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# FEAR THE LAW: Codifying Fear Through the Objectification of the Law

Kat Albrecht, Andrew Burns, & Sierra Bell

## Abstract

Despite the social and legal resonance of fear events, fear has received little academic attention as a mechanism for creating and entrenching law in the United States. Importantly, long after the fear stimulus fades from social discourse, the law remains, sometimes in ways that are not obviously derivative of the original fear object. Consequently, understanding fear as an origin of law is of heightened importance. In this Article, we analyze various domains of law using experimental digital surveys and detailed case study analysis to unveil the *fear principle* that demonstrates how fear becomes law.

We examine the lawmaking potential of fear through the process of objectification. To do so, we dissect the multidimensionality of objects—the social, the tangible, and the legal—and explain how overidentification with one dimension of an object leads to a process of objectification. From there, we consider how the unique emotional capacity of fear can accelerate the process of objectification to create law. In doing so, we craft and empirically test an interdisciplinary definition of fear. Through five case studies: the 1976 Crime Wave Against the Elderly, the Satanic Panic, the Juvenile Superpredator Myth, the Creepy Clown Conspiracy, and the Fentanyl Contact Overdose Myth, we trace the objectification of fear into law and identify key elements needed for objectification to occur. Critically, none of these fear objects were real—but we argue that realness is not necessary for a wave of fear to create law. We end the Article with our theoretical contribution of the *Fear Principle*: an analytic tool designed to help scholars and policymakers identify the legal objectification of fear.

**KEYWORDS:** fear, fear principle, legal objects, case study, measurement, objectification

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**Introduction**

NEW YORK, 1976 – The city was gripped by fear, as reports from the city’s three newspapers and five local television stations covered an unprecedented rise in violence against the elderly.<sup>1</sup> For nearly two months the crime wave raged on.<sup>2</sup> The Mayor of New York City, the New York City Police Department, and local police precincts spoke out condemning the brutal crimes committed by Black and Hispanic youth from poor neighborhoods against the city’s senior citizens.<sup>3</sup> Legislators introduced new bills into law that unsealed juvenile records for sentencing, denied juvenile status for crimes against the elderly, and created lengthy mandatory sentences for elder crimes.<sup>4</sup>

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CALIFORNIA, 1983 – A mother accused employees of abusing her son at McMartin Preschool.<sup>5</sup> Police sent letters to two hundred families asking for information and enlisted therapists to interview the children.<sup>6</sup> Seven daycare workers were accused and eventually charged with child molestation and conspiracy.<sup>7</sup> There were no convictions, but the McMartin case proved the first of hundreds like it in the United States involving Satanic Ritual Abuse.<sup>8</sup> By 1989, one

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1. Mark Fishman, *Crime Waves as Ideology*, 25 SOC. PROBLEMS 531, 532 (1978).  
 2. *Id.*  
 3. *Id.* at 532 (reporting that this Harris Poll was published in 1977 by the Washington Post); *see also* Jack Goldsmith and Sharon S. Goldsmith, *CRIME AND THE ELDERLY* (1976); Frank Clememte and Michael Kleiman, *Fear of Crime Among the Aged*, 16 GERONTOLOGIST 207, 207–210 (1976); JAMES GAROFALO, *PUBLIC OPINION ABOUT CRIME: THE ATTITUDES OF VICTIMS AND NONVICTIMS IN SELECTED CITIES* (1977); RICHARD SPARKS ET AL., *SURVEYING VICTIMS: A STUDY OF THE MEASUREMENT OF CRIMINAL VICTIMIZATION, PERCEPTIONS OF CRIME, AND ATTITUDES TO CRIMINAL JUSTICE* (1977) (confirming this heightened fear of the crime by the elderly in the same period are measurements); *see also* Alan Clarke & Margaret Lewis, *Fear of Crime Among the Elderly: An Exploratory Study*, 22 BRIT. J. CRIMINOLOGY 49, 60 (1982) (confirming this heightened fear in a slightly later empirical study).  
 4. Fisherman, *supra* note 1, at 532.  
 5. Alan Yuhas, *It’s Time to Revisit the Satanic Panic*, N. Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/us/satanic-panic.html> [<https://perma.cc/28NR-A3NV>].  
 6. *Id.*  
 7. *Id.*  
 8. *Id.*

hundred daycare workers were charged with ritual sex abuse of children nationwide under similar circumstances.<sup>9</sup>

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WISCONSIN, 2016 - Seven photos appeared on Monday, August 1, 2016, in a Facebook group called “Gags - The Green Bay Clown.”<sup>10</sup> The photos showed a dirty looking clown in full face paint holding dark balloons and skulking around buildings and under overpasses.<sup>11</sup> The page exploded with speculation.<sup>12</sup> As the year wore on, sightings of creepy clowns committing crimes or stalking people were reported across small towns in the United States, eventually becoming a nationwide panic that resulted in schools being closed due to clown threats, clown hunts, and even the implementation of local laws banning clowns.<sup>13</sup>

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All of these waves of fear have something in common: they were not “real.”

There was no increased wave of crime against the elderly. In fact, there were fewer homicide crimes against the elderly in the summer of 1976 compared to the previous year despite an increase in reporting of elder homicides.<sup>14</sup> There was also no evidence of a wave of satanic daycare crimes.<sup>15</sup> Under scrutiny, the evidence of Satanic involvement became slimmer, and many such alleged incidents were dismissed altogether and convictions were reversed.<sup>16</sup> The creepy clowns in Wisconsin and elsewhere were identified as nothing more than movie marketing stunts.<sup>17</sup>

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9. Rosalind Theresa Waterhouse, *Satanic Abuse, False Memories, Weird Beliefs and Moral Panics: Anatomy of a 24-Year Investigation* 21 (Jan 2014) (Ph.D. dissertation, City University London) (City Research Online).
  10. *Clown Sightings Prompt Police Calls in Green Bay, Wisconsin*, ABC7 CHICAGO (Aug. 5, 2016), <https://abc7chicago.com/green-bay-clown-freak-gags-the-wisconsin/1458590> [<https://perma.cc/FXY7-C33Z>].
  11. *Id.*
  12. *Id.*
  13. Christopher Roth, *The Creepiest Clown*, 57 ANTHROPOLOGY NEWS e196, e196 – e198 (2017).
  14. See Fishman, *supra* note 1, at 532 (where Fishman notes that the crime wave itself was unlikely, that police statistics do not support it, and that homicide of the elderly experienced a 19 percent drop from the previous year).
  15. Mary deYoung, *Another Look at Moral Panics: The Case of Satanic Day Care Centers*, 19 DEVIANT BEHAV. 257, 258 (1998).
  16. See Yuhas, *supra* note 5 (quoting FBI Investigator Ken Lanning as saying of the Satanic Panic that “The evidence wasn’t there, but the allegations of satanic ritual abuse never really went away” suggesting the divorce between the reality of crime and social fear).
  17. See Gwendolyn Purdom, *Rest Easy, That Creepy Wisconsin Clown Was Just a Marketing Stunt*, CHICAGOIST (Aug. 11, 2016) [https://chicagoist.com/2016/08/11/rest\\_easy\\_that\\_creepy\\_wisconsin\\_clo.php](https://chicagoist.com/2016/08/11/rest_easy_that_creepy_wisconsin_clo.php) [<https://perma.cc/SM8X-XS8B>](where

Even if the underlying object of fear was never real, the consequences of those fears remain, and we argue, are enshrined in law in ways that might not be obvious on their face. In this Article, we study how fear accelerates multidimensional objects into law, even when the underlying phenomena might not be true. Importantly, we argue that the legal consequences of these fears remain entrenched in systems of law long after the original fear stimulus has abated. The culmination of this Article is to propose the *fear principle* that explains the legal consequences of the objectification of fear and answers the fundamental question of whether objects need to be real.

The Article unfolds in five parts. In Part I, we consider the multidimensionality of objects and build a theory about the objectification of fear, with particular emphasis on its connection to the law. In Part II, we undertake the substantial project of defining fear and leverage an empirical experiment to prove that our specific conceptualization of fear is measurable. In Part III we unpack five fear case studies that span the 1970s - 2020s. In Part IV, we synthetically analyze the legal consequences of objectifying fear and develop the fear principle. In Part V, we conclude the Article and propose various points for intervention in the face of the potential fear of reactionary regulation.

## I. Objectifying Fear

This Article is principally about two things: objects and fear. We begin by briefly considering the idea of a multidimensional object and its relationship to the law. Then, we make a more concerted effort to explain how fear interacts with objects.<sup>18</sup> In Part A to follow, we do this theoretical work before posing a profoundly important question: What happens to the law if the fear object is not real?

### A. *Objects and the Law*

Before we take up a discussion of how fear affects objects of law and regulation, we must first understand the meaning of an object.<sup>19</sup> Here

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film director Adam Krause explained that the clown was marketing a stunt for a film of the same name).

18. It is not the intention of this Article to fully explain the dynamics of objects. For a theoretical primer on objectification in this sense see Kat Albrecht, "*If I See A Burmese Python I'm Gonna Kill that Shit*": *How Changing the Object of the Law Affects Support for Legal Regulation*, U.C. IRVINE L. REV. (forthcoming) (tracing the meaning of objects and developing a theory of objectification in great depth).
19. In the paper to follow we break standard conventions around the use of personal pronouns in legal writing. We do this for two reasons. First, this paper is occasionally empirical, making it fundamentally ethically necessary to center the decision-making capacity of the researcher. Second, this paper is often theoretical in ways that extend and complicate existing theory. Again, it feels

we take up a very particular conceptualization of an object as a multi-dimensional ‘thing’ comprised of social, legal, and tangible dimensions of various weights. This consideration of objects is borne out of a line of research hinging on theories by Michael Madison, who distinguishes between a tangible ‘thing’ and a legal ‘thing,’ Henry E. Smith who argues for the inclusion of a social dimension of a ‘thing,’ and work by Author Kat Albrecht on the legal consequences of becoming attached to a single dimension of a ‘thing.’<sup>20</sup>

Take as an example a restaurant that sells a limited-edition secret flavor of their signature ice cream. This very special ice cream is itself a multidimensional object that interacts both with law and society beyond its status as ‘tangible’ or ‘real.’ In the realest sense, it is ice cream, and should you receive this object, you will receive ice cream.

But ice cream is also a legal object beyond its physical capacity as ice cream. Taken to court, the attorneys on the case will not be fighting over ice cream; they will be fighting over intellectual property, likely in the form of trade secrets, patents, and trade dress.<sup>21</sup> In fact, ice cream products have been substantially litigated and protected, like Coldstone Creamery’s Strawberry Passion ice cream cake,<sup>22</sup> Dairy Queen’s federally registered trademark ice cream curl,<sup>23</sup> or the unenforceability of trade secret law onto Dippin’ Dots method of creating their signature little ice cream balls.<sup>24</sup>

At the same time as ice cream is a legal object that differs from the tangible object, it is also a social object. The special limited-edition ice cream in our example is not interchangeable with merely any ice cream.<sup>25</sup> In this way, ice cream has a social dimension beyond the

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necessary that these complications – whether you agree with their study or not – be grounded in these own origins with these authors.

20. Michael Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 *CASE W. RESV. L. REV.* 381, 383–384 (2005); Henry E. Smith, *Property as the Law of Things*, 125 *HARV. L. REV.* 1691, 1691 (2012); see Albrecht, *supra* note 18, at 1.
21. See generally Kurt M. Saunders and Valerie M. Flugge, *Food for Thought: Intellectual Property Protection for Recipes and Food Designs*, 19 *DUKE L. & TECH. REV.* 159 (2021) (for an extended consideration on how food falls under various dimensions of intellectual property protection and where these protections end).
22. *Id.* at 173 (discussing various foodstuffs protected as patented designs, including Coldstone Creamery’s ice cream cake under U.S. Patent No. D571,526 (filed Jun. 23, 2004)).
23. *Id.* at 180 (discussing various foodstuffs protected under trademarks, including Dairy Queen under Registration No. 2,183,417).
24. *In re Dippin’ Dots Pat. Litig.*, 249 F. Supp. 2d 1346, 1375–76 (N.D. Ga. 2003).
25. This hypothetical has played out in reality, with some limited edition or seasonal ice creams for fast-food restaurants achieving cult-like status and mainstream media coverage reporting its availability to consumers. For an example, see Jordan Valinsky, *Here’s When McDonald’s is Bringing Back the Shamrock*

fact that it is ice cream. Were we to attempt to describe the importance of this ice cream without considering all three dimensions of it, and merely assign it the status ‘ice cream’, we would be fundamentally underestimating and misunderstanding the object. The ice cream is literally ice cream, but it is also intellectual property, and it is also a societally significant object.

Importantly, we do not claim here that all people who think about ice cream care about every dimension of it as an object. Some people just like it because it is ice cream, not because it represents an innovative use of patent law. However, in the present inquiry, this becomes very important because the legal dimension of an object can be quite effective without being the most salient dimension of the object to most people. This example can be applied across other domains of law, with other use cases in intellectual property law, property law, environmental law, and even criminal law—as this Article will demonstrate.<sup>26</sup>

If objects have multiple dimensions, and those dimensions are worth consideration, we can next contemplate *how* objects matter. Previous empirical work on the relationship between multidimensional objects and the law proposes a process of objectification in which one dimension of an object—be it the tangible, legal, or social—can dominate perception of the object and lead to legal decisions and precedents that may be dissimilar from other dimensions of the original object.<sup>27</sup> Take as an example, Author Kat Albrecht’s empirical experimental work on invasive snakes and feral cats. That experiment controlled for the environmental harm of both the snakes and cats, proposing the same regulatory actions for two legally similar objects (invasive species) and measuring public support for eradication measures and regulatory control. A super majority of participants in the experiment supported killing and regulating snakes but argued against the same treatment of cats while using inconsistent logic to differentiate the two animal objects. That is, participants saw a substantial social or tangible difference in the desirable animal object (cats) vs. the undesirable object (snakes) even if the legal status of the object considers them similarly regulatable.<sup>28</sup>

This example demonstrates that certain dimensions of objects can result in chains of legal decisions that do not actually represent the position of the original supporters. We can use the idea of legal precedent to clarify this danger further. Precedents are not borne out of one simple

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*Shake*, CNN BUSINESS (Feb. 9, 2022) <https://www.cnn.com/2022/02/09/business/mcdonalds-shamrock-shake-return-date/index.html> [<https://perma.cc/XR2V-XLV5>].

26. Madison, *supra* note 20, at 838–84; see Albrecht, *supra* note 18.

27. Albrecht, *supra* note 18, at 19–29.

28. *Id.*



rule but by the process of having to tessellate many small decisions together into a more general principle.<sup>29</sup> We can then imagine a situation where there may have been substantial support for one or more of the many small decisions baked into a precedent, but where that support does not translate into support for the general rule. Returning to the example above, participants appeared to support harsh sanctions around invasive species law, but what they actually supported was harsh sanctions around invasive species that they did not like. Nevertheless, the new precedent for animal eradication and regulation can outlast the undesirable object and perhaps be transferred onto another animal object that is legally similar even if it is not socially or even tangibly similar. In this way, we now see how social attachments to objects and legal realities of those arguments do not always match.

What has yet to be satisfactorily analyzed in previous work on the objectification of the law is the origins of attachment to particular dimensions of objects and the veracity of objects themselves, with the latter considering whether an object has to be ‘real’ or ‘true’ to be effective. In the present Article, we propose fear as one such possible origin that may have a particularly insidious or pernicious ability to obfuscate the eventual consequences of regulating the object. We then consider an additional potential source of complication, when we explore whether objects need necessarily be real to be effective in creating law.

## **B. *Defining Objects Through Fear***

In this work, we consider how the addition of a powerful emotional attachment to one dimension of an object might so quickly accelerate and solidify the process of objectification. This process would then enshrine enduring elements of that fear into law long after the feared object ceases to be relevant. In this way, we propose that fear acts as a mechanism for objectification of the law.

Take as an example, the passing of the Patriot Act. In the wake of 9/11, the United States experienced a variety of complex social and emotional responses. Scholars argue that fear was perhaps the most powerful of these, with scholar Mark Hamm invoking fear as the direct conduit to U.S. responses to 9/11 and the potential threat of future terror attacks, writing:

That fear was caused by extraordinary images of indiscriminate violence – planes crashing into buildings, skyscrapers in flames, men and women leaping to their deaths, and landmark structures collapsing to the ground as panicked crowds ran for safety amid a whirlwind of dust and debris. This vivid imagery demonstrated that the point

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29. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis* 19 J. L. & ECON. 249, 249–250 (1976).

of terrorism is fear. And fear, in turn, would define the very fabric of subsequent responses.<sup>30</sup>

Some of these responses were legal regulation, including the Patriot Act.<sup>31</sup> The passing of the Patriot Act was notable for several reasons: The culture of fear surrounding its initiation, the quickness with which it was passed, and the hindsight debate about its constitutionality.<sup>32</sup> The Patriot Act increased the abilities of the government to engage in the search and seizure of private property, expanded legal capacity to search third-party records, and greatly reduced other protections under the Fourth Amendment through “trap and trace” and “roving wiretaps” that allow for the expansion of investigative scope, and enabled greater capacity and time to use information gathered in Foreign Intelligence Securities Act (FISA) court proceedings.<sup>33</sup> In hindsight, scholars have critiqued the Patriot Act as functionally relying on racially profiling Arabic and Muslim people as a strategy to combat terrorism.<sup>34</sup>

The Patriot Act is also a very clear example of how a law remains even after the immediate hysteria surrounding a fear event like a terror attack has lessened. That is, the social fear response to terror attacks dulled somewhat in the years following 2001, while the Patriot Act remained in effect until President Barack Obama signed the USA Freedom Act in 2015.<sup>35</sup> The Patriot Act is also an example of how specu-

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30. Mark Hamm, *The USA Patriot Act and the Politics of Fear*, CULTURAL CRIMINOLOGY UNLEASHED, 301, 301 (2016).
  31. Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).
  32. See Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 435 (2002); Amani Michael Awwad, *The U.S. Patriot Act and Civil Liberty: The Culture of Fear and Mass Media as Agents of Social Control 2* AM. INT'L J. HUMANS. & SOC. SCI. 54, 56 (2016); and see generally John Whitehead & Steven Aden, *Forfeiting Enduring Freedom for Homeland Security: A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-terrorism Initiatives* 51 AM. U.L. REV. 1081 (2001) (providing a detailed analysis of the constitutionality of the Patriot Act that is beyond the scope of the present article).
  33. See generally Brett Shumate, *From Sneak and Peek to Sneak and Steal: Section 213 of the USA Patriot Act*, 19 REGENT U.L. REV. 203 (2006) (giving a specific breakdown of Section 213 and the nature of clandestine searches and seizures); see also Christopher Bellas, *The USA Patriot Act: Legislative (In) Justice?*, 6 HOMELAND SEC. REV. 191 (2012) (providing a more general breakdown of the various sections of the act and its impact on 4th Amendment rights); see also *The USA Patriot Act: Myth vs. Reality*, DEP'T. JUSTICE, [https://www.justice.gov/archive/ll/subs/add\\_myths.htm#s218](https://www.justice.gov/archive/ll/subs/add_myths.htm#s218) [<https://perma.cc/SN8M-CGBS>] (providing a defensive counterpoint to the arguments above).
  34. Susan M. Akram, *The Aftermath of September 11, 2001: The Targeting of Arabs and Muslims in America*, 24 ARAB STUD. Q. 61, 85 (2002).
  35. See *Terrorism*, GALLOP: TOPICS A-Z <https://news.gallup.com/poll/4909/terrorism-united-states.aspx> [<https://perma.cc/4YG2-5BLB>] (showing that Gallup Polls

lative or preventative laws are created in reaction to an event without any reasonable way of calculating the likelihood of a repeated incident. While the underlying single event may be completely true and worthy of fear—that does not necessarily guarantee a wave of similar events is forthcoming even absent increased regulation.<sup>36</sup>

### C. *The Realness of Fear Objects*

A principal concern of this Article will be the consideration of whether fear objects need to be real to be effective in generating law. As will become abundantly clear, we argue that they do not. However, like most things, there is nuance in the meaning of realness that needs to be unpacked so as not to misconstrue fear objects themselves. There are many ways for phenomena to be real or false, with substantial gray areas in between where something is neither entirely false nor entirely true. We identify a number of ways that a fear object might not be real, providing detailed examples of these in the case study Part of this Article.<sup>37</sup>

Perhaps the clearest understanding of lack of realness is situations where the underlying fear object is completely false. That is, where the underlying event purported to generate fear never happened. To take up a legal example, the CSI Effect, postulates that criminal juries can be swayed into false beliefs about forensic evidence due to consumption of fictional crime dramas.<sup>38</sup> A substantial body of scientific research suggests that the CSI Effect does not exist or is extremely limited in application.<sup>39</sup> Despite this, there is evidence of prosecutors believing the

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have found that American fears of being a victim of a terror attack were as high as 58 percent in the wake of 9/11 but now sit around 36 percent, closer to pre-9/11 levels); see generally Bart Forsyth, *Banning Bulk: Passage of the USA Freedom Act and Ending Bulk Collection*, 72 WASH. & LEE L. REV. 1307 (2017) (providing a more detailed discussion of what governmental data collection abilities were limited by the USA Freedom Act).

36. You could rightly make the point here that a preventative law could in fact stop the development of a legitimate fear wave by preventing future events. While possible, even taking such a possibility as true does not account for all regulatory responses to fear and does not ameliorate the problem of regulations outlasting fear objects. This will be discussed with more nuance in the case study Part of this Article.
37. We do not mean to suggest that this is an exhaustive list of possibilities, rather that they are several ontological types of realness that merit further analysis through the case study methods employed in this Article. We hope additional types will be identified through further research.
38. Steven M. Smith, et al., *Fact of Fiction: The Myth and Reality of the CSI Effect*, 47 CT. REV. 4, 4 (2011).
39. Young S. Kim, et al., *Examining the “CSI-effect” in the Cases of Circumstantial Evidence and Eyewitness Testimony*, 37 J.CRIM. JUST. 452, 454–56 (2009); Donald E. Shelton, *The ‘CSI Effect’: Does It Really Exist?*, 259 NAT’L INST.

CSI Effect matters and altering their behavior due to this belief.<sup>40</sup> In this way, the CSI Effect might not be real in the original sense, but it does not preclude it from having other significant consequences, like changes in prosecutorial strategy.<sup>41</sup> That is, even if an underlying phenomenon is not real, that does not mean that decisions and beliefs about that phenomenon are not impactful.

More complicated are situations where the underlying events are real, but the construction of them as a pattern or wave is not real. Rates of crime in the United States are a consistent example of this. Despite the fact that crime rates have fallen enormously since the 1990s, Americans consistently believe that crime rates are high and on the rise.<sup>42</sup> Scholars theorize that this is due to multiple factors, including the discrete reporting of news, the overemphasis of violent crime in news reporting, and the powerful fear response to violent crime.<sup>43</sup> In such a scenario, interrogating whether or not the fear object is real becomes difficult. In the simplest sense: it is, since the underlying incidents are likely true. However, the prevalence and patterning of those incidents might create a misperception about the underlying events. We argue that in some cases, the misperceptions due to pattern effects can constitute a new wave of fear in itself, one that encourages false beliefs in a pattern that does not exist, even if there are grains of truth in underlying individual incidents.

Another scenario emerges where perhaps the underlying events are real, the construction of them as a pattern is true, but the imagined harm is substantially distorted. A useful example here is borne of 1975's twenty-five-foot cinematic terror *Jaws*. Following *Jaws*, there was a substantial uptick in Americans' fear of sharks, reporting about shark attacks, and hunting of sharks.<sup>44</sup> Particularly good for incubating fears about sharks is the fact that shark attacks do happen in real life, and studies show that shark attacks are increasing in many parts of the world.<sup>45</sup> However,

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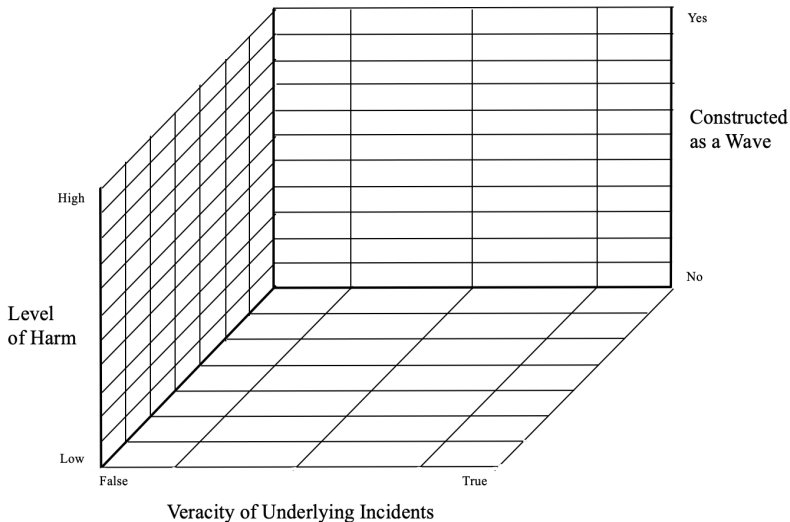
JUST. J. 1, 5 (2008); Kimberlianne Podlas, *The "CSI Effect" and Other Forensic Fictions*, 27 LOY. L.A. ENT. L. REV. 87, 88 (2006).

40. Maricopa Cnty. Att'y Off., *CSI Maricopa County: The CSI Effect and Its Real Life Impact on Justice* 4, 5–6 (2005) (showing that the Maricopa County Prosecuting Attorney's Office found that 38 percent of attorneys believed they lost a case because of the CSI Effect and noted questioning about television viewing habits in *voir dire*).
41. *Id.*
42. John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RESEARCH (NOV. 11, 2020).
43. Mark Warr, *Fear of Crime in the United States: Avenues for Research and Policy*, 4 CRIM. JUST. 452, 452 & 469 (2000).
44. Beryl Francis, *Before and After "Jaws": Changing Representations of Shark Attacks*, 34 GREAT CIRCLE 44, 44 (2012).
45. Daryl McPhee, *Unprovoked Shark Bites: Are They Becoming More Prevalent?*,

despite the rise in shark bites, the absolute number of shark attacks remains extremely low and most shark bites are not fatal.<sup>46</sup> The likelihood of harm is sufficiently low such that the 29.5 percent of Americans who are reportedly afraid of sharks far outpaces the contextual realness of the phenomenon.<sup>47</sup> We of course do not endeavor to suggest that such fears are illegitimate or even totally irrational, only that the reality of the phenomenon would not seem to indicate that urgent and overreaching regulation would be of immediate priority absent a fear response.

This set of three scenarios demonstrates that interrogating realness goes far beyond true or false and instead considers multiple competing axes of truth, accuracy, and reality in making an assessment about whether something is real. Therefore, we consider the three factors described above explicitly: Whether the underlying event occurred, whether the events were misleadingly conceptualized as a wave, and the level of harm. For conceptual clarity, we plot these three factors on a three-dimensional graphic representation in *Figure 1* below with the intention of plotting our selected case studies inside this three-dimensional space.

**Fig. 1. Conceptual Graph Demonstrating Multiple Axes of Realness**



42 COASTAL MGMT. 478, 478 (2014).

46. See generally Blake K. Chapman & Daryl McPhee, *Global Shark Attack Hotspots: Identifying Underlying Factors Behind Increased Unprovoked Shark Bite Incidence*, 133 OCEAN & COASTAL MGMT 72 (2016) (a research study on 6 shark bite hotspots to predict why shark bites are increasing).

47. Roxy Amirazizi, *America's Top Fears 2020/2021*, CHAP. UNIV. SURV. AM. FEARS (2022).

## II. Defining Fear

Having spent considerable time discussing the nature of objects, it is necessary to specifically define fear and its criteria for the purposes of this inquiry. Importantly, it is not our intention to argue that fear is the only mechanism of creating law via objectification or by any other method. Instead, we assert that it is one such salient mechanism that may have some unique enduring effects on the construction of law. While the concept of fear has varying useful definitions, we will define it more narrowly. To explain what our concept of fear is, first, we briefly contextualize the study of fear in social science to generate an interdisciplinary definition that speaks to the strengths of different social scientific fields. Following this, we define fear both logistically and instrumentally, employing a digital survey experience to demonstrate the empirical utility of our chosen definitions.

### A. *Interdisciplinary Fear*

Many social scientific fields have definitions of fear from which our definition may take inspiration and seek improvement. In particular, there is considerable research in psychology, sociology, and criminology that will undergird the definition of fear used here. Psychologists have developed a number of validated instruments for measuring fear called the Fear Survey Schedule (FSS), which utilizes individual-level questions to quantify fears held by the respondent.<sup>48</sup> For the most part, the FSS focuses on individuals, exemplifying a key difference between psychological and sociological approaches to measurement. Where psychologists concentrate on how social factors affect individuals, sociologists tend to focus on the larger structures of status characteristics, social relationships, and societal contexts.<sup>49</sup> The result of these different priorities means that fear is measured often in psychology as an individually held emotion, but has been afforded far less attention in sociology as a large sociological phenomenon.<sup>50</sup> This is particularly important in our investigation of fear

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48. See generally Peter J. Lang & A. David Lazovik, *Experimental Desensitization of a Phobia*, 66 J. ABNORMAL & SOC. PSYCH. 519 (1963) (piloting the Fear Survey Schedule I); James H. Geer, *The Development of a Scale to Measure Fear*, 3 BEHAV. RES. THER. 45 (1965) (piloting the Fear Survey Schedule II); Joseph Wolpe & Peter J. Lang, *A Fear Survey Schedule for Use in Behaviour Therapy*, 2 BEHAV. RES. THER. 27 (1964) (piloting the Fear Survey Schedule III).

49. Peggy A. Thoits, *Social Psychology: The Interplay Between Sociology and Psychology*, 73 SOC. FORCES 1231, 1231 (1995).

50. For examples of influential studies using or discussing the Fear Schedule Surveys in psychology, see generally: Milo W. Scherer & Charles Y. Nakamura, *A Fear Survey Schedule for Children (FSS-FC)*, 6 BEHAV. RES. THER. 173 (1968) (developing a Fear Survey Schedule for use with children); Thomas H. Ollendick, *Reliability and Validity of the Revised Fear Survey Schedule for Children (FSSC-R)*, 21 BEHAV. RES. THER. 685– (1983) (validating the Fear

and the law, since law is deeply welded to society including and beyond the individual: Reflecting the norms and values of societies.<sup>51</sup>

In his canonical work on a macro sociology of fear, sociologist Andrew Tudor laments this oversight writing, “Fearfulness in varying degrees is part of the very fabric of everyday social relations. Any sociology, therefore, must find ways of conceptualizing fear and examining its social causes and consequences.”<sup>52</sup> To Tudor’s point, sociology as a discipline has not devoted significant time to the study of fear specifically.

Where sociologists have failed to adequately study fear in particular, they have devoted some time to the study of sociological emotions as necessary to explain fundamentals of social behavior and patterns of relationships that link individuals to other people, institutions, groups, and environments.<sup>53</sup> Edmund Kemper provides a useful framework to consider emotions as the product of two social dimensions of power and status, specifying that fear is the outcome of an action where an actor is subject to a power greater than their own.<sup>54</sup> This leads us to the small body of sociological work attempting to describe fear as a sociological phenomenon. This work predominately endeavors to explain how topics can be conceptualized as or stoke fears in media, even while being constructed as an anti-fear effort.<sup>55</sup> Some sociologists have also given

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Survey Schedule revision for use with children); Eleonora Gullone & Neville J. King, *Psychometric Evaluation of a Revised Fear Survey Schedule for Children and Adolescents*, 33 J. CHILD PSYCHOL. & PSYCH. 987 (1992) (providing a second revision); Eleonora Gullone, *The Development of Normal Fear: A Century of Research*, 20 CLINICAL PSYCH. REV. 429 (2000) (providing a general overview of fear research in psychology); Barry M. Rubin, et al., *Factor Analysis of a Fear Survey Schedule*, 6 BEHAV. RES. THER. 65 (1968) (conducting a formal statistical analysis of the Fear Survey Schedule III); among others. For the assertion that sociology has under-focused on fear, see Andrew Tudor, *A (Macro) Sociology of Fear?*, 51 SOCIO. REV., 238, 241–242 (2003).

51. See generally PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (2020) (laying out an organizational theory of law and explains how law rises from values and moral in the evolution of institutions).
52. Tudor, *supra* note 50, at 238.
53. See generally J. M. Barbalet, *EMOTION, SOCIAL THEORY, AND SOCIAL STRUCTURE* (2001) (considering the importance of emotions in every day social processes, including lesser studied emotions like fear, resentment, vengefulness, shame, and confidence); Ian Burkitt, *Complex Emotions: Relations, Feelings, and Images in Emotional Experience*, 50 SOCIO. REV., 151 (2002) (attempting to distinguish between feelings and thoughts to understand the development of emotions in a society).
54. Theodore D. Kemper, *How Many Emotions Are There? Wedding the Social and the Autonomic Components*, 93 AM. J. SOCIO. 263, 275 (1987).
55. Barry Glassner, *The Construction of Fear*, 22 QUALITATIVE SOCIO. 301, 301 (1999). See generally Mark Warr, *Fear of Crime in the United States: Avenues for Research and Policy*, 4 CRIM. JUST. 452 (2000) (devoting the entire last section of the article to thinking about how media generates and reifies fear and considers

consideration to how moral climates of fearfulness can pervade society in general.<sup>56</sup> These moral foundations are particularly relevant to the project of fear as law. Taking criminal law as an example, we find moral origins in original criminal standards like ‘depraved heart’ murder and increasing punishment for concepts like ‘wickedness’ as building blocks of modern *mens rea*.<sup>57</sup> Punishment justifications were also explicitly tied to both proportionality and moral guilt.<sup>58</sup> In a similar vein, scholars have also compellingly argued that criminal law still contains moral enforcement in criminal sentences as diverse as traffic violations to sex offenses.<sup>59</sup>

Andrew Tudor responds to his critiques of the field by presenting his own six-part classification of fear.<sup>60</sup> Tudor explains that there are both micro and macro-level structures that range from the physical to the social.<sup>61</sup> Most interesting here is the concept of social subjects because Tudor describes them as having both positions within the social system and social circumstances.<sup>62</sup> What this theory of fear does not do, however, is lay out exactly how one might go about measuring and creating a unified sociology of fear that meets these specifications.

Where sociologists have not embarked upon this larger journey in measurement, criminologists have paid particular attention to measuring fear of crime. First, criminologists note that actual crime and fear of crime are not well correlated.<sup>63</sup> Over time, criminologists have developed an understanding of some patterns in fear of crime that vary by demographic membership finding that women and the elderly fear crime more than other groups.<sup>64</sup> Findings about fear by racial demographic are more

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whether fear is regulatable).

56. See generally Frank Furedi, CULTURE OF FEAR REVISITED (1997) (where he argues that the greatest fear threat is the culture of fear itself and the tendency to fear); Geoffrey R. Skoll & Maximilliano E. Korstanje, *Constructing an American Fear Culture from Red Scares to Terrorism*, 10 INT’L J. HUM. RTS. & CONST. STUD. 341, 342 (2013).
57. Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 116–17 (1996).
58. Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, UTAH L. REV. 635, 655 (1993).
59. Richard C. Fuller, *Morals and the Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 624, 625 (1942); Patrick Devlin, *Morals and the Criminal Law*, in THE ENFORCEMENT OF MORALS 25 (1965); Kat Albrecht & Janice Nadler, *Assigning Punishment*, 13 FRONT. PSYCHOL. 1, 2–3 (2022).
60. Tudor, *supra* note 50, at 248.
61. *Id.* at 247–50.
62. *Id.*
63. Nicole Rader, *Fear of Crime*, OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY 1, 1–2 (2017).
64. Margaret M. Braungart, et al., *Age, Sex and Social Factors in Fear of Crime*, 13 SOCIO. FOCUS 55, 63 (1980); Randy L. LaGrange & Kenneth F. Ferraro, *Assessing Age and Gender Differences in Perceived Risk and Fear of Crime*, 27



mixed, though researchers have found some variation by racial group and economic status.<sup>65</sup>

In general, researchers do find some patterns in fear of crime related to socio-demographic characteristics. Studies find that women fear crime more than men, postulating explanations ranging from perceptions of vulnerability, under-reported female victimization, and fear around specific types of female-dominated victimization crimes like sexual assault.<sup>66</sup> Research on racial/ethnic and social class correlates of fear of crime are less unanimous, though some studies have suggested differences in fear of crime by race or residence in racially heterogeneous neighborhoods.<sup>67</sup> Additionally, some research suggests that the elderly fear crime more than their younger counterparts.<sup>68</sup>

The fear of crime literature intentionally distinguishes between victimization risk and emotional fear. In an overview of the field, Scholar Nicole Rader identifies four fundamental problems: (1) questions about feelings of safety that actually measure perceptions of the likelihood of victimization rather than the emotional fear of a crime happening to oneself, (2) not being specific about the type of crime, (3) not including location-specific cues, and (4) not using a measure (like a Likert scale) that is capable of measuring the magnitude of fear of crime.<sup>69</sup> Consequently, there has been a concentrated effort in recent decades to be more intentional about how fear-related concepts are measured by criminologists, specifically asking how fearful individuals are of specific crimes in specific geographic contexts with scalable responses.<sup>70</sup> By asking more

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CRIMINOLOGY 697,697 (1989). *See also* Rader, *supra* note 63, at 4–9 (summarizing known factors predicting fear of crime across the criminology literature).

65. John G. Boulahanis & Martha J. Heltsely, *Perceived Fears: The Reporting Patterns of Juvenile Homicide in Chicago Newspapers*, 15 CRIM. JUST. POL'Y REV. 132, 145 (2004); Suzanne T. Ortega & Jessie L. Myles, *Race and Gender Effects on Fear of Crime: An Interactive Model with Age*, 25 CRIMINOLOGY 133, 138–140 (1987); Christina Pantazis, *Fear of Crime, Vulnerability and Poverty: Evidence from the British Crime Survey*, 40 BRIT. J. CRIMINOLOGY 414, 424–425 (2000).
66. *See* Braungart, *supra* note 64; LaGrange & Ferraro, *supra* note 64; Elizabeth A. Stanko, *Women, Crime, and Fear*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 46 (1995); Robbie M. Sutton & Stephen Farrall, *Gender, Socially Desirable Responding and the Fear of Crime*, 45 BRIT. J. CRIMINOLOGY 212 (2005); Lesley Williams Reid & Miriam Konrad, *The Gender Gap in Fear: Assessing the Interactive Effects of Gender and Perceived Risk on Fear of Crime*, 24 SOCIO. SPECTRUM 399 (2004); Stephanie Riger & Margaret T. Gordon, *The Fear of Rape: A Study in Social Control*, 37 J. SOC. ISSUES 71 (1981).
67. *See* Boulahanis & Heltsely, *supra* note 65, at 151; Ted Chiricos, et al., *Fear, TV News, and the Reality of Crime*, 38 CRIMINOLOGY 755, 766 (2000); Ortega & Myles, *supra* note 65; Pantazis, *supra* note 65.
68. Braungart et al., *supra* note 64, at 63.
69. Rader, *supra* note 63, at 3–4.
70. Boulahanis & Heltsely, *supra* note 65, at 151; Chiricos, et al., *supra* note 66.

specific questions about individual crime types and narrowing the geography of those questions, criminologists focus research participants on a specific recallable context. A common question type used to help focus the recall of respondents is asking questions defined by the geography of “in your neighborhood” or “near your house.”<sup>71</sup>

Importantly, criminologists have also made changes to the specific wording of fear questions over time. After finding that questions asking about the likelihood of victimization or worry were not accurately measuring fear, criminology has generally made a methodological push toward explicitly using fear language to ask, “how afraid are you”?<sup>72</sup> We argue that these improvements continue to fall short in their external validity to capture emotional states. That is, we propose that asking someone who is safely taking a survey in a laboratory or in the comfort of their own home, “how afraid are you” is not close enough to actual fear experiences to accurately quantify fear, even in hindsight. Our goal in crafting our definition of fear is to take the strongest elements from psychology, sociology, and criminology to create a specific but nuanced definition of fear that can help elucidate the process by which fear becomes law.

### **B. Definition of Fear**

Our definition of fear has specific components designed to differentiate fear from other forms of risk or anxiety while also acknowledging the social structures, knowledge, and context that undergird it. This definition of fear also returns to our theory of objects and how multidimensional objects undergo legal objectification. We therefore define fear as an explicitly emotional response to perceived danger that may or may not be rooted in realness or rationality. In this way, fear is attached to the social dimension of a multidimensional object, even if the tangible dimension of that object is mistaken and the eventual legal dimension is obfuscated. We also acknowledge fear as both an individually held emotion and a site of cultural knowledge and social consensus. That is, that fear can exist both within an individual and a society. Instrumentally, we also define fear as a potential mechanical driver for legislative and policy change by conceptualizing fear as a form of routinized urgency that produces regulation to ultimately exert control on behalf of the frightened group. By routinized urgency, we refer to the impetus to regulate quickly using existing systems of power and authority. We argue that fear allows an object to undergo rapid objectification under the law. Moreover, we

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71. *Id.*

72. See generally Kenneth F. Ferraro & Randy L. LaGrange, *The Measurement of Fear of Crime*, in *THE FEAR OF CRIME* 277–308 (2017) (providing a detailed overview of the particular word choice to measure fear across multiple criminological studies).

consider fear as law to reify the beliefs and priorities of certain segments of society rather than a fully utopian collective—the segment of society attempting to maintain or gain control via regulation.

### C. *Measuring Fear*

In order to test the suitability of our fear definition, and our particular concern with emotional response, we conducted an empirical survey experiment.<sup>73</sup> The goal of the experiment was to test whether or not there would be a meaningful difference in levels of fear if participants were given emotional cues vs. non-emotional information about a potential fear event as well as testing both individually held fears (psychological fears) and social fears (sociological fears). We fielded the survey on Prolific.co, a digital survey platform empirically demonstrated to provide the highest quality participants.<sup>74</sup> In addition to onboard vetting procedures provided by Prolific, we used standard preventative measures to maintain sample quality including bot control, attention checks, and answer triangulation.<sup>75</sup> We recruited 201 participants to take the survey, requiring that participants be located in the United States.<sup>76</sup> The survey took participants an average of thirty-eight minutes to complete and they were compensated at a rate of fifteen dollars per hour.

We opted to design the experiment using scenario vignettes to increase external validity beyond the laboratory setting (i.e., offering a description that is more similar to an actual experience instead of a standard survey question). We generated and tested thirteen separate vignette scenarios that span individual fears, fiction-based fears, sociological fears, group fears, and several control categories designed to measure startle, risk assessment, and imagination. The vignettes concerned the following topics: Fear of flying in a plane, fear of snakes, fear of ghosts, horror movie tropes about creepy cabins in the woods, race-based interaction with police, a woman being followed as she walked home alone, fear of a homeless person, a potential hate crime against a gay man alone at night, notification of an escaped prisoner in the neighborhood, a school shooting, a cat in the bushes, a power outage in a storm, and a cyber security threat. The vignettes were assigned in a random order to participants, with intermittent attention checks. Participants were then asked demographic questions and given a fear debrief. The general flow of the survey is shown in *Figure 2*.

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73. The surveys and all of their associated language are provided in *Appendix A*.

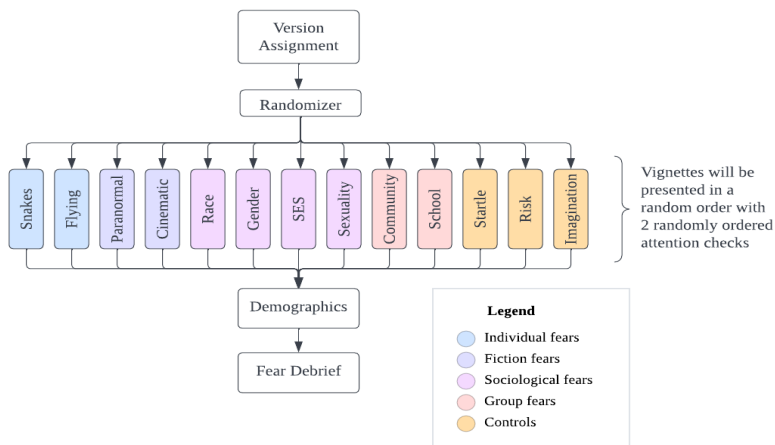
74. Benjamin D. Douglas, et al., *Data Quality in Online Human-Subjects Research*, 18 PLoS ONE 1, 12 (2023).

75. Prolific takes significant steps to verify user identity, audit participant quality, and give test assignments to potential survey takers.

76. Note that Prolific also requires participants to be over the age of 18 in order to be employed by the platform.

**Fig. 2. General Survey Flow**

**Figure 1. General Survey Flow**



**Table 1. Demographics**

	N	%
Version		
Control	98	48.76
Emotion	103	51.24
Gender		
Female	130	66.33
Male	53	27.04
Other	13	6.63
Race		
White	143	73.71
Black	30	15.46
Other	13	6.70
Multiple	8	4.12
Ethnicity		

	N	%
Hispanic	22	11.40
Education		
High school or no degree	32	16.33
Some college or votech	65	33.16
Bachelor's degree	64	32.65
Post-Baccalaureate degree	35	17.86
Age		
Younger than 19	4	2.04
20–29	79	40.31
30–39	53	27.04
40–49	30	15.31
50–59	19	9.69
60 or older	11	5.61
Political views (N=193)		
25%	50	
50%	80	
75%	96	
100%	100	

The general demographics of the sample are reported above in *Table 1* to provide context about the U.S.-based participation pool. Women were slightly overrepresented constituting 66.33 percent of the sample. The sample was also majority white (73.71 percent), with 15.46 percent of the sample self-identifying as Black, 6.70 percent self-identifying as some other race (most commonly Asian), and 4.12 percent self-identifying as a combination of multiple races. A further 11.40 percent of the sample indicated that they were Hispanic. Participants had diverse educational backgrounds, with 16.33 percent having a high school degree or no degree, 33.16 percent attending some college or vocational school, 32.65 percent holding a bachelor's degree, and 17.86 percent holding a post-baccalaureate degree (MA, MS, JD, PhD, MD). Many age groups were represented in the

sample pool, with most participants ranging between 20 and 39 (67.35 percent). The sample also skewed politically liberal, with only the first quartile self-identifying as politically conservative.

Participants were eligible to receive either the control or emotional version of the survey. In the control condition, participants would be shown a descriptive vignette that contained no emotional cues. In the emotional condition, the vignette was supplemented with one to two emotional cues designed to explain how the character in the vignette perceived their situation. A sample vignette for the gendered fear condition is shown in *Figure 3* below. In the vignette, Jenna was headed home from a bar when she heard someone following her. In the emotional condition, Jenna describes the hairs on the back of her arms and neck standing up and is determined to not look afraid. This vignette is typical of the sample for length, complexity, and amount of variation between the control and emotional conditions. Participants were then asked to score how afraid Jenna should be on a scale from one to ten, one being the least afraid and ten being most afraid.<sup>77</sup> This scalar measurement is in line with methodological improvements suggested by contemporary criminologists.

**Fig. 3 Sample Vignette**

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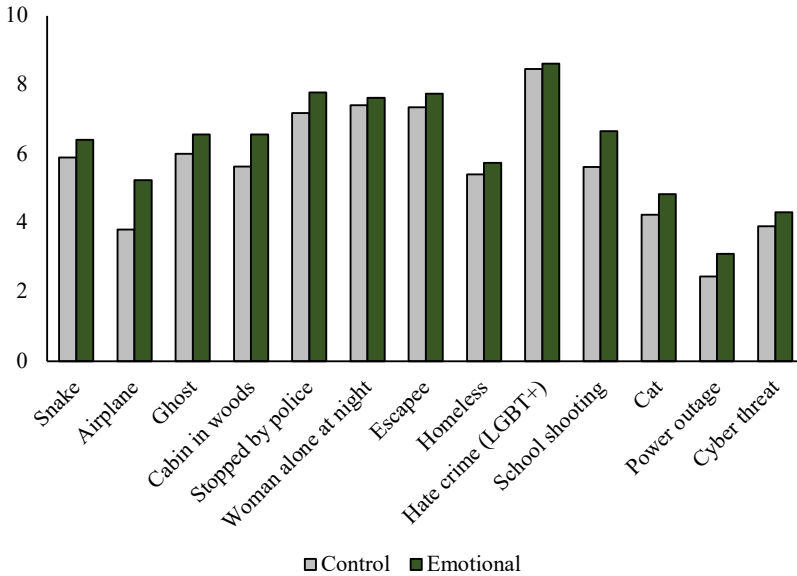
Control	Jenna had told her friends she'd be fine. She wanted to head home early since she was tired from her classes and her new nannying job. So, she'd left the bar and started walking towards home. She thought she was alone, but then Jenna heard footsteps behind her that weren't hers. She sped up, walking faster, and digging in her purse for her phone.
Emotional	Jenna had told her friends she'd be fine. She wanted to head home early since she was tired from her classes and her new nannying job. So, she'd left the bar and started walking towards home. She thought she was alone, but then Jenna heard footsteps behind her that weren't hers. <i>The hairs on her arms and the back of her neck stood up</i> . She sped up, walking faster, <i>determined not to look afraid</i> , and digging in her purse for her phone.

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77. Participants were also asked to imagine themselves in the position of the vignette character and again rate fear 1–10. The results of this are available in *Appendix B*, which are consistent on average with the character-based vignettes (though there was often variation within participants depending on the demographic group of the respondent, this averaged out across the sample).

Figure 4 below plots the average fear scores across the sample for all thirteen vignettes, with the left-hand series displaying results from the control condition and the right-hand series displaying results from the emotional condition. Following the bar graph, the numerical means for each vignette are reported in tabular form. In all thirteen cases, the average score for the emotional condition was higher than its control counterpart. Participants generally avoided the extreme tails of the score distribution, rating most of the vignettes between four and eight, where one was the least fear inducing and ten was the most fear inducing.

**Fig. 4. Fear Rating per Vignette**



**Table 2: Fear Rating (Numerical)**

	Control	Emotional
Snake	5.90	6.41
Airplane	3.81	5.24
Ghost	6.01	6.57
Cabin in woods	5.64	6.56
Stopped by police	7.18	7.78
Woman alone at night	7.41	7.63
Escapee	7.35	7.74

Homeless	5.41	5.74
Hate crime (LGBT+)	8.46	8.61
School shooting	5.62	6.66
Cat	4.24	4.84
Power outage	2.45	3.11
Cyber threat	3.91	4.31
N=	98–97	101–103

**Fig. 5. Percent Change in Fear Rating by Vignette (Control vs. Emotional)**

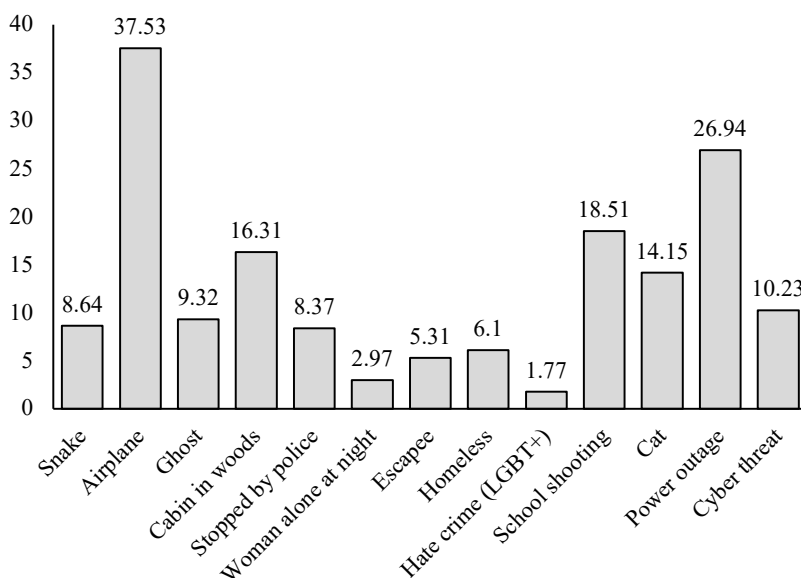


Figure 5 above makes more meaning of the difference between the two survey versions, displaying the percentage change in fear score for each vignette. Through this calculation, it becomes evident that some scenarios were substantially more frightening in the presence of emotional cues. Interestingly, a number of these vignettes concerned stimulus that is not necessarily frightening on its face: like a power outage or flying on an airplane. It was only after explaining how the character in the vignette felt, that participants rated fear as more plausible. This suggests some utility in considering the emotional dimension of fear.

In contrast, some of the scenarios with explicit harm threats: a woman walking alone at night, a presumably Black man stopped by the police, and



a potential hate crime against a gay man walking alone were rated as very frightening by participants both with and without emotional cues, though the emotional cues condition still scored higher.<sup>78</sup> Notably, many of the participants who responded to these vignettes were not LGBT, Black, or female and still rated these fear scenarios the highest. This grants credence to the idea of fear as not solely an individualized emotion, but also a sociologically felt phenomenon. Both exploratory findings help substantiate our chosen fear definition for continued analysis and give context to fear as both an accelerant and influential on a multidimensional object.

### III. Case Studies

We now begin the process of weaving together all the threads introduced in the Article so far. Having discussed the meaning of objects and realness, the definition of fear, and introduced the reality of regulating fear in criminal justice, we now must connect the dots to show precisely how a fear event becomes objectified under the law. Differentiating the Part to follow from the previous, we intentionally select relatively discrete fear events to limit the need to discuss causes of objectification that might compete with fear. Using our definition of fear, we focus on criminal law, selecting five unique case studies ranging from the 1970s to the 2020s, all of which focus on fear objects that are not real. In chronological order, those cases are the 1976 Crime Wave Against the Elderly, the Satanic Panic, the Juvenile Superpredator Myth, the Creepy Clown Conspiracy, and the Fentanyl Contact Overdose Myth. Following this introduction, we move on to analyze and synthesize the five cases into the development of the fear principle in part five.

#### A. 1976 Crime Wave Against the Elderly

In 1976, New York City was gripped by the terror of a crime wave targeting elderly residents.<sup>79</sup> As the crimes continued, the city's newspapers and news stations identified potential perpetrators as young Black and Hispanic career criminals who were attacking poverty-stricken elderly white people in poor inner-city neighborhoods.<sup>80</sup> This phenomenon did not exist solely within the newspapers, public officials and lawmakers also responded in kind, instituting legally relevant initiatives and changes

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78. Notably, situations like these are often over-represented in crime news and fictional entertainment media. For examples of empirical studies quantifying these media effects, see generally: Alexis M. Durham, III, et al., *Images of Crime and Justice: Murder and the "True Crime" Genre*, 23 J. CRIM. JUST. 143, 150–51 (1995); Kat Albrecht & Kaitlyn Filip, *The Serial Effect*, 53 N.M. L. REV. 29 (2023); Wendy Colomb & Kelly Dampousse, *Examination of Newspaper Coverage of Hate Crimes: A Moral Panic Perspective*, 28 AM. J. CRIM. JUST. 147 (2004).

79. Mark Fishman, *Crime Waves as Ideology*, 25 SOC. PROBS. 531, 531 (1978).

80. *Id.* at 532.

without further evidence.<sup>81</sup> On the policing side, the police department's Citizens Robbery Unit (SCRU) began extended plain-clothes operations to try and prevent the spate of crimes against the elderly.<sup>82</sup> For their part, legislators introduced bills that would make juvenile records available to judges at sentencing in order to deny juvenile status from 16–19-year-old defendants with elderly victims, and to mandate prison sentences for elderly crime.<sup>83</sup> These bills survived through the New York State Senate and Assembly but were vetoed by the Governor in 1977—who weighed in long after the crime wave had ended.

The only problem with the 1976 Crime Wave Against the Elderly is that it never happened. While the individual crimes reported by the news were true, the construction of them as a new wave of crime was not.<sup>84</sup> Twenty-eight percent of the stories reported by the news were about homicides against the elderly, even though elder homicide had declined from the previous year and constituted less than one percent of crimes against the elderly.<sup>85</sup> While rates of some types of victimization did increase, they increased for society as a whole, not just the elderly.<sup>86</sup>

The origins of this fictitious crime wave can be found in the sociology of news and the logistics of news creation. Newspapers don't exist in a vacuum; instead, the flow of information constitutes a socio-cognitive relationship across a shared universe of newsmakers, news consumers, and their respective social worlds.<sup>87</sup> These tensions are not about fabricating news, but instead characterize news as the outcome of sociological work.<sup>88</sup> Here we can transcend the logistical process of reporting news and instead intuit value from its actual construction.<sup>89</sup> In the case of the 1976 Crime Wave Against the Elderly, reporters did not fabricate the news but rather gave determinate form to the incidents they reported on.<sup>90</sup> Scholar Mark Fishman further explains in his canonical work on the topic that a steady supply of incidents and the consistent reporting of a theme are the necessary ingredients for the creation of a crime wave, both of which were abundant in the 1976 Crime Wave Against the Elderly.<sup>91</sup>

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81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 532–3.

87. Zhongdang Pan & Gerald Kosicki, *Framing Analysis: An Approach to News Discourse*, 10 *POL. COMM.* 55 (1993).

88. *See generally*: Michael Schudson, *THE SOCIOLOGY OF NEWS* (2011) (which presents a history of the news and explains how the generation of news is a sociological project).

89. Dan Berkowitz, *SOCIAL MEANINGS OF NEWS*, 4–5 (1997).

90. Fishman, *supra* note 1, at 538–40.

91. *Id.* at 538.

The 1976 Crime Wave Against the Elderly affords us the opportunity to classify the fear object along the three dimensions of realness outlined earlier in this Article: level of harm, the construction of a wave or pattern, and the veracity of underlying incidents.<sup>92</sup> In this case, the underlying incidents were true and neither the police wire nor the news were in the business of making up fake crimes. The harm from those incidents was also very real and severe, in this case as physical injury to the victimized elderly. However, the construction of the wave itself is where the realness of the fear object comes into question as there was no true wave at all.

The fictitious crime wave also named young Black and Hispanic men as perpetrators, further criminalizing a social group that was not actually conducting a new wave of crime. This racialization of the crime wave made the legislative actions proposed at the time, mandatory sentences and consideration of juvenile records, more palatable to the general public. Notably, the changes in law proposed as a result of the 1976 Crime Wave That Wasn't were for the most part vetoed by the Governor the following year. This is an important legal lesson about fear regulation. In this case, the natural passage of time and the lack of rapidity with which regulation could be enshrined essentially prevented fear-based laws from making it on the books. However, this was not due to a system of explicit protections designed to limit reactionary regulation. In some ways, we can conceptualize this as a lucky outcome that foreshadows what can happen when the fear wave is not naturally abated in time to prevent permanent regulatory action. The next example, the Satanic Panic, demonstrates what happens when fear-based regulation around fictitious crime waves is more permanently embedded in criminal sentencing.

## **B. *Satanic Panic***

The first major event of the Satanic Panic of the 1980s occurred in 1983 with accusations of Satanic ritual abuse at McMartin Preschool in Manhattan Beach, California.<sup>93</sup> Before the end of the decade, there were thousands of accusations of Satanic ritual abuse—accusations stemming from children being interviewed by therapists or police employing leading questions.<sup>94</sup> The first study to demonstrate the lack of evidence for

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92. Note that the fear object in this case is not a tangible object, as it was in some of the simplistic examples in the beginning of this Article. Importantly, the theory of multidimensional objects allows objects to have many different dimensions, rather than forcing all theoretical dimensions into relevance.

93. Rosalind Theresa Waterhouse, *Satanic Abuse, False Memories, Weird Beliefs and Moral Panics*, 20 (2014) (PhD dissertation, City University of London) (asserting the McMartin case is widely accepted as the first major event of the Satanic Panic).

94. Alan Yuhas, *It's Time to Revisit the Satanic Panic*, *NEW YORK TIMES* (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/us/satanic-panic.html> (there were

the existence of a well-organized intergenerational satanic cult, who sexually molested and tortured children in their homes or schools for years and committed a series of murders came in 1994, with findings that have yet to be refuted.<sup>95</sup> The Satanic Panic is perhaps one of the clearest examples of a moral panic driven by fear.<sup>96</sup>

In the height of this panic, news media uncritically reported accusations of Satanic ritual abuse on television and in print, self-styled experts lectured police on telltale signs of Satanic cult activity, and therapists recovered memories of children suspected of being victims.<sup>97</sup> That the perceived victims were children provides some of the cause for fear and moral indignation. Women entering the workforce, dual-earner households, divorce, and single-parent households were all viewed by conservatives and religious fundamentalists as either a harbinger of societal collapse or evidence of its inevitability. Thus, preschools and daycare centers became the target of religiously themed backlash, representing to religious conservatives the enablers of the abandonment of family values.<sup>98</sup>

Neither Satanic ritual abuse nor an organized network of Satan-worshipping child abusers operating out of daycare centers existed. Despite being a less-than-real object, it remained both a social and legal object. A trio of victims of the Satanic Panic; Damien Echols, Jason Baldwin, and Jessie Misskelley—known as the West Memphis Three—were convicted in 1994 of the murder of three eight-year-old boys found mutilated in a creek bed in West Memphis, Arkansas in May 1993.<sup>99</sup> The crime shocked

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approximately 12,000 unsubstantiated accusations of “group cult sexual abuse” analyzed by the National Center on Child Abuse and Neglect. At least one child was coaxed into making accusations and later reported being forced to do so). [<https://perma.cc/FE2D-8SDX>].

95. Daniel Goleman, *Proof Lacking for Ritual Abuse by Satanists*, NEW YORK TIMES (Oct. 31, 1994) <https://www.nytimes.com/1994/10/31/us/proof-lacking-for-ritual-abuse-by-satanists.html>.
96. See generally Erich Goode & Nachman Ben-Yehuda, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* (2010) (Satanic ritual abuse, and the misplaced accusations of the 1980s comprise a key example of moral panics in this text, one of the most often cited in dealing with moral panic theory).
97. Ben Crouch & Kelly Damphousse, *Connection: A Survey of “Cult Cops” in THE SATANISM SCARE, 195–197* (2017) (police concerned with Satanism were surveyed as to their interest in the topic, many attended seminars or subscribed to newsletters); see also Tamara Roleff, *Satanism*, 50–52, 60–65 (2002) (irresponsible and uncritical media reporting noted as spreading the Satanic Panic. Likewise, irresponsible therapists were likely the source of some false memories introduced through suggestion or other manipulation).
98. Mary de Young, *THE DAY CARE RITUAL ABUSE MORAL PANIC*, 12–14 (2003) (describes the politics of women placing children in daycare, including the anxiety of mothers, and the New Christian Right that linked what they saw as an erosion of the nuclear family as proof of societal turmoil).
99. Dan Stidham, et al., *Satanic Panic and Defending the West Memphis Three*, 42

area residents, and police were pressured to find the culprits.<sup>100</sup> The West Memphis Three represented expedient scapegoats, considered weird and, as a result, suspected of both Satanism and ritual murder.<sup>101</sup> Echols was sentenced to death, and Baldwin and Misskelley were sentenced to life in prison.<sup>102</sup> The West Memphis Three were eventually released from prison when, in 2011, a judge accepted an Alford plea from one of the three.<sup>103</sup> According to the court, the case is closed, but three young boys were murdered and the most recent attempt, by Damien Echols, to introduce the DNA evidence existing at the crime scene and in evidence for thirty years, was denied by a circuit court judge due to lack of jurisdiction.<sup>104</sup> At the time of writing, the Arkansas Supreme Court is considering the matter.<sup>105</sup>

The Satanic Panic is different from the 1976 Crime Wave Against the Elderly because the underlying incidents were either unspeakably rare or untrue altogether. Despite this, the potential harm and the resultant social harm of child sexual abuse were high. So also, were the fictitious events constructed as a wave. Importantly, the lasting damages to individuals and communities far outlived the Satanic Panic itself, even as its consequences continue to be litigated and re-litigated today.<sup>106</sup>

### C. *Juvenile Superpredators*

Unlike a crime wave that was made of real incidents that were interpreted through the news, the creation of the Juvenile Superpredator Myth exemplifies a case where the news instilled panic and legal consequences around a prospective crime wave where the underlying incidents

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U. MEM. L. REV. 1061 (2011) (the West Memphis Three were convicted based no evidence. Damien Echols deliberately cultivated an image of a spooky kid, dabbling in the occult. Another of the three, Jessie Misskelley, was clearly coached into confession by police. Despite the claims that the three were engaged in Satanic ritual abuse, Misskelley did not know what or who Satan was at time of his wrongful conviction. The Three were convicted in 1994, and released after Jason Baldwin accepted an *Alford* plea in 2011).

100. *Id.* at 1069.

101. *Id.* at 1065, 1084.

102. *Id.* at 1077, 1080.

103. *Id.* at 1099–1101.

104. Rose Johnson, Joyce Peterson, & Lydian Kennin, *West Memphis 3 Damien Echols appeals to Ark. Supreme Court for DNA Evidence*, ACTION NEWS 5 (Jan. 09, 2023). <https://www.actionnews5.com/2023/01/09/west-memphis-3-damien-echols-appeals-ark-supreme-court-dna-evidence>. [https://perma.cc/8M6H-6ZV5].

105. George Jared, *Arkansas Supreme Court Denies Attempt to Dismiss Echols Appeal for Advanced DNA Testing*, TALK BUSINESS (Apr. 6, 2023) <https://talkbusiness.net/2023/04/arkansas-supreme-court-denies-attempt-to-dismiss-echols-appeal-for-advanced-dna-testing>. [https://perma.cc/2SSA-LHSN].

106. Mary de Young, *Another Look at Moral Panics: The Case of Satanic Day Care Centers*, 19 DEVIANT BEHAVIOR 257, 258 (1998).

did not come to fruition. In the 1990s, criminologists and political and local leaders, influenced strongly by the work of Professor John Dilulio and Safe Streets Coalition President James Wooten's presentation to the Senate Subcommittee on Youth Violence, predicted a rise in juvenile crime due to an expanding juvenile population.<sup>107</sup> However, this was to be no ordinary sort of juvenile crime. Dilulio wrote that this juvenile crime wave would be comprised of vicious, predatory, youths operating with no remorse: superpredators.<sup>108</sup> As the media frenzy reached its zenith, juvenile homicide rates, and crime plummeted—Dilulio's juvenile crime wave simply never happened.<sup>109</sup>

The Superpredator Myth was not without consequences, as it is believed that it contributed directly to policy measures that levied more punitive punishments on youth and resulted in an overrepresentation of Black or African American youth in the juvenile justice system.<sup>110</sup> Between 1992 and 1999 almost every state in the United States passed laws making it easier for juvenile defendants to be tried in adult courts.<sup>111</sup> This legacy persists, as youth swept up in the harsh incarceration policies of the 1990s remain incarcerated today.<sup>112</sup>

The Juvenile Superpredator Myth exemplifies a second case targeting young people of color in a distinct process of racialized fear. The weaponization of crime and law to manage racialized fear is nothing new. Scholar Thelma Harmon traces the codification of racial fear from the

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107. See generally: Karen S. Miller, Gary Potter, & Victor Kappeler, *The Myth of the Juvenile Superpredator* in the HANDBOOK OF JUVENILE JUSTICE (Barbara Sims & Pamela Preston eds., 2006) (who describe the contours of the rise of the Juvenile Superpredator Myth and its consequences).
  108. John Dilulio, *The Coming of the Super-Predators*, WEEKLY STANDARD, November 27 23–28 (1995)
  109. Franklin E. Zimring, *American Youth Violence*, 42 CRIME AND JUSTICE 265, 290 (2013).
  110. See generally: Howard Snyder & Melissa Sickmund, *Minorities in the Juvenile Justice System*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention: National Report Series (Dec. 1999); Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT'G REP. 260 (1999) (for rich descriptions and discussion about the demographics of justice involved youth and the consequences of 90s juvenile justice policies).
  111. See Jessica Short & Christy Sharp, *Disproportionate Minority Contact in the Juvenile Justice System*, CHILD WELFARE LEAGUE OF AM. 7 (2005) (“Between 1992 and 1999, 49 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults through statutory exclusion, mandatory waiver, direct file by prosecutors, or presumptive waiver legislation”).
  112. Krista Larson & Hernan Carvente, *Juvenile Justice Systems Still Grappling with Legacy of the “Superpredator” Myth*, Vera (Jan. 24, 2017) <https://www.vera.org/news/juvenile-justice-systems-still-grappling-with-legacy-of-the-superpredator-myth>. [<https://perma.cc/3PQZ-XLZV>].

Slave Codes to the present day, arguing that these racialized laws still lurk in the shadows of contemporary American law—often thinly disguised as something else.<sup>113</sup> For example, George Bush's 1988 presidential campaign used the imagery and story of Willie Horton to inspire fear of crime—but also to cue race-based fears.<sup>114</sup> Cronin, Cronin, and Milakovich explain that this alleged fear of crime in the Horton case actually transcended a fear of crime alone and was a fear of disorder, fear of riots, and a fear of Black people in the United States.<sup>115</sup> Melissa Barlow et al. translates this into a broader finding about crime news being ideological and political.<sup>116</sup> Jonathan Simon explains this directly in the Willie Horton case, writing that:

The image of a dangerous killer being released from prison to prey on an unsuspecting family was used by Dukakis's opponents to cast the Democratic Party as out of touch with the fears of ordinary law-abiding citizens and unable to inflict the punishments supported by such citizens.<sup>117</sup>

Returning to the specifics of the Juvenile Superpredator Myth, we see some interesting complications when classifying the realness of objects. In some ways, the veracity of underlying incidents looks like the 1976 Crime Wave Against the Elderly, since there really were some violent crimes by juveniles during the period. However, the veracity of underlying incidents was also not real in the way that it was packaged by criminologists since none of these crimes was committed by some new breed of youthful superpredator. Despite this, the consequences of violent victimization do qualify as high harm. Thanks in part to legitimation by the courts and academic experts, the Juvenile Superpredator Myth was also constructed as a wave of sorts – but more of a potential wave to ward off than an actual present pattern. This makes the wave itself much more insidious since disproving a potential wave is an impossible counterfactual.

In hindsight, even some of the criminologists who fanned the fears of the Juvenile Superpredator Myth have tried to legally intervene to counteract the harsh punishments designed to quell those fears. Professors John Dilulio and James Fox joined an amicus brief on behalf of two 14-year-olds facing life without the opportunity of parole in *Miller v. Alabama*, writing, “the [S]uperpredator [M]yth contributed to the dismantling

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113. Thelma L. Harmon, *Codification of Fear: SYG Laws*, 5 RALPH BUNCHE J. OF PUB. AFF. 1, 2 (2016).

114. See generally: Kathleen Jamieson Hall, *DIRTY POLITICS* (1992) (for a rich description of the Bush presidential campaign strategy and crime policy).

115. Thomas E. Cronin, et al., *U.S. v. CRIME IN THE STREETS*, 167–168 (1981).

116. See Melissa Hickman Barlow, et al., *Economic Conditions and Ideologies of Crime in the Media: A Content Analysis of Crime News*, 41 CRIME & DELINQUENCY 3–19 (1995).

117. Jonathan Simon, *From a Tight Place: Crime, Punishment, and American Liberalism*, 17 YALE L. & POL. REV. 853, 855 (1999).

of transfer restrictions, the lowering of the minimum age for adult prosecution of children, and it threw thousands of children into an ill-suited and excessive punishment regime.”<sup>118</sup> Despite this, thousands of juveniles remain incarcerated with life sentences due to the state’s refusal to retroactively apply the decision in *Miller v. Alabama*, demonstrating how fear reactionary regulation is significantly easier to enact than to take back.<sup>119</sup>

#### D. *Creepy Clown Conspiracy*

The next example, the Creepy Clown Conspiracy picks up from the theme of unintended consequences and explains how fear stimulus about something false can serve to make real law. The exact first incident spawning the Creepy Clown Conspiracy of 2016 is debated, but credit is usually ascribed to media stunt clown ‘Gags the Clown’ in Green Bay, Wisconsin, or to reports of clowns luring children into the woods in Greenville, South Carolina.<sup>120</sup> From there, the clown craze caught on like wildfire with clown sightings reported in Florida, Georgia, Arkansas, Mississippi, Missouri, Louisiana, Texas, Virginia, West Virginia, Maryland, Delaware, New Jersey, Massachusetts, Rhode Island, New York, Pennsylvania, Ohio, Indiana, Minnesota, Michigan, Illinois, Iowa, Nebraska, Kansas, Colorado, Washington, Utah, Idaho, Oregon, and even the United Kingdom.<sup>121</sup> While a few isolated crimes occurred that involved clown masks or threats, virtually zero incidents were identified that featured actual creepy clowns leading news outlets to pan all of the sightings as hoaxes and false reports.<sup>122</sup>

To trace the spread of the Creepy Clown Conspiracy and measure the amount of news coverage, we briefly analyze news data about creepy

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118. See Brief of Jeffery Fagan, et al., as Amici Curiae Supporting Petitioners at 37, *Miller v. Alabama*, 567 US 460 (2012), text of amicus here: <https://eji.org/wp-content/uploads/2019/11/miller-amicus-jeffrey-fagan.pdf>.

[<https://perma.cc/DF5S-WMX6>].

119. The Superpredator Myth, 25 Years Later, EQUAL JUSTICE INITIATIVE (Apr. 7, 2014) <https://eji.org/news/superpredator-myth-20-years-later>. [<https://perma.cc/BD5F-6BEW>].

120. *Clown Sightings Prompt Police Calls in Green Bay, Wisconsin*, ABC7 CHICAGO (Aug. 5, 2016), <https://abc7chicago.com/green-bay-clown-freak-gags-the-wisconsin/1458590>. [<https://perma.cc/56VP-KL9M>]; AJ Willingham, *What’s with All the Clowns Everywhere? 6 Legit Possibilities*, CNN (Oct. 10, 2016), <https://www.cnn.com/2016/10/05/health/creepy-clowns-rumors-trnd/index.html>. [<https://perma.cc/25JB-BV3P>].

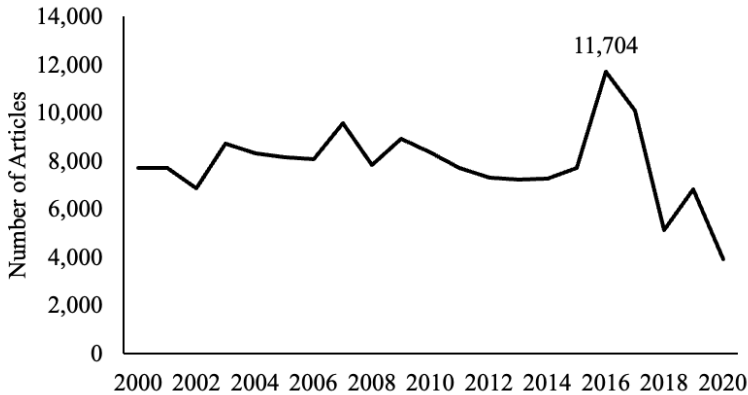
121. Aja Romano, *The Great Clown Panic of 2016 is a Hoax, but the Terrifying Side of Clowns is Real*, Vox (Oct. 12, 2016), <https://www.vox.com/culture/2016/10/12/13122196/clown-panic-hoax-history> [<https://perma.cc/Q6TZ-8GGE>]; *Police Issue Warning as Creepy Clown Craze Comes to Britain*, REUTERS (Oct. 10, 2016), <https://www.reuters.com/article/us-usa-clowns-britain/police-issue-warning-as-creepy-clown-craze-comes-to-britain-idUSKCN12A0M2>.

122. Romano, *supra* note 121.



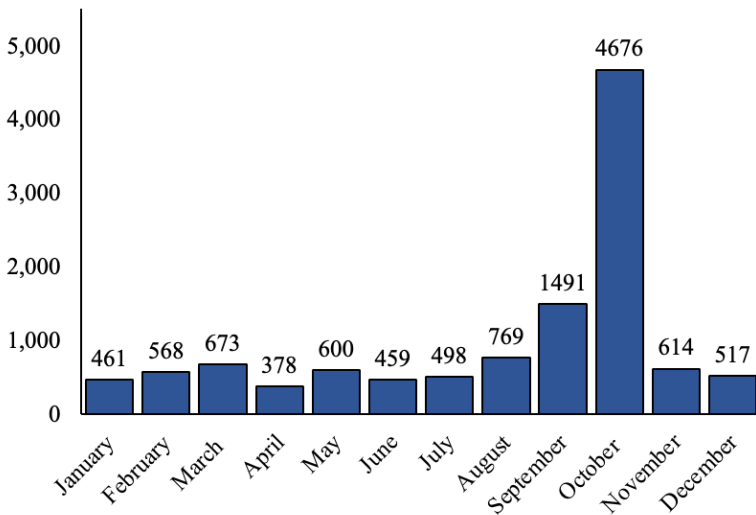
clowns. *Figure 6* visualizes this data as actual news coverage, showing a spike in the number of articles about creepy clowns in 2016, with approximately 12,000 articles published on the topic in the United States.<sup>123</sup>

**Fig. 6. Evil Clown Coverage in the United States, 2000–2021**



*Figure 7* below provides a more detailed breakdown of creepy clown coverage by month for the entirety of 2016. This confirms that the spike in news coverage coincides with the fall of 2016, not-so-coincidentally reaching its peak on the month of Halloween and then quickly falling back closer to baseline coverage numbers.

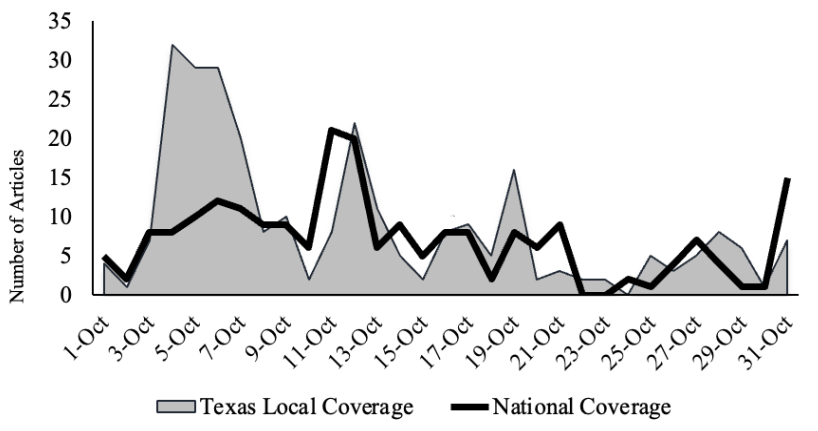
**Fig. 7. Evil Clown Coverage in 2016**



123. These figures were generated using data from Access World News.

Figure 8 plots two trendlines, to show the difference in creepy clown coverage by local news in a given location and national news. Looking at this example of Texas (one of the states where creepy clowns were allegedly spotted), we see that Texas local coverage dwarfed National coverage in early October, but that National news coverage seems to have reinvigorated local news coverage by early/mid-October. What this data foreshadows is a relationship between local and national news coverage. Figure 8 hints at a sort of feedback loop—where local news might feasibly drive national news coverage that serves to reignite local news coverage again. If true, this might explain how a low number of incidents could still lead to magnified coverage as a function of logistical spread rather than reoccurrence.

**Fig. 8. Texas Local vs. National Creepy Clown Coverage in October 2016**



Ultimately the legal consequences of the Creepy Clown Conspiracy included criminal charges for false reports, terroristic threats levied against schools, and harassment, with at least twelve people facing such charges.<sup>124</sup> One of the most significant criminal justice responses from the Creepy Clown Conspiracy came from schools across the nation. In response to a myriad of threats specifically targeting schools, a number of schools were closed after clown threats.<sup>125</sup> Even in schools that had not faced active threats, law enforcement came forward with statements explaining changes to shifts and policing strategies in order to be more visible inside schools.<sup>126</sup>

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

125. *Id.*

126. Natalie Pate, *School Districts Address Concerns About Clowns, Safety*, STATESMAN JOURNAL (Oct. 7, 2016) <https://www.statesmanjournal.com/story/news/>

In some states, like Wisconsin where clown-based threats targeted over half a dozen schools in multiple incidents, new laws making terroristic threats class 1 felonies were applied to creepy clown conspirators.<sup>127</sup> There is also some evidence of the clown hoax inspiring individuals to commit their intended crimes while dressed as clowns, including the fatal stabbing of a sixteen-year-old boy in Reading, Pennsylvania.<sup>128</sup> However, the links between these incidents and actual clowns were never concrete as opposed to primarily juveniles using the landscape of fear to make fictitious threats. Explanations for the Creepy Clown Conspiracy ranged from mass hysteria to long-held social fears of clowns to the difficulty in verifying false claims incentivizing copycat-type claims.<sup>129</sup>

The Creepy Clown Conspiracy differentiates itself from the previous three cases by having underlying incidents that are known to be completely false, even as the wave-pattern construction of the Creepy Clown Conspiracy swept the nation. As such, the Creepy Clown Conspiracy provides another varied example of a different way that fear objects can be not real, but really matter, sitting at the nexus of all three types of un-reality studied here.

### E. *Fentanyl Contact Overdose Myth*

A final example of an unreal fear object emerges from the ongoing overdose crisis. Overdose deaths in the United States have increased nearly every year since 2001 and the death toll for 2021, the last year we have reliable numbers for, was 106,699 overdose deaths.<sup>130</sup> One element of this unprecedented increase in overdose fatalities is the proliferation of previously less ubiquitous opioids, such as fentanyl including

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education/2016/10/07/school-districts-address-concerns-clowns-safety/91743998. [https://perma.cc/8PNJ-N6LM].

127. Bret Lemoine, “*Not Something to Make Light Of*,” FOX 6 NOW MILWAUKEE (Oct. 5, 2016) <https://www.fox6now.com/news/not-something-to-make-light-of-creepy-clown-reports-making-headlines-nationwide-popping-up-in-se-wi>, [https://perma.cc/NJ4T-QJ9K]; See also Assembly Bill (AB) 341 / Senate Bill (SB) 256 to become Act 311
128. *No Laughing Matter: Clown Mask at the Center of Pennsylvania Teen’s Deadly Stabbing During Fight*, PHILADELPHIA NBC10 (Sept. 28, 2016), <https://www.nbcphiladelphia.com/news/local/clown-sightings-pennsylvania-reading-stabbing-teen/122869>. [https://perma.cc/6L5B-JDX5].
129. Christopher Mele, *Creepy Clown Hoaxes Lead to 12 Arrests in Multiple States*, THE NEW YORK TIMES (Sept. 29, 2016), <https://www.nytimes.com/2016/09/30/us/creepy-clown-hoaxes-arrests.html> [https://perma.cc/ZJ4Z-N4LJ]; AJ Willingham, *What’s with All the Clowns Everywhere? 6 Legit Possibilities*, CNN (Oct. 10, 2016) <https://www.cnn.com/2016/10/05/health/creepy-clowns-rumors-trnd/index.html> [https://perma.cc/8VFE-H5ZR].
130. Merianne Rose Spencer, et al., *Drug Overdose Deaths in the United States, 2001–2021*, 457 NCHS DATA BRIEF 1 (2022) (provides an updated count for overdose deaths in 2021 and compares death rates from 2001 to 2021).

the highly potent carfentanil, and with it the unprecedented variability of the potency of opioids in the illicit drug market.<sup>131</sup> As a result, law enforcement officers across the country have been empowered to reverse overdoses involving opioids with the drug naloxone, often in the intranasal spray form known by the brand name Narcan.<sup>132</sup> The increased variability of drug potency, along with an apparent lack of knowledge of the realistic risk that fentanyl poses through incidental contact, however, led the DEA to inadvertently perpetuate a myth and, with its viral spread among law enforcement, shifted perceptions of fentanyl past its demonstrable risk and into an unrealistic fear object.

As early as June 2016, the first reports of incidental fentanyl overdose by police officers were reported by the Associated Press involving two New Jersey police officers who reported feeling ill after sealing evidence bags which later were shown to contain cocaine laced with fentanyl.<sup>133</sup> An edited video interview of the two NJ officers featured prominently in a Drug Enforcement Agency (DEA) video distributed in August 2016 entitled “Fentanyl Roll Call”—meant to be played to police during daily departmental roll call meetings—in which DEA Deputy Administrator, Jack Riley claimed that fentanyl could cause an overdose or death to police and k-9s if they touch or inhale the powder.<sup>134</sup> In 2017, the then-acting Deputy Director of the DEA Chuck Rosenberg appeared in a second video, entitled “DEA Officer Safety Alert” also meant for roll call viewing. In the 2017 video, Rosenberg states that fentanyl, “can be absorbed through the skin, through mucus membranes,” as well as by touching the face or unintentionally inhaling airborne fentanyl powder.<sup>135</sup> During the 2017 roll call video, acting Deputy Director Rosenberg says “something that looks like heroin could be pure fentanyl. Assume the worst. Don’t

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131. Nektaria Misailidi, et al., *Fentanyls Continue to Replace Heroin in the Drug Arena*, 36 *FORENSIC TOXICOLOGY* 12, 15, 23–24 (2018) (describes the proliferation of fentanyls such as carfentanyl and mentions potency variability on pages 15, 23–24).
  132. *See generally*: Jennifer Murphy & Brenda Russell, *Police Officers’ Views of Naloxone and Drug Treatment*, 50 *JOURNAL OF DRUG ISSUES* 455 (2020) (provides basic information on police use of naloxone/Narcan).
  133. Jim Salter, *A Drug More Deadly than Heroin is Changing How Police Operate*, *ASSOCIATED PRESS* (Jun. 26, 2016) <https://www.businessinsider.com/ap-fentanyl-worries-changing-way-narcotics-officers-operate-2016-6>. [<https://perma.cc/X3RF-YZX3>].
  134. Christine Stapleton, *DEA Warns of Fentanyl’s ‘Unprecedented Threat’ to Cops, K-9s*, *THE PALM BEACH POST* (Aug. 15, 2016) <https://www.police1.com/police-products/fentanyl-protection/articles/dea-warns-of-fentanyls-unprecedented-threat-to-cops-k-9s-GJ7dEFQ1E63orQia> [<https://perma.cc/HHA8-7KZN>].
  135. U.S. Department of Justice, *Roll Call Video Warns About Dangers of Fentanyl Exposure*, *OFFICE OF PUBLIC AFFAIRS* (JUN. 6, 2017) <https://www.justice.gov/opa/video/roll-call-video-warns-about-dangers-fentanyl-exposure> [<https://perma.cc/ARQ7-9R68>].

touch this stuff . . .” The image shifts from Rosenberg to a still image of a hazardous materials decontamination team, with a member of the team in full HazMat gear, apparently being decontaminated.<sup>136</sup> The video was accompanied by a text briefing that ends with a quote from then-Deputy Attorney General Rod Rosenstein, stating “Any fentanyl exposure can kill innocent law enforcement, first responders, and the public.”<sup>137</sup> The DEA’s message, which is both clear and demonstrably false, is that any physical contact with fentanyl can cause overdose and death.

In the years following the two DEA roll call videos, DEA websites have removed most of the references to transdermal or incidental fentanyl contact overdoses from their public-facing materials, though the Department of Justice (DOJ) maintained the 2017 roll call video on their official government website significantly longer.<sup>138</sup> But this was only the beginning of the Fentanyl Contact Overdose Myth. When an East Liverpool, Ohio, officer brushed what might have been fentanyl off his uniform, he soon collapsed and was rushed to the hospital—CNN reported that the fentanyl was absorbed into his system “through his hands.”<sup>139</sup> Social media accounts from news agencies and law enforcement groups also shared bodycam footage of a Columbus, Ohio police officer appearing to be under duress and subsequently administered Narcan nasal spray.<sup>140</sup> In another incident, a Williamston, South Carolina, officer reported dizziness before self-administering naloxone and calling

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136. *Id.*

137. *Id.*

138. *Id.*; U.S. Drug Enforcement Agency, *Fentanyl, A Briefing Guide for First Responders, June 2017*, DEA 17 (2017) (dead link appears below) <https://www.dea.gov/media.shtml> (dead link) Access attempted 7/20/2023.

139. Artemis Moshtaghian, *Police Officer Overdoses After Brushing Fentanyl Powder Off His Uniform*, CNN (May 16, 2017) <https://www.cnn.com/2017/05/16/health/police-fentanyl-overdose-trnd/index.html> [<https://perma.cc/N5D5-KJY5>].

140. 10TV WBNS, *Body Cam Footage Shows Columbus Police Officer Receiving Narcan During Drug Arrest*, FACEBOOK (2018). <https://www.facebook.com/WBNS10TV/videos/10156649869759369> [<https://perma.cc/Z28P-HH2M>] (police officer in Columbus Ohio experiences what was believed at the time to be a potential opioid overdose. The text accompanying the video now notes that the toxicology test for this event was methamphetamine); WVNS 59News, *Body Cam Footage Shows Police Officer Receiving Narcan During Drug Arrest*, FACEBOOK (2018). <https://www.facebook.com/watch/?v=10156440992607754> [<https://perma.cc/H5VK-UNJS>] (caption: This is body camera footage of a drug arrest where a police officer had to be administered Narcan. Suspect: “She called it ICE, I swear to God that’s what she called it”); Brotherhood of Minority Law Enforcement Officers “Officer Accidentally Exposed to Fentanyl,” FACEBOOK (2019) <https://www.facebook.com/BrotHerhoodOfMinorityLEOs/videos/403921043681769> [<https://perma.cc/KZ63-DF9A>] (caption reads, in part: This officer was exposed to fentanyl on a traffic stop. The title is printed as a chiron above the video, which focuses on the police officer apparently retching after being administered Narcan).

for HazMat decontamination during a 2019 incident after a fatal overdose at that same residence.<sup>141</sup>

The counternarrative, that accidental fentanyl exposure is virtually impossible, originated in a joint position statement from the American Academy of Clinical Toxicology (AACT) and the American College of Medical Toxicology (ACMT) in 2017.<sup>142</sup> The AACT/ACMT statement stated that with the exception of a few extreme examples—the weaponization of fentanyl using a military-grade aerial dispersal device, or prolonged transdermal exposure for several minutes over a substantial percentage of bodily surface area—accidental fentanyl overdose via skin absorption or inhalation is highly unlikely.<sup>143</sup> Since this statement, several federal agencies recognized their error and created new messaging to actively counter their earlier misinformation.<sup>144</sup> Still, police and law enforcement agencies in the United States maintain a culturally-bound fear that some first responders say makes them hesitant to respond to an overdose emergency.<sup>145</sup>

The impact of the fear of fentanyl exposure among law enforcement inspired legislation in West Virginia; where a bill to amend a statute prohibiting assault or other imposition of bodily harm of a governmental employee would include language to reflect fentanyl exposure as a potential form of bodily harm.<sup>146</sup> The West Virginia statute, if passed, already

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141. Joe Ripley, *Upstate Officer Gave Himself Narcan After Possible Drug Exposure, Police Say*, WYFF NEWS 4 (Jan. 27, 2019) <https://www.wyff4.com/article/upstate-officer-gave-himself-narcan-after-possible-drug-exposure-police-say/26048689>. [<https://perma.cc/R2TB-T6BR>].
  142. See Michael J. Moss, et al., *ACMT and AACT Position Statement: Preventing Occupational Fentanyl and Fentanyl Analog Exposure to Emergency Responders*, 56 CLINICAL TOXICOLOGY 297 (2018).
  143. *Id.*
  144. U.S. Customs and Border Patrol *Video Release Event*, YOUTUBE (Aug. 30, 2018), <https://www.youtube.com/watch?v=UkxT0bgekQ8> [<https://perma.cc/TB27-6KGS>] (The video released on behalf of multiple government agencies and presented by Bureau of Justice Assistance director Jon Adler documents the myth of overdose through touching fentanyl; see video at 0:30:20 to approximately 0:31:30 of playback for a demonstration and scientific explanation).
  145. Brandon del Pozo, et al., *Police Reports of Accidental Fentanyl Overdose in the Field*, 100 INT'L J. DRUG POLICY 1, 2 (2022); Leo Beletsky, et al., *Fentanyl Panic Goes Viral*, 86 INT'L J. DRUG POLICY 102951 (2020); see also Eric Persaud & Charles Jennings, *Pilot Study on Risk Perceptions and Knowledge of Fentanyl Exposure Among New York State First Responders*, 14 DISASTER MEDICINE AND PUBLIC HEALTH PREPAREDNESS 427–441 (2020) (a pilot study that shows that police and other first responders are misinformed as to the dangers that fentanyl poses, and feel unsafe around fentanyl in general. Police respondents expressed fear and endorsed misinformation in greater numbers than EMS and Fire respondents).
  146. Steven Allen Adams, *Rescuing 911: West Virginia House Passes Bill Creating Penalties for First Responder Fentanyl Exposure*, NEWS AND SENTINEL (Jan. 25, 2022) <https://www.newsandsentinel.com/news/local-news/2022/01/>

has a precedent in neighboring Ohio, where assault charges were added to drug possession charges for Justin Buckel, whose vehicle was being searched when the local police officer experienced a pseudo-overdose in 2017.<sup>147</sup> In effect, Buckel was charged and pled guilty to instigating a police officer's fear response, and soon, many more people may be charged with the same erroneous form of pseudo-assault.

We can classify the underlying incidents in the fentanyl contact overdose as not "real," since contact overdose is somewhere between impossible and extremely unlikely. However, the harm perceived and reported by law enforcement from these false incidents is high and the pattern of incidents has been socially constructed as a wave. As such, while fentanyl contact overdoses can also be considered unreal objects of fear, they too, differentiate themselves from the other four fear objects described here. This illustrates exactly how dynamic and nuanced an understanding of realness has to be.

#### IV. Objectification & the Fear Principle

The final substantive Part of this Article takes on the task of making meaning of the case studies, object theory, and the definition of fear to provide a coherent analytic framework by which to consider multidimensional fear objects and the realness of those objects. The Part begins by considering the realness of objects, answering the question set out at the beginning of this Article: how real does an object need to be to have legal consequences? Next, we make meaning of the five case studies to identify pathways by which fear becomes law. Finally, we stitch these ideas together with objects theory to present the *Fear Principle* as an analytic tool for diagnosing the objectification of fear.

##### A. *The Realness of Objects & The Spread of Objectification*

We return to the theory of multidimensional objects. In all five case studies, we have multidimensional fear objects. In each case, we see rapid identification with the social or sociological dimension of the object without full consideration of the tangible or legal dimensions of those objects. For example, in the 1976 Crime Wave Against the Elderly, the resonance

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rescuing-911-west-virginia-house-passes-bill-creating-penalties-for-first-responder-fentanyl-exposure [https://perma.cc/Y7W7-6YJT].

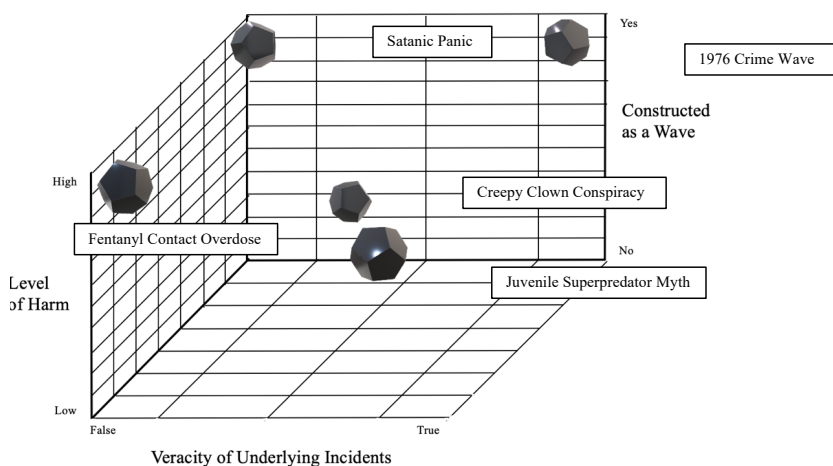
147. Dan Tierney & Jill Del Greco, *Man Sentenced to Prison After Exposing East Liverpool Officer to Fentanyl During Traffic Stop*, OHIO ATTORNEY GENERAL (Mar. 12, 2018) <https://www.ohioattorneygeneral.gov/Media/News-Releases/March-2018/Man-Sentenced-to-Prison-After-Exposing-East-Liverp> [https://perma.cc/ZWM2-QGYJ]; West Virginia Legislature, House Bill 2184, [https://www.wvlegislature.gov/Bill\\_Status/bills\\_text.cfm?billdoc=HB2184%20SUB%20ENG.htm&yr=2022&sesstype=RS&i=2184](https://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=HB2184%20SUB%20ENG.htm&yr=2022&sesstype=RS&i=2184) [https://perma.cc/8QCW-VXBA].

of a wave of elder crime permeated society much more effectively than skepticism about the tangible construction of the crime wave. The moral panic that overtook society during the Satanic Panic led to convictions in the absence of evidence, surely a legal dimension of the fear object that would not normally see such broad social support. In the case of the Juvenile Superpredator Myth, the social fear about the potentiality of a new wave of predatory youth obfuscated the legal consequences of wrongfully having the law remain. In the case of the Creepy Clown Conspiracy, the social dimension of the object was so strong that there did not need to be any tangible dimension of the object at all. The case of the Fentanyl Contact Overdose Myth is especially sobering, as we watch denial of the absence of tangible incidents lead to the entrenchment of new laws in a process that continues to unfold today.

In all five cases, overidentification with the social dimension of the object obfuscated potential legal consequences and even obscured the need for the tangible dimension of the object to be real. In this way, the emotional capacity of fear had a concentrated effect on the process of objectification—spurring on and accelerating the process. Across these five cases, fear acts as a mechanism by which the process of objectification can actually occur.

Importantly, all of these cases occupy different spaces along the multidimensional space theorized at the beginning of this Article in *Figure 1*. We return to that figure here, considering all three scenarios that interrogate the realness of an object: The veracity of underlying incidents, the construction of patterns or waves, and the level of harm, but this time taking care to plot the multidimensional object within that multidimensional space representing realness. *Figure 9* below plots all five case studies as three-dimensional objects, with the larger objects being closer to the foreground.

**Fig. 9. Plotting Multidimensional Objects in Space**





In chronological order, the 1976 Crime Wave Against the Elderly is classified as having true incidents, high harm, and the construction of a wave (upper right). The Satanic Panic is classified as having false incidents, high harm, and the construction of a wave (upper back left) The Juvenile Superpredator Myth is classified as having incidents that were true, but misunderstood, high harm, but did not produce a real wave (larger foreground, representing the mid-point between true/false incidents and yes/no wave construction). The Creepy Clown Conspiracy is classified as having untrue incidents, low harm, and wave construction (background middle). The Fentanyl Contact Overdose Myth is classified as having false incidents, high harm, and wave construction (upper left).

The purpose of this varied classification is to demonstrate how highly impactful fear objects, that lead to enduring legal consequences of new laws (some repealed and some not), false convictions, harsh sentences, and copycat events vary on the spectrum of realness even if the objectification process has some commonalities in over-identification with the social dimension of the object. The results of this analysis demonstrate without question that objects of fear need not be real to undergo objectification with legal consequences and that this un-realness can be particularly difficult to diagnose as it unfolds.

With the identification of various fear objects, the interrogation of the multidimensionality of those objects via an emotional fear response to the social dimension of the object, and recognizing that we do not require the realness of an object for it to have consequences, it may seem as though our analysis of objectification is complete. But it is not. What has been laid so far is the groundwork for the objectification of fear, but it is not complete without celerity, spread, and legitimation. The case studies did more than confirm that objectification of fear has consequences, they also told five stories about how the objectification of fear was accelerated. We identify two key touchpoints as available spaces for intervention and regulation to slow the objectification of fear: media spread and institutional legitimation.

Virtually all the cases demonstrate the power of the media in facilitating the rapid spread of a fear object, regardless of its realness. In each case, regardless of the realness of the object, both the sociological process of news creation and the logistics of creating news functioned to spread both information and misinformation. This problem is particularly pernicious in the modern era as the rapid digitization of news and the advent of social media make it more possible than ever for misinformation and media panics to spread across the population.<sup>148</sup> Where

148. See Bo Li & Olan Scott, *Fake News Travels Fast: Exploring Misinformation Around Wu Lei's Coronavirus Case*, INT'L J. SPORT COMM. 505 (2020) for a

the rapid spread of information across news networks and social media poses a problem, it also presents as an intervention point for regulation. For this reason, media institutions of all types should be held to higher regulatory standards in the distribution of information. Importantly, this regulation must be apparent to consumers of news and not be relegated to fines doled out without any meaningful changes in practice.<sup>149</sup> Additional research should focus on the spread element and pathways to corrective regulation.

A second important commonality across cases is the legitimization of the fear object by institutions or authorities regardless of the realness of the fear object. Whether this legitimizing institution is the news media itself, professorial experts, or criminal justice institutions, the function of these legitimizing institutions is to further reduce the need for the object to be real. This is because the expert or institution stands as a mitigating authority between the object and the perception others have of the object. Once again, we point to this as a possible intervention point—particularly as local and national governmental entities serve as key legitimating institutions. Much like their media counterpoints, we must hold institutions to higher standards in disseminating information that provides accurate context and sufficient descriptions of the available evidence. Moderately the entire terrain of institutions in society is a lofty goal, but a more actionable start would be auditing the claims of state and federal institutions in systematic ways and having pipelines for correcting misinformation. Fear-specific research is needed to measure the exact obfuscating force of legitimization on the objectification of fear, but also to quantify the effectiveness of attempts at correcting misinformation surrounding fear objects.

## **B. *The Fear Principle***

The ultimate concern of this Article is to distill the sum of theorizing herein into a principle that can be usefully extracted, improved, and applied elsewhere. Much like our process in taking the current measurements of risk as a guide to improve into a measurement of fear, we begin with a well-known risk principle: the Precautionary Principle.

Influential across many areas of law and science disciplines, the Precautionary Principle advises the avoidance of risk even when the

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discussion of how misinformation spreads even faster due to self-produced news and access to social media.

149. For an example of one possible avenue that has shown some promise at scale see Mohammed Saeed, et al., *Crowdsourced Fact-Checking at Twitter*, PROCEEDINGS OF THE 31ST ACM INT'L CONFERENCE ON INFORMATION & KNOWLEDGE MANAGEMENT 1736 (2022) (analyzing the effectiveness of Twitter's Birdwatch program as crowd sourcing fact-checking demonstrating that in some cases it may be as effective as other experts).

likelihood of consequences seems remote, with concentration on the interplay between costs and benefits.<sup>150</sup> Notably, Scholar Cass Sunstein attacked the Precautionary Principle as irrational, paralyzing, and directionless.<sup>151</sup> Sunstein explored these ideas further in a monograph, arguing for the replacement of the Precautionary Principle with a narrower Anti-catastrophe Principle, close attention to costs and benefits, and libertarian paternalism.<sup>152</sup> Sunstein's suggestion was not without detractors, who argue for the usefulness of the Precautionary Principle as significantly better for cost-benefit calculations, implementing deliberative democracy, assessing risk, and incorporating social values into threat assessment.<sup>153</sup>

Considering both the critiques of the Precautionary Principle and the critiques of its suggested replacement, we propose the *Fear Principle* as a warning tool to identify where there is a substantial risk of objectification due to one-dimensional endorsement of a fear object. We lay out the analytic dimensions of the *Fear Principle* as those things that are required for fear to be objectified under the law. Importantly, this process begins with the multidimensional object. To trigger objectification with fear as a mechanism, there must be an emotional response to the social dimension of an object without consideration of the legal dimension of that object. The tangible dimension of the object may or may not be considered under this framework, allowing for the object to take on any number of forms of falseness or un-reality. But this over-identification is not enough to yield unique consequences without additional criteria including a trigger for spread and a reification, or legitimation, process. As discussed in the previous Part, media serves as a suitable but not exclusive vehicle for spread. Similarly, institutions of government, crime control, and social authority can serve in the role of legitimator. We lay out the dimensions and the possible consequences here in brief:

STEP I: Emotional response to the social (and/or tangible) dimension of an object without full consideration of the legal dimension of the object

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150. See generally: Timothy O'Riordan, *Interpreting the Precautionary Principle* (1994) for a detailed discussion of the precautionary principle and how it works.

151. See generally: Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2002).

152. See generally: Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (2005) (where Sunstein lays out this theory in substantially more detail).

153. Gregory Mandel & James Thuo Gathii, *Cost-Benefit Analysis Versus the Precautionary Principle: Beyond Cass Sunstein's Laws of Fear*, U. ILL. L. REV. 1037, 1037 (2006); see also Noah Sachs, *Rescuing the Strong Precautionary Principle from its Critics*, U. ILL. L. REV. 1285 (2011).

- STEP 2: Celerity or swiftness and urgency facilitated by spread
- STEP 3: Reification of the fear object via legitimating institutions
- CONSEQUENCE: Support for regulation as an immediate solution to the problem spurred by the fear object, without imagining the future consequences of said regulation

This framework has significant advantages over other ways of assessing risk because it takes on the most important elements of our interdisciplinary definition of fear and speaks to the reality of emotional responses to threats, contextualizes the social dynamics of spread and legitimation, and explicitly allows for the object to not be real. We hope that scholars and policymakers will consider the *Fear Principle*, not only in hindsight analysis of the consequences of fear but also in ongoing social problems.

### **C. *Combatting Fear-Based Regulation***

The Fear Principle as an early diagnostic tool identifying potential reactionary fear regulation is operational only through concrete steps and actions by the criminal justice system and safeguards through legal remedies. First, criminal justice system actors must act to guard against legitimizing fear without evidence. In almost every case study presented in this analysis, police, academics, and legal system actors hindered the project of preventing fear-based regulation by moving quickly to make declarative statements and propose legislation that endorsed fear mythology. Navigating a terrain of uncertainty, where some types of harm might be legitimate even in the face of misleading construction of frequency, severity, or wave-like patterns, requires turning to evidence and legal safeguards.

Scientific and data evidence are fundamental tools to allow legal actors to differentiate fact from fear. The three fear dimensions discussed in this Article: level of harm, veracity of underlying incidents, and wave-like construction are all individually analyzable via evidence-based practices. When criminal justice systems actors or media institutions that disseminate potentially misleading information consider their strategic moves in crime prevention and public information, they should take these vectors into account. The sobering reality proven in this Article is that fear objects do not need to be real to be highly impactful.

Returning briefly to the case studies in sequence, we can see how the combination of fear dimensions has differing outcomes for legal codification and criminalization. In the case of the Crime Wave Against the Elderly, the underlying harm was serious and real, but it was the

construction of the wave itself that allowed fear and potentially reactionary regulation to go into effect. This is evidenced by the fact that the underlying number of elder homicides had been even higher in the previous year, where no such wave of fear was present. This demonstrates the capacity of the sociological construction of a false wave to have effects in and of itself.

The case of the Satanic Panic represents what happens when severe alleged underlying incidents and a wave construction combine and are not disproven in time to prevent reactionary regulation from taking hold. The Satanic Panic has a different remedy available to stem the flow of fear response: proving the underlying incidents to be false. This is another injection point where strict consideration of scientific and factual evidence can guard against over-punishment and new forms of criminalization.

Relatedly, the Juvenile Superpredator Myth falls prey to another form of falsity in trying to mitigate severe real-life harm with crime wave construction. The Superpredator Myth endorses speculative patterns that never had a basis in reality, sourcing confirmation from experts in academia as justification for a lack of tangible data evidence. In the case of the Creepy Clown Conspiracy, we see how a series of fictitious underlying events became a different sort of public safety problem: moving away from allegations of clowns in the forest to the real-life problem of terroristic threats against schools expressly because of media circulation surrounding unproven events. Finally, we take up the fentanyl contact overdose myth as a current site of potential fear regulation where there is still time to use scientific evidence and diagnostic tools like the Fear Principle to limit the amount of future regulation that is founded on fears rather than facts.

It is somewhat optimistic to consider evidence-based inspection and institutional consideration about spreading misleading information as primary remedies for the problem of fear regulation without any sort of enforcement mechanism. To that end, we also propose three legal safeguards that would explicitly help prevent reactionary fear regulation. First, we call for courts to require evidence of harm or scientifically plausible harm before moving to create new regulations and punishment categorizations. This would confront the analytical tenants studied in this article directly: the veracity of underlying incidents, the level of harm, and the validity of wave construction. Second, courts should increase the use of sunset policies, which establish legislative end dates, when trying to regulate contemporaneous events. There are examples of sunset-eligible regulation already present in criminal justice and criminal law, which necessarily prompts reconsideration of laws and regulation and provides

an avenue to incorporate new evidence and understandings into law.<sup>154</sup> Third, courts should intentionally combat discovered errors in fear regulation by using their discretion to grant retroactive relief when possible. This is the entrée to a larger argument about the importance of retroactivity under the law. This would be particularly necessary for cases like the Juvenile Superpredator Myth, where the consequences of a false fear wave have not been absolved for juveniles incarcerated at the height of the fear event.

### Conclusion

This Article accomplishes substantial analytic work untangling the relationship between fear and the law. First, it considers theories of multidimensional objects and the process of objectification, investigating whether objects need to be real to be impactful under the law. Second, it defines an interdisciplinary fear and measures its efficacy. Third, it presents a history of fear and the law. Fourth, it considers a series of five case studies designed to interrogate the realness of fear objects. Fifth, it provides an analytic framework to consider the dimensions of fear objects, concludes that fear objects need not be real, and culminates in a new analytical tool for guarding against the objectification of fear: the *Fear Principle*.

It is more likely than not that the Article as written has neglected an important domain of fear. Rather than being the last word on the subject, this Article aspires to be one of the first, ushering in additional work on the topic. In particular, more detailed theorizing about tangible fear objects and innovations in the empirical measurement of the objectification of fear is necessary.

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154. The Patriot Act, much discussed in this Article, is an example of sunset regulation. The Patriot Act expired in 2015 at which time The USA Freedom act replaced it with some extended and modified provisions. In 2020, extensions were not passed, so the law has expired.

## Appendix

### A. Surveys

For assistance in editorial processes, please find the links to the survey versions here: <https://drive.google.com/drive/folders/11IdB-f2ZdZxBogizOkV3VUzd7rRKMIV8T?usp=sharing>.

### B. Modeling Individual Fear

#### Appendix B. Individual Level Fear Scores

	Control	Emotional	% Change
Snake	5.96	6.42	7.72
Airplane	2.92	4.58	56.85
Ghost	5.86	6.4	9.21
Cabin in woods	5.48	6.38	16.42
Stopped by police	6.27	7.11	13.4
Woman alone at night	6.93	7.4	6.78
Escapee	6.86	7.16	4.37
Homeless	5.42	5.76	6.27
Hate crime (LGBT+)	8.15	8.24	1.1
School shooting	4.94	6.26	26.72
Cat	4	4.65	16.25
Power outage	2.64	3.25	23.11
Cyber threat	3.38	3.95	16.86
N=	98-97	101-103	