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**From the Selected Works of Mireille Hildebrandt**

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# Controlling Security in a Culture of Fear

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## **Introduction: Who Controls Security in a Culture of Fear?**

### **Fears below the threshold of consciousness**

In *Man in the Dark* Paul Auster describes the insomnia of a man who has been confronted with the uttermost cruelty against a former boyfriend of his granddaughter.<sup>1</sup> The ex-boyfriend had taken up a civilian job in Irak and the indescribable atrocities that tore him apart were committed by terrorists trying to force the company he worked for to retreat from Irak. At some point the book draws the reader into a nightmare and for some time you wish you had never picked it up in the first place. Auster has found a way to write unsentimentally but with great feeling about something that is beyond verbal expression, evoking a physical nausea and a sudden understanding of what fear really is.

When opening the conference on ‘Controlling security in a culture of fear’ that led to this volume, I briefly turned to the biological roots of fear.<sup>2</sup> From the perspective of cognitive science, fear surges from what brain scientists call the reptile brain and the limbic system – neither of which involve conscious thought. Both are hidden under the neo-cortex that generates reflection, thinking, analysis etc. The reptile brain and the limbic system allow for fast and immediate responses to dangers perceived, especially when there is no time for conscious interventions.

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<sup>1</sup> Paul Auster, *Man in the Dark*, New York: Picador 2009.

<sup>2</sup> E g Dagleish, Tim (2004), 'The emotional brain', *Nature Reviews Neuroscience*, 5, 582-89. The relationship between fear, other emotions and conscious deliberation is infinitely more complex than I am portraying it here. The point I am making is that deliberation may be less powerful than we tend to think, in cases of what we perceive as immediate danger.

Consciousness is slow, causes delay, has limited computing power and limited capabilities to process complexity. Fear arouses the body and shortcuts (or bypasses) the conscious part of the brain, it generates a series of autonomic responses like those of ‘fight or flight’, ‘freezing’ (immobility), ‘rapid heartbeat’, ‘increased respiration’, and ‘stress-hormone release’.<sup>3</sup> This is interesting because it indicates how fear can be used to control people. It is easy to manipulate a person who is afraid, as long as she has no access to her fears and remains in the grip of the unconscious mechanisms of her autonomic nervous system. For the middle classes of Western societies such fear is not a regular experience, and getting the news reports on terrorist attacks will probably invoke a *fear of such fear* rather than this primal drive itself. And this *fear of fear* – as Van Swaaningen saliently remarks in his contribution – may foster the narrative of a culture of fear: a dangerous tale of *risky others* that could break the magic spell of our relatively stable physical safety and economic security.

### **Ariadne’s threads**

This volume presents a variety of dimensions of a culture of fear in function of the many attempts to control security. Scanning the contributions could evoke a sense of having entered a labyrinth, and if I am Ariadne and the reader is Theseus this introduction should provide a thread that will enable a safe journey into (and out of) the various paths taken. In fact I will provide several red threads that connect the chapters, divided between a part I that takes focus on ‘Justice, Fear and Security: Political Aspects’ and a part II that focuses on ‘Public Protection, Legal Safeguards and Resilience’, ending with the introduction of a new line of

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<sup>3</sup> On the relationship between fear, psychopathology and the amygdala

research that should be very relevant to the topic of this volume: the study of resilience.

The first thread that runs through the entire volume is that of the ‘risky other’, introduced by Hudson in her discussion of cosmopolitan justice. The risky other is the stranger, whom we don’t recognize as being like us, whom we like to portray as the cause of our fear. Whether an illegal immigrant, a potential terrorist, a juvenile delinquent, a neglected child, a person that exhibits anti-social behaviour, a sex-offender, a foreign prisoner, an image on the screen of a CCTV camera or commercial enterprises that pollute our environment, there is a pervasive attempt to keep whoever is perceived as a risky other at a distance, to control her movements and exclude her from our premises.

The second red thread, introduced by Ramsay, is the ‘vulnerability of ordinary citizens’, invoked by media and politicians to justify a wide variety of precautionary as well as repressive measures, thereby also admitting the failure of the existing criminal law. This relates to a third red thread, of ‘public protection’, as the mantra of novel criminal law policies (co-opting civil and administrative law), suggesting the need to balance public protection against individual human rights. It is worthwhile to note that the idea of public protection closely resembles the notion of ‘social defense’, put forward by the Modern School of Criminal Law Theory already half a century ago.

The fourth red thread, introduced by Van Swaaningen, is the ‘fear of fear’ that paves the way for a ‘trade-off between security and liberty’, whereby those who have little to lose may be forced to ‘trade’ their liberty to secure the perceived safety of those who have much to lose.

A fifth red thread could be a shift from vulnerability to resilience, visible in Makinwa’s argument for private remedies in cases of international corruption, thus empowering victims to improve their position after the

fact. Klima provides a first exploration of what an investment in resilience would require in terms of cross-disciplinary research.

Though many more interconnections can be detected between the different chapters, I will restrict myself to an overview and hope this will suffice to appetize the reader.

## **Part I: Justice, Fear and Security: Political Aspects**

In ‘Security and the ‘risky other’: doing justice in a world of strangers’ the keynote speaker of the conference, legal philosopher and criminologist Barbara Hudson – well-known for her *Justice in the Risk Society*<sup>4</sup> – outlines a daring and richly argued approach to cosmopolitan justice. Her point is not only normative but also methodological: fear of what is strange will not do in a world that inevitably brings strangers within the borders of our community.

Whereas theories of cosmopolitan justice most often start from an assumed consensus on basic values, Hudson finds that the real challenge is our common predicament of living with strangers. Globalization has resulted in the need to encounter others that are not part of our moral community, shared geography, history or culture, whom we do not see as similar to ourselves, and who are ‘not persons such that we can imagine that if we were in the same circumstances, we might do as they do’. She describes the persistent tendency to respond to these strangers as ‘risky others’ who pose unknown security risks that must be calculated and managed. In his contribution Digard will make a similar point in discussing the treatment of sex-offenders, whose testimony is often presumed to be contaminated by their ‘guile and cunning’ – they are a

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<sup>4</sup> Hudson, Barbara (2003), *Justice in the Risk Society* (London Thousand Oaks New Delhi: Sage).

salient example of risky others. There is a prevailing mood these days, stipulating that we should not waste our time trying to understand those considered wholly different from ourselves. Ramsay makes a similar point when he invokes the UK Justice Minister's spite against criminal justice professionals that invest time and money in offenders, while their task should be to pay attention to the potential victims (i.e. to 'ordinary' citizens). Hudson refers to Garland who discriminates between 'criminologies of the self' (treating the criminal as a rational person open to censure we would find reasonable) and 'criminologies of the other' (treating the criminal as an incomprehensible irrational and unpredictable person that must be excluded or repressed because she will not respond to our appeal to reason). A cosmopolitanism that stands for inclusive justice would build on an ethics of hospitality (Kant, Derrida, Levinas, Habermas, Benhabib and Bauman are discussed), rejecting 'criminologies of the other' on normative grounds. Next to this normative cosmopolitanism Hudson also draws on Beck's notion of a cosmopolitan understanding of identity, rejecting 'criminologies of the other' on methodological grounds. This results in a methodological cosmopolitanism next to the normative variation. Hudson provides two test cases for the type of cosmopolitan justice that she advocates: the status and treatment of illegal immigrants and the issue of torture in the 'ticking bomb scenario'. The first issue raises the question of whether Rawls' theory of justice should be applied on the basis of individuals or of states as actors: do the borders between national states have moral meaning if we aim for cosmopolitan justice? The second issue raises the question of whether we should follow the 'lesser evil doctrine' (proposed by Ignatieff): if we can save lives by torturing a terrorist, we should do it. Luban argues that the ticking bomb scenario cheats by the certainty of its suppositions (can we be sure that torture will reveal a truth that will save lives?). Waldron critiques Dershowitz's proposal to accept the

inevitability of torture in a culture of fear. Whereas Dershowitz calls for the *regulation* of torture (which means acceptance of it as inevitable), Waldron upholds an absolute prohibition. As Ericson claimed, regulating torture would constitute a 'counter-law' that forfeits the very rule of law it aims to protect. Some would even claim that those liable for torture are the 'worst of the worst' (Rumsfeld about Guantanamo detainees), not worthy of the protection of human rights. Hudson concludes that cosmopolitan justice calls for dialogue without assuming a universal commonality to human mentalities, arguing for a more fluid sense of self, a planetary humanism (Gilroy), or grand universalism (Sen), beyond the simple legalism of international justice. This provides the reader with a well-founded argument against the type of precautionary logic that finds a welcome ally in the culture of fear of risky others.

In 'The Insecurity State' legal scholar Peter Ramsay presents the reader with a cogent argument for an interesting paradox. Whereas many authors accuse politicians of playing out post 9/11 vulnerabilities to reinforce the sovereignty of the security state, Ramsay notes that these politicians in fact highlight the failure of the authority of the state by emphasizing the ineffectiveness of the ordinary criminal law. He discusses the political rethorics that stress the vulnerability of ordinary citizens, thus legitimizing (1) anti-social behaviour orders (ASBOs), (2) the criminalization of mere indications for the preparation of terrorist activities and (3) new rules to impose extended and indeterminate sentences under the banner of imprisonment for public protection (IPP). Ramsay suggests that the attempt to draw on (or breed) populist fears in fact backfires on a government that admits its own incompetence, presenting its constituents with an 'insecurity state' that fails to invest in fighting the *causes* of offenders' behaviour.

In 'Fear and the Trade Off Between Security and Liberty' cultural criminologist René van Swaaningen describes how politicians and the media try to hook up with the discontents of what they like to call 'ordinary people', in order to justify more stringent policies. Van Swaaningen explains his scepticism towards the notion of 'cultural trauma' (De Haan) because it reinforces the idea that a collective anxiety unites citizen in the post 9/11 era, whereas he contends that such collective consensus is not at stake in the pluralist type of societies of today. With Garland and Young he observes a continuous flow of moral panics that is often related to a fear of risky others, inspiring the actuarial management of security that paradoxically generates an ever greater awareness of vulnerability (Ericson). The fear of fear that is produced by the measurement of insecurities leads to a false trade-off between security and liberty, based on the mistaken belief that one could control security by giving up freedom. Drawing on Loader and Walker in *Civilizing Security* who differentiate between thin and thick security, Van Swaaningen suggests to also speak of thin and thick liberty. Whereas the business community often seems to enjoy a tick freedom (to pollute the environment, engage in corporate crime) the less advantaged migrant has to make do with a thin liberty, because her civil liberties have been traded against the purported security of 'ordinary citizens'. Needless to remind the reader that immigrants as 'risky others' enjoy a very thin security.

In 'The political reasons for tackling anti-social behaviour' criminologist Monique Koemans investigates the rationale for the 'diffusion' of the British policy with regard to so-called anti-social behaviour to the Netherlands. Whereas Ramsay notes that the success of the ASBOs has now been reported as doubtful within the UK, Dutch politicians seem to



follow suit in a rather uncritical fashion by introducing similar measures. Koemans has conducted a series of interviews with Members of Parliament, members of city councils and civil servants to find out how they describe their motives for initiating these measures. The move towards some kind of zero tolerance policy is especially interesting since the Netherlands have been known worldwide for their policy of *gedogen*, which translates as tolerance or condonement. Koemans suggests that – other than in the UK - in the Netherlands the motivations for introducing ASBO-type measures are tied up with the problems of ethnic minorities, Moroccan youths in particular: Hudson's risky other revisited. Though Koemans detects indications of a precautionary logic that invites politicians to take measures even if there is no evidence that they will be effective, her conclusion is that the process of policy making seems to invite politicians to engage in legislative interventions that are aimed to satisfy the assumed sense of insecurity in their constituencies. She seems to suggest that the rationale is the need to cater to the inferred anxieties of the voter, rather than any straightforward policy of precaution.

In 'Deus sive Natura. Investigating the axioms of precautionary logic' philosopher and lawyer Tobias Arnoldussen tackles the pervasive logic of precaution in environmental and criminal law, foreign relations and politics in general. He explains that the precautionary approach, which he defines as a form of risk-aversion, is *based on – and nourishes* – a culture of fear. Precaution is found to present a new paradigm for controlling security that is based on a general fear of known and especially unknown threats. This chapter thus spells out the presumptions behind the theme of the conference that formed the incentive to compose this volume. Arnoldussen opposes the culture of fear that informs the logic of precaution to the optimistic view that Enlightenment scholars developed

of human nature and its capacity to control security. He proposes, however, a continuity between early Christian worldviews and the present preoccupation with fear and vulnerability. In doing so, he claims that though we may no longer project the cause of our fear to the medieval God of Christianity, we have simply transferred our fears from God to Nature (Gaia), which needs to be appeased with a variety of measures to prevent its wrath. Arnoldussen thus equates the precautionary approach with the apocalyptic position of deep ecology and politically inspired rethorics like that of Al Gore (quoting his quasi-religious calls for redemption). This could cause difficulty – as he asserts in his conclusion – for those advocating other types of precaution, to be convinced by his argument. Nevertheless it seems obvious that the kind of precautionary approach that Arnoldussen discusses is closely related to the issues of risky others, insecurity states, fear of fear and policy making that is geared to appease voters rather than basing itself on evidence of effectiveness.

In ‘International Corruption and the Privatisation of Security – Resorting to Private Remedies’ legal scholar Abiola Makinwe takes us to corruption as a matter of international concern, advocating a partial ‘privatisation’ of the fight against international corruption. This approach has been made possible by the construction of a normative framework of bi- and multilateral treaties that stipulate criminal sanctions for strictly defined instances of transnational corruption. The strict definitions have paved the way for private law remedies. Makinwa argues that since criminal sanctions depend on the initiative of a state that may be part of the problem, the instigation of private law remedies is pertinent if the legal framework is to have serious effect. The criminal law framework has produced a necessary consensus on what types of international corruption

warrant international cooperation, because criminalization requires the kind of strict definition that provides a workable footing for tort actions. Though private law remedies still depend on the monopoly of violence of a state for their enforcement, the author seems to suggest that it becomes easier to invoke the jurisdiction of other states, or other branches of the government of the same state, as well as international commercial arbitration tribunals. At least the initiative no longer depends on the state that may be involved in the corruption. Such ‘privatisation’ follows a trend to take victims seriously, but it does not fall into the trap of populist rethorics that uses the fear of ‘ordinary citizens’ to enforce a political agenda of increased monitoring and forced compliance. It rather grants the victim a legal position from where to claim her right to be compensated, thus increasing the resilience of those otherwise portrayed as vulnerable subjects of risky others. Makinwa thus prepares the subject that appears at the end of part II, being a research agenda with regard to *resilience* as a novel concept, distinct from the usual suspects of security, risk-management, victimhood and vulnerability.

## **Part II: Public Protection, Legal Safeguards and Resilience**

In ‘Locating offenders between risk and denial: the implications for ‘public-protection’ legal scholar Léon Digard outlines the paradox that seems to govern the responses of the criminal justice system to sex-offenders. He explains that because sex-offenders are often in denial about the offences they have committed, their judgements are not trusted in other matters; to achieve their compliance, however, it is important that they perceive the way they are treated as fair. This becomes next to impossible if their reports of the manner in which the system treats them are not taken seriously. Digard undertook empirical research by conducting a series of semi-structured interviews with sex-offenders that

were serving so-called extended sentences. These sentences allow for detention beyond the proportionality between crime and punishment that should normally inform a court's determination of a prison sentence. Like the indeterminate sentences made possible by the imprisonment for public protection (IPP), discussed by Ramsay, they violate the logic of the criminal law. Instead of limiting the prison sentence by the principle of just desert, these measures allow for indefinite detention to protect the vulnerable citizen that could fall prey to the sex-offenders' incomprehensible urges. In terms of the conference theme we could conclude that the fear of the 'guile and cunning' of sex-offenders prevents their fair treatment and informs a precautionary logic that may be counterproductive in the end.

In 'The idea of protection in Dutch juvenile criminal justice' legal scholar Willem-Jan Kortleven traces the history of protection (1) of juvenile delinquents and (2) of juveniles in need of protection, from the end of the 19<sup>th</sup> century. This, for instance, allows him to discuss the influence of the Modern School in criminal law theory, over and against the Classical School. Whereas the last emphasized core tenets of the criminal law, such as the principles of legality and proportionality, the Modern School was more worried about what we would now call public protection, then termed 'social defense', for instance advocating therapy over and above punishment. One could interpret this therapeutic approach as an attempt to transform 'risky others' into 'others like ourselves', causing a great deal of frustration or even anger if the other resists the endeavour to redefine her self.<sup>5</sup> Kortleven provides a detailed analysis of

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<sup>5</sup> We could refer to Moosbrugger in Musil's *Mann ohne Eigenschaften* or Raskolnikov in Dostojevski's *Crime and Punishment* or to Goffmann's *Asylum* to explain why the attempt

how the dual aim of (a) protecting juveniles from neglect and adverse circumstances and (b) protecting society from delinquent juveniles, has created a persistent tension in the policies with regard to both types of juveniles. The author concludes that the recurrent incompatibility of measures that aim to protect juveniles with those targeting public protection has often harmed the interest of juveniles. The chapter highlights the historical background of the current tendency to treat young offenders like their adult ‘colleagues’, based on the *alleged* similarity of the dangers they pose for the *assumed* vulnerability of ‘ordinary’ citizens. Kortleven thus introduces a richly documented account of the juvenile as a ‘risky other’, whether ‘merely’ neglected or delinquent.

In ‘Who’s afraid of ... risky sex? Criminal law perspectives on HIV transmission’ legal scholar Bjorn Ketels investigates to what extent the transmission of the HIV virus by means of sexual intercourse could fall within the scope of existing criminal offences under Belgium positive law. After noting that the HIV virus has moved from the laboratories to hospitals and courts, Ketels indicates that in some jurisdictions the virus has also reached the legislator. In the UK and the US, for instance, HIV-specific criminal laws have been promulgated in response to – once again - a clear case of ‘risky others’. The author provides a detailed legal examination of the generic Belgian criminal law. He meticulously checks whether the requirements for fault, causality and *mens rea* are met and to what extent and under which precise conditions certain behaviours could qualify as a criminal offence. Ketel’s well-argued conclusion builds on

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to *impose* therapy is unethical and ineffective. The figure of Lisbeth Salander in Stief Larsson’s *Millennium Trilogy* makes the same point all over again.

the unsentimental consideration of a myriad of relevant circumstances in relation to relevant legislation, case law and doctrine. This demonstrates that juridical technicalities offer a sound protection against populist attempts to criminalise behaviour of 'risky others'. His conclusion is that, under Belgian law, the crime of '(un)intentional assault' and the offence of the 'failure to act in respect of a person in great danger', can be most probably be successfully charged in cases of sexual intercourse by a carrier of the HIV-virus.

In 'International execution of sentences: A macro and meso perspective' legal scholar Eveline de Wree describes the International Law framework regarding the transfer of foreign prisoners to their country of origin. She highlights the official rationale of the relevant treaties and EU regulation, as being focused on the better opportunities for rehabilitation and reintegration in the home country of a foreign prisoner. International cooperation on this subject seems to have originated in a concern for the treatment of a country's nationals in foreign prisons. This is confirmed by the rethorics of, for instance, the Convention on the Transfer of Sentenced Persons of 1983 and its Protocol of 1997, and the EU Council Framework Decision on the Application of the Principle of Mutual Recognition to Judgements in Criminal Matters Imposing Custodial Sentences or Measures Involving Deprivation of Liberty for the Purpose of Their Enforcement in the European Union of 2008. De Wree argues that this emphasis on rehabilitation seems to be at odds with the relatively recent competence to enforce the transfer of prisoners without their consent, which has been made possible in the 1997 Protocol and – to an even further extent – in the 2008 Framework Decision. It seems that behind the rethorics of reintegration, the competence to transfer foreign prisoners back to their home country is seen as an instrument for 'being

tough on crime', 'exporting criminals' or relieving 'overcrowded prisons'. This could mean that the interest of the state that is detaining foreigners prevails over the individual detainee's interest in rehabilitation. Foreign prisoners are another example 'risky others', whose presence may be seen as a continuous threat to the vulnerability of 'ordinary citizens'. Referring to Van Swaaningen's criticism of the idea of trading security against liberty, it seems that the liberty of the foreign prisoner (whose consent is no longer needed) is traded against the security of the national 'ordinary citizen'. De Wree's empirical research into the Belgian implementation of international transfers of prisoners shows that a major part of the Belgian prison population consists of foreigners (44%), but that for now the impact of novel competences is still relatively small. The question thus remains what will happen once policy makers discover the novel competences as tools to ousted part of the prison population.

In 'Boring Pictures — Images of Video Surveillance between Evidence and Emptiness' Katja Langeland provides this volume with a surprising perspective on fear and security. The surprise is twofold. First, the surprise is due to the disciplinary background of this author, who is not a criminologist nor a lawyer, but holds a master of arts in digital media. Her discourse stems from canonical literature not familiar in criminology and law, and her method involves images rather than mere text and/or graphs and tables. Second, the surprise is in the subject. Boredom seems antithetical to a state of fear or the quest for security. A sense of irony may overcome the reader, who takes note of the fact that the attempt to pacify vulnerable citizens by flooding public space with CCTV cameras results in the endless boredom of those payed to watch the screens. Langeland thus takes an unusual perspective on the implementation of CCTV cameras as means to control security, also by questioning the aura

of objective representation they are supposed to deliver. Since Walter Benjamin and Susan Sontag broke the spell of the objective realism associated with photography,<sup>6</sup> we should be aware of the fact that the images of visualisation technologies do not speak for themselves. Langeland confirms that the status of these images as evidence in a court of law is less straightforward than is often claimed, because of bad quality and the need for corroborating evidence. She adds that even if the images of CCTV cameras may be of interest when an important or exciting event provides them with context and meaning, they are more often boring in form as well as in content. In 2007 a philosopher defended his doctorate thesis at Erasmus University Rotterdam, under the title of 'Being bored'. He saliently remarks that 'those who are tormented by grief will not experience boredom; nor will those persecuted, nor those who suffer from illness or poverty'.<sup>7</sup> He opposes scholars who describe 'the primacy of anxiety of our current epoch' and claims that our present age is one of technological repetition and intellectual nihilism, resulting in boredom rather than fear. In confirming the boredom generated by security technologies, Langeland perhaps confirms that we do not only live in a culture of fear but also in one of boredom.<sup>8</sup>

In 'Resilience joins research in vulnerability of economic activity to crime' criminologist Noël Klima mines the resources of a whole set of

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<sup>6</sup> Walter Benjamin, *Das Kunstwerk Im Zeitalter Seiner Technischen Reproduzierbarkeit; Drei Studien Zur Kunstsoziologie* ([Frankfurt am Main]: Suhrkamp Verlag, 1963), Susan Sontag, *On Photography* (1st Anchor Books edn.; New York: Anchor Books, 1990).

<sup>7</sup> A W Prins, *Uit Verveling (Being Bored)* (Kampen: Klement, 2007), at 439.

<sup>8</sup> Cf. Lippens 'We zijn al waar we zijn moeten. Beschouwingen omtrent de voorzorgcultuur', in *Zorgen om voorzorg*, Mireille Hildebrandt en Roel Pieterman (red.), Den Haag Boom, on the subject of edgework and risktaking behaviour like bungy jumping as the flipside of the precautionary approach.



still other disciplines, presenting a dizzying set of topics that could be relevant for the study of resilience and vulnerability. Like the final chapter in part I, Klima turns away from the singular focus on vulnerable victims that need to be protected from dangerous elements by means of the criminal law, to focus on what constitutes a person's or an organisation's resilience *after the fact*. Just like Makinwa's argument to facilitate private initiatives of individual victims to recover from international corruption, Klima argues for research into the capacity of organisations to recover from criminal events. There is an interesting parallel to a precautionary approach, because Klima explains that in complex environments the paradigm of risk-management fails due to unknown unknowns or *Black Swans* (Taleb). Whereas the precautionary approach seems to focus on abstaining from activities that could generate such unexpected consequences (or on implementing preemptive strikes), Klima suggests to invest in the kind of resilience that will be of help after-the-fact. Though he presents work in progress his contribution is especially rich in that it traces the developments of the concepts of vulnerability and resilience from their origins in medical and social science (resilience) and from engineering and environmental science (vulnerability) through biology, systems theory and management studies. In arguing that criminology should mine the findings of these sciences in as far as relevant, he ends the second part of this volume with an ambitious research agenda that does not take fear for granted, diverts our attention from an assumed vulnerability and aims to avoid preconceived ideas about who constitute risky others.

