WHO KILLED ARTICLE 38(1)(B)? A REPLY TO BRADLEY & GULATI

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INTRODUCTION

Curtis Bradley and Mitu Gulati's provocative article, *Withdrawing from International Custom*,[1] shines light on a central yet under-analyzed issue about customary international law and brings to bear thought-provoking research and analysis. Ultimately, however, when one considers custom's nature and purpose, the withdrawal proposal is unpersuasive as a matter of theory and limited as a matter of practice.

First, the withdrawal proposal is premised on an analogy between treaties and custom given the apparent anomaly that withdrawal is sometimes permitted from the former but never from the latter. Yet the emphasis in treaty law is on optional commitments entered into individually by states, whereas custom sets the ground rules for the international system by imposing a minimum core of binding obligations on all states. Treaties might commonly permit exit precisely because custom, which does not allow for withdrawal, exists to protect key structural and substantive interests. If so, the suggestion that states should be able to withdraw from custom because they can withdraw from treaties is flawed. Treaties and custom serve different purposes, so it is unsurprising that they have complementary rather than analogous secondary rules.

Second, the potential exceptions to a right of withdrawal appear to be so extensive as to largely swallow the rule. Ignoring the presumption in treaty law that withdrawal is prohibited unless it is expressly or impliedly permitted, the authors fail to state a positive case for when withdrawal would be appropriate and give but a single hypothetical to illustrate their theory in practice. Instead, sensitive to some of the problems of permitting withdrawal from key customary norms, Bradley and Gulati carefully craft

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1. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010).

numerous exceptions to and limitations on their proposal. Not only do these exceptions appear to be somewhat ad hoc, but their breadth undermines the boldness of the withdrawal proposal, exposing its negligible effects in practice.

Third, the withdrawal proposal may be very interesting within the confines of academia, but seems hazardous when appreciated in its real world context. The authors seem intent on considering their proposal within the controlled environment of the academic laboratory, seeking to identify the ideal rule and best possible exceptions. But concern arises when their proposal is transported into the real world because the authors cannot ensure that states will accept their headline claim—a right of withdrawal—subject to all of the constraints they deem necessary to make their proposal palatable. Despite this, Bradley and Gulati do not account for the costs of introducing uncertainty about custom's secondary rules, nor do they sufficiently consider the ways in which their proposal is likely to facilitate opportunistic and abusive claims.

Finally, allowing states to withdraw from custom might stunt custom's development and shift power from the majority of states to individual states. Drawing on the concepts of exit and voice developed by Albert Hirschman,[2] this Article suggests that allowing states to withdraw from customs (exit) might lessen their incentive to argue for changes to those customs (voice), which could inhibit the dynamics of change in customary international law. In addition, changes in customary law obligations would come not from the actions and reactions of states as a whole but from a single state's decision to unilaterally withdraw. The resulting shift in power from the majority of states to individual states is problematic given custom's function of protecting key structural and substantive norms in order to best serve the interests of the international community.

Bradley and Gulati's withdrawal proposal is certainly novel. Although a strength in the academy, this novelty begs the question of why the authors can cite to no examples of states arguing for a right of withdrawal. Novelty can be a strength where authors have seen a truth that others have missed, but it can also be a weakness where authors have missed a truth that others have seen or assumed. I believe that the lack of agitation by states for a right of withdrawal reflects a general recognition by them that they have a collective interest in having certain norms determined by a collective process, without the possibility of individual withdrawal. In light of this interest, I hope that any concerns raised about the death of or serious injury

2. ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

to Article 38(1)(b) of the ICJ Statute as a result of Bradley and Gulati's withdrawal proposal will come to be seen as greatly exaggerated.[3]

I. ON FALSE ANALOGIES

Central to the Bradley and Gulati article is an analogy between the secondary rules for treaties and customary international law. The article begins by contrasting treaties and custom: treaties are expressly negotiated, usually written down, subject to domestic ratification and generally provide for the right of individual states to withdraw; custom, by contrast, is not expressly negotiated, is often unwritten, does not require domestic ratification and permits persistent objection but not subsequent withdrawal.[4] "It is not obvious," the authors argue, "why it should be easier to exit from treaties than from [custom], especially given the significant regulatory overlap that exists today between treaties and [custom]" and that "modern claims about the content of [custom] often rely heavily on the content of treaties, especially multilateral treaties, even though many of these same treaties contain withdrawal clauses."[5]

As treaties and custom often cover similar subject matter, and treaties frequently evidence custom, the authors assume that the sources' secondary rules should be analogous. But analogical reasoning works well only if two situations are "relevantly similar" and there are not "relevant differences" between them.[6] Despite the centrality of the analogy to their argument, Bradley and Gulati only briefly (and belatedly) question whether differences between treaties and custom justify divergent rules.[7] In doing so, they avert to the fact that states withdrawing from treaties remain bound by custom, leading to the concern that, if states could also withdraw from custom, gaps might appear in the law.[8] Yet they respond by noting that international law is not a seamless web of rules and, in any event, such gaps might encourage treaty negotiations and would otherwise be subject to the *Lotus* principle of freedom of action.[9]

By failing to recognize relevant differences between the function of

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3. With apologies to Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970) and Louis Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 544 (1971).

4. Bradley & Gulati, *supra* note 1, at 204.

5. *Id.* at 205.

6. *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993); *see also* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 933 (1996).

7. Bradley & Gulati, *supra* note 1, at 270-73.

8. *Id.* at 272.

9. *Id.* at 272-73.

treaties and custom, and the potential synergy between these sources, Bradley and Gulati overlook explanations that account for these sources' divergent secondary rules. Treaties may well commonly permit exit precisely because custom, which does not allow for withdrawal, exists to protect key interests. If so, one cannot suggest that states should be able to withdraw from custom because they can do so from treaties as this argument fails to take into account the effect of the presumed safety net provided by custom. If treaties and custom had equivalent secondary rules, there would be little utility in having both sources. Instead, the sources' secondary rules complement, rather than mirror, each other. Treaties enable states to enter into—and sometimes withdraw from—new or different international obligations on both an optional and individual basis. But this patchwork of obligations is made workable by a minimum core of generally applicable customary norms that exist to protect key substantive and structural interests of the international community.

In some areas, custom exists in the absence of universal treaties (e.g., jurisdiction, statehood and state responsibility). In other areas, custom exists alongside treaties that may be universally ratified, widely ratified, sparsely ratified and/or pockmarked by reservations (e.g., the use of force, diplomatic and state immunities, the law of treaties, international humanitarian law and human rights). Some norms are extended from custom to treaty and others from treaty to custom. To understand why, it is helpful to consider the concept of legalization, which defines international commitments by reference to three characteristics: obligation (whether or not a commitment is binding); precision (where the legal commitment falls on the spectrum between specific rules and general standards); and delegation (whether a third party, like a court or tribunal, has been granted authority to interpret and apply the law).[10]

Custom typically involves high levels of obligation but low levels of precision and delegation. (With the exception of *jus cogens* norms, which are always obligatory, states can contract out of custom by treaty or regional custom or through persistent objection, but the former two require the consent of other interested states and the latter is rarely utilized.) Where the custom precedes the treaty, the latter may have the advantage of increasing precision or delegating enforcement, but it does not undermine the obligatory nature of custom. Where the treaty precedes the custom, the

10. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000). *See also* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992) (expanding the distinction between rules and standards); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–89 (1976) (distinguishing between "formally realizable" rules and standards defined by underlying "substantive objectives").

movement to custom often reflects recognition of, or a desire to recognize, the core commitments as non-revocable and binding on all states, thereby increasing their obligatory nature or scope. For example, the push to recognize a customary prohibition on apartheid seemed motivated by a desire to bind apartheid South Africa.[11]

When treaties do not overlap with customary law obligations, it is unsurprising that states may withdraw from those treaties because such commitments are optional in the first place and thus, subject to reliance interests and corresponding notice requirements, should usually be revocable. But what about when treaties overlap with custom? Regarding such treaties, some say nothing about withdrawal,[12] others expressly permit withdrawal without mentioning custom,[13] and others allow withdrawal but explicitly note that states remain bound by their customary law obligations.[14] In each case, however, the background assumption is that states remain bound by custom.[15] One cannot reason that because withdrawal is permitted from treaties in particular areas, it should also be permitted from equivalent customary norms, as this reasoning fails to take account of the effect of the presumed safety net provided by customary international law.

Take the Genocide Convention, for example, which prohibits treaty parties from committing genocide, gives the International Court of Justice ("ICJ") jurisdiction over claims relating to its interpretation and/or

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11. *See* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 479 (1985); *see also* Holning Lau, Comment, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495 (2006) (making a similar point about human rights norms in general).

12. *See, e.g.*, Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

13. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, art. XIV, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

14. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 63, ¶ 4, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 68 (Denunciations "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 63, ¶ 4, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (same); Geneva Convention Relative to the Treatment of Prisoners of War, art. 142, ¶ 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (same); Convention Relative to the Protection of Civilian Persons in Time of War, art. 158, ¶ 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (same).

15. Vienna Convention on the Law of Treaties, art. 43, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT] (stating that withdrawal from a treaty "shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty").

application, and explicitly permits withdrawal under certain conditions.[16] One could not assume (and the authors do not assume) that similar withdrawal rights should therefore be permitted under custom because the treaty and customary norms cover similar substantive terrain and the treaty is often cited as evidence of the custom. A treaty party that withdraws from the Convention remains bound by the substantive prohibition on genocide, both as a matter of custom and because of its *jus cogens* status, but will no longer be bound by its non-customary law obligations, such as consent to ICJ jurisdiction. It may be that it is this very customary law safety net that makes withdrawal from the treaty acceptable (or, at least, less objectionable).

The analogy between treaties and custom betrays an implicit commitment to viewing international law through a contract law lens. As with contracts, states can individually determine whether or not to enter into treaties and, subject to their terms, may also withdraw from those commitments. The emphasis is on optional obligations and individual consent. But custom is developed and changed by collective actions and generally imposes mandatory obligations to protect common community interests. The analogy here might be closer to the compulsory application of criminal law or mandatory public regulation. No one finds it strange that individuals cannot unilaterally withdraw from criminal law obligations (such as the prohibition on murder) or rules designed to facilitate societal interactions (such as road rules and immigration laws). The secondary rules in these areas of law diverge from those in contract law because they serve different purposes.

There might, in fact, be a stronger analogy between custom and social contract theory, than between custom and contract. In domestic law, the notion of a social contract captures the idea that legitimate state authority must be based on the consent of the governed. Individuals give general or theoretical consent to limit their rights in order to create a fair and workable set of rules governing all of them in a society.[17] Individuals cannot unilaterally withdraw from these rules, but they can work collectively or by majority to change them. By analogy, consent in custom is not given by individual states to individual rules; rather states consent collectively to generally binding rules in recognition that certain substantive and structural

16. Genocide Convention, *supra* note 13, at arts. I, IX, XIV.

17. *See generally* THOMAS HOBBES, LEVIATHAN (Dent 1983) (1651); JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Ian Shapiro ed., Yale Univ. Press 2003) (1690); JOHN RAWLS, A THEORY OF JUSTICE (1971); JEAN-JACQUES ROUSSEAU, THE BASIC POLITICAL WRITINGS (Donald A. Kress ed., trans., Hackett 1987) (1750-1762).

rules are needed to create an orderly and just international community.[18] Custom protects collective interests while treaties prize individual autonomy, so it is unsurprising that the sources' secondary rules are complementary rather than analogous.

II. OF BOLD CLAIMS AND LIMITED EFFECTS

The idea that certain community interests should prevail over the right of individual states to withdraw from custom is not inimical to Bradley and Gulati's theory. Sensitive to the need to protect some norms from being entirely optional, the authors identify numerous potential limitations on a right of withdrawal, including: an exception for highly normative customs, such as *jus cogens* norms; limitations where exiting would impose costs on other states, such as with the prohibition on war; and possible exceptions for human rights norms on account of "significant agency problems" and "certain structural or background principles" such as *pacta sunt servanda*.[19] But this patchwork quilt of exceptions raises a number of concerns.

First, it is not clear that one should start with the presumption that withdrawal from custom is generally permitted and then look for exceptions to that general rule. If one takes the treaty analogy seriously, it would support the opposite presumption. Absent a specific term to the contrary, withdrawal from a treaty is *not permitted unless* "the parties intended to admit the possibility of denunciation" or such a right "may be implied by the nature of the treaty."[20] If the same presumption applied to custom, Bradley and Gulati would need to provide a positive case for when a right of withdrawal was intended or could be implied from the custom's nature.[21] Yet the authors ignore this aspect of the treaty analogy and make

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18. *See* J.H.H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZAÖRV 547, 556 (2004) (the goals of modern international law "often transcend any [specific] transactional interest and are of a 'meta' type – i.e. the overall interest in having an orderly or just international community" thus making analogies with contracts unconvincing); Bruno Simma & Andreas L. Paulus, *The "International Community": Facing the Challenge of Globalization*, 9 EUR. J. INT'L L. 266, 266 (1998) (noting that the idea of an "international community" prioritizes community interests over the egoistic interests of individual states, leading to a departure from the classical *Lotus* principle towards a more communitarian approach to international law); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 229-235 (1994) (tracing the movement from traditional bilateral approaches to international law founded on a "delict-property-contract ethos" to a modern, more multilateral approach that emphasizes certain community interests of states and non-state actors as a whole over the views and consent of individual states) (citing Philip Allott, EUNOMIA: NEW ORDER FOR A NEW WORLD 324 (1990)).

19. Bradley & Gulati, *supra* note 1, at 263-68, 273-74.

20. VCLT, *supra* note 15, at art. 56.

21. There were suggestions in the VCLT's drafting history that implied withdrawal might not be possible for codifying or law-making treaties, though no firm conclusion was reached partly because of

no such positive case.

Second, the exceptions give the impression of being ad hoc rather than coherent. It may have been helpful for the authors to ground their exceptions in related principles, such as limitations on the permissibility of countermeasures. Countermeasures arguably reflect a narrow right to withdraw from certain international obligations in specific circumstances. Although the wrongfulness of an act not in conformity with an international obligation is precluded if and to the extent that it amounts to a countermeasure, various limitations apply, including that such measures cannot affect obligations: to refrain from using force; for the protection of fundamental human rights; of a humanitarian character prohibiting reprisals; or that amount to peremptory norms.[22] Tapping into these debates may have provided a fruitful basis for grounding some of the exceptions that Bradley and Gulati propose, whilst also highlighting how controversial and problematic even a narrow right of withdrawal has proved.

Third, it is unclear how far the potential exceptions to a withdrawal right extend. As the authors do not positively identify which customs would be subject to withdrawal, assessing the practical impact of their theory is difficult. If the restrictions are limited, we may end up with states being able to unilaterally opt out of important substantive and structural norms, despite potential detriment to specific states and non-state actors or to the international system as a whole. If they are expansive, the bold theoretical claim that states should be able to presumptively withdraw from custom might be so circumscribed in practice as to have little effect. Given the nature of customary norms, which exist on a spectrum between more normative and more facilitative rules,[23] I suspect that any exceptions to a

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the complicating factor that states remain bound by the underlying customary rules in any event. Report of the International Law Commission on the Work of Its Eighteenth Session, [1966] 2 Y.B. Int'l L. Comm'n 250-51, UN Doc. A/CN.4/SER.A/1966/Add.1. The International Law Commission suggested that peace and boundary treaties do not permit implied withdrawal, whereas treaties of alliance do, *id.*, but it is hard to find a clear rationale that could be applied to all treaties. Aust distinguishes territory, codification, peace and disarmament, permanent regimes (like the Suez Canal) and human rights treaties which do not permit implied withdrawal, from alliance, commercial, trading, cultural relations, dispute resolution and international organization constituent treaties which do; suggesting that implied withdrawal is more likely when there is no presumption of a customary obligation (e.g., dispute resolution clauses given the presumption that international jurisdiction is consensual) and less likely when dealing with highly normative issues (like human rights) or interests that cannot be protected through the provision of mere notice (like boundary treaties). ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 290-91 (2007).

22. INTERNATIONAL LAW COMMISSION, ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, arts. 22, 49-54 (James Crawford, ed., Cambridge Univ. Press 2002) (2001) [hereinafter ARTICLES ON STATE RESPONSIBILITY]

23. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 758, 764-66 (2001).

right of withdrawal would end up largely swallowing the rule.

At one end of the spectrum, some customs deal with highly normative commitments, such as human rights norms, restrictions on the use of force, and humanitarian law obligations. The international community has a strong interest in these norms existing and having a particular content, regardless of the individual interests of particular states. Some of these normative customs are classified as *jus cogens*, such as the prohibition on genocide and the use of force, meaning that states accept that the normativity of these rules outweighs the right of any state to unilaterally dissent from them. Others are not categorized as *jus cogens*, yet unilateral withdrawal would be problematic because the rules implicate core interests of other states or non-state actors. These customs include certain human rights protections, limitations on lawful uses of force (such as necessity and proportionality), and key humanitarian law principles (including the principles of distinction and proportionality and the prohibition on causing unnecessary suffering).[24]

At the other end of the spectrum, some customs help to facilitate interstate interaction by establishing structural constraints that permit states to coordinate and cooperate. These customs often work to minimize international friction by balancing competing interests of states, but generally lack the strongly normative quality of the customs outlined above. Examples include customary norms governing the law of treaties (e.g., who may sign a treaty, when a state can withdraw from a treaty and the requirement to abide by treaty commitments in good faith (*pacta sunt servanda*)), state responsibility (e.g., when a state will be responsible for the actions of its organs, sub-units, officials and non-state actors), and jurisdiction and immunities (e.g., when a state can assert jurisdiction extraterritorially or claim immunity before a foreign court). As these rules balance opposing interests, there is often room for debate about the precise trade off that should be made and their content may change over time. But, regardless of their exact content, states benefit from having generally applicable and relatively stable rules to structure and manage their interactions and competing interests.

In the case of both normative and facilitative customs, the acting state is not the only one with an interest in these customary norms. In some

24. These norms largely overlap with those that cannot be affected by countermeasures. *See* ARTICLES ON STATE RESPONSIBILITY, *supra* note 22, at art 50. *See also* Silvia Borelli & Simon Olleson, Obligations Relating to Human Rights and Humanitarian Law, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1177, 1177 (James Crawford, Alain Pellet & Simon Olleson eds., 2010) (explaining that these limitations on countermeasures seem motivated by the laws of humanity and the dictates of the public conscience).

cases, other states or non-state actors have *specific interests* that cannot be protected through mere notice. Civilians will not feel satisfied that they are now the subject of legitimate attack simply because a state has given notice that it no longer considers itself bound by the rule on distinction. Nor will one state feel appeased that another is exercising jurisdiction over matters within the first state's territory simply because the latter gave notice that it no longer considered itself bound by the customary norms on extraterritorial jurisdiction. In other cases, states have a *general interest* in having universal rules in order to structure their basic interactions and reduce transaction costs. Allowing states to depart from foundational rules, like *pacta sunt servanda*, would cause significant headaches for international interaction even if notice were given. Likewise, permitting withdrawal from structural rules, such as a federal state being bound by the actions of its component units, would increase uncertainty and transaction costs.

To the extent that Bradley and Gulati note that the mandatory approach to custom may have solidified overtime, this should not be surprising given both the increased number of states (making patchwork rules on core structural or interactional issues more cumbersome and costly) and the more normative content of international law post-World War II (which now encompasses commitments like human rights obligations). Waiting for treaty solutions to cover potential gaps left by withdrawal may be problematic where negotiations are protracted and/or individual states have incentives to hold out on rules that are in the general interest of the international community. And resorting to the *Lotus* presumption of freedom of action in these areas would be unsatisfactory where one state's actions are likely to infringe on the interests of other states and non-state actors. This may explain why international courts have shied away from relying on the *Lotus* principle to resolve disputes in controversial areas.[25]

Of course, Bradley and Gulati might well object that each of these customs would be protected from withdrawal by one of their many exceptions or that, even if exit were permitted, states would lack the incentive to withdraw. But, if so, to what does their theory really apply? Other than a hypothetical about the diplomatic pouch, their article is largely bereft of examples of customs to which their controversial theory might apply. I believe that both this illustration and the absence of other examples speak volumes about the limited nature of their theory.

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25. *See, e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8) (failing to discuss or apply the *Lotus* principle).

The diplomatic pouch example is illuminating because it involves a balance between the interests of the sending and receiving state, rather than between a state and an individual or the international community. Reasonable disagreements may exist over whether a customary rule should prohibit or permit screening of diplomatic pouches, which contrasts with more normative customs where the international community has a clear interest in the rule having a particular content (as, for example, with genocide and the principle of proportionality). Tit-for-tat responses would not be unreasonable in this area, in contrast to other areas where equal but opposite retaliation would be objectionable (as, for example, with human rights norms). And the provision of notice would allow other states to modify their behavior in order to lessen any harm caused by the screening, which may not be possible in other areas (for example, it is difficult to see how one state could modify its behavior to lessen the harm of objectionable exercises of prescriptive jurisdiction in its territory by another state).

The absence of other examples is even more illuminating. Bradley and Gulati suggest that their article sets out a general theory and that the next step is to develop a typology of customs to which it applies.[26] But not applying their proposal in the current article works to obscure something important about their theory. Underlying the limitations and exceptions they espouse seems to be a thesis that withdrawal from customary norms is not problematic, subject to adequate notice being given, where exiting effectively causes no injury.[27] But if customs usually exist in order to protect the interests of other states or non-state actors individually, or of the international community collectively, this "no injury" requirement might be the exception that swallows their rule. Subject to *jus cogens* norms, we already permit states to opt out of custom through treaty or regional practices where other affected states consent. What, if anything, is left between customs where other affected states would not consent to one state opting out and customs where a state should be able to unilaterally withdraw because doing so would cause no injury?[28]

III. OUT OF THE LABORATORY

It is interesting how Bradley and Gulati characterize the aim of their paper. They describe their goal as not to challenge custom's legitimacy but

26. Bradley & Gulati, *supra* note 1, at 273.

27. *See id.*

28. To the extent that one could identify customary norms that would be appropriate for a withdrawal right, I would support the application of many of the limitations identified by the authors and Laurence Helfer. *See id.* at 258-59, 273-75; Laurence R. Helfer, *Exiting Custom: Analogies to Treaty Withdrawals*, 21 DUKE J. COMP. & INT'L L. 65 (2010).

to "better understand" how it does and should operate.[29] Consistent with that goal, they claim to be writing "primarily for scholars and students of international law," with the aim of initiating an "academic discourse" about whether the default view of custom might be more appropriate in certain circumstances and about what subject matter limits and notice requirements would ideally apply.[30] In doing so, they seem to be self-consciously attempting to confine their project to the academy, with no apparent ambition to speak to states or influence state practice. And they see their role as being to identify the ideal rule and best possible limitations and exceptions in laboratory-like academic conditions.

Yet disquiet arises when their withdrawal idea is transported from the laboratory to the real world. Academics cannot define and delimit their audience. The opinions of academics can play an important role in shaping international law—a point that Bradley and Gulati clearly recognize in their historical review of the rules governing custom. Given the potential influence of academic work on international law's development, the authors' attempts to cabin their article to the academy seem naïve. This also means that proposals about custom should not be assessed in a controlled laboratory environment where one can package certain options together and control for variables. Any theory of custom should be assessed in light of the fact that states are likely to use it to make conflicting and sometimes opportunistic arguments. When assessed in this light, two concerns become apparent.

First, the withdrawal proposal increases uncertainty about custom's secondary rules. The choice is not between all states accepting the mandatory view or all states endorsing the default view. Introducing the option may well encourage states to split between these positions, creating uncertainty over the secondary rules governing an already uncertain source. The authors examine the efficiency of each view in isolation, but do not assess the inefficiency or costs of having uncertainty over the secondary rules governing custom, which is the likely result of presenting this choice. These are not mere transition costs as states move from one approach to the other; the real risk here is in putting custom in limbo between these two approaches for a long or indefinite period. Certainly, the risk of introducing or increasing uncertainty occurs whenever someone questions secondary rules. This does not mean that such proposals should not be raised; rather, the cost of such uncertainty must be weighed against the proposal's benefits.

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29. Bradley & Gulati, *supra* note 1, at 275; *see also* 208.

30. *Id.* at 208, 275.

Second, suggesting a withdrawal right might increase the prospect of opportunistic or abusive claims by unscrupulous states. Outside of the academic lab, one cannot guarantee that states will adopt the headline claim (a withdrawal right) with all of the exceptions and limitations that the authors deem wise. What if some states endorse the default view but assert that it is applicable across the board, even with respect to core substantive norms and important structural constraints? It will be difficult to discipline such approaches by appeals to state practice as such practice neither motivates the overall withdrawal proposal nor the exceptions identified. Yet Bradley and Gulati assess the functionality of their ideal rule only, rather than also considering the utility of their rule if the limitations they deem necessary to make it palatable are not adopted in whole or in part.

Uncertainty about custom's secondary rules might facilitate abusive claims about custom's (in)applicability. Utilizing the concept of legalization, custom is currently understood as obligatory, imprecise, and not generally subject to delegation.[31] Accordingly, most debates about custom occur over its existence and content, not its binding nature. Under the withdrawal proposal, however, states would also be allowed to exit from custom, making it optional rather than obligatory. This shift would soften custom's legalization, moving it along the law-to-politics spectrum and increasing state discretion. This approach would open up new avenues for uncertainty and canny argumentation as states could dispute whether a custom binds them and whether they gave adequate notice of withdrawal, in addition to contesting the custom's existence and content.[32]

The question here may be, in part, one of intention versus effect. Are Bradley and Gulati crafting a Machiavellian approach to custom in order to assist unprincipled governments in extricating themselves from important customary law requirements? No. But is their approach open to this sort of opportunism, with states endorsing the idea of withdrawal without

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31. As noted above, the obligatory nature of custom is subject to the rarely utilized persistent objector doctrine and the possibility of states opting out through treaty or regional custom with the consent of other affected states.

32. The case for, and risks posed by, withdrawal may be different where enforcement is delegated to international courts and tribunals. Demand for withdrawal might be greater because the combination of high obligation and delegation, coupled with low precision, shifts interpretive discretion from states to courts. *See* Abbott et al., *supra* note 10, at 415; Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 461–62 (2000). However, the risk of abuse might also be lower as courts could police withdrawal claims. *Cf.* Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1984 I.C.J. 392, 419-20 (Nov. 26) (enforcing notice period requirements on withdrawal and suggesting that a reasonable notice period would always be required). The possibility of delegation might encourage some states to opt for the default view of custom. But, as delegation is haphazard at best, this approach may pave the way for increased uncertainty and abuse in custom more generally where delegation is not present.

accepting or following the subject matter or notice limitations they propose? Yes, and this is worrying. As much as the authors want to treat the notion of withdrawal as a purely academic exercise, custom exists in the real world. The utility of assessing the functionality of the mandatory view and the default view as idealized types existing in a vacuum is questionable when suggesting withdrawal rights is likely to result in murky, middle ground positions.

I am not suggesting that Bradley and Gulati should not have written this article; there is merit in academics pushing the boundaries of analysis and a discipline is only as strong as its ability to respond to critiques. But assessing proposals in a vacuum is problematic because it neglects real world costs that become evident when proposals are understood in their true context.

IV. THE DYNAMICS OF CHANGE

Bradley and Gulati's suggestion that withdrawal rights might help in custom's formation and change is also unconvincing. To explain why, let us consider Hirschman's concepts of exit and voice as two mechanisms by which members can respond to declines in benefits provided by organizations and institutions.[33] As Joseph Weiler, who applied Hirschman's theory in the context of the European Community, explains: "Exit is the mechanism of organizational abandonment in the face of unsatisfactory performance. Voice is the mechanism of intraorganizational correction and recuperation."[34]

In our context, exit might be understood as the equivalent of a state withdrawing from a custom, while voice may represent attempts by a state to change or influence the existence, interpretation or application of a custom by which it is bound. Voice options include arguments to the effect that X custom does or does not exist, X custom exists but should be interpreted in Y way, and X custom exists but does not apply in Z circumstances. The exit option would be akin to saying that, even if X custom exists, it does not bind the relevant state.

In addition to identifying the mechanisms of exit and voice, Hirschman and Weiler posit a particular dynamism between the two: "a stronger 'outlet' for Voice reduces pressure on the Exit option and can lead to more sophisticated processes of self-correction. By contrast, the closure of Exit leads to demands for enhanced Voice."[35] The mandatory view,

33. *See generally* HIRSCHMAN, *supra* note 2.

34. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2411 (1991).

35. *Id.* at 2412.

which permits voice but not exit once a custom is established, replicates this approach. At the same time, calls for increased voice may be less effective in the absence of a credible threat of exit.[36] This option is reflected in the default view because states have exit and voice options.

How might these different approaches affect the development and change of customary norms? In theory, custom is built on the back of widespread and consistent state practice and *opinio juris*. In practice, it is often made and changed on the back of the actions and statements of a smaller number of states (often together with actions/statements of other actors, such as international courts) coupled with general acquiescence by the majority. Under the mandatory view, if states are dissatisfied with an existing custom, they can voice their disagreement with it and, in doing so, seek to change the custom. But if states regularly opt to exit custom instead, this might lead to stagnation in custom's development because states would not seek to change its general content but rather its specific application to a given state. The role of acquiescence here is key. Under the voice model, a minority of states may be able to change the custom in the face of general acquiescence. Yet if those states simply exited, the general acquiescence might seem to remain in support of the original rather than modified rule.

Two ways of dealing with this problem are immediately obvious. First, any attempt at exit could be treated as effectively being a dual voice and exit claim. This would involve recasting withdrawal attempts as amounting to a claim that X custom does not exist or should have a different content (voice) and, if not, that X custom does not apply to the particular state because of its withdrawal (exit). In this way, exit attempts would also impact custom's development. Second, states might already have adequate incentives to adopt this dual approach. An analogy might be found in the use of exit and voice at custom's formation through the persistent objector doctrine. Although we might expect states to favor the persistent objection argument as an easier option than shaping custom's content, it seems much more common for a state to argue that X is not a customary norm, with the idea that X is a custom but the state is not bound by it being clearly a secondary argument.[37] Thus states simultaneously exercise their options of voice and exit in that order.[38]

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36. HIRSCHMAN, *supra* note 2, at 33–34, 82–86.

37. *See* Stein, *supra* note 11, at 457-63.

38. A good recent example can be found in reactions to the ICRC's Study on Customary International Humanitarian Law, which concluded that certain customary rules had formed and that the United States, United Kingdom and France were persistent objectors to those rules. In rejecting this conclusion, the United States argued that "the weight of the evidence . . . clearly indicates that these

Yet even if these approaches are adopted, what impact will they have on custom's development? As Hirschman notes, calls for increased voice may be made more effective by a credible threat of exit.[39] But do states want custom to be highly consensual, such that states can argue for a new interpretation of custom, threaten to exit the custom if their proposal is not accepted, and follow through on that threat if need be? Or are states happy for custom to be less consensual, deriving it from consensus views and making it binding on all states subject to changes by consensus? Bradley and Gulati's approach shifts power from the majority of states to individual states even though part of custom's virtue is that it represents consensus views on core structural and substantive issues.

Bradley and Gulati argue for symmetry between the difficulty of the formation and exit rules for custom, a symmetry they believe is lacking because custom is easily formed yet withdrawal is impossible.[40] But having custom created by majority or consensus views, yet subject to individual withdrawal, would create an asymmetry that shifts power from the majority to the minority.[41] Where treaties and custom overlap, some states already take an opt-in approach where they do not sign the treaty but say that it generally represents binding custom subject to certain exceptions. The withdrawal approach would give these states an additional ability to opt-out by them being able to exit even from rules agreed to be customary. Again, this shifts custom away from a consensus model to a pick-and-choose approach that favors the interests of individual states over those of the

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three States *are not simply* persistent objectors, but rather that the rule has not formed into a customary rule at all." *See* John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 457 (2007) (emphasis added). The United States specifically affirmed the existence of the persistent objector doctrine, but would have preferred its views to have prevented the formation of a custom rather than simply prevented the custom's application to it. *Id.* at 457, n. 43 ("We note that the Study raises doubts about the continued validity of the 'persistent objector' doctrine. Study, Vol. I, p. xxxix. The U.S. Government believes that the doctrine remains valid.").

39. HIRSCHMAN, *supra* note 2, at 33–34, 82–86.

40. Bradley & Gulati, *supra* note 1, at 243-44.

41. Symmetry exists with *jus cogens* rules as these can be modified only by the emergence of another *jus cogens* rule. VCLT, *supra* note 15, at art. 53 ("a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"). The position with respect to custom is less clear as there is disagreement about whether a custom stays in effect until there is consensus on a new custom or whether the consensus behind one custom can be lost without a consensus on a new custom emerging. The latter approach appears more accurate, which means that outdated customs cannot be maintained by a minority of holdout states, contrary to Bradley and Gulati's analysis. Bradley & Gulati, *supra* note 1, at 243-44. If anything, this makes the rules of change for custom less demanding than those of formation.

international community.

Whether one prioritizes the interests of the international community, or gives primacy to the sovereignty of individual states, often reflects one's underlying ideological commitments. Gabriella Blum traces the division between "universalists, who aspire for an interconnected 'one world, one law' international order, and unilateralists, who value independence, flexibility and freedom of action."[42] The former are more likely to make appeals to concepts like the international community and the latter to concerns about sovereignty and national interests.[43] Yet, regardless of one's ideological preferences, it is noteworthy that Bradley and Gulati cite no examples of states clamoring for a general withdrawal right in custom. We also see few states exercising the right of persistent objection, which is the equivalent of withdrawal before a custom is formed. Perhaps this suggests that states are by and large happier to have generally applicable customary rules, and to attempt to influence the existence and content of those rules, rather than to permit patchwork rules and gaps on core customary norms.

Under presently accepted secondary rules, customary norms may change over time but the threshold for change is relatively high because the international community has a vested interest in the stable existence and/or particular content of these norms. And when change comes, it does so not unilaterally from the decision of one state to withdraw, but from the actions and reactions (including acquiescence) of states as a whole, which has the virtue of providing a safety-in-numbers community check on the narrow self-interest of individual states. It may be that it is simply in the long term interests of states to create secondary rules for custom that limit their ability to individually opt out of such norms when their short term interests might otherwise tempt them to do so. This would explain both the absence of a general right to withdraw from custom and the lack of protests about such an absence.

CONCLUSION

Bradley and Gulati note that the shift towards the mandatory view "may have occurred more in academic commentary than in state practice,"[44] pointing to the role of academics such as Brownlie and Oppenheim in mainstreaming this view. Yet a similar critique could be

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42. Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 324 (2008).

43. *See, e.g.*, Dino Kritsiotis, *Imagining the International Community*, 13 EUR. J. INT'L L. 961 (2002); Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, 79 FOREIGN AFF. 9, 9 (2000).

44. Bradley & Gulati, *supra* note 1, at 231.

made of their proposal. The authors do not appear to be responding to state concerns in making their claim; indeed, they point to no examples of states arguing that they should have the right to unilaterally opt out of custom. Nor do they claim to be writing to states. And, given all of the potential carve outs, Bradley and Gulati's bold claim—that states should be able to withdraw from custom contrary to prevailing wisdom—might have surprisingly limited practical effects.

Despite the genuine originality and considerable intellectual value of their article, its central treaty/contract analogy remains unconvincing because of the different functions of the two sources, while its potential impact is concerning given that it is likely to increase uncertainty about custom's secondary rules and facilitate opportunistic claims. Custom exists to serve key interests of the international community and states consent to it at a more general, structural level than they do with treaties. Instead of collapsing the distinction between these sources by making their secondary rules converge, it is worth exploring their complementary functions as these seem to justify divergent secondary rules.

There is no doubt that custom is a problematic source. Considerable disputes exist over the content of its primary norms and the nature of its secondary norms. Yet, through all of the attacks and criticisms, custom endures because it serves an important purpose of securing baseline structural and substantive norms for the international community, which cannot be guaranteed through the optional and individualized commitments provided by treaty law alone. Recognizing this function should lead states and academics to reject Bradley and Gulati's withdrawal proposal as ill-suited to customary law theory and not grounded in actual practice.