

9/11 AS FALSE FLAG: WHY INTERNATIONAL LAW MUST DARE TO CARE

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ABSTRACT

At the heart of contemporary international law lies a paradox: The attacks on the United States of September 11, 2001 have justified nearly fifteen years of international war, yet the official international community, embodied principally in the United Nations, has failed to question or even scrutinize the U.S. Government's account of those attacks. Despite the impressive and serious body of literature that has emerged to suggest that 9/11 was a classic (if unprecedentedly monstrous) false-flag attack, international statesmen, following the lead of scholars, have acted as if there is no controversy whatsoever. This disconnect between the growing (alternative) evidentiary record of state responsibility for the attacks and the focus of international institutions is impossible to sustain if those institutions are to maintain any semblance of viability and meaning.

In a three-step process, this Article seeks to connect the international community to the possible reality of 9/11-as-false-flag. First, it shows that it is highly rational to question the official 9/11 account given the historical record of the first half of the twentieth century, which reveals a pattern of false flag attacks over which the international community openly fretted and tried to exercise jurisdiction. Second, it analyzes the reasons why intellectual elites and the statesmen they influence are behaving irrationally in not inquiring into the possibility of 9/11-as-false-flag, deconstructing a multi-faceted motive into all its unsavory parts. Third, it argues that the means for ceasing this irrational behavior is readily available, as the United Nations need only carry out its core and incontrovertible "jury" function of determining the existence of aggression in order to exercise a long-overdue oversight of the official 9/11 narrative.

INTRODUCTION

No matter what one may think about the nature of the attacks that took place in the United States on September 11, 2001, one thing is beyond dispute: Those attacks have provided the legal, political and moral justifications for nearly fifteen years of international war. Indeed, it is not an exaggeration to say that, with few exceptions, all use-of-force roads laid

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since the beginning of this century lead back to the Rome of 9/11. These would include the 2001 invasion and occupation of Afghanistan; the 2003 invasion and occupation of Iraq; the series of drone strikes here¹ and cluster bombings there;² the current mission to “degrade and defeat” ISIL in Iraq and Syria;³ and even the recently rumored need to re-intervene in Libya at some point now that it has become a “failed state” that may be in the business of harboring terrorists.⁴

Each one of these military campaigns is based on the legal authorization and moral dispensation granted by domestic and international authorities in the days following 9/11 to respond to the attacks of that day. Ask today for the legal basis of fighting a global “War On Terror” against groups that were not even in existence in 2001, and you will be handed a copy of the law passed just seven days after 9/11 authorizing the President to use force against the perpetrators and abettors of 9/11 (*i.e.* Al-Qaeda and the Taliban).⁵ Challenge the wisdom of fighting a “War On Terror” to the end of a second decade, and you will likely be chided for

1. See, e.g., Steve Coll, *The Unblinking Stare – The Drone War in Pakistan*, THE NEW YORKER, Nov. 24, 2014.

2. See Amnesty International, *Yemen: Images of Missile and Cluster Munitions Point to US Role in Fatal Attack*, June 7, 2010, available at <https://www.amnesty.org/en/press-releases/2010/06/yemen-images-missile-and-cluster-munitions-point-us-role-fatal-attack-2010/> (date accessed 11/2/15).

3. Barack Obama, *Letter from the President – Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant*, Office of the Press Secretary, Feb. 11, 2015.

4. See Glen Greenwald, *Hailed As a Model For Successful Intervention, Libya Proves To Be the Exact Opposite*, THE INTERCEPT, Feb. 17, 2015, <https://theintercept.com/2015/02/16/hailed-model-successful-intervention-libya-proves-exact-opposite> (date accessed 11/15/15).

5. See 2001 Authorization For Use of Military Force, P.L. 107-40; 50 U.S.C. § 1541 (Sept. 18, 2001) (“2001 AUMF”). The plain language of the 2001 AUMF authorizes the use of force only against groups and entities connected to the 9/11 attacks. However, it has been interpreted broadly by both the Bush and Obama administrations to permit the targeting of any group deemed to be affiliated or associated with Al-Qaeda in the years since 9/11 regardless of any lack of connection (or even possibility of connection) to the 9/11 attacks. See Matthew Weed, *The 2001 Authorization for Use of Military Force: Background in Brief*, CONG. RES. SERV. (Jul. 10, 2013), <https://www.fas.org/sgp/crs/natsec/aumf-071013.pdf> (date accessed 11/2/15); see also Lauren Leatherby, *Whatever Happened to the Debate Over Use of Force Against ISIS?*, NAT’L PUBLIC RADIO, June 17, 2015, <http://www.npr.org/2015/06/17/415203016/whatever-happened-to-the-debate-over-use-of-force-against-isis> (date accessed 11/2/15).

inviting a terror attack on par with, or even worse than, 9/11.⁶ From the standpoint of international law and international political morality, then, 9/11 presumes to shoulder the heaviest of loads: A monumental amount of war to date, with apparently a good deal of war still to come.⁷

We would do well to remind ourselves, however, that this shouldering is only as strong and effective as the claim of self-defense on which it is based. The “War on Terror” is, after all, a war that is claimed to be fought in self-defense.⁸ Were this claim ever to be proved false – were it ever to be shown that the United States was not in fact attacked by “others” on 9/11 but rather attacked itself (or let itself be attacked) for the purpose of blaming others and justifying international war – then its war would not be one of self-defense but of pre-meditated and

6. See, e.g., Al Kamen and Colby Itkowitz, *Cheney Headed Back to the Hill*, THE WASH. POST, Sept. 8, 2014 (“In recent interviews, Cheney has issued dire warnings about ignoring the militant group [ISIL], saying inaction will result in an attack worse than 9/11”), https://www.washingtonpost.com/politics/cheney-headed-back-to-the-hill/2014/09/08/1f18e940-378b-11e4-bdfb-de4104544a37_story.html (date accessed 11/2/15).

7. See Charlie Savage, *Debating the Legal Basis for the War on Terror*, THE N.Y. TIMES, May 16, 2013 (“A top Pentagon official said Thursday that the evolving war against Al Qaeda was likely to continue ‘at least 10 to 20 years’ and urged Congress not to modify the statute that provides its legal basis”), http://www.nytimes.com/2013/05/17/us/politics/pentagon-official-urges-congress-to-keep-statute-allowing-war-on-terror-intact.html?_r=1 (date accessed 11/2/15). 9/11 also continues to do considerable heavy-lifting in U.S. domestic politics. When recently asked to explain her close financial ties to Wall Street, Presidential candidate Hillary Clinton replied:

So I represented New York, and I represented New York on 9/11 when we were attacked. Where were we attacked? We were attacked in downtown Manhattan where Wall Street is. I did spend a whole lot of time and effort helping them rebuild. That was good for New York. It was good for the economy, and it was a way to rebuke the terrorists who had attacked our country.

Mike Krieger, *A New Low? Hillary Clinton Claims 9/11 Is the Reason She’s Owned by Wall Street*, LIBERTY BLITZKRIEG BLOG, Nov. 15, 2015, <http://libertyblitzkrieg.com/2015/11/15/a-new-low-hillary-clinton-claims-911-is-the-reason-shes-owned-by-wall-street/> (date accessed 11/17/15).

8. See 2001 AUMF, *supra* note XX (“Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad ... ”); Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1-49, 6 (2003) (U.S. military action in Afghanistan was “predicated on the claim that the September 11 attacks constituted or foretold subsequent ‘armed attacks’ within the meaning of the U.N. Charter.”) (footnote omitted).

carefully camouflaged aggression.⁹ Further, all subsequent events of terror deemed connected to 9/11 through the inchoate skein of violence that flowed from it – Madrid’s 3/11, London’s 7/7, Paris’s 1/7 and 11/13 – would immediately become suspect as representing aspects of the same foundational fraud. In this sensitive matter especially, the obvious bears repeating: “[I]f 9-11 is in fact an instance of Machiavellian state terror . . . then any US pretence that these wars have to do with self-defense is totally unsustainable.”¹⁰

Precisely because so much is at stake, one would think that international institutions such as the United Nations would have been keenly interested in satisfying themselves that the American claim of self-defense is valid. But astonishingly enough, they have never shown any such interest. In the days and weeks following 9/11, the U.N. accepted without hesitation or scrutiny the American claim to have been attacked by elements of international terrorism.¹¹ NATO more or less followed suit, even though the peremptory nature of its mutual-defense pact obliged it to probe the validity of the American self-defense claim, not merely rubber-

9. A “false flag attack” occurs when a country organizes an attack on itself and makes the attack appear to be by enemy nations or terrorists, thus giving the country a pretext for domestic repression and/or foreign military aggression. I will use here a broadened definition of the term that also includes foreign attacks “that a government knew were coming and could have stopped but allowed to succeed so that the nation would be primed for war.” LANCE DEHAVEN-SMITH, *CONSPIRACY THEORY IN AMERICA* (U.Texas Press 2013), at 226. False flag attacks justifying inter-state war represent a special type of aggression that I have elsewhere labeled “aggression-by-pretense,” which comprises acts of pretextual humanitarianism as well as acts of pretextual self-defense. See Amy Baker Benjamin, *To Wreck a State: The New International Crime*, *NEW CRIM. L. REV.* (April 2016).

10. David MacGregor and Paul Zarembka, *Marxism, Conspiracy and 9-11*, 24 *SOCIALISM AND DEMOCRACY* 139-63, 142 (2010).

11. See S.C. Res. 1368, 4370th mtg., UN Doc S/RES/1368 (Sept. 12, 2011); S.C. Res 1373, 4385th mtg., UN Doc S/RES/1373 (Sept. 28, 2001). Since 9/11, each and every time a Western government has claimed to have been attacked on its territory by elements of international terrorism, it has received the Security Council’s uncritical endorsement. See S.C. Res. 2249, 7565th mtg., UN Doc S/RES/2249 (Nov. 20, 2015) (accepting, without independent investigation, France’s claim that ISIS carried out terrorist attacks in Paris on November 13, 2015); Security Council Press Statement On Terrorist Attack on French Newspaper, SC/11727-PI/2109 (Jan. 7, 2015) (same respecting France’s claim to have been attacked by international terrorism on January 7, 2015); S.C. Res. 1161, 5223rd mtg., UN Doc S/RES/1611 (July 7, 2005) (same respecting Britain’s claim that terrorist forces struck London on July 7, 2005).

stamp it.¹² Moreover, despite the impressive body of serious literature that has emerged since 9/11 challenging the official version of the attacks and strongly suggesting that they were either perpetrated by elements of the U.S. Government or allowed by them to happen,¹³ neither the U.N. nor NATO has ever bestirred itself to re-visit the crucial issue of responsibility/authorship.

This reluctance to ask hard questions in the halls of international institutions that are charged with the duty to “go there” and vet claims of national self-defense has unfortunately been matched – non-discourse for non-discourse – by the silence of scholars. It is really quite astonishing: Scholars as a group scurry away from the controversy surrounding the official version of *9/11* as if it were the intellectual equivalent of kryptonite.¹⁴ This is not to say, of

12. On September 12, 2001, NATO’s governing body authorized invocation of Article 5 of NATO’s Charter – which states that an armed attack on one member shall be regarded as an armed attack on all – subject to the evidentiary caveat, “if it is determined that this attack was directed from abroad against the United States.” NATO Press Release (2001) 124, Statement by the North Atlantic Council (Sept. 12, 2001). Three weeks later, NATO Secretary General Lord Robertson reported that this evidentiary test had been satisfied on the basis of “clear and compelling” evidence presented by the United States showing that the *9/11* attacks had been the work of Al-Qaeda, as protected by the Taliban. Statement by NATO Secretary-General Lord Robertson, Brussels, Belgium (Oct. 2, 2001). However, there appears to have been no independent investigation by NATO authorities into the facts surrounding the *9/11* attacks. The evidence referred to by Lord Robertson, such as it was, appears to have come solely from U.S. Government sources in the form of closed-door briefings.

13. A small sampling of (purelyAnglo-American) alternative *9/11* literature might include: KEVIN R. RYAN, *ANOTHER NINETEEN: INVESTIGATING LEGITIMATE 9/11 SUSPECTS* (Microbloom 2013); CHRISTOPHER LEE BOLLYN, *SOLVING 9-11: THE DECEPTION THAT CHANGED THE WORLD* (2012); PHILIP MARSHALL, *THE BIG BAMBOOZLE: 9/11 AND THE WAR ON TERROR* (2012); Paul Zarembka (ed.), *THE HIDDEN HISTORY OF 9/11* (Seven Stories Press 2008); James H. Fetzer (ed.), *THE 9/11 CONSPIRACY: THE SCAMMING OF AMERICA* (Catfeet Press 2007); David R. Griffin and Peter D. Scott (eds.), *9/11 AND AMERICAN EMPIRE: INTELLECTUALS SPEAK OUT* (Olive Branch Press 2007); BARRIE ZWICKER, *TOWERS OF DECEPTION: THE MEDIA COVER-UP OF 9/11* (New Society Publishers 2006); Allen M. Poteshman, *Unusual Option Market Activity and the Terrorist Attacks of September 11, 2001*, 79 *J. BUS.* 1703-26 (2006); MICHAEL C. RUPPERT, *CROSSING THE RUBICON: THE DECLINE OF THE AMERICAN EMPIRE AT THE END OF THE AGE OF OIL* (New Society Publishers 2004); DAVID R. GRIFFIN, *THE NEW PEARL HARBOR: DISTURBING QUESTIONS ABOUT THE BUSH ADMINISTRATION AND 9/11*. (Olive Branch Press 2004). In addition to these texts, *The Journal of 9/11 Studies*, edited by Graeme MacQueen and Kevin R. Ryan, publishes peer-reviewed articles that challenge many aspects of the official *9/11* narrative.

14. See Roger Roots, *Who Benefits from Terrorism: The Common Interests of Terrorists and Governments of Terrorized Societies*, 5 *WAR CRIMES, GENOCIDE, AND CRIMES AGAINST HUMANITY* 125-45, 137 (2011) (noting that alternative *9/11* literature is “noteworthy both for its popularity among readers and for its nonrecognition among academic sources”); Carolyn Baker, *9/11 and American Empire: Intellectuals Speak Out*, *GLOBAL RESEARCH NEWSLETTER* (Jan. 20, 2007) (noting “higher education’s abject paranoia regarding skepticism of the official story of 9/11”), <http://www.globalresearch.ca/9-11-and-american-empire-intellectuals-speak-out-by-david-ray-griffin-and-peter-dale-scott/4538> (date accessed 11/4/15); see also DEHAVEN-SMITH, *supra* note XX, at 13 (“Social scientists have studied various forms of state crime, but in almost every case the potential for public officials in liberal democracies to subvert democratic institutions has been disregarded.”); Richard Jackson, *The*

course, that they reject 9/11 as an object of study. Quite the contrary – they have embraced it, but only so far, and only in a highly circumscribed way. Scholars specializing in international law or international relations, for example, have generated hundreds, if not thousands, of articles and books on 9/11, but almost all such studies assume the correctness of the core U.S. claim of self-defense and then proceed to nibble on issues that lie around its perimeter. Do the Laws of War apply to a “War on Terror” that features (on one side) non-state actors? Can the 9/11 attacks support a paradigm shift away from anticipatory self-defense to preventative self-defense? Can the torture of terror suspects be justified on a “warfare” approach to counter-terrorism as opposed to a “crime” approach (and vice versa)? All good questions these, but they uniformly assume a (U.S.-Government-friendly) answer to the most pressing question of all: Was the United States the victim of attacks by others, or was 9/11 a false flag? If the latter, then these scholars are not merely feeding on downstream phenomenon; they are boxing at shadows projected onto the cave wall by a calculating and highly dangerous criminal elite.¹⁵

A good deal of academic ink has also been spilled studying 9/11 as a “conspiracy theory” phenomenon. The scholars who author this literature – many of whom practice in the social sciences, but there are a few lawyers as well – regard those who question the official version of 9/11 as “conspiracy theorists” who should not under any circumstances be engaged on their evidentiary claims but rather objectified and studied in an effort to ascertain the cause of their distemper.¹⁶ Even scholars who concede that the U.S. Government has engaged in

Ghosts of State Terror: Knowledge, Politics and Terrorism Studies, 1 CRITICAL STUDIES ON TERRORISM 377-92, 380-81 (2008) (“[T]here are a great many prominent scholars who acknowledge in passing that terrorism is a strategy of political violence which any actor can employ, including states, but then do not examine cases of state terrorism in any systematic or sustained manner in their research....[A] discourse analysis of [introductory terrorism] texts reveals ... a deep and pervasive silence on Western democratic state terrorism”)

15. *Accord* DEHAVEN -SMITH, *supra* note xxx, at 105.

16. Political scientists Joseph E. Uscinski and Joseph M. Parent, for example, hypothesize that people who reject official accounts of tragic political events are usually “vulnerable groups” needing to manage perceived

heinous acts of state terror in the past – including a proposal at the highest level of government during the Kennedy Administration to commit false flag attacks against American citizens for the purpose of justifying war against Cuba¹⁷ – refuse to dwell on such episodes or draw any conclusions from them relative to the evidentiary debate concerning 9/11 (which they resolutely refuse to participate in).¹⁸ Surely academia has reached some sort of level of the absurd when

dangers and fears that “are fundamentally driven by shifts in relative power.” JOSEPH E. USCINSKI and JOSEPH M. PARENT, *AMERICAN CONSPIRACY THEORIES* (Oxford Scholarship Online 2014), at 131. Legal scholars Cass Sunstein and Adrian Vermeule explain 9/11 alternativists thus: “Terrible events produce outrage, and when people are outraged, they are all the more likely to seek causes that justify their emotional states, and also to attribute those events to intentional action.” Cass R. Sunstein and Adrian Vermeule, *Conspiracy Theories: Causes and Cures*, 17 J. POL. PHIL. 202-227, 213 (2009). Literature professor Peter Knight suggests that 9/11 alternativists believe as they do because they seek “the refuge of humanist certainties in an increasingly post-humanist age” and because, in or around 2004, they clumsily misprojected their rage about the “disintegrating American mission in Iraq” retrospectively onto 9/11. Peter Knight, *Outrageous Conspiracy Theories: Popular and Official Responses to 9/11 in Germany and the United States*, 103 NEW GERMAN CRITIQUE 165-93, 166, 181 (2008). With theories and analyses such as these, citizens who are concerned that in 9/11 they are confronting a “State Crime Against Democracy” (to use Professor deHaven-Smith’s term, *see supra* note XX) present as patients in need of counselling, if not psychiatric treatment. It is not for nothing that historian Kathryn S. Olmsted writes, “American scholars, public officials, and journalists frequently use the metaphor of illness when they discuss alternative conspiracy theorists. The experts see the conspiracist worldview as a pathology, a form of disease afflicting the body politic.” KATHRYN S. OLMSTEAD, *REAL ENEMIES: CONSPIRACY THEORIES AND AMERICAN DEMOCRACY, WORLD WAR I TO 9/11* (Oxford U. Press 2009), at 233.

17. This proposal, codenamed “Operation Northwoods,” is discussed *infra* Part I.

18. Sunstein and Vermeule are typical in this regard:

Of course some conspiracy theories have turned out to be true, and under our definition, they do not cease to be conspiracy theories for that reason. The Watergate hotel room used by the Democratic National Committee was, in fact, bugged by Republican officials, operating at the behest of the White House. In the 1950s, the Central Intelligence Agency did, in fact, administer LSD and related drugs under Project MKULTRA, in an effort to investigate the possibility of ‘mind control.’ Operation Northwoods, a rumored plan by the Department of Defense to simulate acts of terrorism and to blame them on Cuba, really was proposed by high-level officials (though the plan never went into effect). *Our focus throughout is on demonstrably false conspiracy theories, such as the various 9/11 conspiracy theories, not ones that are true or whose truth is undetermined.*

Sunstein and Vermeule, *supra* note XX, at 206 (footnotes omitted; emphasis added). At no point in their article do Sunstein and Vermeule attempt to demonstrate the “demonstrably false” nature of 9/11 alternativism. Instead, they simply assert it and expect that their readers will agree. For similar examples of this (rather dubious) methodology, see USCINSKI and PARENT, *supra* note XX, at 32 and *passim* (acknowledging the reality of *Operation Northwoods* yet assuming, without argument, that 9/11 alternativism comprises false conspiracy theories), and OLMSTEAD, *supra* note XXX, at 228 (assuming, without argument, that the Bush II administration did not perpetrate 9/11, but instead just “got lucky” with it).

not even Marxist scholars will entertain doubts about the official 9/11 account,¹⁹ and when a respected Swiss historian, who wishes merely to subject that account to academic scrutiny, is reduced to pleading with his colleagues: “Wir müssen über die Vergangenheit sprechen” – “We must talk about the past.”²⁰ Indeed.

We are, it seems, at a stalemate, one that I hope to soften and perhaps break. My main contention is that, however long Americans might domestically be prepared to live with a no-decision regarding the official 9/11 account, international law can no longer tolerate it. The core mission of the premier public international body – the United Nations – is to perform its “jury” function²¹ of determining whether an act of aggression has occurred. Pretextual self-defense based on a false flag event is, almost by definition, aggression. Even if the collective-security role of the U.N. system, as reflected in the second half of Article 39 of the Charter, seems to have withered on the vine and to be now worth little, the U.N.’s jury role, as reflected in the first half of Article 39, remains firmly intact.²² (Importantly, and as I will show below,

19. MacGregor and Zarembka, *supra* note XX, at 142 (“[M]any [Marxist scholars] are unwilling to grant that 9-11 occurred in a manner not officially validated by US authorities; that is, they dismiss the possibility of a conspiracy by the capitalists and their state. While the terrorism of 9-11 offered a reason for US military-state action, no thought is given to the possibility that the attacks might have been a product of the state apparatus itself.”)

20. Daniele Ganser, *911 Untersuchen: Persönlichkeiten aus der Schweiz für Eine Neue, Unabhängige 911-Untersuchung* (Tr. “911 Investigation: Swiss People For A New, Independent 911 Investigation”), <http://911untersuchen.ch/wissenschaft/daniele-ganser> (date accessed Nov. 4, 2015).

21. To borrow the late Thomas Franck’s apt term. See Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization*, WASH. U. J. L. POL’Y 51-68, 68 (2001).

22. Article 39 reads: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Although the Article reads seamlessly, it in fact comprises two very different functions. Determining the existence of an act of aggression involves arriving at a verdict based on facts found through investigation, a quasi-declaratory role likened by Professor Franck to a jury role. Making recommendations and deciding measures to stop aggression, on the other hand, links to and supports the quasi-injunctive, policing functions of Article 41 (which sanctions non-military measures to stop aggression) and Article 42 (which sanctions military measures). See U.N. CHARTER arts. 41 & 42. In Professor Franck’s formulation:

Failure to adhere to [the use-of-force rules of the Charter] was to be met by decision of the Security Council acting, first as a jury to determine whether there

this is true regardless of whether this jury role is viewed as being rooted in the positive law of Article 39 or in pre-Charter customary international law.) For the U.N.'s political organs²³ to ignore the controversy surrounding the events of 9/11 is to abdicate all responsibility in fulfilling their core mission. It is, in a sense, to deny their own *raison d'être*. This, indeed, is an outcome to be avoided if at all possible.

But is it possible? Can the U.N.'s political organs finally, after all these years, muster the will to pass judgment on the U.S. claim to have been the victim of international terrorism on 9/11? They certainly can, but they obviously need some help. Members of these bodies – along with the scholars whose works infuse the atmosphere in which they deliberate – must first confront the reasons for their silence and abdication-of-duty to date. An awakening of sorts is needed, and it can only come to pass on the basis of (collective) self-understanding. In an effort to prompt such understanding, I will argue that officialdom and scholars appear to be in the grip of an intellectual formalism every bit as vise-like as the “Lochner-era Formalism” American law students are taught to frown upon and deride from the very first moment of their studies. This formalism functions in the nature of a gate-keeper, letting some ideas, issues and facts into our minds and (from there) into the public domain, whilst sternly barring others. As for what lies back of this formalism, lending it its terrible strength, two sadly plausible guesses emerge: fear and its handmaiden, corruption.

had been a breach of the peace, by whom, and how serious it was, and then deciding what collective measures might appropriately be taken to put matters right.

Thomas M. Franck, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (Cambridge U. Press 2002), at 20-21.

23. *I.e.* The Security Council and the General Assembly

But perhaps the best (because easiest) place to begin in an effort to break the *9/11* stalemate will be not with the international political mechanics of change (*see infra* Part III), nor with critical introspection (*see infra* Part II), but with an appeal to history. The case of *9/11-as-false-flag* is so fraught with anger and ignorance as to be almost paralyzing. Whether we passively listen or actively turn away, all that many of us hear are disturbing sounds and cries claiming to have evidence of unspeakable acts. Historical events that lie deep in the past, however, are far less threatening, and therefore far more instructive. And so I will suggest that the first step in trying to break the *9/11* paralysis is to recognize that international law and political institutions have long been concerned with the danger of nation states committing false flags in order to justify (or prepare for) international war. To that history I now turn.

PART I

WHY IT IS RATIONAL TO CARE

A. Manchuria, Reichstag Fire, Gleiwitz

From the start of the Cold War through to the present day, international political and legal bodies have had to deal with many dodgy claims of self-defense. However, almost all such claims have involved acts of either anticipatory self-defense²⁴ or collective self-defense/counter-intervention.²⁵ This can obscure the fact that during a more distant time period – namely, the twenty-year interregnum of the inter-war period and the immediate aftermath of World War II – international concern was focused to a large extent on pretextual claims of self-defense based on false flag attacks.

24. *E.g.* Israel's bombing of Iraq's nuclear reactor in 1981 and the U.S. naval blockade of Cuba in 1962.

25. *See, e.g., Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 ICJ Rep. 14 (June 27).

It is sobering to recall that the first major crisis to strike the U.N.'s predecessor organization, the League of Nations, was an international invasion by one state of another based on a highly dubious claim of having been attacked. In 1931, Japan invaded the northeastern Chinese province of Manchuria, claiming that Chinese nationalists had sabotaged portions of a railway line controlled and operated by it near the city of Mukden. Though the explosion was so weak that it failed to destroy the track, the Japanese Army immediately accused Chinese dissidents of the attack and responded with a full-scale invasion that led to the occupation of Manchuria, and the installation of a puppet regime, within six months. Historian Walter LaFeber makes short work of any doubts as to what actually occurred:

[In the hours immediately following the explosion], [f]ighting broke out between Japanese and Chinese troops. By morning, the [Japanese] Army held Mukden and was expanding its control over surrounding territory. Its officers claimed that the bomb had been set by the Chinese and even conveniently spread several Chinese bodies around the explosion site. But authorities in Tokyo and other world capitals quickly concluded that the army had blown up its own railway tracks as an excuse to conquer Manchuria.²⁶

Upon China's complaint of illegal aggression by Japan, the League of Nations seized itself of the matter and sent a commission to Manchuria to investigate. Although remarkably even-handed in its assessment of blame for the generally tense situation in Manchuria between the Japanese Army and the Chinese populace, the Lytton Commission left no doubt, despite its gentlemanly language, that the Japan's claim of having had its railroad attacked was false:

The Japanese, as was explained to the Commission in evidence, had a carefully prepared plan to meet the case of possible hostilities between themselves and the Chinese. On the night of [the explosion] this plan was put into operation with swiftness and precision. *The Chinese ... had no plan of attacking the Japanese troops or of endangering lives or property of Japanese nationals at this particular time or place.*

26. Walter LaFeber, *THE CLASH: A HISTORY OF U.S.- JAPAN RELATIONS* (W.W. Norton & Co. 1997), at 166 (footnote omitted).

*They made no concerted or authorized attack on the Japanese forces and were surprised by the Japanese attack and subsequent operations. An explosion undoubtedly occurred on or near the railroad between 10 P.M. and 10:30 P.M. on September 18, but the damage, if any, to the railroad did not in fact prevent the punctual arrival of the south bound train from Changchun and was not in itself sufficient to justify military action. The military operations of the Japanese troops during this night ... cannot be regarded as measures of legitimate self defense. In saying this the Commission does not exclude the hypothesis that the officers on the spot may have thought they were acting in self defense.*²⁷

However mild the rebuke, the Japanese knew an insult when they heard one and abruptly withdrew from the League in 1933.²⁸

This, then, was the sneaky face of aggression in a world where aggressive war had ceased to be regarded as a legitimate instrument of national policy. As the Japanese well understood, by 1931 a state could no longer legitimately say, “We want their territory, let’s take it” – as Germany had effectively said to France sixty years earlier, in 1870, when it had gobbled up French-owned Alsace-Lorraine in a bid to craft a unified German nation-state.²⁹ No, by 1931 – courtesy of the League’s collective-security system and the 1928 Kellogg-Briand Pact, which denied states the right to wage aggressive war³⁰ – a nation would have to fake it in order to get away with it.

27. Memorandum on the Report of the Lytton Commission, 1 INSTITUTE OF PACIFIC RELATIONS, AMERICAN COUNCIL 2-3 (Oct. 7, 1932) (emphasis added). Needless to say, in being open to the possibility that "officers on the spot" may have thought they were acting in self-defense, the Commission hardly implied exoneration of higher-level Japanese officers who were not present on the ground during the night of the explosion and who would have been the ones to orchestrate the event.

28. Stuart Brown, *Japans Stuns World, Withdraws From League*, UNITED PRESS INT’L, Feb. 24, 1933, http://100years.upi.com/sta_1933-02-24.html (date accessed 11/16/15).

29. In his memoir, Prussian Chancellor Otto von Bismarck remarked: "I did not doubt that a Franco-Prussian War must take place before the construction of a United Germany could be realised." Otto von Bismarck (A.J. Butler, trans.), *BISMARCK: THE MAN AND THE STATESMAN*, Vol. 2 (originally published in 1898; reprinted in 2007 by Cosimo Classics, New York), at 58.

30. General Treaty for the Renunciation of War As an Instrument of National Policy, arts. I-II, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

Hitler, of course, had been watching and taking notes on Manchuria, and when he decided to invade Poland in 1939, he felt he needed to create a veneer of self-defensive indignation before sending his already-primed army over international borders. Thus ensued what has come to be known as the “Gleiwitz Incident.” To create the appearance of Polish aggression against Germany, Hitler’s lieutenants had German troops dress up as Poles and attack German installations along the German-Polish border.

[By August 1939 Hitler] was left with no alternative but to attack Poland and to fight England and France as well. Still he had no excuse for war. The Poles were not threatening Germany with military force; it was Germany who was rattling the saber. Lacking an excuse, Hitler proceeded to fabricate one.

Early in August, 1939, a plan had been conceived for this purpose by the Chief of the Security Police and SD, Heydrich, to stage simulated border raids by personnel of the Gestapo and SD dressed as Poles. To add authenticity, it was planned to take certain prisoners from concentration camps, kill them by the use of hypodermic injections, and leave their bodies, clad in Polish uniforms, at the various places where the incidents supposedly were to occur. On August 31 these ‘border incidents’ were staged at Beuthen, Hindenburg, Gleiwitz, and elsewhere.³¹

The Gleiwitz Incident was not forgotten by the United States or its allies during the course of World War II. In fact, after the war they specifically included it in the bill of particulars on the conspiracy charge levied against the major Nazi war criminals at Nuremberg,³² and the Nuremberg Tribunal heard affidavit testimony regarding it.³³ There is, further, tantalizing evidence to suggest that the lessons drawn by the Allies from the Gleiwitz

31. WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945-1946* (Southern Methodist U. Press 1999) (rev. ed.), at 124.

32. *See* Nuremberg Trial Proceedings, Vol. 1, Indictment, Section IV (F)(4)(b) ("Accordingly, after having denounced the German-Polish Pact of 1934 on false grounds, the Nazi conspirators proceeded to stir up the Danzig issue, to prepare frontier 'incidents' to 'justify' the attack, and to make demands for the cession of Polish territory. Upon refusal by Poland to yield, they caused German armed forces to invade Poland on 1 September 1939, thus precipitating war also with the United Kingdom and France. ") (internal quotation marks in the original).

33. HARRIS, *supra* note XXX, at 124-26.

Incident – the foremost being that false flag attacks *do* occur – shaped the debate about the scope of the right of self-defense under the new U.N. system being planned at the end of the war in San Francisco. Commenting on the drafting history of Article 51 of the U.N. Charter, Thomas Franck noted:

Even the terminology eventually agreed upon, preserving states' 'inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations' (Article 51) was criticized by Archibald MacLeish, within the US delegation, as 'too vague.' He 'recalled that Germany had entered Poland at the beginning of the present war on the pretext that Poland had attacked her.'³⁴

Perhaps one reason why no one believed Hitler at the time regarding his claim of Polish aggression, and why after the war some statesmen seemed preoccupied with the issue of false flags justifying aggression, was because people remembered the occurrence of a notorious false-flag event early in the Nazi reign, to wit, the Reichstag Fire of 1933. The story is relatively straightforward: The Nazis set fire to the German Parliament (the Reichstag) but blamed the crime on a group of communists in order to justify a mass political witch hunt of the German left, the termination of political and civil liberties for the citizenry at large, and the seizure of totalitarian political control over Germany.³⁵ What is important about this false flag for our purposes is the extent to which it was viewed (both at the time and years later at Nuremberg) as an act of state terror having *international ramifications*. The Nazis, after all, had made no secret of their irredentist designs on the post-war peace of Europe as enshrined in

34. Franck, *supra* note 22, at 48 (footnote and citation omitted).

35. See Nuremberg Trial Proceedings, Vol. 1, Indictment, Section IV (D)(2)(1); John Mage and Michael E. Tigar, *The Reichstag Fire Trial, 1933-2008: The Production of Law and History*, 60 MONTHLY REV. 24-49, 27-28 (2009). In the early 1960s, under the pressure of Cold War-era anti-communism and a concomitant need to rehabilitate the Nazi-dominated German judiciary, a revisionist account of the Reichstag Fire emerged, according to which one of the defendants (Dutch anarchist Marinus van der Lubbe) had been the sole perpetrator and the Nazis were innocent. See *id.* at 42-45. This revisionism – endorsed by none other than the CIA in its effort to defend the "lone assassin" thesis of the Warren Commission against its first-generation critics, see DEHAVEN-SMITH, *supra* note XX, at 200 – was conclusively debunked by German scholars following the end of the Cold War and German re-unification. The Nazis did, in fact, do it. See *id.* at 45-47.

the Versailles settlement,³⁶ and it was generally believed that any event which would enable them to seize power within Germany would also enable them to begin their march toward the use of aggressive war to re-draw the map of Europe. The feeling was ripe that the international community – in some way, shape or form – had to become involved in litigating the facts of the Reichstag Fire.

The upshot of this international concern was the convening of a citizen-initiated Legal Commission of Inquiry in London in September, 1933, shortly before the commencement of the actual trial of the communist defendants in Germany. Doubting the ability (or willingness) of the German judiciary to afford the defendants a fair trial, the London Commission resolved to hear evidence in the matter and come to a verdict regarding responsibility.³⁷ The judges/jurors were nine public-spirited international lawyers, including Arthur Garfield Hays, co-founder of the American Civil Liberties Union. The London Commission quickly concluded that the Nazis had torched the Reichstag.³⁸ Twelve years later, the Nuremberg Tribunal agreed that the

36. See Nuremberg Trial Proceedings, Vol. 1, Indictment, Section IV (B).

37. See *A Mock Trial: Reichstag Fire, Legal Commission*, THE COURIER-MAIL, Sept. 16, 1933, <http://trove.nla.gov.au/ndp/del/article/1120113> (date accessed 11/17/15).

38. See Mage and Tigar, *supra* note XX, at 29. The international character of the London Commission's work was clear:

The commission's work was part of an international protest movement, focused not solely upon the pending and impending judicial proceedings in Germany, but also upon the National Socialist seizure of power using the fire as a pretext. The commission had the benefit of an extensive investigation conducted by the World Committee for the Relief of the Victims of German Fascism, which assembled physical evidence and found witnesses.

Id. In key respects, the London Commission was the template for the many 9/11 Truth Movements and International Citizens' Inquiries that have striven to investigate the 9/11 case. See, e.g., International Citizens' Inquiry Into 9/11, Toronto, Canada, 2004, <http://cleveland.indymedia.org/news/2004/04/9937.php> (date accessed 11/17/15).

crime of the Reichstag Fire was relevant to proof of a crime of international dimension (*i.e.* the crime of aggression), and heard evidence of Nazi responsibility for it.³⁹

B. Operation Northwoods and the Larger Historical Context

Jim Garrison, the New Orleans prosecutor who for years tried to investigate the assassination of President Kennedy, once remarked, “I’m afraid, based on my own experience, that fascism will come to America in the name of national security.”⁴⁰ He was, perhaps, closer to the truth than he realized, for it was during the Kennedy Administration that senior U.S. military officials proposed a false-flag terror operation to justify international war with Cuba that would have made the likes of Reinhard Heydrich proud indeed. The plan was called *Operation Northwoods*, and it entailed the following:

[T]he plan, which had the written approval of the Chairman and every member of the Joint Chiefs of Staff, called for innocent people to be shot on American streets; for boats carrying refugees from Cuba to be sunk on the high seas; for a wave of violent terrorism to be launched in Washington, D.C., Miami, and elsewhere. People would be framed for bombings they did not commit; planes would be hijacked. Using phony evidence, all of it would be blamed on Castro, thus giving [Joint Chiefs Chairman Lyman Lemnitzer] and his cabal the excuse, as well as the public and international backing, they needed to launch their war.⁴¹

Northwoods included proposals for false-flag acts of sabotage of the U.S. Naval Base at Guantanamo Bay, Cuba; the sinking of a U.S. Navy ship in the Guantanamo Bay harbor (casualty lists for which, it was hoped, “would help cause a helpful wave of national indignation”); the blowing up of John Glenn’s rocket ship during his historic space flight; and a

39. See ANN TUSA and JOHN TUSA, *THE NUREMBERG TRIAL* (MacMillan 1983), at 330 (testimony of Hans Gisevius implicating Goering and Goebbels in the fire).

40. Jim Garrison Interview, *PLAYBOY MAGAZINE*, October, 1967, available at http://www.whale.to/b/jim_garrison_i.html (date accessed 11/18/15).

41. JAMES BAMFORD, *BODY OF SECRETS: ANATOMY OF THE ULTRA SECRET NATIONAL SECURITY AGENCY* (Doubleday 2001), at 82. The original *Operation Northwoods* documents were declassified and released to the public in 1997, and are available online at <http://nsarchive.gwu.edu/news/20010430/northwoods.pdf>.

highly elaborate deception for simulating the shooting-down of civilian airplanes which involved the retrofitting of aircraft by the CIA, secret landings and disembarkation of passengers, and the surreptitious substitution of drones for aircraft.⁴² On behalf of the Joint Chiefs, Lemnitzer submitted the *Northwoods* plan to President Kennedy's Secretary of Defense, Robert MacNamara, whereupon it was summarily quashed.⁴³

Manchuria, the Reichstag Fire, and the Gleiwitz Incident were all undisputed, fully-executed false flags, but none of them resulted in mass (or even many) casualties. *Northwoods*, on the other hand, gets us far closer to 9/11 in terms of an historical precedent, as it would have involved multiple theatres of operation and hundreds, perhaps even thousands, of innocent victims. Moreover, when set within the context of two larger and closely-related categories of state malfeasance – namely, false flags used for *domestic* political purposes and false pretenses for war *not* involving the use of false flags – the 9/11 false-flag scenario becomes scarily thinkable and, if you will, speakable. As to the former category, we have strong evidence that Western democratic governments have perpetrated acts of mass-casualty, false-flag terrorism

42. BAMFORD, *supra* note XX, at 84-86.

43. BAMFORD, *supra* note XX, at 86-87. Some scholars who specialize in the “sociology of conspiracy-theorizing” describe *Northwoods* in a way that trivializes it. Uscinski and Parent, for example, describe *Northwoods* as an “outlandish conspirac[y]” that “found no reception among decision makers.” USCINSKI and PARENT, *supra* note XX, at 32. If by “outlandish” they mean clownish, amateurish, or unserious, *Northwoods* was quite clearly none of these things. And if by “no reception” they mean to suggest that all (or most) responsible officials within the U.S. Government rejected the plan, they are simply wrong. As far as the historical record tells us, only President Kennedy and his chosen civilian liaison to the military (MacNamara) stood in the way of the plan's execution – no one else. James Bamford puts the issue nicely into perspective:

Lemnitzer was a dangerous – perhaps even unbalanced – right-wing extremist in an extraordinarily sensitive position during a critical period. But Operation Northwoods also had the support of every single member of the Joint Chiefs of Staff, and even senior Pentagon official Paul Nitze argued in favor of provoking a phony war with Cuba. The fact that the most senior members of all the services and the Pentagon could be so out of touch with reality and the meaning of democracy would be hidden for four decades.

Id. at 90.

against their own populations in order to discredit internal political opposition.⁴⁴ As to the latter category, we have strong evidence that the U.S. Government lied about being attacked in order to commence full-scale war against North Vietnam in 1964,⁴⁵ and lied about the danger of being attacked in order to commence war against Iraq in 2003.⁴⁶ Both sets of lies resulted in wars in which vast numbers of innocent people perished. Putting all these pieces together, what emerges is a horrifying mosaic showing the very real possibility of a mass-casualty false-flag attack being executed to justify international war. To dismiss this possibility out-of-hand, or to deny the right and the duty of the international community to investigate it, is nothing short of irrational.

44. In the early stages of the Cold War, NATO and the governments of various West European countries arranged for the formation of a clandestine network of resistance fighters that would be activated to fight against the Soviets in the event they invaded and occupied Western Europe. The project was codenamed *Operation Gladio*. The backbone of the *Gladio* network were far-right and Neo-Nazi groups working in coordination with carefully compartmentalized sections of the Western security and intelligence services. Although the Soviets never invaded Western Europe, NATO nonetheless activated the network to commit political assassinations and mass-atrocity terror attacks that were blamed on Western European communists for the purpose of discrediting the West European left. See generally PAUL L. WILLIAMS, *OPERATION GLADIO: THE UNHOLY ALLIANCE BETWEEN THE VATICAN, THE CIA, AND THE MAFIA* (Prometheus Books 2015); RICHARD COTTRELL, *GLADIO: NATO'S DAGGER AT THE HEART OF EUROPE* (Progressive Press 2010); DANIELE GANSER, *NATO'S SECRET ARMIES: OPERATION GLADIO AND TERRORISM IN WESTERN EUROPE* (Frank Cass 2005). Between 1963 and 1969 (years when *Gladio* was fully operational), NATO was headed by none other than General Lyman Lemnitzer of *Operation Northwoods* fame, who had been fired as Chairman of the Joint Chiefs of Staff by President Kennedy in 1962.

45. The Johnson Administration knowingly lied when it claimed that a U.S. naval vessel had been fired upon by the North Vietnamese in the Gulf of Tonkin.. See JOHN J. MEARSHEIMER, *WHY LEADERS LIE: THE TRUTH ABOUT LYING IN INTERNATIONAL POLITICS* (Duckworth Overlook 2011), at 48-49; ERIC ALTERMAN, *WHEN PRESIDENTS LIE: A HISTORY OF OFFICIAL DECEPTION AND ITS CONSEQUENCES* (Viking Penguin 2004), at 160-237 (concluding that "[t]he violation of public trust and the corruption of public leadership that Tonkin inspired continued to haunt U.S. politics for decades"). As many will be aware, this fabricated incident was the *casus belli* justifying America's war in Vietnam.

46. The Bush II Administration knowingly lied when it claimed that Iraq possessed weapons of mass destruction and/or was involved in the 9/11 attacks. MEARSHEIMER, *supra* note XX, at 49-55; ALTERMAN, *supra* note XX, at 296-306.

PART II
WHY WE HAVEN'T CARED THUS FAR

Why, then, are so many of us behaving irrationally? Why haven't we (scholars, statesmen, bureaucrats, the mainstream press) been willing to scrutinize the facts of 9/11 to determine if that event wasn't a modern-day *Operation Northwoods*? We look at 9/11, yet we choose not to see it. We treat it as a taboo subject – yet one of our own making. Why is that? This is a sensitive topic, and, again, before we broach it relative to ourselves, it might be easier to broach it in a safer way: historically, and relative to our ancestors. Let us, in effect, gore *their* ox, and then perhaps we might be willing to gore our own.

A. *Lochner-Era Formalism and Pound's 'Legal Monks'*

One of the rites of passage for nearly every American law student who studies constitutional law is to learn about the sordid tale of “Lochner-era formalism.” The term derives from the 1905 case *Lochner v. New York*,⁴⁷ in which the U.S. Supreme Court declared unconstitutional a New York state law that limited the number of hours each day a baker could work. The Supreme Court rejected New York's argument that the law was necessary to protect the health of bakers, calling it an “unreasonable, unnecessary and arbitrary interference with the right of the individual ... to enter into those contracts in relation to labor which may seem to him appropriate or necessary.”⁴⁸ During the thirty years that followed *Lochner* – until its decision in

47. 198 U.S. 45 (1905).

48. 198 U.S. at 56.

*West Coast Hotel Co. v. Parrish*⁴⁹ – the Court persisted in striking down state and federal laws that sought to protect the welfare of workers.⁵⁰

The “formalism” of which the Justices stood accused by their critics – both at the time and since – amounted to an intellectual insulation from “social facts” that kept them from appreciating the realities of modern industrial relations. Those realities fatefully disadvantaged workers in contract negotiations with their would-be employers and rendered talk of “freedom of contract” cruelly farcical. By refusing to gaze upon those realities and draw the necessary inferences from them in assessing protective legislation, the Justices were, in Roscoe Pound’s colorful words, behaving as “[l]egal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded”⁵¹

In many ways Pound authored the received wisdom of *Lochner*. Yet as recent scholarship has shown,⁵² the picture he conveyed was somewhat distorted; the reality of what the *Lochner*-era judges were up to was more complicated than he cared to admit. Strangely enough, those judges were both virulently anti-empirical *and* empirical at one and the same time. Their anti-empiricism was dictated by an abstract, and highly ideological, *laissez-faire*-era assumption about the nature of equality in modern industrial relations. Drawing a page out of Herbert Spencer’s *Social Statics* (to paraphrase Holmes’ *Lochner* dissent⁵³), the judges assumed, with little attention to real-world conditions, symmetrical bargaining power as

49. 300 U.S. 379 (1937).

50. See, e.g., *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (holding that minimum wage laws violated the Fourteenth Amendment’s Due Process Clause).

51. Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 612 (1907).

52. See, e.g., Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, U. ILL. L. REV. 59-102 (2013); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011); BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010).

53. See 198 U.S. at 75.

between employers and employees (*i.e.* that employers and employees were equally free to accept, or walk away from, proposed labor contracts).⁵⁴ In this (wholly fictitious) world of symmetrical power,⁵⁵ social-welfare legislation represented an impermissible attempt, either to rig an otherwise equal game in favor of the worker, or to prevent the worker from exercising his personal sovereignty in deciding whether to accept the terms of employment offered.⁵⁶ The only way such legislation might be justified was on narrow “health” grounds: If the legislature could show that its law was intended only to safeguard the physical health of the workers, rather than to paternalistically interfere in the industrial bargaining relationship itself, the law might pass constitutional muster.⁵⁷ Interestingly, it was at this point in their reasoning that the *Lochner*-era judges suddenly became *very* interested in the real world. For on the question of

54. Writing for the majority, Justice Peckham stated:

There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State.

Id. at 57.

55. See J. M. Balkin, *Ideology and Counter-Ideology From Lochner to Garcia*, 54 U.M.K.C. L. Rev. 175, 176 n.7 (1985) (The *Lochner*-era Court’s “exaltation of liberty of contract concealed the economic coercion that may result in a regime of free contract where parties have vastly different amounts of economic resources and bargaining power.”)

56. Justice Peckham again:

[W]hen the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail - the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state. . . . Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

198 U.S. at 54, 56. See also Balkin, *supra* note XX, at 178-79.

57. 198 U.S. at 53.

health dangers, they were not content merely to accept the say-so of the legislature (*i.e.* they were not prepared to be bound by the mere “forms” of legislative assurances), but instead insisted on reviewing the health facts for themselves in an exercise of quasi-*de novo* review.⁵⁸

Looking back at *Lochner* today, we can put its benighted “formalism” into clearer perspective than Pound was able to. Properly understood, that formalism – in the form of *a priori* assumptions about the nature of industrial relations that bore no semblance to reality – operated to keep certain issues off the table. The State of New York could not talk about (because it could not hope to win by citing) workers’ poverty, or the disempowering effect of worker demographics, or how each of these factors, separately or in combination, prevented workers from bargaining equally with employers. To have talked about either of these things would have been to impugn the formidable *laissez-faire* paradigm on which the *Lochner* Justices based their world view. Having thus rendered the explosive subject of class-based inequality off-limits and taboo, the formalism then served to channel discussion and fact-finding into a much narrower tributary – that of “health dangers” – the navigation of which involved fairly prosaic questions about the weaknesses of middle-age respiratory systems and the requirements of podiatric fitness. These were, of course, downstream phenomena of

58. As Morag-Levine explains:

The portrayal of *Lochner*-era courts as preoccupied with abstract rules (to the exclusion of facts) ... is contradicted by the presence of references to encyclopedias, legislative reports, and medical textbooks both in judicial opinions and litigant briefs of the time.The *Lochner* decision gave short shrift to the bakery law’s proffered health rationale not because it approached the issue through deductive reasoning or abstract conceptions, but because, quite on the contrary, it assumed the task of evaluating for itself the pertinent legislative facts. In doing so, the *Lochner* Court rejected the longstanding progressive position that social legislation was entitled to judicial deference.

Morag-Levine, *supra* note XX, at 61, 63 (footnotes omitted). That said, neither the empirical reality nor constitutional status of “freedom of contract” was at issue in *Lochner*, only the question of whether the maximum-hours law could be justified on health grounds.

relatively minor importance, but focusing on them kept the social order intact until, ultimately, the pressures of the Great Depression priced the judges' disassociation-from-reality out of the market.

B. Our Modern-Day Lochner

The notion of taboo subjects that are off the table, combined with a penchant for empiricism in areas of relatively minor concern, should sound familiar to anyone who has considered the ways establishment scholars, statesmen and journalists have treated the subject of 9/11.

In the 9/11 context, the key taboo claim is that the government is not well-intentioned toward its citizenry. Importantly, this claim is no more entertained by the establishment today than the claim that workers lacked equal bargaining power was entertained by the *Lochner*-era establishment. It is not entertained because it impugns a formidable paradigm, according to which government officials and agencies in the First-World West uniformly and consistently work to advance the welfare of the citizenry at large.

A few examples will suffice to show this paradigm at work. Throughout their analysis of how best to combat false conspiracy theories – such as (allegedly) 9/11 alternativism – Sunstein and Vermeule “assume a well-motivated government that aims to eliminate conspiracy theories, or draw their poison, if and only if social welfare is improved by doing so.”⁵⁹ Although they readily concede that this assumption might be false, they go ahead and make it, they say, because it is a “standard” assumption to make in policy analysis.⁶⁰ (*Translation: We will base our study on an arguably flawed premise because we do not care to inquire into the nature of a world governed by its opposite.*) Well-regarded international relations theorist John

59. Sunstein and Vermeule, *supra* note XX, at 219.

60. *Id.*

J. Mearsheimer writes an entire book detailing the lies that Western leaders tell their citizens about foreign affairs, yet is at pains to assure his readers – without any explanation or proof – that “leaders usually tell international lies for good strategic reasons, not because they are craven or corrupt.”⁶¹ Legal scholar Michael Glennon argues that an unaccountable, national-security-obsessed bureaucracy dictates all significant policy choices to elected officials (who are mere fronts), yet attributes this phenomenon to the benign fact of “smart, hard-working, public-spirited people acting in good faith who are responding to systemic incentives.”⁶² Finally, journalist and MSNBC commentator Rachel Maddow authors a study exposing the exponential growth of the U.S. military-industrial complex and the placement of the United States on a permanent war-footing, yet insists without reference to any evidence whatsoever that these developments have all been, in effect, terrible accidents that nobody intended.⁶³

A second taboo claim that hovers around discussion of 9/11 is that First-World western societies such as the United States are not open and free enough to allow their citizens to easily uncover officials’ crimes against them. Sunstein and Vermeule, for example, do not seem prepared to entertain this claim in the slightest, assuming (without argument) that the United States is an open society where “the press is free” and “checks and balances are in force.”⁶⁴ In open societies such as the U.S., they insist, “it is harder for government to keep nefarious

61. MEARSHEIMER, *supra* note XX, at 13. *See also id.* at 103 (“Leaders not only tell lies to other countries, they also lie to their own people, and they do so because they believe it is in the best interest of their country”) (emphasis added).

62. Jordan Michael Smith, *Vote all you want. The Secret Government Won’t Change*, THE BOSTON GLOBE, Oct. 19, 2014 (quoting Glennon), <http://www.bostonglobe.com/ideas/2014/10/18/vote-all-you-want-the-secret-government-won-change/jVSkXrENQlu8vNcBfMn9sL/story.html> (date accessed 11/27/15).

63. *See* RACHEL MADDOW, DRIFT: THE UNMOORING OF AMERICAN MILITARY POWER (Broadway Paperbacks 2012), at 8 (“It’s not a conspiracy, there aren’t rogue elements pushing us to subvert our national interests to instead serve theirs. It’s been more entertaining and more boneheaded than that.”)

64. *See* Sunstein and Vermeule, *supra* note X, at 209.

conspiracies hidden for long.”⁶⁵ Conspiracy theorizing, they sniff, is for “closed societies” only.⁶⁶ In like vein, political scientists Uscinski and Parent approvingly cite Noam Chomsky’s dismissal of 9/11 theories implicating the Bush Administration. Chomsky asks:

Did they plan it in any way or know anything about it? This seems to be extremely unlikely. They would have been insane to try anything like that. If they had, it is almost certain that it would have leaked. It’s a very porous system, secrets are hard to keep.⁶⁷

In reality, none of the *a priori* assumptions about modern-day America noted above are justified on the known facts. Indeed, by any standard of measure, the reality of modern-day America differs strikingly from what these intellectual elites posit. There is very good evidence to suggest, for example, that the U.S. Government is no longer subject to popular, majoritarian control and is, for all intents and purposes, an unaccountable oligarchy.⁶⁸ There is very good evidence that, far from being subject to the control of its citizens, the U.S. Government successfully employs extreme measures to control *them*.⁶⁹ Finally, there is very good evidence

65. *Id.* Sunstein and Vermeule cite only two random sources in support of this extremely broad assertion, one of which is ironically entitled “The Black Sites: A Rare Look Inside the C.I.A.’s Secret Interrogation Program.” *Id.* note 28 (emphasis added).

66. *See id.* at 209-10.

67. USCINSKI and PARENT, *supra* note XX, at 45 (quoting Chomsky).

68. *See* Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564-581, 576 (2014) (“In the United States, our findings indicate, the majority does not rule – at least in the causal sense of actually determining policy outcomes”). Peter Dale Scott’s seminal work on the “Deep State” (*i.e.* the shadow government behind the public front) is required reading for anyone seeking to understand the formation and preservation of this oligarchy. *See* PETER DALE SCOTT, *THE AMERICAN DEEP STATE: WALL STREET, BIG OIL, AND THE ATTACK ON U.S. DEMOCRACY* (Rowman & Littlefield 2015); PETER DALE SCOTT, *DEEP POLITICS AND THE DEATH OF JFK* (U. Calif. Press 1996). Many of Professor Scott’s findings, first published twenty years ago, have been confirmed by more recent scholarship. *See* MICHAEL J. GLENNON, *NATIONAL SECURITY AND DOUBLE GOVERNMENT* (Oxford U. Press 2015); SHELDON S. WOLIN, *DEMOCRACY INCORPORATED: MANAGED DEMOCRACY AND THE SPECTER OF INVERTED TOTALITARIANISM* (Princeton U. Press 2008).

69. These measures include indiscriminate and widespread government surveillance, militarized police forces at the state and local level, and the imprisonment of a sizable portion of the U.S. population. (The United States has the second highest per capita prison population rate in the world, second only to the Seychelles. *See Countries with the Largest Number of Prisoners Per 100,000 of the National Populations, As of July 2015*, STATISTA, <http://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/> (date accessed 11/26/15)).

that the U.S. Government has an immense ability to keep official crimes hidden from public view for very long periods of time.⁷⁰ We know that it uses a variety of tools to ensure this secrecy, ranging from the over-classification⁷¹ and/or destruction⁷² of government documents, to the control of the press,⁷³ to the prosecution (actual or threatened) of government

70. *Operations Northwoods* and *Gladio*, for example, did not come to light for over forty years, and their coverups were by no means exceptional. Following its inception in the early 1950s, Project MK-ULTRA – a CIA program to develop techniques of mind control through the use of hallucinogens, sensory deprivation, sexual abuse, and other forms of torture – was kept hidden for twenty-five years. See *Project MKULTRA, The CIA's Program of Research in Behavioral Modification*, JOINT HEARING BEFORE THE SELECT COMM. ON INTELL. ET AL., 95th Cong., 1st Sess. (Aug. 3, 1977) (hereinafter "MKULTRA Report"), at 1 ("It should be made clear from the outset that in general, we are focusing on events that happened over 12 or as long as 25 years ago") (statement of Sen. Inouye). Tellingly, the secrecy of this project was maintained despite the fact that it involved the participation of personnel from eighty-six universities and institutions. *Id.* at 3 (statement of Sen. Kennedy).

A smaller yet significant example of successful coverup occurred in the case of a U.S. Government program of involuntary medical experimentation on foreigners. This program, which involved the injection of syphilis and gonorrhea into the organs of non-consenting Guatemalan citizens, was kept hidden for over sixty years. See Donald G. McNeil, Jr., *Panel Hears Grim Details of Venereal Disease Tests*, THE N.Y. TIMES, Aug. 30, 2011, http://www.nytimes.com/2011/08/31/world/americas/31syphilis.html?_r=0 (date accessed 11/25/15).

71. See Nate Jones, *Black Holes in the Predecisional Universe: Agencies Gain a New Justification for Secrecy*, AMERICAN HISTORICAL ASSOC., Aug. 2014 (detailing CIA efforts to frustrate historical inquiry through document withholding), <http://www.historians.org/publications-and-directories/perspectives-on-history/summer-2014/national-security-archive-v-central-intelligence-agency/black-holes-in-the-predecisional-universe> (date accessed 11/26/15); Ronan Farrow, *The Real Concern: Why Are So Many US Government Documents Classified?*, THE GUARDIAN, June 28, 2013 (warning of a "culture of over-classification" that "has shielded too much from public debate"), <http://www.theguardian.com/commentisfree/2013/jun/28/nsa-surveillance-too-many-documents-classified> (date accessed 11/27/15).

One case in point: The U.S. Government continues to withhold from the public over 1,000 documents relating to the assassination of President Kennedy 53 years ago. See Bryan Bender, *Troves of Files on JFK Assassination Remain Secret*, THE BOSTON GLOBE, Nov. 25, 2013, available at <https://www.bostonglobe.com/2013/11/25/government-still-withholding-thousands-documents-jfk-assassination/PvBM2PCgW1H11vadQ4Wp4H/story.html> (date accessed 12/11/15). Many of these documents are believed to be the operational files of key CIA operatives at the time of the assassination.

72. In the case of MK-ULTRA, then-CIA director Richard Helms ordered all records of project activities destroyed in 1973. See MKULTRA Report at 3 (statement of Sen. Kennedy). As Senator Kennedy noted with exasperation, this document destruction was accompanied by a surprisingly thorough bout of official amnesia:

In spite of persistent inquiries by both the Health Subcommittee and the Intelligence Community, no additional records or information were forthcoming. And no one – no single individual – could be found who remembered the details, not the Director of the CIA, who ordered the documents destroyed, nor the official responsible for the program, nor any of his associates.

Id.

73. Control of the press is achieved mainly through the recruitment of publishers and journalists as U.S. government assets. See James F. Tracy, *The CIA and the Media: 50 Facts the World Needs to Know*, GLOBAL

whistleblowers.⁷⁴ Although there may be an argument – somewhere, somehow – that a government possessing these characteristics is likely to be “well-motivated” and “open” toward its citizenry, I for one have yet to hear it.

In fact, given the undeniable political and social reality of present-day America, I would argue that establishment intellectuals, as well as the statesmen they influence, are very much like Pound’s cloistered legal monks. Armed with comforting models they gaze outward, yet see neither the emaciated workers standing at the factory gate nor the union-busting goon squads of the employer. Of course, many establishment intellectuals are social scientists, and, as such, they are both trained and presumably eager to study the real world. And so, just as the *Lochner*-era judges investigated health matters, so too do they – the mental health, histories, habits and motivations of those who question official government narratives, as well as of the terrorists themselves.⁷⁵

RESEARCH NEWSLETTER, Dec. 15, 2015, <http://www.globalresearch.ca/the-cia-and-the-media-50-facts-the-world-needs-to-know/5471956> (date accessed 12/17/15); Carl Bernstein, *The CIA and the Media*, ROLLING STONE MAGAZINE, Oct. 20, 1977 (documenting the history of the CIA’s program (codenamed *Operation Mockingbird*) to employ the services of “cooperative” journalists for propaganda purposes). Lest anyone think that *Mockingbird* was ended back in its day and is of historical interest only, see UDO ULFKOTTE, *BOUGHT JOURNALISTS: HOW POLITICIANS, SECURITY SERVICES, AND HIGH FINANCE STEER MASS MEDIA* (Tr.), (Kopp Verlag 2014) (revealing how European journalists routinely plant stories for the CIA to this day) and David Talbot, *Interview with Len Osanic on October 28, 2015*, available at https://www.youtube.com/watch?v=xlg_UY7jFAA (detailing how journalists and Hollywood have been “warned away” from Talbot’s 2015 book, *The Devil’s Chessboard*, in which he implicates Allen Dulles and the CIA in the plot to assassinate President Kennedy).

That the Fourth Estate function of the press has been compromised relative to the news coverage of 9/11 is quite clear. How else might one explain that, as of 2006, only 43% of Americans were aware that a third massive skyscraper – World Trade Center 7 – fell to the ground on 9/11 at free fall-speed and in its own footprint? See DAVID RAY GRIFFIN, *THE MYSTERIOUS COLLAPSE OF WORLD TRADE CENTER 7: WHY THE FINAL OFFICIAL REPORT ABOUT 9/11 IS UNSCIENTIFIC AND FALSE* (Olive Branch Press 2011), Introduction XIII (citing the relevant Zogby poll and noting that, “[a]lthough television viewers repeatedly saw the Twin Towers being hit by planes and then coming down, footage of the collapse of WTC 7 was seldom if ever seen on mainstream television after 9/11 itself.”). Interestingly enough, the collapse of WTC 7 did not merit a mention in the 2004 *9/11 Commission Report*. *Id.*

74. Whistleblowers who have been targeted by the U.S. Government since 9/11 include William Binney (NSA), Russell Tice (NSA), Thomas Tamm (Dept. of Justice), John Kiriakou (CIA), Thomas Drake (NSA), Susan Lindauer (CIA), Edward Snowden (CIA), Chelsea Manning (U.S. Army), and Barrett Brown (journalist).

75. See *supra* note XX and accompanying text. As Roger Roots observes:

Why our intellectual elites spend their time swimming in the tributaries of minor concern is an interesting question. Indeed, determining how and why minds are closed to key social facts, for any group in any era, is a difficult but critical task. For the *Lochner*-era judges, one can only speculate: The mental blockage was possibly due to parochial class interests rationalized as natural-law truths and mixed with doses of arrogance and ignorance. For our current crop of elites, speculation can give way to a bit more certainty, as two explanations present themselves: Fear and corruption.

Today's establishment elites have several things to fear from questioning the official *9/11* account. First, they might reasonably fear reputational insult (*i.e.* being labeled irrational, paranoid, unpatriotic, greedy and/or self-promoting). As Professor deHaven-Smith has shown, this fear comes courtesy of a CIA propaganda campaign master-minded in the late 1960s to discredit critics of the Warren Commission Report.⁷⁶ Second, they might reasonably fear being targeted in more tangible ways. Notes Richard Jackson relative to the scholarly silence on the subject of Western state terror: "Some scholars may be intimidated by state power, fearing the ways in which state officials and state apologists can punish and harm scholars who apply the

Since 9/11, there has been an outpouring of scholarship on the threats posed by domestic and international terrorists. Scholars have generally tracked the phenomenon of international terrorism through cultural and historical perspectives and focused on the effectiveness of counterterrorist policy efforts. Recently, more journalists and social scientists have analyzed international terrorism by focusing on the socialization of the terrorists themselves. But rarely have scholars addressed more troubling questions about the roles of the world's governments in the creation and funding of terrorism; and almost never have scholars examined the common interests of terrorists and governments of terrorized societies.

Roots, *supra* note XX, at 127 (internal citations omitted).

76. See DEHAVEN-SMITH, *supra* note XX, at 106-20. This campaign weaponized the term "conspiracy theory" by deploying it in such a way as to ensure that skepticism of official explanations would be equated with irrationality, mental imbalance and greed. In addition to being unlawful and insidious, the campaign was regrettably anti-historical: The reality of elite political criminality was well-accepted by both the American prosecutors at Nuremberg (who designed the conspiracy charge against the Nazi leadership) and the Framers of the U.S. Constitution (who fully expected political elites to attempt crimes against the people and sought to thwart those crimes prospectively by pitting elites against each other via a system of "checks and balances").

term ‘terrorism’ to state actions.”⁷⁷ Retaliatory options are not hard to imagine: Research funding might suddenly dry up, accusations of misconduct might suddenly be lodged, private emails might be read. Indeed, in a twist of fate that can only be described as Orwellian, scholars who question too much in the wrong direction might have their on-line communications anonymously interfered with by government agents working in the cognitive infiltration program proposed by none other than Professors Sunstein and Vermeule.⁷⁸

Then there is the delicate issue of academic corruption. Government funding for higher education may well have fallen off in recent years, but supporting official government narratives – and/or pursuing lines of inquiry that support the agenda of key establishment players – is *still* where the money is. This is as true for the fields of political science and

77. Jackson, *supra* note XX, at 388.

78. In their own words:

We suggest a role for government efforts, and agents, in introducing cognitive diversity. Government agents (and their allies) might enter chat rooms, online social networks, or even real-space groups and attempt to undermine percolating conspiracy theories by raising doubts about their factual premises, causal logic, or implications for action, political or otherwise. In one variant, government agents would openly proclaim, or at least make no effort to conceal, their institutional affiliations.... In another variant, government officials would participate anonymously or even with false identities. Each approach has distinct costs and benefits; the second risks perverse results but potentially brings higher returns.

Sunstein and Vermeule, *supra* note X, at 224-25.

This proposal – amounting to calculated and possibly covert Government interference in core First Amendment speech – is clearly unconstitutional in spirit, and recalls the rather diabolical efforts on the part of J. Edgar Hoover’s FBI to sabotage progressive political groups and press organizations in the 1960s. See JOHN MCMILLIAN, *SMOKING TYPEWRITERS: THE SIXTIES UNDERGROUND PRESS AND THE RISE OF ALTERNATIVE MEDIA IN AMERICA* (Oxford U. Press 2011), at 115-16. (“As part of its massive counterintelligence program (COINTELPRO), the FBI used infiltrators, provocateurs, wiretaps, forged letters and documents” and created two fake underground publications “that were meant to propose more moderate (as opposed to radical) viewpoints.”) Unfortunately, there is reason to believe that Sunstein oversaw the creation and management of his proposed infiltration program when he joined the Obama Administration as head of its Office of Information and Regulatory Affairs. See Glenn Greenwald, *Obama Confidant’s Spine-Chilling Proposal*, SALON MAGAZINE, Jan. 16, 2010, http://www.salon.com/2010/01/15/sunstein_2/ (date accessed 11/30/15).

terrorism studies⁷⁹ as it is for the fields of medicine, pharmacology, business and economics.⁸⁰ Although it is impossible to quantify the extent to which scholarship in general, and *9/11* scholarship in particular, is determined by the interests of academic-funding sources, it is equally impossible to deny the reality (and corrosive effect) of this dependence .

Where, then, does all this leave us? With a bit of mental-adjustment work to do, I would suggest. In order to nudge the cloistered monks of his day into the real world, Roscoe Pound famously called for a “Sociological Jurisprudence” – a tearing down of the wall separating law from social and political facts.⁸¹ A similar tearing down of walls is needed on the issue of *9/11*. Through an appeal to history – regarding the reality of past false-flag attacks (actual and proposed), mass-casualty state terror, and intellectual formalism – I have tried to pry open the mental space needed for this to happen. While I do not expect establishment intellectuals to run out and begin writing books that challenge the official *9/11* account, I do urge them to begin engaging the topic on its merits rather than simply ignoring or ridiculing it. At the very least, I hope that they will open their minds sufficiently to welcome, and perhaps even to demand, a proper international investigation of the *9/11* case. The final section of this Article is devoted to the theory and mechanics of just such an investigation.

79. See, e.g., Jackson, *supra* note XX, at 388 (“[T]here may be cases in which scholars have been co-opted through various means into state perspectives and projects. *Given the benefits that can accrue from close association with state power*, it is not surprising that some scholars choose to participate directly in such projects.”) (emphasis added); Edward Newman, *Failed States and International Order: Constructing a Post-Westphalian World*, 30 CONTEMPORARY SECURITY POLICY 421-43, 434, 438 (2009) (emphasizing the ample funding placed at the disposal of scholars willing to explore the “Failed State Doctrine,” which “securitizes” the internal weaknesses of third-world states and provides a basis for Western intervention); cf. Jackson, *supra*, at 377 & n.1 (noting the explosion, since *9/11*, of publications and post-graduate dissertations on the subject of non-state terrorism and the comparative dearth of state-terrorism research).

80. See, e.g., Charles Ferguson, *Heist of the Century: University Corruption and the Financial Class*, THE GUARDIAN, May 21, 2012, <http://www.theguardian.com/education/2012/may/21/heist-century-university-corruption> (date accessed 11/30/15) (“The problem of academic corruption is now so deeply entrenched that these disciplines [economics, business, law, political science], and leading universities, are severely compromised, and anyone considering bucking the trend would rationally be very scared”).

81. Morag-Levine, *supra* note XX, at 95-96.

PART III
HOW WE MIGHT CARE

A. The Power and the Right to Investigate

The World Community, acting through the United Nations, has the power and the right to investigate the case of 9/11 and come to a judgment regarding it. The first half of Article 39 of the U.N. Charter uses peremptory language, providing that “[t]he Security Council *shall determine* the existence of any threat to the peace, breach of the peace, or act of aggression.”⁸² Because fraudulent acts of self-defense will almost always constitute breaches of the peace or aggression within the meaning of the Charter,⁸³ the Council unquestionably has the right to determine the validity of claims of self-defense. Professor Oscar Schachter noted the obvious when he stated:

The Council has in fact never doubted its right to reject a self-defense claim and call on states making such claims to cease hostilities. It would be absurd to maintain that the use of force under a claim of self-defense cannot be denied and overridden by the Council when it determines that such action is necessary.⁸⁴

In order to enable Council review of self-defense claims, the Charter imposes on self-defenders both an explicit reporting duty and an implicit evidentiary burden-of- proof. The

82. U.N. Charter art. 39 (emphasis added).

83. See Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 421-43, 434, 438 (2001).

84. Oscar Schachter, *Authorized Uses of Force By the United Nations and Regional Organizations*, in Lori F. Damrosch & David J. Scheffer (eds.), *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* (Westview 1991), 65-93, 79. See also Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATHOLIC U. L. REV. 871-957, 905 (2007) (“It appears to follow [from Article 39] that the Security Council has the authority to review and override a Member State’s claim (even if made in good faith) to have exercised its right of self-defense, and to find instead that such action is itself a breach of the peace, a threat to the peace, or an act of aggression.”).

former requires no commentary, as it is textually-based and fairly straightforward.⁸⁵ The matter of the evidentiary burden is more controversial, as there has long been disagreement on the timing issue (*i.e.* At what point in a crisis must a self-defending state meet its burden?) That said, there has been near universal agreement that if a self-defending state does not produce satisfactory evidence of a claimed attack or danger prior to acting, it certainly must do so afterwards if and when the Council demands it. Writing in the immediate aftermath of 9/11, Professor Franck – who took the position that Council pre-approval of self-defensive action was not required – also stated: “This reading of Article 51 does not mean that the question of evidence is irrelevant in law...The law does have an evidentiary requirement, but it arises *after*, not *before* the right of self-defense is exercised.”⁸⁶

For all practical purposes, it would seem that the timing of the Security Council’s review of a self-defense claim is far less important than the nature and quality of that review. The Council’s authority can well tolerate a state acting in self-defense without prior Council blessing – including in cases where an armed attack is not even imminent – *provided the Council is prepared to exercise meaningful review of the state’s decision at some point after the fact*. This, indeed, is key; the threat of ultimate Council review, through initiation of an independent and effective investigation, is the only factor capable of making states understand that they undertake self-defense at their peril. Professor Franck may have interpreted the Article 51 right expansively, but in doing so he correctly perceived what was truly important: not Council pre-approval (which has often proved perfunctory), but determined investigation

85. U.N. Charter art. 51 (“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council ...”)

86. Franck, *supra* note XX, at 842 (emphasis in original). *See also id.* at 840 (“[W]hile the production of ... evidence is essential to sustaining the right, that emphatically is not a condition precedent to its exercise.”).

and assessment of the facts, even if these take place after the self-defense is underway or even completed. He concluded:

[I]t is less important to fine-tune the legal formula than to agree on institutions and procedures for getting the facts speedily and correctly, on which to base a sensible systemic response to the claim to have acted in... 'self-defense.'⁸⁷

Unfortunately, “getting the facts speedily and correctly” is exactly what the Security Council has failed to do regarding 9/11 and the host of other events of non-state terror claimed by the West to have occurred in its wake.⁸⁸ The Council has by and large rubber-stamped the factual assertions of the Western self-defense claimants and then sent them on their way to self-defend as they see fit. If one were of a conspiratorial frame of mind, one might suspect that the Council had traded away its right to meaningfully investigate in exchange for states’ agreement to consult it perfunctorily *ex ante*. But regardless of whether or not a tacit agreement is in fact in place, the Council’s all-too-ready validation of self-defense claims amounts to a gross abdication of its responsibility to ensure that acts of self-defense are not, in fact, cleverly-disguised acts of aggression. It is, in short, a gross abandonment of its core mission.

87. Franck, *supra* note 21, at 60. *See also id.* at 62 (“It is not merely new agreed upon principles that appear to be needed, but rather an effective, credible process for their implementation: a way to distinguish those instances where a state’s recourse to force is factually and contextually justified and those where it is not.”)

In this regard, former Secretary General Kofi Annan arguably fought the wrong battle when he insisted that, in cases of preventative self-defense, states should bring their claims to the Security Council before taking action. *See* The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005), ¶¶ 124-25 (essentially endorsing the criticism of unilateral preventative action expressed in the 2004 report of the U.N. High-level Panel on Threats, Challenges & Changes, entitled *A More Secure World: Our Shared Responsibility* (U.N. Doc. A/59/565 (Dec. 2, 2004), ¶¶ 190-91)).

88. *See supra* note xx and accompanying text.

B. Does the Right to Condemn Fraudulent Self-Defense Fall with the (Claimed) Inability to Support Genuine Self-Defense?

Of course, the discussion cannot end there for the simple reason that some critics of the U.N. argue that the Security Council has no core mission left when it comes to policing claims of self-defense. Robert Delahunty, for example, argues that the limits imposed on the right of self-defense by Article 51 – including *post hoc* Council review – are no longer binding on states because they were accepted in consideration for a system of collective security that never materialized. He reasons:

[T]he limitations on sovereignty to which member states consented in accepting Article 51 were reciprocal to, and predicated on, the promise of collective security; and ...the persisting and incurable failure of the Charter's collective security system can reasonably be held to relieve member states of their legal obligations to use self-defensive force within the limitations of Article 51...⁸⁹

Given this (claimed) failure of consideration, Professor Delahunty argues that nations are entitled “to resume their pre-Charter right of self-defense and even, in light of changed circumstances, to seek to develop more permissive customary norms.”⁹⁰

This is an aggressive and powerful argument and, if sound, it would certainly call into question the right of the U.N. to review the validity of the U.S. claim of self-defense stemming from 9/11. Fortunately, the argument is not sound, at least insofar as it relates to the Council's right of review. For even if one agrees *arguendo* that the Council's policing function⁹¹ has radically failed, there is no evidence to suggest that the Council's jury role is similarly dead or handicapped. Injunctive power logically depends on an enforcement mechanism, but the same

89. See Delahunty, *supra* note X, at 881.

90. *Id.* at 872.

91. As reflected in the second half of Article 39, Articles 41 and 42. See *supra* note X.

is not true for the power to declare rights and status: Fact-finding can be undertaken and verdicts rendered even if the declaring body does nothing to enforce its judgment. While the failure of the collective-security system may have implications for the extent of Security Council preemption of self-defensive action,⁹² it has no logical bearing on the question of which entity – the nation-state or the U.N. – has the right to pass judgment on the sufficiency of the facts adduced in support of a claim of self-defense. Moreover – and perhaps most importantly – while states may well have the right to do what they want in pursuit of their self-defense (for who will stop them or help them?), they have no right or entitlement to the label “victim of aggression.” The granting of that precious label is reserved exclusively to the international community, acting through the Security Council.

I call that label “precious” because declaratory judgments of rights and status *matter*. They have intrinsic value regardless of whether they result in injunctive action. To be declared a lawbreaker (or aggressor) means something of significance, even if you don’t end up in jail for it. People (and nations) are not inclined to be seen in public with lawbreakers, or to cooperate with them privately, or to do them any favors. As Professor Delahunty concedes, the declaratory judgments of the U.N. are viewed as far more legitimate and weighty – because far more representative – than the judgment of any one state.⁹³ The failure of the U.S. and Britain to obtain Council authorization for their invasion of Iraq in 2003, for example, delegitimized that military campaign in the eyes of many (at least in the West).⁹⁴ The failure of the U.S. and Britain to obtain Council authorization for their humanitarian intervention in Kosovo in 1999 provoked a crisis so large that an effort was hurriedly made to redefine the very notion of state

92. See, e.g., Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT’L L. 229-48 (1996).

93. See Delahunty, *supra* note XX, at 947-48.

94. See *id.* at 949.

sovereignty in order to gain recognition of a new norm of intervention (the “Responsibility to Protect”) that the Council might endorse.⁹⁵ These examples underscore the truth of Professor Franck’s conclusion that “[t]here is no realistic alternative to the Council and [General] Assembly as the global juries.”⁹⁶

Of course, serious discussion needs to take place regarding how best to enable the Council to perform its still-viable jury function. Professor Franck was right to call for “an augmented system of fact-finding reporting to the political organs through the Secretary General.”⁹⁷ Indeed, it might well be time to amend Article 43 and replace the concept of standby armed forces with that of standby teams of crime-scene investigators, scientists, engineers, and forensic accountants.⁹⁸ It is just this sort of practical, institutional capacity-building that is needed to uncouple the jury half of Article 39 from the problematic and under-realized policing function enshrined in the second half of Article 39, Articles 41 and 42. Such an uncoupling would amount to a flexible adaptation of the Charter that would echo the gradual uncoupling of Article 42 from Article 43 which took place during the early U.N. period (when

95. See INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY (2001), Forward, p. VII (“NATO’s intervention in Kosovo in 1999 brought the controversy [surrounding humanitarian intervention] to its head...It was in response to this challenge that the Government of Canada, together with a group of major foundations, announced at the General Assembly in September 2000 the establishment of [this Commission]”).

96. Franck, *supra* note 21, at 68.

97. *Id.*

98. Article 43(1) of the Charter provides:

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

it became clear that the hoped-for Article 43 forces were not going to materialize and that the Council would have to rely on “coalitions of the willing” to deploy military force).⁹⁹

Perhaps the final point to make regarding Professor Delahunty’s argument is that he should be careful what he wishes for when he advocates a return to pre-Charter rights of self-defense. Customary international law in the pre-Charter world reflected a practice of international review and adjudication of self-defense claims every bit as intrusive and tenacious as that which has occurred under Article 51. The League of Nations, for example, rejected Japan’s claim that its judgment alone was conclusive on the matter of its need to invade Manchuria in self-defense; hence the mandate and ruling of the Lytton Commission (discussed *supra* Part I).¹⁰⁰ The League similarly rejected Italy’s claim of authority to judge its own self-defense needs vis-à-vis Ethiopia during the Abyssinia Crisis of 1934-36.¹⁰¹ Finally, the Nuremberg Tribunal rejected the Nazis’ claim that Germany’s judgment was conclusive on the matter of her need to invade Poland and Norway in self-defence, noting that “whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.”¹⁰² The Tribunal’s arrogation to itself of the ultimate authority to assess Germany’s self-defense claims

99. *See id.* at 53-57.

100. *See* Delahunty, *supra* note XX, at 906 n.168.

101. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 242-43 (Oxford U. Press 1963) (citations omitted) (emphasis added):

Italian arguments in justification of the action against Ethiopia were in part based on necessity for action in face of Ethiopian military preparations and attacks. The League of Nations did not consider that this argument was justified by the facts *and disregarded further Italian arguments that action to protect vital interests and security was justified and that Italy had the right to decide questions of self-defence for herself.* Italy was stated by the Council and by some governments separately to have acted in violation of the [Kellogg-Briand] Pact.

102. Delahunty, *supra* note xx, at 906 (quoting from the Nuremberg judgment).

paved the way for judgments of conviction on the “Crimes against Peace” charge against the Nazi leadership.

In short, the reactivation of pre-Charter states’ rights proclaimed by Professor Delahunty would represent nothing less than a return to full, *post hoc* international review of self-defense claims.¹⁰³ And since such a return would put us “back” to where we essentially are, we would be foolish not to use the Conventional institutions already in place to carry out the task of international review.¹⁰⁴

CONCLUSION

This Article has not attempted to litigate the case of 9/11. Rather, it has sought to show that this very special case merits an objective and independent investigation by the foremost political body of the international community, the United Nations.

Consider, for one moment, what the world would look like were the international community to arrive at a convincing judgment on 9/11. If the official account were confirmed, much of the political toxin injected by the event into the Western body politic would likely drain away. If (as seems more likely) the official account were falsified and the event adjudged a false-flag attack by a criminal elite, several things would occur. The War on Terror would

103. Professor Delahunty concedes that the Nuremberg judgment provides “a more coherent and more authoritative formulation of pre-Charter customary law” than any other pre-Charter source. *See id.* at 905. He nonetheless suggests that the judgment’s formulation may require international institutions to presume the correctness of national self-defense claims and/or substantially defer to them. *See id.* at 906. He does not, however, cite any evidence that supports this suggestion; nor does there appear to be any.

104. If the U.S. were to veto a proposal in the Security Council to open an investigation into 9/11, the proposal could be taken to the General Assembly on the Uniting For Peace procedure (perhaps renamed the Uniting For Truth procedure). *See* G.A. Res. 377(V), 5th Sess., 302nd Plen. Mtg., U.N. Doc. A/RES/5/377 (Nov. 3, 1950). Given that the Assembly has successfully used Uniting For Peace in a maximalist way – taking charge of aggression-situations such as that presented by the Suez Crisis of 1956, *see* Franck, *supra* note 22, at 35-37 – it would certainly seem to be able to use the procedure to achieve the more modest goal of recommending the initiation of an investigation into a self-defense claim such as 9/11. The International Criminal Court might also have a role to play if the State Parties to the Court – a group of nations that does not include the U.S. – were to amend the Rome Statute to allow for General Assembly-referral jurisdiction on the crime of aggression.

come to an immediate halt. Indictments would be issued and criminal trials held until justice was served. Forgiveness of the Muslim world would be sought, and forgiveness would be extended to any Muslims who struck in terror against the West in backlash against the initial fraudulent terrorism of *9/11*. Truth and reconciliation on a world-wide scale would become not only thinkable but realistically possible. And not an ounce of additional surveillance of innocent citizens anywhere in the world would be needed in order to achieve these worthwhile goals.

Either way, on either outcome, the world would be a better place. A genuine international investigation of a horrific and hugely important event is within our power. Mercifully, we have nothing to lose.