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International Law, Institutional Moral Reasoning, and Secession[‡]

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Participants in the contemporary debate over the morality of secession are typically categorized in terms of the conditions they argue are necessary and/or sufficient for a group to possess a moral right to secede.[1] Remedial-right, or just-cause, theorists maintain that groups enjoy a right to unilaterally secede only if they are the victims of serious injustice. Primary right theorists, in contrast, argue that even in the absence of injustice the promotion of political self-determination grounds a right to unilateral secession, with some disagreement as to whether this right is possessed only by nations or by any group able and willing to perform the functions that morally justify the state. Moral theorists of secession may also be categorized by their method, however, and as I will demonstrate in this paper the methodological dispute is the more fundamental one. Institutionalists such as Buchanan and Norman maintain that secession and a right thereto are inherently institutional concepts, and so can only be theorized on the basis of institutional moral reasoning.[2] Pre-institutionalists such as Altman and Wellman, Moore, and

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[1] The conditions I have in mind here include both features possessed by the group and characteristics of the circumstances they inhabit.

[2] Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004); Allen Buchanan, "Secession," *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/sum2013/entries/secession/; Wayne Norman, "The Ethics of

Weinstock, defend the possibility of a pre-institutional moral right to secession, and distinguish arguments, and the mode of argument, appropriate to establishing the existence of such a right and its content from the question of whether a right to secession ought to be institutionalized in international law (and, if it should, the extent to which the content of the legal right should mirror the content of the moral right).[3]

My first goal in this paper is to defend the institutional view; i.e. the claim that secession is an inherently institutional concept and that therefore we ought to use institutional moral reasoning to argue for or against a right to secession. For reasons that will become clear below, this leaves any specific argument regarding the morality of secession vulnerable to the critique that we lack the empirical evidence necessary to sustain its conclusion. My second aim, then, is to consider the argument for this claim and to explore how we ought to proceed if there is some truth to it. Finally, I argue that to the extent we are warranted in our judgments regarding the effects rival international legal norms governing secession will have on the advancement of peace and the secure enjoyment of basic human rights, we should for the time being preserve international law's existing stance. That is, we

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Secession as the Regulation of Secessionist Politics," in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998): 34-61.

[3] Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (New York: Oxford University Press, 2009); Margaret Moore, *The Ethics of Nationalism* (New York: Oxford University Press, 2001); Daniel Weinstock, "Constitutionalizing the Right to Secede," *The Journal of Political Philosophy* 9:2 (2001): 182-203.

ought to maintain the absence of any right to secede outside the colonial context, rather than reform international law so that it includes either a remedial or a nationalist or plebiscitary primary right to secession.

I begin in section I with a characterization of the concept of secession that I argue better captures its common use to describe, explain, or justify conduct than does a rival analysis offered by Altman and Wellman. In section II I defend the claim that secession is an inherently institutional concept, and explain why we ought to employ institutional moral reasoning to theorize a right to engage in it. The argument I sketch for these conclusions rests on two key claims. First, I maintain that we should distinguish between the *value* of political self-determination and the *norm* governing secession. Second, I contend that any argument for or against a candidate norm governing secession ought to be grounded in an accurate understanding of the nature of norms; that is, their mode of existence and the manner in which they causally contribute to the production of social order. These features account in turn for the properties that characterize institutional moral reasoning, most importantly the centrality of empirical claims to the success or failure of any normative theory of secession.

In section III I employ the distinction between ideal and non-ideal theory to rebut several objections to the claim that a right to secession ought to be theorized institutionally. As these arguments demonstrate, secession's inherently institutional nature does not rule out the possibility that an ideal or fully just international law includes a primary right to unilateral secession, national or plebiscitary. Like Buchanan, however, I argue that the claim that it does can be little more than

speculation. In section IV I consider Altman and Wellman's allegation that the same conclusion holds for any claim regarding the international legal norm that ought to govern secession at present. In response, I maintain that for the time being we ought to adopt a precautionary approach to arguing for an international legal right to secession, and that this favors a remedial-right to secession over either a nationalist or plebiscitary primary right. In the fifth and final section, however, I offer several reasons to doubt that international law would better serve to advance even the minimal goals of peace and the secure enjoyment of basic human rights were we to replace the current prohibition on unilateral secession with a remedial-right.

I

Secession involves essentially a claim to sovereign equality. Necessarily, to attempt to secede is to assert both (a) one's independence from the rule of the agent that previously enjoyed jurisdiction over one, and (b) one's enjoyment of the same rights, liberties, powers, and immunities possessed by the agent whose jurisdiction one now contests.[4] This construal of secession captures federal as well as

[4] We can distinguish analytically between secession, which involves essentially a claim to equal standing within a given community, and claims regarding the specific rights, liberties, powers, and immunities members with that standing in the community ought to enjoy. In some cases, a group may simultaneously advance both claims; i.e. assert a right to be recognized as a sovereign equal and challenge one or another aspect of what it means to be a sovereign equal in the community in question. In other cases, however, a group may advance only one or the other of these two claims; e.g. demand treatment as a sovereign equal on the community's current understanding of what such

international political secession; i.e. attempts to create new states within federal republics such as India and the United States, as well as attempts to create new states within the existing international legal order. Moreover, it also characterizes conduct undertaken by parishes or congregations within organized religions (as has recently occurred in the Episcopal and Presbyterian Churches in the United States) and chapters or other administrative sub-units in civic groups (such as the Boy Scouts of America).[5]

Per the above analysis, one agent's challenge to another's rule over it counts as secession only if the party mounting the challenge claims the right to exercise itself the very same panoply of rights, liberties, powers, and immunities enjoyed – or that it maintains ought to be enjoyed – by the current ruler. As I explain in the next section, the content of that set of rights, liberties, powers, and immunities depends on the particular institutional form political order takes at the point in time in which a particular group engages in secession.[6] It follows that in a world in which states

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treatment involves. For a group that simultaneously advances both claims, its attempt at secession succeeds as long as it is recognized as a sovereign equal, entitled to the same panoply of rights, liberties, etc., enjoyed by other members of the community in question, regardless of whether it also succeeds in its attempt to modify the shared understanding of those incidents that characterize sovereign equality.

[5] This observation highlights an important methodological point, namely that the degree to which a proposed characterization captures the actual use of the concept ought to figure centrally in our judgment regarding its truth.

[6] Institutions are "a public system of rules which define offices and positions with their rights and duties, powers and immunities, and the like" (John Rawls, *A Theory of Justice, Revised Edition*

play the central role in the institutional realization of political order, international political secession necessarily involves a claim to that set of rights, liberties, powers, and immunities states enjoy under international law, or that the secessionists maintain states ought to enjoy as a matter of international law.[7] In other words, in such a world secession necessarily involves a claim to recognitional legitimacy.[8]

Altman and Wellman maintain otherwise. The concept of secession, they assert, "does not include any reference to international law or to any type of institution," but only "the withdrawal of a territory from the jurisdictional boundaries of an existing state."[9] Therefore "there is no conceptual contradiction in a separatist group asserting, "we have a right to secede, but we make no claim to recognitional legitimacy.""[10] In order to assess this claim we must first get clear on what it would mean to make no claim to recognitional legitimacy. Recognitional legitimacy consists in the satisfaction of the conditions necessary and/or sufficient to qualify as a state under international law, in virtue of which an institutionally

(Cambridge, MA: Belknap Press, 2003): p. 47). See also Buchanan, *Justice*, p. 2; David Wiens, "Prescribing Institutions Without Ideal Theory," *Journal of Political Philosophy*, 20:1 (2012): pp. 46-7; and the discussion in fn 21.

[7] As Buchanan writes, "Secessionists typically assert that they have a right to their own legitimate state, and a legitimate state is an institutionally defined entity, an entity defined as having certain rights, powers, and immunity under international law" (Buchanan, *Justice*, p. 24).

[8] Henceforth I use the term 'secession' to refer to 'international political secession.'

[9] Altman and Wellman, *Liberal Theory*, p. 57.

[10] Ibid.

organized group enjoys the legal incidents that states possess.[11] A group that claims recognitional legitimacy simply asserts that it meets those conditions (or, perhaps, that it could do so were other actors to refrain from internationally illegal conduct, such as unjust occupation of the group's territory). That is, to claim recognitional legitimacy is to maintain that one is a state possessed of all those rights, liberties, powers, and immunities that accrue to states under international law.[12] For secessionists to refrain from claiming recognitional legitimacy, then, would require either that they govern both people and territory but assert no entitlement to do so – no right to territorial integrity, to border control, to exclusive jurisdiction over their subjects vis-à-vis a wide range of conduct, etc. – or that they assert a right to rule but reject the entire institutionalized political order constituted by international law. The former seems wildly implausible, and may well be at odds with the concept of ruling or governing. The latter is certainly possible; indeed, the Islamic State (IS) – or, more accurately and less ironically, the purportedly reborn Caliphate – provides a current example. But IS neither characterizes itself as, nor is

[11] See Matthew Craven,"Statehood, Self-Determination, and Recognition" in *International Law. (3rd ed.)*, Malcolm D. Evans, ed. (Oxford: Oxford University Press, 2010): pp. 203-251; James R. Crawford, *The Creation of States in International Law, 2nd Edition* (New York: Oxford University Press, 2007): 375-415; Glen Anderson, "Secession in International Law and Relations: What Are We Talking About?" *Loyola of Los Angeles International and Comparative Law Review* 35 (2013): 343-388.

[12] Note that the *concept* of recognitional legitimacy says nothing about what standards must be satisfied for a group to count as a state, either as a descriptive matter or as a normative one. It takes no stand, that is, on whether the declarative or constitutive *conception* of recognitional legitimacy accurately describes the existing legal practice, or which one ought to do so.

it typically characterized by others as, a secessionist group precisely because it does not seek the status of an independent state under international law but instead the overthrow of a global political order organized on the basis of equal sovereign states.[13] Altman and Wellman's conceptual claim seems dubious, then, a conclusion that goes unchallenged by the arguments they marshal to support it.

Imagine a world in which there are states but no international law, they write. In such a world it would be impossible to claim recognitional legitimacy, "yet a separatist group could quite sensibly assert that it had a moral right of secession."[14] History provides compelling reasons to concede the possibility of a world composed of distinct political communities in the absence of international law, understood as a political order premised on the existence of modern states. However, history does not warrant, and we should not concede, the possibility of secession in a world populated by agents who lack a conception of political order characterized in terms of sovereign equality. As a conceptual matter secession presumes a world composed of political communities that neither claim to rule nor to be ruled by one another, and who share to a considerable degree a common understanding of the jurisdiction that comprises the independence or sovereignty

[13] See Tanisha Fazal, "Is the Islamic State a Secessionist Movement?" *The International Relations and Security Network*, February 20, 2015. http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?id=188149; last accessed July 17, 2015.

[14] Altman and Wellman *Liberal Theory*, p. 57.

each enjoys vis-à-vis the other.[15] And regardless of whether those political communities consist of states, kingdoms, or empires, secession necessarily involves a claim to recognitional legitimacy, i.e. to the status of a sovereign equal, characterized in terms of the common understanding of independent jurisdiction that prevails at the time a group seeks to secede. To put the point in terms commonly employed by international lawyers, secession is conceivable only for those for whom a horizontal political order is conceivable.[16] As noted above, absent such a shared understanding a group's normative challenge to those who rule can take only two forms: a rejection of the possibility of legitimate political authority or a claim to completely replace the institutional framework in which horizontal political authority is currently realized with one that that realizes a hierarchical political authority, as in the case of IS's attempt to replace the authority institutionalized in modern international law with one inspired by a certain understanding of Islamic law. Thus to answer another of Altman and Wellman's

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[15] See, for example, the discussion of a "nascent international law" in the Fertile Crescent, northern India, and classical Greece in Stephen C. Neff, *Justice Among Nations: A History of International Law*, (Harvard University Press, 2014): 13-31.

[16] "International law has never flourished in times of anarchy (think of the "Dark Ages" in Europe from 500-1100 AD), nor, for that matter, in times of hegemony (consider the Roman Empire from 50 BC-300 AD). The ideal environment for the development of international law has been times of "multi-polar" international relations, where a number of States have competed and cooperated in a particular part of the world" (David J. Bederman, *International Law Frameworks, 2nd Edition* (New York: Foundation Press, 2006): p. 2). The claim here is that a norm governed "multi-polar" world is a *sine qua non* for secession.

attempts to demonstrate the conceivability of secession in the absence of international law, we can imagine a group attempting to secede in a one-state world, but only if we also imagine as part of their attempt *and as a condition for its success* the development of a set of conventional norms that delineate the domain of each putative political community's exclusive jurisdiction from each other, and that structures or informs their interactions with one another.

Secessionists do not advocate for political self-determination in the abstract. Rather, they normally advocate for a particular, concrete specification of political self-determination, namely the same panoply of institutional rights, liberties, powers, and immunities enjoyed by those who currently rule them.[17] The foregoing argument demonstrates that doing so is a necessary feature of secession. In the next section I defend the claim that secession is an inherently institutional concept, and explain why it follows that we ought to employ institutional moral reasoning to theorize it.

II

Much of the discussion regarding a right to secession is plagued by a failure to clearly and consistently distinguish claims regarding the *value* of political self-determination from those regarding the justifiability of a *norm* governing secession. As the label suggests, a theory of value is an attempt to characterize what makes some type of thing (e.g. object, act, experience, state of affairs, etc.) valuable, as well

[17] "Normally" because, again, secessionists occasionally advocate simultaneously for a change in the incidents constitutive of sovereign equality.

as the appropriate mode of valuing that thing (e.g. by honoring it, or promoting it, or maximizing it, and so on). Familiar examples include rival attempts to characterize the value of choice, or of free speech, or most important for our purposes here, the value of political self-determination. Yet by itself an account of what makes political self-determination valuable, and the mode of valuation appropriate to it, does not tell us what sort of treatment counts as properly valuing an agent's exercise of political self-determination. Does it require treatment as a sovereign equal, for example, or only one or another form of intra-state autonomy? Perhaps the former in some circumstances, and the latter in others – but what circumstances, and why? What counts as an appropriate response to the value of an agent's exercise of political self-determination in a context in which we are also required to value other agents' exercise of political self-determination, and/or things other than political self-determination? These questions do not concern the inputs that ought to figure in an agent's deliberation; that is, they do not ask us to characterize the kind of considerations to which an agent ought to be responsive. Rather, these questions assume an answer to that question and ask what an agent ought to conclude on the basis of these considerations; specifically, what an agent ought to do in various circumstances if he, she, or it is to properly value the exercise of political self-determination. A normative theory aspires to provide an answer to that question.

Norms are the justifications actors deploy in order to hold themselves and one another accountable, e.g. for their conduct, or for particular outcomes, or for

their character.[18] They exist by virtue of their use within a particular community, and conversely a community exists in virtue of certain actors' – its members' – use of a common (system of) norm(s) to regulate or structure their interactions with one another (as well as, in many cases, non-members and/or the natural environment). At any given moment, a normative system reflects a community's current understanding of the values to which its members, *qua* members of that community, ought to be responsive, and determines or constitutes what counts as a proper response to those values across a diverse range of circumstances. Reference to the community's *current* understanding highlights an important feature of normative practices, namely that they evolve over time as members of the community contest one another's claim that a particular norm best serves to promote, respect, etc. some value, or dispute the values to which members of the community ought to be responsive *qua* members of the community, or debate who counts as a member of the community, and so on. Indeed, some degree of contestation seems almost inevitable. Such is the case with the norm governing international political secession, with members of the international community constituted by international law, or those who seek to influence them (including political and legal theorists writing on the topic of secession), offering rival accounts

[18] For a more detailed exposition of this and many other claims in this paragraph, see Gerald Postema, "Custom, Normative Practice, and the Law," *Duke Law Journal* 62 (2012): 707-38; David Lefkowitz, "Sources in Legal Positivist Theories: Law as Necessarily Posited and the Challenge of Customary Law Formation," in Samantha Besson and Jean D'Aspremont (eds.), *Oxford Handbook on the Sources of International Law* (Oxford University Press, 2017).

of the norm that ought to govern international political secession. The account of norms I offer here entails that any argument in favor of a particular norm governing international political secession is necessarily a claim regarding what the international law governing secession ought to be.[19] Put another way, secession is an inherently institutional concept because it is a normative concept, and normative concepts exist and have the content they do in virtue of their figuring in the often institutionalized practice of holding accountable that constitutes a group of actors as a particular community.[20]

If norms exist by virtue of their practice within a given community, then to defend or criticize a norm is necessarily to make a claim about the type of social world one thinks will obtain if members of that community adopt it; that is, if they use it to hold one another and themselves accountable. In the case of an existing norm, this involves a description of the actual world and a claim regarding the causal contribution the norm makes to its realization, both of which may be controversial. In the case of a proposed norm it involves a description of a possible social world, typically one alleged to be feasible under certain conditions that either currently obtain or could do so at some point in the future, and a claim regarding the

[19] As I explain in the next section, however, it need not be a claim that this is what the law ought to be right now.

[20] In fn. 21 I suggest that this point might be better put in terms of the conventional nature of norms, with institutions characterizing a sub-set of normative practices, and explain why I nevertheless continue to describe secession as an inherently institutional concept and the form of reasoning appropriate to theorizing it as institutional moral reasoning.

causal contribution the proposed norm would make to its realization, both of which, again, may be controversial. In either case, an argument for or against a particular norm is hostage to empirical facts; i.e. to the truth of the claim that under certain conditions the norm will become a fairly stable part of the practice of holding accountable that constitutes the community in question, and that as a consequence the social world will take the form the argument's author alleges will result from members use of that norm to regulate their interactions with one another. To be compelling, such an argument will need to be responsive to how norms work: how they causally contribute to social order, under what conditions they produce particular results, how they originate or cease to exist, what factors strengthen or weaken their acceptance (i.e. legitimacy) within a given community, and so on. The phrase 'institutional moral reasoning' refers to this approach to defending or criticizing norms.[21]

[21] I use the phrase "institutional moral reasoning" here because it is familiar to many participants in the contemporary debate regarding the norm that ought to regulate secession. Nevertheless, there are a number of ways in which talk of "institutional moral reasoning" may mislead, two of which I want to briefly address. First, it wrongly suggests that this form of moral reasoning is limited to institutionalized normative practices, i.e. practices that exhibit some level of specialization in a community's practice of holding accountable, when in fact it also applies to critical moral reflection on non-institutionalized normative practices. Arguably, the horizontal nature of the international political community entails that disputes over the norm that ought to govern international political secession concern a non-institutionalized normative practice. If so, then it might be more accurate to describe secession as an inherently conventional concept rather than an inherently institutional one, though the basic claim remains that the concept of secession exists in virtue of its use by members of

Buchanan uses the term "teleological," while Jack Knight and James Johnson employ the label "consequentialist," to describe the fact that institutional moral reasoning assesses rival candidates for a norm in terms of the social (and natural) worlds they produce.[22] Both terms invite misunderstanding, however, because in some contexts they are used as labels for a theory of value; again, an account of what makes something(s) valuable and the mode of valuation we ought to adopt vis-à-vis that thing(s). But to claim that we ought to evaluate rival candidate norms in terms of the worlds they produce or constitute is not yet to make any claim regarding the values we ought to use to rank the resulting worlds. While some might argue that we should use a consequentialist theory of value such as classical act-utilitarianism

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an actual or allegedly possible community of sovereign equals (and possibly would-be sovereign equals) to hold themselves and one another to account.

Second, the phrase "institutional moral reasoning" may suggest that we can distinguish between those rights, liberties, etc., actors enjoy in virtue of their membership in some community constituted by a particular normative practice, and those rights, liberties, etc., some creatures enjoy in virtue of one or another non-relational property, such as sentience or autonomy. My position, as stated in the text, is that such an understanding confuses an account of what is valuable with an account of what counts as properly valuing it in a variety of circumstances, in some of which agents may also be required to value other things, possibly using other modes of valuation. This stance does not rule out the possibility that there may still be good reason to speak of non- or pre-institutional rights as part of a theory of value, despite the risk of confusing them with institutional rights, i.e. normative claims to specific forms of treatment, experiences, objects, etc.

[22] Buchanan, *Justice*, 75; Jack Knight and James Johnson, *The Priority of Democracy: The Political Consequences of Pragmatism* (Princeton, NJ: Princeton University Press, 2011).

to do so, others may advocate for a theory of value that includes individual moral rights. My point here is simply that to argue for or against *a norm* one must do more than describe what would make the world good, better, or best (or just, or more just, or fully just); one must also elaborate and defend an account of how the norm will function to produce the world one maintains it will. Thus a compelling defense of a norm governing secession requires a detailed account of how international law works, or how it could be made to work under certain specified conditions (consistent with the envisioned community still being a horizontal political order).[23]

Any norm governing secession will be enmeshed in the larger system of norms that structure interactions among members of the international political community (at a given point in time). This reflects the fact that international law

[23] For an excellent summary of the various respects in which international law may work, i.e. causally contribute to the production of an international political order, see Robert Howse and Ruti Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," *Global Policy* 1:2 (2010): 127-36. Elsewhere I argue that international law's causal contribution qua genuine law requires that in most cases most of those over whom it claims jurisdiction treat it as legitimate, meaning that they are disposed to treat it as a conclusive reason to act as the law directs them to act (though not necessarily as the only conclusive reason they have to perform that act). I also point out, however, that even if or where international law is not genuine law, or in terms some might prefer, where it is law but not legitimate, it may still be prudentially and morally valuable. See David Lefkowitz, "The Legitimacy of International Law," in David Held and Pietro Maffettone (eds.) *Global Political Theory* (Cambridge: Polity Press, 2016): 98-116; and David Lefkowitz, "A New Philosophy for International Legal Skepticism? Dworkin, Republicanism, and the Rule of International Law," unpublished manuscript.

structures the interactions of a large number of agents who are responsive to a variety of values – or at least to a variety of different, sometimes conflicting, ways of responding to the same value – and whose conduct affects one another, intentionally or as a side-effect, in a wide range of different circumstances. As a result, the moral assessment of a particular legal norm governing secession, existing or proposed, ought to be holistic. This requires attention to the contribution that norm makes or would make to the efficacy of other norms within the system, whether in terms of their legitimacy or the prudential costs or benefits attached to compliance or non-compliance. We should also take into account, as best we can, the effects on the practice of holding accountable constitutive of other legal orders (e.g. domestic law), as well as non-legal normative orders that contribute directly or indirectly to the realization of justice (or injustice). Finally, in carrying out a holistic assessment of an institutional norm like the international law governing secession we must also pay close attention to institutional capacity; e.g. the design of those mechanisms or institutions charged with adjudicating disputes over the applicability of a norm to a specific case, or with its enforcement against violators.

In any community constituted by a normative practice that regulates the interactions of a plurality of human actors responsive to diverse values across a wide variety of circumstances, considerations of certainty and predictability, worries regarding the abuse of nuanced rules, and limits on actors' cognitive ability to keep track of the content of complex rules argue in favor of norms characterized by generality. This implies that we should be extremely wary of inferring from an argument that a given norm is over- or under-inclusive in a particular case that it

ought to be reformed. Rather, those who argue for reform to an existing norm such as the current international legal prohibition on unilateral secession must make a case that their proposed change will produce a moral advance when taking into account all of those circumstances and actors covered by the existing norm. Likewise, analogical arguments for or against a norm governing secession may have little probative value. For example, we ought to be careful about drawing any conclusions regarding the justifiability of a proposed international legal norm governing unilateral secession from the (presumed) justifiability of a law permitting unilateral divorce in a particular domestic legal order. If the justifiability of the latter norm depends on the presence of other norms (legal and non-legal), institutions, institutional capacities, and material facts that are radically different in the sphere of international relations, it will offer little guidance as to what the international legal rule governing secession ought to be.[24]

More could, and likely should, be said in defense of the claim that we ought to employ institutional moral reasoning to theorize a right to secession, especially the metaphysics of norms I suggest it presumes. Here, however, I simply want to point out how we might reconcile the view sketched in this section with some of the positions defended by prominent primary right theorists. David Miller, for example,

[24] The framework outlined in the text can be used to morally evaluate international legal norms governing conduct other than secession, of course. See, for example, its use by Henry Shue to argue against most revisionist just war theorists that the morality of war just is the morally best law of war ("Do We Need a Morality of War?" in David Rodin and Henry Shue (eds.) *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press: 2008): 87-111).

differentiates a political theory of secession from a legal one in a way that to a considerable extent tracks the distinction between a theory of value and a theory of norms outlined above.[25] Consider, too, that while we ought not to rely on intuitions drawn from reflection on seemingly infeasible and/or underspecified cases to justify a norm, these intuitions may well play a central role in the development of an account of what we should value and why we should do so. Perhaps, then, we might be persuaded by the hypothetical forcible annexation example Altman and Wellman use to argue for a pre-institutional right to secession to acknowledge instead the existence of a moral right to political self-determination; i.e. a claim regarding the value of political self-determination and the mode of valuation appropriate to it. Insofar as one of the fundamental tasks (indeed, *the* fundamental task) international law performs is to allocate jurisdiction, it follows that the enjoyment or exercise of the right to political self-determination should figure among the ends that a morally defensible international legal order ought to advance. But what the scope or content that right might be, and under what conditions and subject to what

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[25] David Miller, "Secession and the Principle of Nationality," in M. Moore (ed.) *National Self-Determination and Secession* (Oxford: Oxford University Press: 1998): 64. One way to interpret Miller's argument in this piece is as follows: the principle of nationality offers an account of the *value* of political self-determination, one to which any political order ought to be responsive, though what *norm or norms* constitute the best response to that value, i.e. what rights it grounds, depend on a host of other factors, some empirical and some normative (e.g. regarding the relative importance we ought to assign to political self-determination and the secure enjoyment of various basic human rights).

procedures a group might rightfully exercise it, are questions we should employ institutional moral reasoning to answer.

III

While the fact that secession is an inherently institutional concept has certain implications for how we ought to theorize it, by itself it entails no specific conclusion regarding the existence or content of a right to secession. Rather, as I argued in the previous section, the conclusion we should draw on the basis of institutional moral reasoning depends on the assumptions we make about how the world works, or could work. Thus those who advocate for a nationalist or plebiscitary primary right to secession can argue that as a matter of ideal or full compliance theory international law includes the right they defend, while also maintaining that as a matter of non-ideal or partial compliance theory international law includes only a remedial-right to secession, or perhaps no right to secession at all.[26] The assumption of partial compliance is clearly implicit in the argument that creating an international primary right to secession will lead to an increase in war and violations of basic human rights. If we assume instead that fear, greed, hatred, jealousy, a lust for power and status, bias and so on will not lead to resistance to national or plebiscitary groups' attempts to secede, and that groups meeting certain conditions have a moral right to political self-determination, it is less obvious why we might object to an international legal order containing a right to engage in such conduct.

[26] See, e.g., Moore, *Ethics*, pp. 205-6.

The distinction between ideal and non-ideal theory enables those who argue that secession must be theorized institutionally to rebut a number of criticisms leveled against their position. For example, Daniel Weinstock maintains that unless we postulate a pre-institutional moral right to secession we will be unable to acknowledge "what seems intuitively plain, namely, that when the circumstances are just too hostile to grant the right… then there will be some moral loss inflicted upon the persons whose rights have been overridden, some good which ought to have been conferred upon her, and thus there will be some balancing of the moral ledger that will still have to be done."[27] Likewise Altman and Wellman suggest that only a pre-institutional moral right to secession can account for the judgment that even if "the right of secession is justifiably sacrificed to peace and human rights… something of real value has been given up, namely, a certain measure of respect for the deontological principle of political self-determination."[28] These theorists are mistaken, however. A pre-institutional right to secession is not necessary to warrant the judgment that the legal norm governing secession we ought to adopt in the present circumstances nevertheless involves a "moral loss." Rather, we can defend it on the basis of an argument that employs institutional moral reasoning to demonstrate that as a matter of ideal theory (or, perhaps, an idealized but still non-ideal theory) international law would include, say, a primary right to plebiscitary secession. We could be warranted, that is, in maintaining that at present only the

[27] Weinstock, "Constitutionalizing," pp.185-6.

[28] Altman and Wellman, *Liberal Theory*, p. 56.

attempt to reform to international law so that it includes a remedial-right to secession is justifiable, while also holding that even if successful such an effort at reform would not produce a fully just international law governing secession. Indeed, the defender of institutional moral reasoning simply maintains that we can *only* defend this conclusion on the basis of such an argument. For such a theorist, the claim that a particular legal norm governing secession is justifiable but not fully just stands in need of an empirically informed argument regarding the motives, institutional structures, and institutional capacities that constitute a global normative order containing a primary right to secession.

Arguably, we ought to have very little confidence in any judgment we make regarding the global political-legal institutional structure that will best advance justice as a matter of ideal theory. This uncertainty may characterize both ends and means; that is, what justice requires, and whether a world composed of sovereign states organized according to international law will best realize it. Moreover, even if the morally optimal global political-legal order includes states, the legal incidents they enjoy may differ quite significantly from those states possess under existing international law. Not only might these incidents be distributed upward and downward – e.g. to global or sub-state regional governmental institutions – some forms of authority that are currently exercised on a territorial basis might come to be exercised on, e.g., a functional basis, or on the basis of membership in groups whose identities are not linked to specific territories.[29] Insofar as we have no idea

[29] See Richard T. Ford, "Law's Territory: A History of Jurisdiction," *University of*

how political authority will be allocated in such a world, we cannot know what the consequences of an international legal primary right to secession would be, and so whether it would fare better or worse than other norms governing secession at advancing peace, basic human rights, and political self-determination (not to mention whatever other ends we might one day be confident constitute morally appropriate goals for international law). Thus any moral argument for a primary right to unilateral secession is bound to be mere conjecture, and should be put in a highly conditional form.[30]

Michigan Law Review, 97:4 (1999): pp. 843-930.

[30] Whatever international legal norm might govern secession in an ideal world, might a case be made that if certain politically feasible changes were made to the existing global order, the creation of a primary right to secession in international law would produce no more wars or setbacks to basic human rights than would a less permissive legal right to secession (or a categorical prohibition)? David Copp's and Altman and Wellman's brief arguments that an international court exercise oversight vis-à-vis the exercise of a plebiscitary right to secession might be interpreted along these lines (Altman and Wellman, *Liberal Theory*; David Copp, "International Law and Morality in the Theory of Secession," *Journal of Ethics*, 2 (1998): pp. 219-45). One might object that such an arrangement is not politically feasible in the foreseeable future, and so no less speculative than is a claim regarding the norm that would govern secession in an ideal (full-compliance) world. Alternatively, or in addition, one might argue that Copp and Altman and Wellman assume the existence of institutions and/or institutional capacities the development of which would count as the supersession of international law, not its reform. That is, their argument requires the replacement of the horizontal normative order, or anarchical society, that is definitive of international law and a necessary condition for international relations with the vertical normative order that characterizes (even a federal) state.

A second objection to the argument that a right to secession can only be theorized institutionally is that while such an approach may be essential to creating just institutions, it cannot offer us any guidance regarding the permissibility of undertaking secession, or acting to support or suppress it, in the absence of such institutions.[31] This criticism also fails. To maintain that a particular group enjoys a moral right to secede is simply to hold that international law ought to accord that group a right to secede. As I noted above, this claim might be formulated in either ideal or non-ideal terms. Consider the latter first: a group has a moral right to secede if and only if the legal norm that currently ought to govern secession would accord them such a right. Note that this is consistent with maintaining that, all things considered, this group should not attempt to exercise its right to secession. As for a formulation of this claim as a matter of ideal theory, it too will need to be spelled out in institutional terms, though for the reasons set out above, it will likely be a very speculative claim. The key point is that the necessity of theorizing secession institutionally does not entail that the possession of a right to secede depends on existing institutional norms, but only on an empirically informed moral argument that the institutional (legal) norm that ought to govern secession would accord particular actors a right to secede.[32]

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[31] For a valuable discussion of this objection, see Norman, "Ethics of Secession," 46.

[32] One question that warrants more consideration than I can give it here is whether in the case of a non-ideal theory of the right to secession we should allow for the possibility of the moral equivalent to efficient breach; that is, norm violating conduct that is nevertheless justifiable because it produces

IV

Thus far I have sought to make some headway in the debate over the nature of secession and how we ought to theorize an international political right to engage in it. I turn now to a second point of contention between remedial-right theorists and some of their primary-right interlocutors, one that involves competing claims vis-à-vis the international legal norm governing secession that will best serve now or in the near future to advance or honor the goals of peace, the secure enjoyment of basic rights, and political self-determination. While this dispute points to a serious challenge to our ability to defend any particular international law governing secession, I argue it is one that we can overcome by using a precautionary approach to defend the superiority of a remedial-right over a primary one.

Remedial-right-only theorists, Buchanan foremost among them, maintain that the morally optimal international legal norm in a non-ideal world like ours permits secession only as a remedy for (a) forcible annexation by another state, or (b) as a last resort response to serious and persistent violations of basic human rights.[33] The case for a remedial-right only norm rests centrally on the claim that it

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a superior moral outcome to the one that would result from norm compliant conduct, even taking into account the costs to the rule of law.

[33] Buchanan, *Justice*, 353-9; Buchanan, "Secession," section 2.2. See also Norman, "Ethics of Secession," 41-3; Steven R. Ratner, *The Thin Justice of International Law* (New York: Oxford University Press, 2015): 160-1. Sometimes Buchanan includes as a separate ground for secession major violations of intra-state autonomy agreements, while at other times he describes such violations as falling under condition (b) above. The former characterization suggests more strongly

gets the incentives right. For example, Buchanan alleges that such a norm will encourage state officials to respect the basic human rights of their subjects, since the failure to do so will create a legal path to the loss of some of the territory over which they currently rule. A remedial-right only legal norm may also promote greater intrastate autonomy, if its explicit restriction of a unilateral legal right to secede to victims of forcible annexation or gross violations of human rights makes states more willing to devolve political power to regional or local government. Were a remedial-right only legal norm to have such an effect, it might well serve to advance the political self-determination of territorially concentrated groups, and perhaps their secure enjoyment of basic human rights as well. In contrast, Buchanan contends that a primary legal right to secession, whether nationalist or plebiscitary, will likely fare worse at both encouraging peace and respect for basic human rights and fostering political self-determination. With respect to the former, he notes that historically attempts to unilaterally secede are nearly always accompanied by violence, and at least in the case of national or ethnic groups, frequently involve campaigns of ethnic cleansing that can become genocidal. As for political self-determination, Buchanan suggests that the creation of a primary legal right to unilateral secession would likely discourage states from devolving political power to regional governments and/or investing in regions' economic development, or from facilitating internal migration, immigration, or asylum, all out of fear that doing so

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than the latter an attribution of non-instrumental value to political self-determination, though neither formulation constitutes a definitive stance on that question.

might eventually lead to secession and so the state's loss of territory and population (and all that follows from it). In short, a more permissive legal norm governing secession would likely do a worse job of advancing those values a morally defensible international legal order should aim to advance.

Altman and Wellman challenge a number of these arguments.[34] First, they point out that even in the absence of any international legal right many states already refrain from devolving political power to regional governments and/or fostering economic development in those regions because they fear it will lead to secession. It is not obvious, therefore, that the creation of a primary legal right to secession would lead to an increase in such conduct, and if it would, how large the increase would be. Second, they note that the devolution of political power to sub-state regional governments has sometimes served to pacify separatist desires. It is possible, therefore, that those who aim to preserve the existing state will conclude that they are more likely to realize this end by promoting intra-state autonomy than by centralized rule. If so, then state officials may elect to devolve political power to regional governments even if international law includes a primary right to secession.[35] Finally, Altman and Wellman suggest that the creation of a primary

[34] Altman and Wellman, *Liberal Theory*, pp. 58-65.

[35] Altman and Wellman fail to note empirical work that explores the conditions under which the devolution of political power to sub-state regional governments reduces or increases demands for secession, and the use of violence in its pursuit. Bakke and Wibbles, for instance, argue that devolution increases ethnic rebellion where there is significant economic inequality between regions, and where territorially concentrated ethnic or national groups are largely excluded from national

international legal right to secession may strengthen nationalist or would-be plebiscitary groups' bargaining power vis-à-vis other groups within the state, which may enable them to negotiate domestic political and legal arrangements that better advance their secure enjoyment of basic human rights and/or political self-determination. In other words, contrary to Buchanan's claim, the legal ability to threaten secession might actually facilitate intra-state autonomy.

The conclusion Altman and Wellman draw on the basis of these arguments is not that international law ought to be changed so as to include a primary legal right to plebiscitary secession. Rather, they maintain only that we lack the data to draw any conclusions regarding the incentive effects of different international legal norms governing secession.[36] The only defensible view is agnosticism: "…judgment should be suspended on any conclusion about a right to secede under international law until those potential consequences are far less uncertain than they are at this stage in the scholarly discussion of secession."[37] The theorist can rest content with such a conclusion, but not the political actor; his or her agnosticism does not suspend judgment but leaves intact an international legal order that more or less prohibits unilateral secession. Assuming, *arguendo*, that Altman and Wellman's agnosticism is

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government (Bakke and Wibbels, "Diversity, Disparity, and Civil Conflict in Federal States," *World Politics* 59 (2006): 1-50). If far more states are characterized by the presence of this kind of economic inequality and political representation than are not, then only rarely will states have good reason to pursue the devolution of political power as a means to head off secession.

[36] Altman and Wellman, *Liberal Theory*, p. 64.

[37] Ibid, 59.

well founded, what course of action should be taken by those political actors who could influence reform to, or the preservation of, international law's current stance vis-à-vis secession?

One possibility is that they should focus their limited resources elsewhere; for example, on efforts to reform international legal norms where we have data that warrants significantly greater confidence that this will lead to an increase in international law's advancement of its proper moral goals. The same is true for those who aim to influence the conduct of political actors, including theorists of international law and justice. Insofar as they wish to advocate for or against changes in international law now, rather than merely developing greater knowledge on the basis of which, at some future point in time, they plan to offer practical guidance, they should steer clear of secession. While this strategy should not be dismissed out of hand, it also seems unsatisfactory given the prevalence of secessionist movements, the number of violent conflicts to which they give rise, and the frequency with which secession is mooted as a solution to internal conflicts (regardless of whether they originated in a quest for independent statehood).[38] A second possibility, therefore, is to employ a precautionary approach when arguing

[38] A 2003 study found that about half the civil wars since the end of the Cold War involved rebels seeking to secede or gain substantial intra-state autonomy, while a 2001 study found that roughly 70% of civil wars since 1945 were ethno-nationalist in nature. See David S. Sirosky, "Explaining Secession," in Aleksandar Pavkovic and Peter Radan (eds.), *The Ashgate Research Companion to Secession* (Burlington, VT: Ashgate Publishing, 2011) for citation to these and others studies that demonstrate the centrality of secession movements to the incidence of armed conflict.

for the superiority of a specific international legal norm governing secession over its rivals.

The question of how to formulate a precautionary principle (or set of principles) so that it is both precise enough to be action guiding while also compelling as a principle (or principles) of rational choice is a vexed issue. However, Stephen Gardner finds a plausible candidate for a core precautionary principle in Rawls characterization of the conditions under which maximin reasoning is appropriate.[39] These conditions are as follows: the actor faces a choice under uncertainty, cares little for the potential gains he forgoes relative to the minimum he aims to secure, and views the failure to secure that minimum as unacceptable or catastrophic. Arguably these three conditions are met vis-à-vis the selection of a legal norm governing secession. First, if Altman and Wellman correctly maintain that we should have no confidence in predictions regarding the outcomes different legal norms governing secession will produce, then in deciding whether we should retain the existing norm or instead seek to replace it with a more permissive one we choose under uncertainty. Second, there appears to be a fairly widespread consensus (at least among liberal political and legal theorists) that peace and the secure enjoyment of basic human rights enjoy a kind of priority over the non-instrumental value of political self-determination.[40] That priority need not

[39] Stephen Gardner, "A Core Precautionary Principle,' *Journal of Political Philosophy* 14:1 (2006): pp. 45-9.

[40] Remedial-right theorists are clearly prepared to accept this claim, but there is some evidence that (liberal-) nationalists and plebiscitary theorists do so as well. Altman and Wellman, for example,

be lexical, but we must care relatively little about the advancement of political self-determination in comparison to our concern for setbacks to peace and the secure enjoyment of basic human rights. Third and finally, the gross violation of basic human rights and, typically, war (or widespread violence) constitute a catastrophic or unacceptable outcome.[41] There is some reason, then, to think that in the present circumstances we ought to adopt a precautionary approach to theorizing secession,

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explicitly grant that where realizing peace and human rights is incompatible with a legal right to secession the latter right must give way (Altman and Wellman, *Liberal Theory*, p. 56). David Miller's nuanced treatment of nations' claim (but, explicitly, not a right) to secession suggests the protection of human rights trumps the advancement of national self-determination. Miller notes the difficulty of "estimating whether minority rights are likely to be better or worse protected if secession goes ahead," but unfortunately limits his remarks regarding what to do in the face of such difficulty to identifying one way we should *not* proceed (Miller, "Secession," p. 71). Further support for the claim that we care far more about peace and human rights than we do about political self-determination can be seen in the large literature arguing for armed responses to aggression and gross violations of human rights, but hardly any arguments at all for armed intervention in support of political self-determination for groups that have been neither recently forcibly annexed nor subject to gross violations of their human rights.

[41] There is one wrinkle here, since just wars may sometimes be acceptable. Elsewhere I argue against the treatment of peace as a proper goal for a morally defensible international law distinct from the advancement of basic human rights (David Lefkowitz, "Reflections on the Thin Justice of International Law: Peace, Justice, and Secession (*Ethics and International Affairs Online*)). Rather, peace generally but not necessarily contributes more to the secure enjoyment of human rights than does war. If that argument is correct, we only need hold that the gross violation of basic human rights counts as a catastrophe.

and this requires that we exclude from our deliberations any argument for a candidate norm premised on advancing or honoring the non-instrumental value of political self-determination. In other words, the precautionary approach entails that we ought to select among competing candidates for a legal norm governing secession solely on the basis of which one we believe will best serve to advance peace and the secure enjoyment of basic human rights.

The precautionary approach appears to favor a remedial legal right over both the nationalist and plebiscitary primary rights to secession. The former tracks and responds to all and only those goals on the basis of which we ought to assess candidate norms *given our current knowledge*, whereas the attractiveness of the latter rights lies in their serving to advance political self-determination even in cases where doing so is not necessary to secure peace or individuals' basic human rights. But this is precisely the consideration that the precautionary approach requires we exclude from our deliberation. Of course, primary-right theorists might respond that their favored legal norm will do better at advancing peace and human rights than will a remedial-right to secession. Note, first, that to argue on these grounds would constitute a significant shift from past practice, while also implicitly conceding that at least for purposes of a non-ideal moral theory of international law their favored moral account of secession is irrelevant. But second, and more importantly, it is hard to see why an international legal norm that *is not* specifically designed to advance the goal of peace and the secure enjoyment of human rights would do better at achieving that end than would a legal norm that *is* specifically designed to do so.

The quality of the evidence available to us might once again be offered as an objection to drawing any moral conclusion regarding the stance international law ought to take vis-à-vis secession. But the question of whether we have sufficient evidence to warrant some degree of confidence when making an empirical claim is a matter of judgment. With respect to the effects on peace and human rights that a more permissive international legal norm governing secession would have in a world organized more or less as ours currently is, I believe the evidence warrants some confidence that we would see an increase in systematic violence and a decrease in the secure enjoyment of basic human rights. More importantly, since political actors cannot avoid engaging in practices that support one or another legal norm governing secession, they must act on the evidence they have, even if it warrants only a little confidence that one norm will prove superior to another.

It is worth emphasizing the seriousness of the challenge posed by the argument for agnosticism vis-à-vis the effects of different candidates for an international legal norm governing secession. If secession is an inherently institutional concept, then moral arguments for or against a right to secession (with some specific content) can only be moral arguments for the creation of a legal right to secession (with that content). These arguments must be made on the basis of institutional moral reasoning, which as I explained earlier assesses a legal norm in terms of its contribution to advancing the morally proper goals of international law. It follows that if we lack the data we need to make any judgment regarding the superiority of one candidate norm over its rivals, we cannot know whether there is a moral right to secession (and if so, what its content is). Thus the agnosticism

Altman and Wellman urge entails even greater limits than they recognize on our ability to assess the morality of secession.

V

In the previous section I argued that in circumstances like those that presently obtain internationally, a remedial-right to secession will better serve the goal of advancing peace and the secure enjoyment of basic human rights than will a primary right to secession. But is a remedial-right superior in this respect to international law's current stance on unilateral secession, namely that outside the colonial context no group enjoys a legal right to unilateral secession? In what follows I offer a number of reasons to think it is not.

Consider Buchanan's characterization of a remedial-right to secession: a territorially concentrated group may unilaterally secede only if it is the victim of (a) forcible annexation by another state, or (b) serious and persistent violations of basic human rights. At least vis-à-vis the examples Buchanan offers to motivate his case for a remedial-right to secession for victims of forcible annexation, there is no need to reform international law to accommodate the intuition that these political communities had a right to statehood.[42] Where one state's forcible annexation of part or all of another state's people and territory goes unrecognized as a matter of international law, the victims retain their pre-existing legal right to independent statehood. This was true of the Baltic States, for instance, which were illegally occupied by the Soviet Union between 1940 and 1991. Nor do we need a remedial-

[42] See, e.g., Buchanan, "Secession," section 2.2.

right to secession to account for new states produced by the dissolution of a state, as in the case of the successor states to the U.S.S.R. and Yugoslavia. Rather, the original state's loss of sovereignty over people and territory as part of its dissolution creates the necessary legal space in which the new successor states can arise.[43] A graver concern with a legal right to unilateral secession for victims of forcible annexation is that if it applies retroactively, i.e. to forcible annexations carried out prior to the incorporation of a remedial-right to secession into international law, it will invite or exacerbate violent conflict. Few if any borders were established in a manner free from injustice. In theory this cost might be outweighed by the deterrent effect the remedial-right would have on potential future forcible annexations. Yet as noted above, contemporary international law already precludes the acquisition of sovereignty over territory and people through forcible annexation, and therefore already provides whatever deterrence might be achieved by the creation of a right to unilateral secession for victims of forcible annexation.

We should also be skeptical of a deterrence argument for a remedial-right to secession in the case of serious and persistent violations of basic human rights perpetrated or condoned by the state. Presumably the territorially concentrated victims of such a campaign of human rights violations will do whatever they can to stop it, including the use of force, regardless of whether they have a legal right to secede. Whatever deterrent effect the likelihood of such resistance provides will be

[43] See the discussion of the Badinter Commission's findings vis-à-vis the new states that emerged on the territory formerly ruled by Yugoslavia in Craven, "Statehood," 231.

unaffected by international law granting the victims a legal right to secede. Third parties, or at least other states, already enjoy a legal permission (indeed, a responsibility) to aid victims of systematic and persistent violations of their basic human rights by their own state, arguably including the provision of military supplies and even armed intervention. That is, international law either already includes or could be reformed to include norms that serve at least in part to deter *governments or office-holders* from violating the rights of their subjects by threatening action that would make their removal from office (more) likely, without having to sanction secession. Such norms are more likely to track the interests of political leaders than will a norm permitting secession, since such leaders may be less concerned with the diminishment of the state's territory than with remaining in power, and so be more deterred by threats to the latter than to the former. Nor should we forget that international law already permits a number of practices that can be used to deter states – or better, government officials – from perpetrating gross violations of (some of) their subjects' basic human rights, including economic sanctions and international criminal charges. Taking all of these considerations into account, it seems highly unlikely that the fact that their conduct would create a legal right to unilateral secession for their victims would make the difference in state officials' decision not to engage in systematic and widespread violations of some of their territorially concentrated subjects' basic human rights.

Moreover, even if we concede *arguendo* that a remedial-right to secession would make a small contribution to deterring violations of basic human rights, we must also take into account any incentives for perpetrating such violations this right

would create. Donald Horowitz, for example, argues that were international law to include a right to remedial secession some would-be separatists would be motivated to provoke the state that rules them into violent crackdowns against their group, in the hope of acquiring a legal right to secede.[44] There is some evidence that exactly this line of thought motivated the Kosovo Liberation Army's conduct in the late 1990s.[45] Kemoklidze argues that the recognition of Kosovo as an independent state by some members of the international community created a moral hazard subsequently realized in the separatist conflict in South Ossetia.[46] Others might add attempts at secession in Abkhazia and Crimea. Of course, we must be careful here; actual examples of such conduct will not show that recognition of a legal right to secession would increase their incidence, since they occurred in the absence of such a right. Nevertheless, they do provide evidence that some actors seeking independence are prepared to instigate great violence against the very people whose interests they claim to be seeking to advance. Therefore, we should be wary of legal reforms that might encourage these actors to pursue such a course of action,

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[44] Donald Horowitz, "A Right to Secede?" in Stephen Macedo and Allen Buchanan (eds.), *Secession and Self-Determination, NOMOS XLV* (New York: New York University Press, 2003).

[45] See Alan J. Kuperman, "The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans," *International Studies Quarterly* 52:1 (2008): 49-80. For a contrary view, see Alex J. Bellamy and Paul D. Williams, "On the Limits of Moral Hazard: The Responsibility to Protect, Armed Conflict, and Mass Atrocities," *European Journal of International Relations* 18:3 (2012): pp. 539-71.

[46] Nino Kemoklidze, "The Kosovo Precedent and the 'Moral Hazard' of Secession," *Journal of International Law and International Relations* 5:2 (2009): 117-140.

particularly if we have compelling reasons to doubt those reforms will produce much good.

Perhaps a remedial-right to secession can be defended on the grounds that its successful exercise will lead to a decrease in the future incidence of states' grossly violating their subjects' basic human rights. Where such a campaign has taken place, it might be thought that the likelihood that the perpetrators and the victims will be able to co-exist as equal citizens of even a federal state is less than the likelihood that they will be able to co-exist as citizens of two independent states. Whether this is true depends on a host of factors, however. For example, the division of the original state may give rise to irridentist conflicts, or to systematic persecution of members of one group that remain "trapped" within the territory of the state in which the other group is a majority. Indeed, a recent study by Sambanis and Schulhofer-Wohl concludes that partition does not prevent the recurrence of civil war.[47] More importantly, whether a single- or two-state solution is most likely to reduce the likelihood of conflict in the future depends on a variety of factors that vary from case to case.[48] Better, then, to adopt a legal norm that gives international actors greater flexibility to determine in each case which course of action will best serve to advance peace and the secure enjoyment of basic human rights. I contend

[47] Sambanis and Schulhofer-Wohl, "What's in a Line?" *International Security* 34:2 (2009): 82-118.

[48] Among the myriad factors that Sirosky identifies in his three-level analysis of the causes of secession are political grievances, economic inequalty, ethno-demography, ethno-geography, the state's institutional capacity and strength, state policies of repression and inclusion, and other states strategic interests. See Siroky, "Explaining Secession."

that by this measure the existing international legal norm governing secession is superior to one that would create a remedial-right. While the current norm recognizes no right to unilateral secession it does permit consensual secession, even in cases where that takes place in conditions that could hardly be described as voluntary. The secession of South Sudan provides a contemporary example; Eritrea's a slightly older one.

Of course, this argument entails that vis-à-vis their prospects for independent statehood, members of a group that has been subject to gross violations of their basic human rights by the state that rules them are largely at the mercy of other states' willingness to pressure their state into holding a referendum on secession. This may strike many readers as problematic. Surely the fate of these victims should not rest on power and interest; rather, they should enjoy an entitlement, a right, to their own state. While understandable, this reaction is mistaken for two reasons. First, whether a group ought to enjoy an international legal right to secession depends on the contribution a norm according groups of that type such a right will make to the advancement of peace and the secure enjoyment of human rights. The mere observation that a candidate legal norm will leave certain actors dependent on politics does not suffice to show that the norm is unjustifiable. Second, it is a mistake to oppose law and politics, and to think that the creation of a legal right to remedial secession offers an alternative to power and interest – to politics – as a means for achieving peace and the secure enjoyment of basic human rights. Law can serve to channel politics, to shape its exercise, but so too power and politics shape the form and exercise of law, as would no doubt be

true were international law to incorporate a remedial-right to secession. What we must aim for, therefore, is not the replacement of politics with law but the optimal mix of law and politics. My position is that at present it is the existing international legal norm governing secession that does so, not a remedial-right.

One last argument for an international legal right to remedial secession focuses on the effect that such a legal norm would have over time on actors' legal consciousness; that is, the way in which international law informs actors' construction of the social world they inhabit.[49] Specifically, the claim is that international law's incorporation of a remedial-right to secession would contribute to the on-going project of reconceiving sovereignty as first and foremost a means to the protection and/or promotion of human rights. The crucial question here concerns the marginal contribution the creation of an international legal norm creating a right to unilateral remedial secession would have on the advancement of the human rights revolution in international affairs. This is an exceedingly difficult question to answer, but my suspicion is that the answer is "not much." Certainly international law need not adopt a remedial-right to secession in order to convey an understanding of state sovereignty (or jurisdiction) as instrumentally valuable and conditional.

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[49] For general discussion, see Paul Schiff Berman, "Seeing Beyond the Limits of International Law," *Texas Law Review*, 84 (2006): pp. 1265-1306; Jutta Brunnee, and Stephen J. Toope, "Constructivism and International Law" in J. L. Dunoff and M. A. Pollack (eds.) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (New York: Cambridge University Press, 2013).

The foregoing considerations, then, provide a strong case for the conclusion that, at least at present and for the foreseeable future, international law will likely better serve to advance peace and the secure enjoyment of basic human rights if it includes no right to secession, rather than a remedial one. These arguments are conditional on empirical premises, of course. The complexity of the phenomena in question and the limits on our ability to control the many variables that are plausibly thought to contribute to the incidence of demands for secession, as well as the use of violence to advance or respond to such demands, warrants considerable modesty when drawing a conclusion based on such claims. As I argued earlier, however, we must choose some norm to govern secession, and given the institutional nature of the concept of secession and the demands of institutional moral reasoning, we must choose on the basis of the best information currently available to us.

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