Fear and Accountability at the End of an Era

Susan F. Hirsch

I have asked Susan Hirsch, author of In the Moment of Greatest Calamity: Terrorism, Grief, and a Victim's Quest of Justice, *to provide a commentary on two articles in this issue that in very different ways address issues of sociolegal studies in a post-9/11 world.*

Carroll Seron, Editor

A late 2007 bipartisan report issued by a panel of scholars and politicians proposed "smarter, more collaborative policies" to underpin a new, forward-looking agenda for U.S. domestic and foreign affairs (Armitage & Nye 2007). The Armitage-Nye report, considered together with the ramping up of a presidential campaign in which "Change" has emerged as a key issue, strongly suggest that the post-9/11 era as we have known it will come to a close in early 2009. The opportunity to imagine a radically different future is more than welcome, as the period since the attacks of 9/11 has been one of grief, trauma, and fear as well as growing anger and anxiety about the direction of U.S. policy and governance. The post-9/11 era has also been a time of war, with military force deployed as the primary tool of American foreign policy, and, as charged in the Armitage-Nye report, of fear used to justify policies of aggression. On a related note, the era has seen law deployed as a weapon of war, including in the broad and ill-conceived global war on terror, through invigorated laws of surveillance and investigation; reliance on torture, rendition, and summary execution of terror suspects; increased penalties for aiding terrorism; and expanded executive privilege and secrecy. Those seeking change have questioned the legality of these and other reactive measures. As politicians, pundits, and laypeople chart new courses

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of action that move away from the illegalities of the era, sociolegal scholars have an opportunity, if not an obligation, to examine law's role in this dark time. Two articles in this issue do just that, and I would argue that further attention is warranted, even as we participate eagerly in transcending the post-9/11 era to a time when America will be smarter, more collaborative, and more just.

The two articles on which I comment—one on American victims of 9/11 and the other on the war and occupation in Iraq—both fall into the category of "Sociolegal Studies Post-9/11," and each reminds readers that, whatever the motivations for the U.S. invasion of Iraq in 2003, it too has become a site for acts undertaken in the name of terrorism and a front in the "global war on terror." Thus it has been impossible to eradicate the notion that these two post-9/11 phenomena are "connected," which is the fallacy behind the Bush administration's justification for invading Iraq. In exploring these contexts marked by severe violence and its aftermath, the articles address the following questions, among others: How do survivors negotiate their options after a terror attack? How do people living and working in a terror-filled context carry out the tasks of daily life? At the same time, both articles address a fundamental question in sociolegal studies that can be asked in any context: how do judges and laypersons make decisions about legal options and processes? The authors employ quite different, innovative methods to contribute to important areas of inquiry, including critical legal theory, legal consciousness, and dispute transformation. The authors succeed in illuminating the trade-offs that are calculated and the strategies pursued by institutional actors and laypeople confronted with various choices for conceptualizing and mobilizing the law and for acting on notions of justice, procedure, and fairness.

These articles force us to admit that, in the aftermath of mass violence and also in its midst, strong emotion motivates decisionmaking about law. The implication is that laypeople are not the rational calculators imagined or assumed in, for example, law and economics treatises; nor are judges, whose training emphasizes the expectation of impartiality, above succumbing to emotion in sentencing decisions. Rather, motivating factors include grief, anxiety, frustration, and other intense feelings. If, as the Armitage-Nye report contends, we live in a time when America has used fear tactics domestically, including to justify pursuit of a foreign policy that "exports fear," then the impact of fear and other emotions across many contexts is no surprise. Although not their central goal, these articles offer important insights into the nature of fear as a factor in decisionmaking about law. As I describe below, the attention to fear—more explicit in Hagan and colleagues' article—provides an opening to highlight connections between fear and

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law that might be of special interest to the sociolegal community, especially as we contemplate transcending the post-9/11 era.

Extending the implications of these articles and drawing on my own experiences, I argue for interpreting the quest for accountability—also a theme of each article—as an antidote to fear. My aim is to emphasize the idea that fear and accountability are intertwined in complex ways in the decisionmaking of people who have been exposed to fear-filled contexts. It will not be lost on readers that where the Hadfield article highlights accountability I see fear, and that where Hagan and colleagues highlight fear I note the explanatory value of accountability. Fear and accountability also have an intertwined influence on this and other scholarship produced in the post-9/11 era. It is a challenge for most scholars to admit the role that fear and other strong emotions play in our work and, especially, to make the effects of these emotions visible. Later in this comment I consider whether the production of scholarship at the end of the post-9/11 era requires a particular approach to research that would address the challenges posed by the broader context. I conclude by asserting that, in the current moment, accountability should emerge as fear's antidote—not just for the legal decision makers profiled in these articles—but also for the authors and other scholars. In so doing I direct attention to a crucial role that sociolegal scholarship could play in the grand transition anticipated for the end of 2008.

An Era of Fear

Sergio de Mello, killed in 2003 while serving in Iraq as U.N. Chief of Mission, is often quoted as having said: "Fear is a bad advisor." After his death the phrase was invoked to rationalize his presence in Iraq and to herald his example: de Mello refused to be afraid and thus answered the call to serve. But, as Power writes in her biography of de Mello, the veteran U.N. diplomat initially turned down the Iraq mission, citing the impossibility of achieving U.N. goals amidst extreme insecurity (Power 2008). Against his own beliefs about pursuing diplomacy in war zones, de Mello finally agreed to serve when the U.N. Secretary General extended a personal plea. Although de Mello's famous quote can be read as his acknowledgment that fear clouds rational judgment, it is also opaque on the issue of how fear actually influences decisions. In going to Iraq, did de Mello decide to ignore his fear? Did he acknowledge it and plan to outsmart its influence? Even if he were alive to answer these questions, he might be unable to determine how fear shaped his judgments. Fear is tricky. Paradoxically, those who have witnessed extreme violence can be more vulnerable to fear than others or more inured to it. Even those trained to ignore fear's effects, such

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as soldiers, find that fear can make inroads into their psyche through dreams or random thoughts. Given its potential effects, and its significant role in the post-9/11 era, fear has been underestimated and underexamined generally in social science scholarship.

Experience of a violent attack and fear of further attacks can engender terror in individual survivors, a fact that I know from my experience of surviving the bombing of the U.S. embassy in Tanzania in 1998 (Hirsch 2006). Yet fear varies significantly as an individual experience. The widespread view of fear as an instinctual, psychophysical response to threat or trauma leads to the conclusion that self-protection is pre-programmed into the fearful, who lash out or hide in self-preservation. At times, for the traumatized, recurrent waves of debilitating fear cannot be controlled and neither can the body's response. But, as brain chemicals change, fear becomes worked into quite complex narratives. When fear extends over time through exposure to repeated threats, it can interact with other emotional responses and be integrated into multiple goals, such as legitimate self-defense, "I'll-get-them-before-they-get-me-again" logic, or future-oriented planning. The conventional wisdom that depicts fear as paralyzing or as a barrier to rational thought misses the reality that fear can be a highly nuanced experience.

Palpable anecdotal evidence that fear is a defining feature of the post-9/11 era can be found in the narratives familiar from American newscasts, which highlight fear of enemy cells, luggage handlers, port employees, people who cross borders illegally, people of certain religions and ethnicities, or people who stand up simultaneously on a plane in flight. These widely circulating depictions of threat engender other fears: fear of being targeted for one's accent, clothing, charitable contributions, or jokes made over e-mail. Fear—real, created, or imagined—undergirds the post-9/11 landscape and supports overarching terrors: the fear of the next attack, of the "jihad next door,"[1] or even of becoming afraid (a strange aftereffect of trauma). And the twisted fear that others might perceive us as fearful has led to unconscionably aggressive tactics worldwide. As the Armitage-Nye report notes, the fear exported through U.S. government policy and military action will come back to haunt the United States. And we can live in fear of that too. Mindful of the role of culture and context in shaping the parameters of fear, the overarching climate of fear in the post-9/11 era leads me to ask what we can learn about fear's role in decisionmaking from each of the articles.

[1] Temple-Raston's title *The Jihad Next Door* belies the demonstration in the text that the Lackawanna Six, charged and convicted of various crimes related to terrorism, were hardly a dangerous group. Her use of the title offers additional evidence of the pervasive deployment of threat images and narratives (2007).

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Fear Among 9/11 Victims

Hadfield's article focuses on how victims of the 9/11 attacks framed their choices when presented with the option of accepting payment from the 9/11 Victim Compensation Fund or refusing to do so and thus retaining the ability to litigate. The tight analysis of interview data demonstrates that victims represented their choices as based on factors other than economic calculations about how much compensation they might receive. They expressed interest in information, accountability, and responsive change as relevant to the difficult decision they had to make. The article thus offers a compelling display of victims' representations of their legal consciousness that contrasts with the assumptions of many policy makers, legal personnel, and scholars and seriously questions legal theories built on attributions of economic motivation. In a convincing way, it raises the possibility that victims are *not* obsessed with money, even though it is the topic on everyone else's mind.

Clearly, many of those eligible for the Victim Compensation Fund found it extremely difficult to decide whether to accept compensation, and some delayed until the last possible moment. I can hardly imagine that the difficulty and delay were attributable to victims running the calculations repeatedly or waiting to obtain the services of the attorney best positioned to advance their claim. Rather, attention to fear helps me make sense of their behavior. For example, victims might have been motivated by a fear linked to their desire to protect themselves and others from future attacks. This could be accomplished by exposing the truth of what happened through a civil suit, as discussed in the article. Why the 9/11 Commission Report failed to accomplish this is an important unanswered question. Drawing from my own experience, I can imagine that a different kind of fear might be motivating some victims. Specifically, relatives and friends of deceased victims and victims who escaped death, that is, "survivors," can experience tremendous anxiety around the notion of failing to honor the dead properly. This can lead to a wide variety of memorials and to the resolute pursuit of justice, compensation, or recognition in other forms. The fear of not paying adequate homage to those sacrificed can have a very powerful effect. Survivors are vulnerable to the almost existential fear that nothing they choose to do in response to a loss could ever be enough. Under those circumstances, what does it mean to accept a particular compensation amount, especially if even one person will receive more? As Minow argues: "... no market measures exist for the value of living an ordinary life, without nightmares or survival guilt. Valuing the losses from torture and murder strains the moral imagination" (Minow 1998:104).

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My attribution of a role for fear in interpreting the influence on victims' decisions about law should not take away from the framing offered by the interviewees themselves. Hadfield's data on victims invoking civic commitments to justify their choices are an exceptional addition to the growing picture of what might motivate people after loss. Discursive data are an especially rich resource, as they invite re-analysis that can reveal other factors, perhaps unanticipated or unnoticed by the original researcher. I raise just two observations that follow from my own analysis of the data included in the article. First, the nature of conversation itself can sometimes account for linguistic choices. Hadfield notes that victims sometimes used the pronoun *we* when expressing their views. It is possible that this does indeed indicate a sense of community—as a group of mobilized victims or as citizens—as Hadfield suggests. However, I would also note that trading off between *I* and *we* occurs commonly enough in everyday discourse that it might also mean little more than a shifting of the conversational tone. A more critical effect on discourse comes through attention to cultural conventions. Expressions of need, but not greed, would seem a more comfortable position for victims in America, where talking about compensation for wrongful death is culturally avoided. But this is not the case everywhere. In East Africa, monetary donations after a death are routine, thus facilitating the very different kind of discourse about money that ensued after the bombings of the U.S. embassies in Kenya and Tanzania, when victims made direct requests for assistance from the U.S. government and others. The payments made by the U.S. military to families of civilians killed in attacks in Iraq and Afghanistan offer yet another culturally different perspective on compensation after a wrongful death. Each of these examples has an associated set of metalinguistic rules for expressing one's interest in receiving compensation. In a place where people press money into the hand of a person in grief, or one who has suffered an accident, asking for compensation and accepting it as entirely appropriate would be expressed differently than in the U.S. context.

When I was deciding whether to join a civil suit against those who might be held responsible for the embassy bombings, a well-known sociolegal scholar offered me the advice that I might find myself frustrated by being caught up in a never-ending process, such as that faced by the victims of the Pan Am 103 bombing, who have pursued civil and criminal justice for decades. Given the indeterminacy of civil litigation, why do victims choose to become involved? At the time I faced that decision I failed to understand that choosing the route of the lawsuit could mean (to me and others) that I was willing to expend more effort, willing to wait, and willing to bear the burden of loss, guilt, and obligation as long as needed. This is fear's trick on victims.

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Fear Among Iraqi Judges

The context of fear in Iraq differs from that in the United States, although some of the same narratives would still apply. In many parts of their nation, Iraqis experience the fear of physical violence on a daily basis. The fear of reprisals linked to political affiliation, relationship to occupation forces, religious sect, and ethnicity also engenders fear as a continuous experience. Even in those areas that have become more secure, many residents live in fear of violence re-erupting. Change for the better is a fleeting notion even five years after the invasion.

Although Hagan and colleagues' article's central findings about indeterminacy and legal decisionmaking advance the literature on critical legal studies, they also contribute to our understanding of fear in relation to law. Among other important contributions, this research examines a robust finding about the relationship between fear and punitiveness in a new context where the magnitude of fear may be well beyond that assessed in previous studies. The findings illuminate several aspects of decisionmaking by Iraqi judges; however, I focus, as the article does toward the end, on the interpretation of the central and most provocative finding. Simply put, the study establishes that those judges who were most fearful of violence and most desirous of protection by police or the government tended to punish most severely Coalition forces personnel who had been found guilty of torturing al Qaeda operatives. At the same time, those judges who were less fearful were more likely to offer lenient sentences to Coalition forces found to be abusive.

The intricate research design allowed other factors to be separated out and trained our attention on fear's potential role in explaining the harsh sentences. Fear was unequivocally a factor. But what role did it play in this specific provocative finding? The authors speculate that the judges might be using punishment to address the fear that Coalition torture of al Qaeda might result in increased support for the group among its adherents and sympathizers. A stronger al Qaeda puts the judges' own security in jeopardy. This scenario is entirely plausible. The photos of U.S. military personnel abusing prisoners at Abu Ghraib operated as a call to arms for al Qaeda worldwide. The research design did not include attention to determining judges' motivations more specifically, and I am led to ask: is it possible that fear of something else explains the decisions? In my view, judges might be motivated by a fear of what is symbolized by the dynamics of Coalition forces torturing their sworn political enemies. That scenario confronts judges with a governance and custodial system that not only symbolizes and enacts violence against political enemies unchecked by law but also fails to protect citizens from violence. One might ask: what society

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does this resemble? Where have authorities used violence and remained above the law while citizens have felt under threat? Iraqis might have in mind the fear-filled context of life under Saddam Hussein. At various times and places under Saddam's regime, military and police routinely tortured political enemies, while being unable to guarantee a society free of violence for civilians. This was especially the case during the long war with Iran. Fear of torture, incommunicado detention, and the violence of custody, as carried out during that period, must fill many Iraqis with a knowing dread, especially those close to police processes, such as judges. Depending on their age, some might have experienced the terror of combat violence interwoven with political repression, what Green, in her ethnography of war-torn Guatemala, calls "fear as a way of life" (Green 1999). Drawing a parallel between the behavior of Occupation forces and that of Saddam might be unwarranted, but the harsh sentences imposed by the Iraqi judges appear to me an attempt to hold someone accountable for crimes well beyond custodial torture, as I discuss below.

Interrogating Methods

The discussion above speculates about the decisions made by 9/11 victims' family members and Iraqi judges and is meant to stimulate further thought about the remarkable data collected by these two projects. In stark contrast to speculation, the methodologies of factorial analysis and discourse analysis offer powerful means of illuminating data about legal decisionmaking collected in extraordinary times. Reading the two articles together leads to the impression that each would be enhanced by incorporating the methodological approach taken by the other. Specifically, it would be fascinating to know more about factors, such as gender, income, ethnicity, etc., that might correlate with the decisions made by 9/11 victims or with the decisionmaking process and their framing of it. Age clearly influences older victims to settle, and other relevant factors might emerge through a different research design. In addition to a methodology that is innovative in part by virtue of its quasi-experimental nature, the Iraq study would be enhanced by additional insight into how the Iraqi judges frame their decisions. Interview data could yield analysis of their reasons for levels of punishment and might confirm or otherwise illuminate interpretations based on the factorial analysis. Or discursive data from the judges might offer a culturally distinctive perspective missed entirely by the research design. The fact that the views of the judges are presented only through the survey instrument—while appropriate for the research design and for security and ethical

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concerns—limits the degree to which these individuals can be "heard" and leads me to challenge the authors' claim that this article gives "voice" to the judges. Constable's nuanced exploration of the concept of voice in law, including her point that the term is often invoked and understood to connote the empowerment of marginalized speakers, when that is only rarely achieved, should warn off such claims (Constable 2005).

A triangulation of such sophisticated methods is difficult within a discrete research project and thus makes additional studies of these particular populations and contexts welcome. I would hope that future research on these topics would carefully consider human subjects concerns, as was the case for these studies. Acknowledgment of the emotional fragility of victims led Hadfield to utilize appropriate strategies for acquiring and protecting participants throughout the research process. Similarly, concern with the security threats likely faced by judges who would be returning to Iraq shaped how their participation, especially their identity, would be handled by the research team. Overall, the research was designed in a caretaking manner to avoid putting already vulnerable research subjects at greater physical or emotional risk (see also Hirsch 2007). These strategies are instructive for others who might choose to conduct sociolegal research with vulnerable populations.

Despite the high degree of attention to describing methodology, including ethical issues, in each article, questions about the research process remain. Neither article includes attention to the aftermath of the data collection as it relates to the research subjects. This leads me to ask: what kind of debriefing did the researchers offer the victim interviewees or the Iraqi judges? I see in both instances the opportunity to use the debriefing to offer assistance to those who have taken an emotional or security risk to participate in the research. Would it not be appropriate and indeed ethical to talk with the 9/11 victims afterward about the findings? Or to share the sociolegal findings about how victims have navigated compensation and litigation after tragedies in other places and times? In the Iraqi case, sharing the research results would reveal to the research subjects patterns that might be invisible to them. It would also offer Iraqis a chance to consider the reasons behind their decisions. Moreover, what would it mean to talk with the judges directly about the issue of legal indeterminacy and to alert them that fear (or politics?) might be influencing their decisions? I suppose I am suggesting that researchers who learn something about how people make decisions after experiencing trauma and loss or in a climate of fear have some additional obligation to share those understandings, a kind of ethical responsibility toward populations living in situations that cause and perpetuate fear. If this is not possible, then one must query whether the setting is appropriate for conducting research.

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Accountability as Fear's Antidote

Accountability is not usually conceptualized as an antidote to fear, yet the two articles suggest this interpretation. Seeking accountability through, for instance, civil litigation or through punishment inflicted on those deemed responsible is among the responses of individuals acting at least in part out of fear. The connection between accountability and specific kinds of fear is convincingly demonstrated in the article on the Iraqi judges. Similarly, some victims who have expressed reluctance to join the Victim Compensation Fund interpret it as hush money that requires them to abandon the search for accountability. Thus in my reading of these articles, through efforts toward accountability each set of victims pushes back against the fear of having failed to "do something," especially with so much seemingly at stake. And accountability also emerges as an antidote wielded by those who fear living in complicity with a repressive or corrupt system.

In positioning accountability as an antidote to a variety of fears, my point is not to suggest that efforts toward accountability, such as civil and criminal trials or sentencing, are best understood as rational responses to the emotionality of fear. Viewing fear as an emotional reaction brought under control by the rational decision to seek accountability would be a customary, though, in my view, distorted conceptualization of each. Rather, these articles encourage a view of fear as a keenly rational reaction to contexts of violence, repression, and loss, and of accountability as a fiercely affective drive. Victims and, dare I say, judges can feel passionately motivated to hold accountable those responsible for the actions that have caused fear in others. In contrast to fear, bringing justice might not be clinically associated with reactions of a psychophysical sort, but those who seek accountability often narrate their experiences as ones of high drama. One need only recall images from the trial and execution of Saddam Hussein to be reminded of the human intensity and emotionality behind efforts to establish accountability, although these images also raise questions about the line between accountability and revenge (Sarat 2001).

I want to read the evidence provided in these articles as confirming my argument that the 9/11 victims and Iraqi judges have tried to pursue accountability as a means of separating themselves from systems that represent and perpetuate corruption and repression. This would mean attributing to them the belief that acting in complicity with those who would embrace the moral bankruptcies of torturing political enemies or offering hush money to grieving victims would ultimately lead them to live with the much deeper fear of inhabiting a system that could never be trusted to do the right thing. But these are speculations that may or may not be borne out by future research.

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From my own experience, I can offer an example of how overwhelming fear (as well as other emotions, such as anger) can result when the avenues leading to accountability are blocked and one fears that the system has abandoned its core values. More than 20 men were indicted in U.S. federal court for crimes related to the East African embassy bombings in 1998. Four of them were brought to justice for those crimes through a trial in U.S. federal court in 2001 (Hirsch 2006). Through bombings in Afghanistan and other military acts, the U.S. government has killed and sought to kill several of those indicted in the name of "justice." For example, U.S. military personnel operating in the Horn of Africa have made multiple attempts to assassinate Haroun Fazul, who stood accused of playing a central role in the embassy bombings plot. The missile strikes targeting Fazul compel me to ask why such actions are represented as justice when, if successful, they would eliminate the possibility of prosecuting Fazul. Moreover, such attacks, in missing their mark, have killed bystanders, destroyed property, and fueled anti-American sentiment in the region, thus contributing to America's export of fear. Increased anger at the United States is very worrisome, but I am even more frightened by living under a government that equates justice with assassination.

A related case makes my point about accountability and fear in a different way, closer to home. Ahmed Khalfan Ghailani was among those indicted for crimes related to the embassy bombings. He was captured in Pakistan in 2003, and was then held for more than two years in undisclosed locations, presumably in the custody of the United States or its collaborators, through the extraordinary rendition program. In November 2006, Ghailani was transferred along with 14 "high-value" detainees to the Guantanamo Bay detention facility. In late March 2008, charges were sworn against Ghailani under the Military Commissions Act. Having waited to see Ghailani face trial for his alleged role in the embassy bombings, I am frustrated that the commissions will offer a form of justice widely criticized for its reliance on secret and coerced evidence, limitations on counsel for the defense, and procedures that fail to meet the standards of either civilian justice or the military justice of court-martial proceedings. My rights as a victim and those of Ghailani as a defendant are severely compromised in this newly created, untested proceeding, the legality of which will be litigated for years to come. After charges were sworn against several detainees alleged to be responsible for the 9/11 attacks, William Neukom, president of the American Bar Association, wrote the following in a letter to President George W. Bush: "[t]he military commission system at Guantanamo does not adhere to established principles of due process fundamental to our nation's concept of justice" (Neukom 2008: n.p.). My commitment to hold accountable

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every individual who participated in the embassy bombings has merged with my growing desire to hold accountable those who have blocked efforts to achieve recognizable justice for the alleged embassy bombers. The drive to achieve accountability for those who have used fear to amass and abuse power is an antidote to my own fear that the American legal system is at grave risk.

Some would say that my desire to see terror suspects held accountable through fair proceedings sounds naïve. Soon after the attacks of 9/11, U.S. government officials promulgating the war on terror began a systematic effort to sacrifice the quest for accountability through criminal trials to the project of eliminating the "enemy." But at this juncture we must ask whether the victims of 9/11 might have had a different perspective on the Victim Compensation Fund and/or civil litigation had the U.S. government vowed to find those responsible, including their sources of income and their supporters, and bring them to justice. My own experience with the satisfaction of achieving justice through a criminal terror trial suggests that their choices might have been very different. The discourse of justice through conventional criminal law as a response to terrorism evaporated as the war on terror ramped up, with the consequence that for a while the American public was blind to justice as an option. Now justice for those who blinded us is also on the agenda.

Conclusion

In this comment I have urged sociolegal scholars to direct additional attention to the nature of fear, especially in relation to law, given that fear has shaped the contexts in which we have lived and worked in recent years. Even though the types of fear associated with the post-9/11 era might already be transforming into fears about the economy, the climate, and the aging population, the U.S. government focus on exporting fear through military action and the war on terror means that fear will continue to be pervasive worldwide for at least a while to come. Scholarship on people and processes in fear-filled times should continue. But with change nominally on the horizon, let me champion a related project. What would it mean for sociolegal scholars to begin the next era by training our focus on accountability? Accountability as a research agenda in the next era could mean exploring the challenges to achieving accountability across societies and also the tenacious desire for it. As this era of fear and terror ends, law and society scholars would do well to spearhead research agendas in this area, including a debriefing for the public. Such research might ask how recognizable forms of accountability—such as criminal trials for

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terror suspects, courts-martial for enemy combatants, and impeachment for government officials engaged in illegal activities—have failed to be used to address the practices that have caused so much fear in the post-9/11 era.

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