotional harm “can afford objective evidence verifying that the harm is genuine and severe,” the damages that our clown’s victims suffered would be not likely be recoverable.¹⁴¹ For instance, children are often very sensitive to oddities such as this. Why

¹³⁹ *Id.*

¹⁴⁰ RESTATEMENT (THIRD) OF TORTS § 46 cmt. j (AM. LAW INST. 2012).

¹⁴¹ *Id.*

should our clown be any more liable for causing a child to have nightmares and insomnia than, say, a clown entertaining at a birthday party or the creator of a children's show that features an unsettling clown? The gentleman with severe coulrophobia was unusually vulnerable because the harm he suffers well-exceeds the harm that a person of ordinary sensitivities would have suffered in the same circumstances. However, our clown had no knowledge of this man's special vulnerability. To the extent that the woman's pregnancy made her more sensitive to the sight of a clown walking by her home, the same rule applies. Thus, while not altogether impossible, it is highly unlikely that the plaintiffs described above would succeed in a civil claim against our clown.

B. The Constitutional Bar to IIED

There remains a defense that the defendant could raise. As the Supreme Court has held, "The Free Speech Clause of the First Amendment...can serve

as a defense in state tort suits, including suits for intentional infliction of emotional distress.”¹⁴²

In *Snyder v. Phelps*, plaintiff Albert Snyder brought suit against the Westboro Baptist Church, its pastor Fred Phelps, and members of the Phelps family after the church picketed the funeral of Snyder’s son, Marine Lance Corporal Matthew Snyder.¹⁴³ Complying with local ordinances and the instructions of authorities, the Westboro Baptist congregation peacefully assembled outside the church where Matthew Snyder’s funeral mass was being held and erected signs that read: “Thank God for Dead Soldiers,” “Fags Doom Nations,” “America is Doomed,” “Priests Rape Boys,” and “You’re Going to Hell.”¹⁴⁴

In his action, Albert Snyder alleged, *inter alia*, that the defendants had engaged in the intentional infliction of emotional distress, defined in Maryland as “intentionally or recklessly engag[ing] in extreme and outrageous conduct that cause[s] the plaintiff to

¹⁴² *Snyder v. Phelps*, 563 U.S. 443, 451 (2011).

¹⁴³ *Id.* at 443.

¹⁴⁴ *Id.*

suffer severe emotional distress.”¹⁴⁵ A jury found for the plaintiff, holding the Westboro Baptist Church “liable for millions in compensatory and punitive damages.”¹⁴⁶ Subsequently, the District Court reduced the punitive damages award and the Fourth Circuit reversed, ruling “that Westboro’s statements were entitled to First Amendment protection.”¹⁴⁷

On appeal, the Supreme Court affirmed the Fourth Circuit’s conclusion, holding that because “Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to ‘special protection’ under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.”¹⁴⁸ The Court further opined that,

Outrageousness...is a highly malleable standard with an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. In a case such as this, a jury is unlikely to be neutral

¹⁴⁵ *Id.* at 450-51.

¹⁴⁶ *Id.* at 450.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 458.

with respect to the content of [the] speech, posing a real danger of becoming an instrument for the suppression of...vehement, caustic, and sometimes unpleasan[t] expression. Such a risk is unacceptable; in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.¹⁴⁹

The ability of our clown to successfully rest upon this defense depends entirely on whether his conduct constitutes speech. To begin with, if his act constitutes speech, it is inherently expressive conduct or symbolic speech rather than pure speech (i.e. spoken or written communication).¹⁵⁰ While symbolic speech does not enjoy the same level of protection that pure speech does, it is nonetheless protected by the First Amendment to some extent.¹⁵¹ However, "[c]onduct not intended to express an idea cannot be afforded First Amendment protection."¹⁵²

¹⁴⁹ *Id.* at (citations omitted) (internal quotations omitted).

¹⁵⁰ 16A C.J.S. Constitutional Law § 843 (2017).

¹⁵¹ *Id.*

¹⁵² *Id.*

To determine whether conduct constitutes speech protected by the First Amendment, courts generally inquire “whether someone intended to convey a particular message through that conduct and also whether there is a great likelihood that the message would be understood by those who viewed it.”¹⁵³ Alternatively, “some conduct is inherently expressive, and when that is the case, the particularized-message test does not apply,”¹⁵⁴ for,

[I]f a particularized message were always a necessary condition for invoking the First Amendment, then constitutional protection would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.¹⁵⁵

Our clown would, no doubt, have trouble arguing that his conduct constitutes speech under the particularized-message test because it is unclear what his message would be. One can postulate about

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Ex parte Thompson, 442 S.W.3d 325 (2014) (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995)) (internal quotations omitted).

statements concerning, for instance, social media's impact on society or the absurdity of modern life. However, it would be difficult to argue that a passersby viewing his performance would understand this to be his meaning.

However, our clown might argue that dressing in clown attire and acting accordingly, so-called "clowning," is an artistic act that is "inherently expressive," and subject to the same protections afforded "music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures."¹⁵⁶ If this argument proved successful, the court would afford his conduct the same protection against this state tort claim that was granted the Westboro Baptist Church in *Snyder*.

VI. CONCLUSION

Although the number of clown sightings has abated for now, the 2016 hysteria will not soon be forgotten. In the last several decades, "moral panic"

¹⁵⁶ *ETW Corp. v. Jireh Publishing*, 332 F.3d 915, 924 (6th Cir.2003).

has come to describe the “process of arousing social concern over an issue.”¹⁵⁷ In his groundbreaking 1973 book on the subject, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, the noted sociologist Stanley Cohen defines a moral panic as the social anxiety that envelops a population when “[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests.”¹⁵⁸

Moral panic is a troupe of American history that dates to the Salem witch trials.¹⁵⁹ Events like these have colored the country’s folklore, literary tradition, and media practices.¹⁶⁰ Perhaps a propensity for widespread fear of the unknown is a necessary excess of American democracy brought about by Cartesian doubt—that is, the belief in the equality of opinions and the distrust of the opinions of others—that Alexis

¹⁵⁷ *Moral Panic*, A DICTIONARY OF SOCIOLOGY (John Scott ed., 2014).

¹⁵⁸ STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* 9 (1973).

¹⁵⁹ See KAI T. ERICKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* (1966).

¹⁶⁰ See MARK STEIN, *AMERICAN PANIC: A HISTORY OF WHO SCARES US AND WHY* (2014).

de Tocqueville says is an essential feature of the American character.¹⁶¹

With clown hysteria, the old seed of moral panic is present: confrontation with the uncanny, in this context the act of reinterpreting an old and benign cultural institution in such a way that it becomes the very essence of our deepest fears.¹⁶² However, whereas the moral panics of old were geographically limited, the advent of technology—especially social media—has allowed information, and, thus, social-psychological frenzy, to move effortlessly from coast to coast and across borders.¹⁶³

As discussed in this Article, there are likely no legal consequences for simply exacerbating moral panic, even when such actions impact society's most vulnerable members. Indeed, any attempt to impose legal consequences would likely conflict with the principles of freedom of speech and personal liberty that lie at the heart of the American system of

¹⁶¹ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 403 (Harvey C. Mansfield & Delba Winthrop trans., The University of Chicago Press 2002) (1840).

¹⁶² See *supra* Sections II-VI.

¹⁶³ *Id.*

government.¹⁶⁴ While in the throes of trepidation, it can be tempting to utilize the power of the state to halt a disturbing phenomenon, the social consequences of doing so might prove regrettable.¹⁶⁵ Episodes like the 2016 clown hysteria may be an inevitability that society has no means of preventing.¹⁶⁶ However, it remains no laughing matter.¹⁶⁷

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*