Book Reviews

Folded Words

Folded Lies: Bribery, Crusades, and Reforms. By W. Michael Reisman. *New York: The Free Press,* 1979. Pp. 277. $12.95.

Reviewed by Sydney M. Cone III†

In *Folded Lies,*[1] Professor W. Michael Reisman sets forth a number of rich and provocative thoughts about the phenomenon of bribery, notwithstanding a rather pointless prologue and an inexcusable retreat to cynicism. Unfortunately, faced with hard analytic problems, he abandons the challenge for jargon, self-indulgence, and brummagem about "the attractions of money."[2] Withal, it is a worthwhile book—unpolished, often unfocused, yet the product of a keen and engaging mind that, almost despite itself, provides valuable insight into the demimonde of the bribe.

The author's point of departure is the two-tier framework within which bribes are dispensed, received, countenanced, proscribed, and punished.[3] On one level, bribery is performed, secretly or discreetly, in accordance with an "operational code" that "tells 'operators' when, by whom, and how certain 'wrong' things may be done."[4] On another level, however, bribery transgresses the "myth system," that is, public ideology. Much as tension and "seamless symbiosis" exist simultaneously between the giver and the recipient of a bribe, both tension and sym-

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1. M. REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS (1979) [hereinafter cited by page number only].

2. P. 144.

3. Professor Reisman eschews "punished" and uses "sanctioned" antithetically (and, occasionally, correctly). *Compare* p. 34 (example of criminal practices in a factory that "are sanctioned as long as they are controlled by and serve those in charge") *with* p. 35 (examples of conduct that "remains unlawful and effectively sanctioned by the appropriate community processes.")

4. P. 1.

biosis characterize the relationship between these two tiers—the operational code and myth system.[5]

These points are established by what might be called journalistic adduction. The book abounds in illustrations of people and institutions caught up in the dual framework of practice and mythology. Indeed, much of the book is anecdotal, almost chatty—a retelling of incidents that have been reported in the public press or that were unearthed in private interviews.[6] Superimposed on these illustrations is an appearance of categorical structure: three kinds of bribe (transactional bribes, variance bribes, and outright purchases);[7] two kinds of campaign against the bribe (the crusade and the reform);[8] five kinds of crusade and four characteristics of reform;[9] two kinds of law that fail to achieve reform (*lex imperfecta* and *lex simulata*);[10] and two areas of relevant behavior (the bribal zone and, inevitably, the nonbribal zone).[11]

For the reader trying to find and follow the analysis, this structure is often as illusory as the jargon is pedantic. It can only be regretted that, in the absence of disciplined editing, the writing is frequently innocent of transition, organization, or a sense of proportion.

Proportionally more attention might have been devoted to two basic questions. First, given the exigencies of its "myth system," why has our society tolerated a fundamentally inconsistent and subversive "operational code"? Second, is tolerance of this code and its attendant acts of bribery likely to continue in the future?

5. *See* pp. 24-25 (tension between myth system and operational code); pp. 35-36 (symbiotic relationship between myth system and operational code).

6. So dependent is the book on journalism that at one point, to support the proposition that legitimization of a bribery system invites the development of a new bribery system, Professor Reisman's only citation is to a humor column by Russell Baker. P. 85 & n.38.

7. Pp. 69-93. The three categories of bribe represent increasing levels of noxiousness. Transactional bribes "secure or accelerate the performance" of an official's "prescribed function." P. 69. Outright purchases secure, not the performance of a particular act, but the acquisition of an employee who appears loyal to another organization. Pp. 88-89. Professor Reisman also postulates two types of variance bribe—the bribe that suspends the application of a rule and the bribe that changes it—but covers his analysis by saying that "the distinction between the two is sometimes unclear." Pp. 78-79.

8. Pp. 98-114.

9. "Crusade enforcement" may take the forms of "sound and fury," "scapegoating," "selecting downward," "eliminating rivals," and "human sacrifice." Pp. 105-07. Reforms may be initiated by elites as well as by "a newly ascendant elite"; participation by "myth custodians" such as clergymen, journalists, and teachers is critical; and the result must be "an increasing approximation to the community's myth system . . . ." Pp. 111-14.

10. *Lex imperfecta* ("law without teeth") is designed to be imperfect, often promoting "a planned inefficiency," and may be "subtly crafted." Pp. 29-30. *Lex simulata* "is a legislative exercise that produces a statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied." P. 31.

11. Pp. 139-40.

Professor Reisman appears to advance two possible explanations for the first question. One explanation turns on

> a fundamental dualism of our civilization. It encompasses two tendencies, perhaps two world views: capitalism's licit greed and republicanism's civic altruism and disdain for the material. . . . Official and personal ambivalence about bribery, like the ambivalence about white-collar crime in general, relates to the incompatibility of capitalism and republicanism and the reluctance (if not practical impossibility) to choose, at last, one or the other.[12]

Although this may be a tempting analysis, Reisman unfortunately neither develops nor dissects it. Is bribery just a morbid capitalistic wen on the fair form of the Republic? Were it not for capitalism, would our everyday operational codes and our resplendent republican ideology be as one? Surely the analysis must be pushed further, if it is not to collapse entirely. It would be laughable to suggest (and Reisman does not claim) that the socialist countries of the world have diminished either bribery or extortion merely by abolishing capitalism. Notoriously, the gap between legislated ideology and operational practice in some socialist countries is enormous. Domestically, moreover, "capitalism" is itself largely a myth system in many sectors of our economy. Thus it can hardly be said that there is a correlation between the absence of capitalism and the absence of bribery.[13] In fact, there may be no correlation whatsoever in our society between the presence or absence of capitalistic elements, on the one hand, and the presence or absence of bribery, on the other.

The second possible explanation that Professor Reisman appears to advance for the duality of attitudes toward bribery focuses on an individual level. The human personality is seen as "a bundle of selves, each having its own loyalty system, and the selves compete for priority in different situations."[14] The bribe becomes

> in some personal or social contexts, . . . a positive operation. [It is an] assertion of autonomy against the demand for self-subordination to some larger group . . . . [T]he insistence on a private reality separate from that held forth to others may be an important expression of autonomy as well as an exigent modality of survival.[15]

12. P. 122; *see* pp. 43-44 (comparing myth system and capitalism).

13. Do government-to-government bribes nonetheless generate less tension between myth system and operational code than do bribes by private enterprise? *See* p. 152 (discussing probability that United States officials knew of, advised about, and facilitated the massive, transnational commercial bribery that is currently under attack).

14. P. 126.

15. Pp. 126-27 & n.14.

Although this line of analysis seems especially fruitful, it also seems bound to lead into profound and subtle psychological questions that are necessarily beyond the reach of an essentially jurisprudential study.

In any event, having noted that bribery is more complicated than mere lying because "you must incorporate one other human being when you construct a fragment of a private world with a folded lie,"[16] Reisman simply asks: "under what circumstances is it appropriate to tender a bribe? Under what circumstance ought one to bribe?" The answers, he says, will depend upon the "value system" of each individual.[17] The reader is then left to his own devices to translate a multiplicity of individual value systems into a societal framework of "myth system and operational code." Intellectually, it is all very tantalizing, even if the reader is at a loss to explain exactly why.

And the future? As noted above, Professor Reisman distinguishes between crusades and reform. Crusades, the preserve of people delightfully called "moral entrepreneurs," invoke the myth system without materially modifying the operational code. Crusades result in *lex imperfecta* or *lex simulata*, in bureaucratic red tape that may create "new incentives for bribes" and "more and more expensive bribery."[18] In contrast, reform results in an effective change in the operational code "involving greater approximation to the myth system . . . ."[19] Although he postulates the possibility of reform, Professor Reisman clearly is thinking of himself when he writes that "anyone who studies bribery becomes sufficiently cynical to note the proximity of bribal and nonbribal zones, the utility of official power to all, and the attractions of money to many."[20] Show Reisman a possible reform, and he will demonstrate why it is a mere crusade. Show him a federal antibribery statute, be it section 162(c) of the Internal Revenue Code or section 103 of the Foreign Corrupt Practices Act of 1977,[21] and he will prove it to be an imperfect or simulated law.[22]

In this respect, the book takes on an air of unreality. The deterrent effect of the antibribery provisions of the Internal Revenue Code and the Foreign Corrupt Practices Act have been the subject of serious commentary in recent years.[23] It flies in the face of practical experience

16. Pp. 127-28.
17. P. 128.
18. Pp. 100, 146.
19. P. 111.
20. P. 144.
21. Pub. L. 95-213, § 103, 91 Stat. 1495 (1977), 15 U.S.C.A. § 78dd-1 (West Supp. 1980).
22. Pp. 32-33, 161-64.
23. *See, e.g.*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON QUESTIONABLE FOREIGN PAYMENTS BY CORPORATIONS 22-23 (1977) (Internal Revenue Service "vigorously carrying out" investigations; "inviting the extensive criminal and civil sanctions for

to hold these statutes and their enforcement to so rarefied a standard that they are dismissed for conceptual imperfection or executory simulation. The threat of federal investigation and indictment has been and remains real and will continue to inform responsible decisionmaking. This threat constitutes an effective and substantial inhibition to bribery, and it is unreasonable to imply otherwise. Admittedly, bribery is as persistent a feature of human behavior as many other species of venality; undoubtedly, the utility and attractiveness of economic gain make for endless temptations to pay and receive various forms of bribe. It does not follow, however, that any law put forward in this area, let alone the current federal campaign against bribery, should be consigned to the pseudoscientific dustbin of *imperfecta* or *simulata.*

Professor Reisman seeks to rationalize his inability to discern reform in virtually any antibribery campaign or legislation. Bribery, he says, reflects "a pluralistic world community"; to eliminate bribery would be to terminate an "ongoing process of individuation, group formation, and self-determination" and to replace "pluralism" with "a single, unchallengeable authority." He ends his analysis by rhetorically asking whether such an "authority" would be consistent with "the type of world order and psychopersonal organization we desire?"[24]

This book tends to wax ironic whenever it touches on the practicing lawyer in the world of bribery. Lawyers are characterized as resolving their ambiguities "by exhorting their clients to undertake self-reform," thereby producing "more clandestine behavior, not less";[25] as reaping a "windfall" from "reform legislation";[26] as being "silken and aristocratic," while countenancing "specialist roles";[27] as taking care not to be consulted, at least "on the record," about bribery.[28] The practicing lawyer, it would seem, lacks a coherent point of view concerning bribery. Yet Professor Reisman's own flirtation with outright cynicism and his curious rationalization of the futility of reform suggest that he himself is in the same predicament.

tax fraud is, if anything, more unpalatable"); Atkeson, *The Foreign Corrupt Practices Act of 1977*, 12 INT'L LAW. 703, 720 (1978) (the Act and other federal measures constitute "the most comprehensive and draconian controls any home country has ever applied to the involvement of its multinational businesses in corruption abroad"). *See generally* Surrey, *The Foreign Corrupt Practices Act: Let the Punishment fit the Crime*, 20 HARV. INT'L L.J. 293 (1979).

24. P. 149.

25. P. 52 & n.38.

26. Pp. 114-15.

27. P. 145. Professor Reisman implies that he is citing authority for the proposition that "silken and aristocratic American law firms" pay bribes on behalf of their clients. In fact, no such authority is cited.

28. P. 170.

Self-Determination in International Law

Secession: The Legitimacy of Self-Determination. By Lee C. Buchheit. *New Haven and London: Yale University Press,* 1978. Pp. xi, 260. $17.50.

Reviewed by Eisuke Suzuki†

Self-determination is a double-edged concept that can act as a unifying as well as a disintegrative force. It has proven to be the most volatile instrument of twentieth century political movements; it invokes and agitates a basic human desire to assert one's identity by excluding others. Movements for self-determination occur at every level of human association, from the nation-state to the individual.

Self-determination is the subject of a vast body of literature. Post-World War I literature sought to establish objective criteria—including shared culture, history, language, territory, and ethnicity—by which to identify "nations" eligible for self-determination.[1] These studies proved inapplicable to the decolonization process after World War II because the newly independent states inherited territorial arrangements created by metropolitan powers without regard to group characteristics. Rupert Emerson's work, studying the process of "nation-building" as a result of decolonization, concludes that self-determination has no further applicability once independence is achieved.[2] Thereafter, Emerson declares, group claims to self-determination lack legal content and succeed only as a matter of effective power.[3] In contrast, U. O. Umo-

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1. *See, e.g.*, A. COBBAN, NATIONAL SELF-DETERMINATION 48-55 (1944) (discussion of objective elements of nationality); C. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 4-11 (1934) (discussion of cultural concept of nationhood).

2. R. EMERSON, FROM EMPIRE TO NATION 307-08 (1960); R. EMERSON, SELF-DETERMINATION REVISITED IN THE ERA OF DECOLONIZATION 64 (1964) ("What emerges beyond dispute is that all peoples do *not* have the right of self-determination: they have never had it, and they never will have it."); Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 465 (1971) ("There can be no present assurance that the international community will give them, or some defined portion of them, the kind of blessing which it has given the colonial peoples.")

3. Emerson, *Self-Determination, supra* note 2, at 475 ("The realistic issue is still not whether a people is qualified for and deserves the right to determine its own destiny but whether it has the political strength, which may well mean the military force, to validate its claim.")

zurike believes that legitimate political units can be identified, and he contends that their fundamental human rights must take priority over territorial integrity.[4] His study fails, however, to deal adequately with claims for territorial separation from existing states—the most frequent situation in which claims to self-determination are made in the post-colonial era.

Secessionist claims invoke the right of self-determination, a peremptory and fundamental norm of contemporary international law.[5] They conflict, however, with the cardinal principle of international law, which prohibits change in existing territorial arrangements. Article 2, paragraph 4 of the United Nations Charter, which requires states to refrain "from the threat or use of force against the territorial integrity or political independence of any state,"[6] embodies existing states' deference to each others' bases of authoritative and effective power.[7]

Recognizing the conflict between these principles, Lee C. Buchheit, in *Secession: The Legitimacy of Self-Determination*,[8] focuses on "the implications for the international community of appeals to the principle of self-determination by secessionist groups within independent States."[9] Seeking to preserve the legal significance of self-determination in the post-colonial era, he has undertaken the important task of identifying legitimate separatist claims. The principle of self-determination, he declares at the outset, "must be able to accommodate the demands of 'selves' who are located within an independent State but are clearly governed without their consent." To implement the principle, the international lawyer must provide guidelines that "may not accede to the demands of every parochial sentiment but [will] also avoid an uncritical affirmation of the supremacy of the 'sovereign' State."[10]

After introducing the problem, Buchheit analyzes the historical development of the concept of self-determination in four areas: natural law, positive international law, the practice of states, and juristic opinion.[11] He then considers six recent secessionist attempts—by

4. U. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 195 (1972).

5. Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779, 835-37 (1976); *cf.* Advisory Opinion on the Western Sahara Case, [1975] I.C.J. 31-33 (recognizing principle of self-determination in colonial context).

6. U.N. CHARTER art. 2, para. 4.

7. *See* Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1, 2-3 (1973); Suzuki, *Extraconstitutional Change and World Public Order: A Prologue to Decision-Making*, 15 HOUS. L. REV. 23, 68-69 (1977).

8. L. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978) [hereinafter cited by page number only].

9. P. x.

10. P. 7.

11. Pp. 43-137.

Katanga, the Kurds, Biafra, the Somalis, the Nagas, and Bangladesh—and highlights the factors that influenced the international community's response to these claims of self-determination.[12] Finally, he proposes a "calculation of legitimacy," a set of policy-oriented guidelines to be used in evaluating secessionist claims to self-determination.[13]

I. Defining the Subject: Self-Determination

"The student of . . . self-determination," declares Buchheit, "must begin with the fact of entrenched parochial sentiment."[14] The book's discussion of the factors affecting group association, however, is cursory. Buchheit refers, in the abstract, to "parochial sentiment"[15] on the one hand, and "the desire for unification or integration with a wider political or economic entity"[16] on the other, but he does not elaborate on the nature of these competing desires or the process of interaction between them. One wonders, therefore, what Buchheit means by "a doctrine of self-determination," "parochialism," or "subjugation." Is "subjugation" not a product of the dominant group's "parochialism"? Since he does not clearly define his terms, the observational standpoint underlying his description of the factual context is unclear.

In addition, Buchheit fails to give empirical content to the concept of self-determination; the book offers only a disappointingly short discussion of "self" definition and group formation. "[A]t a minimum," Buchheit suggests, "any 'self' must be distinct from the other selves inhabiting the globe."[17] He observes that "a demand for self-determination will often be deeply rooted in a wish to perpetuate the sense of comfort and security that attends a parochial environment,"[18] but contends that distinctive selfhood cannot be established solely by a group's subjective perception that it is reasonably distinct from its neighbors.[19] A group must also have objective characteristics—some combination of geographical, linguistic, racial, or cultural ties—that distinguish it from the ambient population.[20] Without discussing the applicability of these criteria to specific situations, Buchheit continues: "[a]ssuming that one succeeds in isolating a proper self, there remains the question of . . .

12. Pp. 138-215.
13. Pp. 228-45.
14. Pp. 1-2.
15. P. 1 & *passim*.
16. P. 2.
17. P. 9.
18. P. 2.
19. P. 10.
20. *Id.*

what sorts of activities constitute legitimate instances of 'determining.' "[21] He thus ignores recent work in the fields of group psychology, sociology, and political science and misses important insights into the subjective basis of group identification.[22] His work on "legitimacy" therefore rests on an inadequate understanding of the nature of demands for self-determination.

Buchheit emphasizes the external circumstances of claims to self-determination rather than the internal factors that stimulate the claims. "The moral appeal of the principle [of self-determination]," he writes, "seems to arise from a recognition of the harsh treatment and exploitation that have historically been the fate of groups ruled by an 'alien' people."[23] As a result, he arrives at the curious conclusion that "[i]f history were a chronicle of the voluntary association and dissociation of human groups, there would be no need for a doctrine of self-determination."[24]

Yet the "doctrine of self-determination," though volatile and often divisive, operates not only at times of social unrest or subjection to "harsh treatment and exploitation,"[25] but also in the course of orderly performance of government. In each case, the protection of and respect for the *individual's* freedom of choice—the precondition for group formation—is a matter of fundamental concern.[26] The Universal Declaration of Human Rights provides that free, universal suffrage—the "will of the people"—is the basis of the authority of government.[27] In addition, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States emphasizes the close nexus between the fulfillment of self-determination of a group within the state and the territorial integrity of the state.[28] Thus, the in-

21. P. 11.
22. *See* pp. 1251-53 *infra.*
23. P. 2.
24. P. 3.
25. P. 2.
26. E. Suzuki, Self-Determination and World Public Order: Community Response to Group Formation 14-35 (1974) (unpublished J.S.D. thesis, Yale Law School); *see* McDougal, Lasswell, & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919, 938-43 (1975).
27. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948). Article 21(3) of the Declaration provides that "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." *Id.* at 75.
28. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, 124, U.N. Doc. A/8028 (1970) (refusing to recognize or encourage "any action which would dismember or impair, totally

dividual's exercise of free choice through participation in the power process is an empirical foundation for the right to self-determination,[29] a foundation that Buchheit fails to explore.

In addition to the declarations of the United Nations, the work of social scientists also establishes the central importance of the individual in a study of self-determination. Individual demands, expectations, and choices constitute the fundamental basis of group association. Basic human needs[30] may be met individually or through membership in a group—a family, an ethnic group, a territorially based group, a body politic, or another association.[31] Individuals and groups seeking to fulfill their needs face the tension between preserving their own exclusive identity and developing a more inclusive identification with a larger aggregation of persons. Identification as part of a larger grouping, which is an inherent part of the process of group formation, occurs when previously separate individuals or groups perceive that they share common demands and that these demands can most effectively be realized through association. In addition, the broader grouping must provide symbols that both accommodate the competing identities of various members[32] and organize their common demands.[33] Self-determination is exercised in the choice of whether or not to identify with a larger group. Yet, once admitted to a group, the new member is expected to conform to group norms and behavioral patterns if he wishes to remain a member.[34]

The formation of a body politic—a highly organized, territorially

or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples").

29. *See* Chen, *Self-Determination as a Human Right*, in TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDOUGAL 198, 199 (W. Reisman & B. Weston eds. 1976) (principle of self-determination deeply rooted in notion of human dignity and human rights).

30. Every human being harbors biologically based needs "for life, for safety and security, for belongingness and affection, for respect and self-respect, and for self-actualization." A. MASLOW, TOWARD A PSYCHOLOGY OF BEING 3 (1968).

31. R. MACIVER, COMMUNITY: A SOCIOLOGICAL STUDY 23 (3d ed. 1924).

32. *See* Lasswell, *Future Systems of Identity in the World Community*, in 4 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 3 (C. Black & R. Falk eds. 1972).

33. *Cf.* H. LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY 75-93 (1935) (use of symbols to organize demand for security during war crisis); K. MANNHEIM, MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION 133-38 (rev. ed. 1940) (importance of symbols for group integration).

34. R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 308 (rev. ed. 1968). One technique of maintaining group integrity is by reference to those external to the group, that is, through out-group pressure. *See generally* L. COSER, THE FUNCTIONS OF SOCIAL CONFLICT (1956).

based political association—illustrates these processes.[35] The emergence of a recurrent pattern of thought and behavior, subjectively uniting a significant number of the inhabitants of a given community into a group, may lead to the creation of a "protostate" territorial association to pursue common goals.[36] If appropriate constitutional means are unavailable, the group may claim the right to use extra-constitutional means to create a power base. Yet, after seizing power, effective elites will then use the principle of inviolability of the state organization to safeguard their power base against those potentially following the same path to power.[37] So long as a significant number of people expect that membership in the group will improve their condition, they will recognize control by the territorial elite as legitimate.[38]

If a subgroup's expectations of institutions change, however, its perceptions of its own interests may come to diverge from those of the larger group, and it may cease to regard the ruling elite's control as legitimate. The subgroup may then commence a new process of group formation,[39] aiming to form a territorial association and at the same time seeking dissociation from the existing territorial organization. By creating new social institutions, the group becomes a protostate. The subgroup's claim to the right to exercise extra-constitutional means is a demand against the body politic, not within it. In such a situation, it is futile to argue at length about the legality or illegality of a separatist movement in terms of the "limited constitutional" framework of a body politic.[40] Yet the ruling elite, in apparent disregard of its earlier assumption of power by a similar process, labels the separation as rebellious or treasonous; it resorts to violence, which it views as its legitimate and exclusive prerogative, to suppress the separation. The subgroup, in turn, uses violent means to protect its security. "Violence," in the words of one commentator, "is the essential cutting edge that creates and maintains ecological separation between integrated social organizations."[41] In the dynamic continuum of group formation and dissociation, the principle of self-determination used to justify the formation of a new state is complementary to the principles of "political

35. For a discussion of a body politic as a temporal phenomenon of group dynamics, see Suzuki, *supra* note 5, at 785-89.

36. H. LASSWELL, PSYCHOPATHOLOGY AND POLITICS 240-46 (1930).

37. Reisman, *supra* note 7, at 30 n.76.

38. *Cf.* MAX WEBER ON LAW IN ECONOMY AND SOCIETY 341 (M. Rheinstein ed. 1954) (political association's power rests on members' belief in legitimacy of communal action). *See generally* H. LASSWELL, *supra* note 36, at 240-46 (subjective basis of existence of state).

39. *See* M. WEBER, *supra* note 38, at 342-48 (describing formation and evolution of political-territorial association).

40. Suzuki, *supra* note 7, at 36-40.

41. H. NIEBURG, POLITICAL VIOLENCE 100 (1969).

independence" and "territorial integrity" used to protect the existence of the state thus established.[42]

Buchheit fails to take account of these insights of the social sciences. Therefore, his study of secession is incomplete and his understanding of self-determination is inadequate.

II. Sources of Law

Moreover, the book suffers from a narrow view of the sources of international law. Buchheit, a member of the analytical, positivist school of international law, assumes that the agreement of states—in the form of "first principles" or specific international judgments—is the only source of valid international law. By explicit or implicit consensus, he asserts, states accept "certain behavioral norms which, by virtue of their fundamental nature, are intended to be the first principles of civilized international conduct."[43] Typically, these "first principles" impose "normative constraints" and "seek to prevent or limit undesirable international conduct."[44]

Not only is Buchheit oblivious to another important aspect of law—as an affirmative instrument of the social process—but he also equates the mere verbalization of rules with actual operations. Yet even when these "norms" fail "to command strict adherence in the behavior of States," he contends nevertheless that such norms "represent some consensus concerning what *ought* to happen which must be regarded as more than a precatory suggestion."[45] He asks the reader to accept "as a matter of faith" the proposition that, in the absence of the promulgation of such norms, more undesirable international conduct would have occurred.[46] As analyticalists characteristically do, Buchheit rationalizes the discrepancy between perspectives and operations[47] by explaining that these norms evolved "to meet the evasive ingenuities of international policy advisors."[48]

Not surprisingly, the analytical approach fails to provide Buchheit with any guidelines as to the legitimacy of specific attempts by groups

42. Reisman, *supra* note 7, at 30 n.76; Suzuki, *supra* note 5, at 807 n.123.
43. P. 31.
44. Pp. 31-32.
45. P. 32.
46. *Id.* Curiously enough, though he is an analyticalist with a positivist view of law, Buchheit considers such norms "peremptory norms" backed by "a faith," pp. 31-32, as if he were a naturalist.
47. "Perspectives" are the subjectivities that affect choice; "operations" are the choices actually made. McDougal, Lasswell, & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 202 (1968).
48. P. 31.

to secede from territorial states. Buchheit recognizes that the United Nations Charter, human rights covenants, and other General Assembly declarations set forth conflicting "first principles" that can be applied to contested claims to self-determination—the principle prohibiting the use of force, the principle of nonintervention, and the principle of the equal rights and self-determination of peoples.[49] Because of the "extraordinarily vague content of self-determination," Buchheit is pessimistic about the ability of "either international jurists or international politicians" to formulate "any clear delimitation in the foreseeable future."[50] He emphasizes that "the extension of the principle to concepts of economic and cultural self-determination . . . portends an even further encroachment of the principle onto ground formerly considered the domain of other norms such as nonintervention and the proscription of force."[51] In the absence of detailed hierarchical positive norms, therefore, he warns that states are left free to make subjective choices among "alternative 'first principles' of international conduct. The preference of one norm over another by a given State at a given time can therefore be dictated by simple political expediency with relative legal impunity."[52] Alas, the analytical model that relies heavily on the syntactic harmony and autonomy of rules has precluded Buchheit from clarifying explicitly the policy contents of such norms. Swamped in verbal formulae, which by themselves do not form a hierarchical ordering, he is too confused to distinguish factual *events* taking place from a series of legal consequences flowing therefrom.[53] He fails to recognize that events give rise to legal consequences only when norms are applied by an authoritative decisionmaker.

Obliquely, Buchheit acknowledges the presence of community members' expectations about authority, on the basis of which a certain group's claim to self-determination may be considered "illegitimate."[54] He asserts, however, that unless there is "an international judgment regarding the legitimacy"[55] of a particular claim, the efficacy of norms is seriously impaired. Buchheit is unable to ascertain a dynamic flow of authoritative communications that constitute authoritative and con-

49. Pp. 33, 73-85.
50. P. 16.
51. *Id.*
52. P. 33.
53. The actions of states do not themselves imply legal consequences; a claim is not synonymous with an authoritative decision. *See* p. 1255 *infra*. For a discussion of the concept of "normative-ambiguity," see Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, in STUDIES IN WORLD PUBLIC ORDER 42, 119-21 (M. McDougal ed. 1960).
54. Pp. 37-38.
55. P. 38.

trolling decisions.[56] He relinquishes his own task as an international lawyer, stating:

> Under the present legal order, however, there is no clear basis in law for criticizing an intervenor's *subjective decision* regarding the legitimacy of a group's claim to self-determination or for criticizing its judgment in giving priority in its normative hierarchy to the principle of self-determination over nonintervention and the prohibition of force.[57]

By implication, any decisions other than those of international collective organs are reduced to being subjective[58] and hence undesirable. Buchheit fails to recognize that the subjectivity of a decisionmaker *is* an essential component of decisionmaking. Unpersuaded by contemporary studies in self-determination questions, "the more fruitful approach," he suggests, is "an attempt at removing the open-ended subjectivity involved in unilateral determinations of 'legitimacy.' "[59] Thus, he naively proposes a new set of sub-norms to "delimit the scope of 'legitimate' self-determination, thereby reducing the number of instances of permissible deviation" from the two principles of nonintervention and the prohibition of force.[60]

Apparently, it never dawns on Buchheit that an instance of legitimate self-determination is a decision blessed with authoritative sanctions.[61] Because he believes that hierarchical norms have autonomous existence, he erroneously considers that the claimant creates value consequences by invoking a norm in a particular instance. But plainly, legitimacy cannot be provided merely by rules, however detailed and refined, that are read, interpreted, and applied in context by flesh-and-blood decisionmakers purposefully to affect the distribution of values.[62] To establish legitimacy, authoritative decisionmakers must pronounce a given instance as legitimate in creating value consequences. To do so,

56. An "authoritative decision" is "a continuous flow of decisions made from perspectives of authority—that is, made by the people who are expected to make them, in accordance with community expectations about how they should be made, in established structures of authority, and by authorized procedures." McDougal, Lasswell, & Reisman, *supra* note 47, at 201. Authoritative decision combines elements of both authority and control. *Id.* at 200. It is not limited to decisions made by highly organized institutional structures. *Id.* at 201-02.

57. P. 37 (emphasis added).

58. Pp. 37, 42.

59. P. 42.

60. *Id.*

61. *See* note 56 *supra.*

62. A relevant jurisprudence must "distinguish between effective decisions which are taken by sheer naked power, or calculations of expediency, and those which are taken from perspectives of authority." McDougal, Lasswell, & Reisman, *supra* note 47, at 201.

the decisionmakers must be equipped with a more comprehensive intellectual approach than that which Buchheit proposes.

III. Analysis of Historical Trends

Buchheit surveys past trends in theories of law and in decisions about self-determination. He rejects the natural law doctrine of resistance as a basis for self-determination, arguing that it supplies an "insecure jurisprudential foundation for a purported legal right" to self-determination.[63] He insists that the individualistic natural law doctrine would lead to "dismemberment of society into clans, atomic families, or individuals"[64] and that it would result in "an unavoidable conflict with the equally 'fundamental' rights of established States."[65] Thus, Buchheit contends that the natural law doctrine of resistance has no theoretical nexus with the principle of self-determination by means of territorial separation.[66] One is disappointed by his imposition of analyticalism over the right of resistance—a fundamental, metaphysical doctrine that purports to transcend the secular authority of states.[67]

Buchheit believes that self-determination is a group right, not an individual right.[68] His rejection of an individualist approach to self-determination is difficult to reconcile with the General Assembly's inclusion of the right to self-determination in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.[69] Buchheit also fails to acknowledge the logical nexus between the "group" right of self-determination and the individual's rights of association, assembly, and freedom of choice by participation in the power process,[70] and he ignores the centrality of individual needs in the process of group identification.[71]

63. P. 56.

64. P. 51. *But cf.* J. LOCKE, OF CIVIL GOVERNMENT 230 (Everyman's Lib. ed. 1924) (recognition of natural law right to resist will not lead to instability because people are averse to change).

65. P. 57.

66. *E.g.*, pp. 55-56.

67. *See, e.g.*, H. THOREAU, CIVIL DISOBEDIENCE (1849).

68. Pp. 50-51.

69. Article 1 of each Covenant provides: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 53, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, *id.* at 49. Although Buchheit explains that this provision was included because "[t]he felt need for a strong, sweeping statement of the right to self-determination as a weapon against colonialism overcame the implorations of the Western powers for cautious draftsmanship," p. 84, the outcome conflicts with his interpretation of self-determination.

70. *See* pp. 1250-51 *supra.*

71. *See* notes 31-33 *supra.*

Nevertheless, Buchheit does acknowledge that international law recognizes the right of secession. Analyzing the development of international perspectives since the 1919 Paris Peace Conference, Buchheit concludes that "the evolution of an international legal recognition of secessionist self-determination, although cautious and uniformly conservative, is nevertheless perceptible."[72] Thus, he rejects the contention advanced by some writers that the "fundamental principle" of "territorial integrity" precludes any right to secession and that the right to self-determination is limited to the context of decolonization.[73] He maintains, however, that the General Assembly's 1970 Declaration on Friendly Relations "does not give an unlimited recognition to separatism,"[74] because, he reasons, its language reaffirms the territorial integrity and political independence of states and fails to recognize territorial separation unless the state fails "to provide a democratic government and protection for basic human rights."[75] One is puzzled by his obsessive concern with the "limitation" or "qualification" of the principle of self-determination throughout the book. Concerned with stability and order, he seeks first to formulate a "limited and qualified" right, and then to ensure the stability of expectations by applying the already "fixed" and prequalified right in a predetermined manner.[76]

IV. Proposed Standards of Legitimacy

To reduce the "open-ended subjectivity involved in unilateral determinations of 'legitimacy' "[77]—a subjectivity that he attributes to the current absence of positive norms—Buchheit seeks to identify a set of new principles that would distinguish between legitimate and illegitimate movements for self-determination. He argues that such principles should have "predictive value"[78] so that they can influence the conduct of both groups and states and thus reduce the number of instances of

72. P. 97. Buchheit bases his conclusion on the Declaration on Friendly Relations, *supra* note 28, at 124. Buchheit acknowledges that this language "seems to recognize, for the first time in an international document of this kind, the legitimacy of secession under certain circumstances." P. 92.

73. *See* Emerson, *Self-Determination*, *supra* note 2, at 464-65. Emerson's thesis relies heavily on Article 6 of the Declaration on the granting of independence to colonial countries and peoples, G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, 67, U.N. Doc. A/4684 (1960) ("Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.")

74. P. 94.

75. *Id.*

76. *See* pp. 217-18.

77. P. 42.

78. Pp. 45, 219.

permissible deviation from the two principles of nonintervention and the prohibition of force.[79]

Buchheit bases his proposed standards on a conservative, static view of the goals of the world community. As an analyticalist, he purports to "derive" goals from existing norms rather than openly postulating goals as expressions of his own preferences. Thus, he identifies the following substantive goals from the preamble of the United Nations Charter: (1) preservation of the world order against future wars; (2) promotion of social progress; (3) affirmation of human rights and human dignity; and (4) international cooperative actions to achieve these goals.[80] From these goals, Buchheit derives the first principles of a "maximization of international harmony" and a "minimization of individual human suffering," also articulated as "the goal of promoting minimum conditions for individual and social development within States."[81] He recommends that, "[t]o remain faithful to its first principles, the community must obviously balance these conflicting interests. What is significant here, however, is that this balancing must be carried on from a utilitarian viewpoint—albeit perhaps a utilitarianism with a basically conservative (State-centered) prejudice."[82]

Community interests can optimally be achieved, Buchheit asserts, by applying his proposed "calculation of legitimacy" to secessionist claims to self-determination. He argues that the "internal merits of the claim" must be balanced against the "disruption factor."[83] The "internal merits," according to Buchheit, encompass the degree of distinctness and cohesion of the group, as well as the viability of the proposed secessionist territory as a separate state.[84] The "disruption factor" weighs the disruption in "world harmony" resulting from separation, including the economic and strategic impact on the remaining state, against the disruption resulting from continued inclusion in the larger state, including continued oppression and violence.[85]

Both elements in Buchheit's "calculus of legitimacy" must be analyzed in terms of the entire social process. Buchheit fails to articulate all of the relevant factors, which include the following: who demands separation from whom; the relationship within the claimant group between the elite and the rank-and-file; the claimant's demands, identifications, and expectations; the resources possessed by the claimant;

79. P. 42.
80. P. 226.
81. P. 227.
82. *Id.*
83. Pp. 238-41.
84. Pp. 228-31.
85. Pp. 231-38.

the geographical consequences of the claim; the manner—coercive or persuasive—in which the claim is presented; and the effect of various outcomes on the public order of the world community.[86] Buchheit's second factor may also place excessive emphasis on the stability of territorial boundaries.

In addition, Buchheit fails to integrate his own future-oriented proposals for "standards of legitimacy" with his positivist legal standpoint. He considers the concept of "remedial secession"—secession only as a last resort—to be the *lex lata*[87] and does not convincingly explain how he expects the international legal system to implement his proposals. Buchheit recommends only that the proposed standards be published by the international community.[88]

Finally, Buchheit's proposals are limited to legal prescriptions to be applied after claims to self-determination have been made. This ex post facto response excludes alternative strategies for rectifying the predispositional and environmental conditions that may account for recurring, intense claims to self-determination. Nevertheless, Buchheit optimistically hopes that, by adopting his formula, the world community will be able to "impose a reasoned, predictable order upon so dangerous an area of societal and international discord."[89]

Buchheit's book makes a useful contribution to the literature on secession from the analytical viewpoint. His discussion of the historical development of the right to self-determination[90] is extensively researched, although it focuses on ideas without relating them to the contemporary events that influenced their evolution. The case studies provide an effective examination of the secessionist attempt in the Congo[91] and an illuminating contrast between the Congo and Biafra.[92] Buchheit courageously launches a frontal attack on the prevailing misconception that claims for territorial separation are illegitimate under international law. Unfortunately, he ignores the dynamics of group formation, takes a narrow analyticalist approach to the question of legitimacy, and proposes excessively static, state-centered standards for testing future claims to self-determination. The book cannot be treated as the final word on secessionist self-determination.

86. *See* Suzuki, *supra* note 5, at 790-97.
87. P. 222.
88. P. 245. But this seems unduly optimistic in light of his earlier remarks on the vagueness of self-determination and current attempts to extend it to the cultural and economic spheres. *See* p. 16.
89. P. 245.
90. Pp. 43-137.
91. Pp. 141-53.
92. Pp. 172-76.

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