

Symposium on Jurisprudential Perspectives of Contract

The New Paradigm of Contract: A Hermeneutical Approach

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THE NEW PARADIGM OF CONTRACT: A HERMENEUTICAL APPROACH

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INTRODUCTION

Until recently, commentary on and inquiries into the nature of contract have been constrained in two ways. First, theorizing has been limited to what may be called the micro-level, concerned with contract, promise, expectation and reliance in the context of either a bargained-for exchange or action in reliance induced by a promise. Any changes of substance or emphasis made by Article 2 of the Uniform Commercial Code reflect only micro-level concerns. Secondly and relatedly, certain specialized kinds of contract, such as insurance, corporation, partnership, labor, etc., have acquired sufficient importance to become, for the most part, subjects for specialized study. Despite the impact of Article 2, contract has seemed, to some at least, to be contracting to the point of expiring.

Macneil's work bucks both these trends and is expansionary in two ways. First, it is not limited to the micro-level. Indeed, micro- and macro-levels are seen merely as different areas on a continuum. Second, and consequently, it brings back into the contract fold all the specialized spin-offs mentioned above and much more besides.

At the heart of Macneil's new paradigm of contract is the notion of an exchange relation, the theoretical inspiration for which

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seems to be derived from sociologists such as Durkheim and Weber; the enterprise is one of social analysis. As a result, the point of view is essentially external; we are told what the true reality of contract is from that theoretical point of view. My main purpose is to look at that true reality from another, internal, point of view. Macneil has offered a sociology of contract, I am offering a hermeneutics of what he perceives contract to be.

A word about the hermeneutic approach. If one takes the true reality as presented by Macneil, one may then, as Kelsen might have put it, represent its meaning from another point of view. Macneil has described contractual behavior; I shall offer a theory of what that behavior means from the viewpoint of the participants. In doing so, I shall draw on the insights of Hume, Austin and Grice, the foremost practitioners of hermeneutics in English. Hart does something similar in *The Concept of Law*: he seeks to understand law in terms of what the social practices which manifest its existence mean to the participants. Hence his emphasis on the internal as well as the external aspects and points of view. Similarly, I wish to explicate the internal aspect of the exchange relation. Indeed, it is my claim that the essentially external point of view of Macneil may be complemented by an internal point of view which reveals the Gricean meaning of the behavior described to those participating in it.

What follows is an attempt to bring a hermeneutical approach to contract *qua* exchange relation at both the micro- and macro-levels.

MACNEIL'S THESIS

The social institution of contract is defined in terms of what are called its *primal roots*—specialization of labor and exchange, choice and awareness of the future.¹ Its function is that of projecting exchange into the future, and it is manifested in contractual relations. Contract is thus the relations of parties to the processes of projecting exchange into the future, and is not limited to promise in exchange. Indeed, promise is only a fragment of any contractual relation no matter how discrete. The projection referred to emanates from combining in a society the three primal roots of specialization of labor, choice, and awareness of the future. The

1. Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691 (1974). I. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980). These works are the primary sources relied on in this section.

behavior involved in contractual relations gives rise to prescriptive norms and standards of proper conduct.

Promise in exchange is defined as the present communication of a commitment to engage in a reciprocal measured exchange. Non-promissory exchange projectors are custom, status, habit, command, and expectations regarding the status quo.

A contrast—ideal or theoretical, rather than real—is drawn between discrete transaction contracts or contractual behavior and relational contractual behavior: all contractual behavior is in fact relational to some extent; the truly pure discrete transaction is a fiction. A (primarily) discrete exchange transaction is a measured reciprocal exchange, such as a simple exchange of goods, and the projector is typically a promise. But promises are always accompanied by other non-promissory projectors of exchange. Relational contracts are based on contractual relations which are essentially exchange relations, and are not limited to promise in exchange.

Modern contractual relations cover such things as a childless marriage, IBM, UAW-GM, a Macdonald's franchise and a shop with two employees. Clearly, "exchange relation" is a concept of high generality; and Macneil emphasizes that an exchange relation, such as those mentioned above, is not just "a bunch of discrete transactions." Moreover, contractual behavior is not limited to that behavior denoted by contract law.

This is quite revolutionary. All revolutions need a new paradigm and a new vocabulary. Macneil provides both. In place of the discrete transaction characterized by promise, the paradigm of classical theory, we are offered the notion of an exchange relation which embraces at one pole the classical paradigm and at the other the nation-state *qua* massive ongoing exchange relation. Exchange relation is the new paradigm; and the message is that contract ought to be regarded as coextensive with contractual behavior *qua* exchange relation—which does not necessarily involve promise. Thus, there is a claim which is both empirical and normative: contractual behavior extends far beyond the classical paradigm; and there is a recommendation that contract be regarded as coextensive with the true reality of contractual behavior.

The new vocabulary for the new paradigm of exchange relation is provided by the expressions introduced to characterize the contrasting notions of discrete transaction and ongoing exchange relation. For the former, Macneil reactivates the old word "presentiation": the discrete transaction denies the future by pulling it into

the present; the ongoing exchange relation, on the other hand, futurizes the present by projecting it into the future. Contractual behavior should be thought of not only as presentation but also as the projection of exchange into the future. So conceived, it covers not only promise, but also command, status, social role, kinship, bureaucratic patterns, religious obligations, and habits. Moreover, while it covers promise *qua* futurizing the present, Macneil stresses that promise is not necessary for the ongoing exchange relation, the new paradigm of projecting exchange into the future.

THE MEANING OF CONVENTIONAL ACTION

Contractual behavior involves linguistic behavior, talk-exchange, communication, promising, and exchanging. All these are forms of action and their meaning is the meaning of a certain kind of action. That meaning is essentially Gricean and that action is conventional in the Humean sense.

H.P. Grice's theory of 'non-natural' meaning—utterer's meaning rather than word meaning—deals neither with lexical meaning, nor with functional classification, nor with sense and reference, intension or extension, but with utterer's use in the context of talk-exchange, communication and conversation, the pragmatic and instrumental dimensions of meaning.²

What sets the Gricean idea of communication apart from other modes of social interaction is that when a speaker, S, attempts a bit of communication with an audience (hearer) H,

- i) S intends to produce in H some response, R, and
- ii) S intends H to recognize that i), and
- iii) S intends H to produce R on the basis (partly, at least) of H's recognition of ii) and so of i).

And to avoid certain potential counter-examples, Grice adds, in effect,

- iv) S has no relevant hidden intentions.

Communication and talk-exchange thus deal with meaning in the context of utterances, the process or activity of language-using, as contrasted with (word) meaning in the context of inscriptions, the products of language using. Utterer's meaning is concerned with what J.L. Austin called "the total speech-act in the total speech

2. Grice, *Meaning*, 66 PHIL. REV. 377 (1957); Grice, *Utterer's Meaning and Intentions*, 78 PHIL. REV. 147 (1969); Grice, *Logic and Conversation*, in SYNTAX AND SEMANTICS 46 (P. Cole & J. Morgan eds. 1975). See also Strawson, *Intention and Convention in Speech Acts*, 83 PHIL. REV. 439 (1964).

situation on a particular occasion";³ and the meaning of that, i.e., the meaning in use in a non-null context, is a function of its illocutionary force, the Gricean intentions of the utterer, S, and the word meaning of the locution on which the speech-act is based. Meaning in this sense is therefore a matter of the psychological state the speaker, S, intends his hearer (H) to think he (S) is in by virtue of his (H's) recognition of his (S's) intention. This sort of interaction, it must be remembered, could not be fulfilled with any regularity in a social group, without some cooperative trust among members of the group. And this brings us to Hume.

Communication, language-using, promising, using money, exchanging, dancing, playing games, co-operative or coordinated action generally—all are examples of conventional action in the Humean sense: "The actions of each of us have a reference to those of the other, and are perform'd upon the supposition that something is to be perform'd on the other part." And this is so, "tho' without the interposition of a promise." Thus, "[t]wo men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other."⁴ Both conventional action and a convention are solutions to coordination problems in Lewis' sense.⁵

It is conventions that make social life possible; and conventional action depends on our being *in* agreement about something—in the case of communication, the practical necessity of truthfulness; in the case of promising, the practical necessity of performing—which, of course, does not require that *an* agreement has been *made* in the sense of giving promises to each other. Our *being in agreement* about a certain kind of co-operative or co-ordinated action is what is meant by a convention; and the action typically covered thereby is what I shall call conventional action. But not all conventional action manifests a convention, nor, as we shall see, need a convention be about conventional action.

The essential feature of any kind of conventional action is (non-accidental) interpersonal mutuality of reference at the level of *intentions* (not, *pace* Macneil, consent): the self-conscious rower intends his strokes to co-ordinate with those of the other rower, which are intended to co-ordinate with his. In the case of talk-exchange, the mutuality or self-reference gets more complex, as we have seen. And in all cases the intentions are to be explicated in Gricean terms.

3. J. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

4. D. HUME, *A TREATISE OF HUMAN NATURE* 490 (L.A. Selby-Bigge ed. 1888).

5. D. LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* (1969).

Following Searle, the Gricean intentions of S *qua* promisor may be stated as follows:

when S says to H, explicitly or implicitly,

I promise to do A in circumstances C,

- (i) S intends to undertake an obligation to do A in C;
- (ii) S intends, by virtue of his utterance, to be taken by H to undertake an obligation to do A in C;
- (iii) S intends that H recognize (i) and (ii);⁶ and
- (iv) S has no relevant hidden intentions.

Does exchanging imply promising? If it does then logically, at least, the exchange relation theory reduces to the classical promissory theory, provided that Macneil's exchange relation does not extend beyond what may be called intended exchanges. Only the philosopher Prichard appears to have addressed himself specifically to the question; he argued that "even exchanging one thing for another seems to involve [bilateral] promising."⁷ In fact, his argument seems to support the stronger conclusion that a simple (intended) exchange *entails* or presupposes bilateral promises even though neither party uttered the words "I promise—" prior to or at the time of the exchange. But how could a simple swap of an apple for a banana entail or presuppose promises?

Well, following Prichard, we start by supposing that S has an apple and H has a banana and that S believes he will gain by giving up his apple and getting H's banana in return, and so is moved to give up his apple in return for the banana. But S will not give up his apple unless he can gain H's banana by doing so. Hence S resolves: if you (H) will hand over your banana to me (S), I (S) will hand over my apple to you (H). But I (S) will not do so without some assurance that you (H) will hand over your banana; and you (H) will not do the latter without some assurance that I (S) will hand over my apple. Hence, we may imagine that S says to H: if you (H) will promise to hand over your banana on my (S) promise to hand over my apple, then I (S) promise to hand over my apple to you (H). So you (H) promise to hand over your banana. But it is not until *after* H has so promised that S has an obligation to hand over his apple. And it is not until *after* S has handed over his apple that H has an obligation to hand over his banana. Thus, a simple intended swap implies promises and obligations which are future (because conditional) in rela-

6. J. SEARLE, SPEECH ACTS (1969). This account is modified when the promisor is not sincere, i.e., when condition (iv) is not satisfied.

7. H. Prichard, *Exchanging*, in MORAL OBLIGATIONS (1968).

tion to the promises; hence the promises implied are conceptually prior to the actual swap, and so are presuppositions of the intended exchange.⁸

This is very much like a Gricean explanation of the meaning of an exchange *qua* conventional action: what S does depends on what H does, and what H does depends on what S does. But if neither S nor H actually utters the words, "I promise ____," can we *imply* promises? Well, courts of law have no problem with implied promises. And to say that exchange implies promises is to say that exchange intensionally includes promises. However, not all conventional action is an intended exchange in Prichard's sense so it cannot be said, on the basis of Prichard's argument, that all conventional action implies promises (as Hume recognized).

Can there be an intended exchange of things even without implied promises? Macneil has several answers. First, he says that a completely present exchange would not be what he calls a contract because there is no projection of exchange into the future.⁹ On this view, he rejects or fails to appreciate Prichard's analysis. Secondly, to the question: Is a sale of goods a contract? he gives the clear answer: "Yes. No."¹⁰ However, when discussing a gas purchase at a filling station (i.e., an exchange of goods for cash) he says it "inevitably involves some credit, either the tank is filled first before payment or after; in either case credit, and with it promise, occurs."¹¹ This clearly can be spelled out according to Prichard's analysis. Macneil refers to the promise in this case as a 'hidden element,'¹² another way of saying that the promise is implied rather than express—which presupposes that promises (legally, at least) may be either express or implied.

On another occasion, Macneil mentions the so-called silent trade of some primitive people. A modern version of this would be the vending machine. As Macneil notes, "the very fact that the parties do not communicate other than by leaving and collecting goods at a given point out of each other's presence presupposes an element of

8. This paragraph departs from Pritchard (*supra* note 7) to the extent that i) the order of performance does not determine the analysis, and ii) it generalizes from what Pritchard regarded as the analysis applicable "where my [S] action need not come first."

9. Macneil, *The Many Futures of Contract*, *supra* note 1, at 781.

10. I. Macneil, *Values in Contractual Relations* 1 n.2 (1981 Draft) (unpublished manuscript).

11. *Id.* at 6 n.10.

12. *Id.*

trust that can have evolved only by repeated transactions." The "silent trade" is offered by Macneil as an example of an apparently and relatively pure discrete transaction which nevertheless is "not transactional in all respects" because of "the element of trust that can have evolved only by repeated transactions."¹³ Two comments are in order. First, although not transactional in all respects, does Macneil think that the silent trade, like the purchase of gas, has a hidden element of promise? If he does he surely is wrong. This raises a second point. It is not accurate to say that the "element of trust . . . can have evolved only by repeated transactions," for that would not be true of the first silent trade. The latter would have required i) a pre-existing climate of mutual trust in general, or ii) a prior agreement of some sort or iii) a calculated risk by the first 'seller'. Once the silent trade is established, then its underlying legal theory is not the implied promise of Prichard but the notion of conditional consent of the 'seller' to the taking by the 'buyer', as developed in the law of larceny. This is most clear in the case of newspapers sold on the 'honor system'. Thus the silent trade is a case of an intended exchange which is not amenable to a Prichardian analysis. Is the silent trade a case of what I have called conventional action on the model of two men rowing a boat?

There is a certain ambiguity between the Humean notions of convention, conventional action and social (conventional) artifice. Convention is the social mechanism that makes society possible; the social artifices (property, promise and government) are those conventions which serve the public interest and give rise to the artificial virtues of honesty, fidelity and obedience. The basic notion is conventional action in which "the actions of each of us have a reference to those of the other, and are perform'd upon the supposition that something is to be perform'd on the other part."¹⁴ Examples are rowing, speaking a natural language, using money, as well as recognizing the social artifices analysed in terms of convention. This mutual reference of (conventional) action is accompanied by a general sense of common interest.

But Hume blurs the lines between recognizing the *utility* of a co-operative and conventional scheme and recognizing that it is a case of cooperation (rowing) or convention proper (language, money). The latter, the real conventions, involve not only the mere fact of 'agreement in action' or cooperation, but also the explicit recognition

13. Macneil, *The Many Futures of Contract*, *supra* note 1, at 781 n.19.

14. D. HUME, *supra* note 4, at 490.

that *one* of many possible ways to cooperate is the agreed one. Hume notes this in the case of those conventions which he calls the social artifices when he says they are changeable by public will. Thus rowing, while conventional action in the sense of co-ordinated action, could not amount to a convention unless it was a highly stylized kind of rowing.

As Lewis has shown,¹⁵ a regularity in conventional or non-conventional action will amount to a convention if and only if there is common knowledge among those whose behavior it regulates that:

- i) everyone conforms to it;
- ii) everyone expects everyone else to conform to it;
- iii) everyone prefers to conform to it on condition that others do, since conformity to it solves a coordination problem; and
- iv) they would conform to a different regularity if others conformed to it.

The rowers presumably would not satisfy condition (iv) (though Lewis seems to think they would),¹⁶ whereas users of a natural language and a monetary system do satisfy it. And the social artifice of promise satisfies the definition also. The point to note is that not all conventional action rises to the status of convention. Moreover, conventions which become habits serve as rules and may generate their own constitutive and regulative rules.

Conventional action so understood applies to everything from promise to the extremes of Macneil's notion of an exchange relation. Both action which recognizes the social artifice of promise analysed in terms of convention as defined above, and two men rowing a boat in a way not amounting to a convention, are cases of conventional action as I use that expression.

The mutual reference of one rower's (or speaker's) intentions to those of another, when accompanied by common knowledge that the intentions are thus mutually referring, makes each participant's intention ultimately self-referential. The self-conscious rower intends his strokes to coordinate with those of the other rower which are intended to coordinate with his. And similarly with Grice's utterer and hearer, and Searle's promisor and promisee *qua* standard participants in the common convention of promise.

Both conventional action *sans* convention and convention de-

15. See D. LEWIS, *supra* note 5. This way of stating Lewis' definition is due to Annette C. Baier.

16. *Id.* at 44.

financed as above are solutions to coordination problems without any explicit or necessarily implied promises. The silent trade is therefore a case of conventional action: the vendor "declares": if you will put 25¢ in the cup, I consent to your taking (you have my permission to take) a paper; and the buyer "declares": if you consent to (permit) my taking a paper, I will put 25¢ in the cup.

Thus, exchanging is a kind of conventional action which does not necessarily imply promises. If all exchanging is contractual behavior and all contractual behavior involves exchange, then Hume's notion of conventional action gives a philosophical explanation of contractual behavior between autonomous individuals. But Macneil does not believe that the notion of an autonomous individual is a useful tool for *social* analysis. Convention itself is clearly involved in that part of contractual behavior covered by what Macneil calls classical contract theory—exchanges of goods predicated upon an exchange of promises or an exchange of goods for a promise. And both conventional action and convention may be involved at the limits of Macneil's notion of contractual behavior. On the other hand, as we shall see, section 90 (promissory estoppel) may be regarded as a convention only in so far as the behavior it refers to is conventional action. To the extent that section 90 behavior is not conventional, it will not generate a relational contract if the latter is limited to conventional action; the fact that Macneil's exchange relation generates a reliance norm does not affect this point.¹⁷ These and other matters will now be considered in more detail.

CONVENTIONAL ACTION AND CONTRACT: MICRO-LEVEL

In classical theory, what the parties do, if a contract is to be formed, must have the Gricean meaning of offer and acceptance, which have the following (reversible) forms respectively:

- (a) Offer: If you (H) will do B, I (S) promise to do A.
- (b) Acceptance: H does B.¹⁸

The offer, it will be noted, is a conditional promise and the condition is a request. When H satisfies that request (does B) in response to that request we have an intended exchange, H thereby accepts S's offer and also furnishes the consideration for S's promise, making it unconditional and so amenable to legal enforcement—*unless* such things as mistake, fraud, misrepresentation, unconscionability, duress, lack of contractual capacity, donative intent, illegality, etc.,

17. See text section Convention & Contract: Macro-level *infra*.

18. In the case of a bilateral contract, "doing B" is promising something.

can be shown.¹⁹ Consideration is therefore legally sufficient to constitute (a) and (b) a contract which is legally enforceable unless

We may therefore explicate the doctrine of consideration as follows: given (a), a promise by S to H *on condition that* H fulfill a request of S, the satisfaction, (b), of that condition by H *qua* response to S's request constitutes the consideration.²⁰ It is only when the satisfaction of the sufficient condition of an offer (a) itself is questioned that a genuine issue of consideration is raised: questions involving "unless factors" can properly arise only if we have already determined that (b) constitutes consideration for (a). Contract formation itself is thus conventional action constituting an exchange involving a promise on the part of at least one of the two parties.

Concern for the reliance, as contrasted with expectation, interest led to the extension of legally enforceable promises beyond those supported by consideration. Thus, section 90 provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.²¹

A section 90 transaction' will thus have two components:

(a') a promise made by S, and

(b') something done by H,

such that (b') is an objectively foreseeable (causal?) consequence of (a'). This compares interestingly with our notion of conventional action, the essence of which is interpersonal mutuality of reference at the level of intentions, requiring conduct with a Gricean meaning having the (reversible) form:

if you do (will do) something,
then I will do something.

19. Joking on the other hand, could mean there was no offer and/or acceptance, depending who was joking. This notion of "unless factors" draws on Hart's concept of defeasibility. See H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 *PROCDGS. ARISTOTELIAN SOCY* 171 (1948-49).

20. Whence, "[i]f the requirement of consideration is met, there is no additional requirement of ... detriment to the promisee," *RESTATEMENT (SECOND) CONTRACTS* § 81, nor, for that matter, of benefit to the promisor.

21. *RESTATEMENT (SECOND) CONTRACTS* § 90. Section 90 uses the word "induce." Even though it may be doubted whether inducing is a casual relation, contract law does not seem to draw a distinction between the two notions. See §§ 115, 118, 200.

This is clearly satisfied by classical offer, acceptance and consideration.

The illustrations in section 90 indicate that the relevant promise (of S) may be conditional, as in:

(a') If you (H) graduate in June, I (S) promise to pay you \$1000.

(b') H graduates in June.

The promise of (a') may be enforceable under section 90 and the transaction will involve conventional action if the context indicates bilateral Gricean intentions. On the other hand, the form: since you (H) did B, I (S) promise to do A, appears to be the converse of both a section 90 transaction and our notion of conventional action; as such, it does not fit our notion of an exchange relation. This does not mean, of course, that a gratitude context could not lead to an exchange relation defined by conventional action.

Suppose that the promise of (a') is unconditional, as in (a') I (S) promise to pay you (H) \$1000 on Friday, and (b') H buys an automobile, where (a') occurs on Monday and (b') on Tuesday. Suppose also that S and H are 'complete strangers' and there is no pre-existing exchange relation, no status or role relation, no basis for gratitude on the part S, and S has no known reputation for making purely gratuitous promises. In such a case, it could be that (b') reasonably was not action in reliance on (a') and that justice did not require the enforcement of (a'). Nor would we have conventional action. On the other hand, given a suitable context, ϕ , such as a pre-existing exchange relation, etc., a section 90 transaction with unconditional (a') would probably be enforceable. It would not, however, constitute conventional action unless the context, ϕ , were such as to impart to (a') and (b') the relevant Gricean meaning-intentions.

Thus, only those section 90 transactions having the form: if you (H) do B, I (S) promise to do A, are clearly capable of being conventional-action exchange relations; any section 90 transaction of the form: since you (H) did B, I (S) promise to do A, cannot be a conventional-action exchange relation; and in the case of a section 90 transaction with unconditional (a'), the context ϕ will determine whether it is a conventional-action exchange relation or not. For Macneil, however, any section 90 transaction is an exchange relation even though it fits the 'gratitude' pattern or even though the promise of (a') is unconditional and the social context ϕ is insufficient to impart the Gricean meaning-intentions necessary for conventional action. This is because, as we have already noted, Macneil does not believe that the notion of an autonomous individual is a useful tool for *social* analysis.

A conventional-action exchange relation thus captures classical theory, but not necessarily all of section 90. Its extension is therefore less than that of Macneil's notion of an exchange relation, even at the micro-level.

CONVENTION & CONTRACT: MACRO-LEVEL

Convention & Customary Law

Macneil also acknowledges that his notion of relational contract (coextensive with contractual behavior) encompasses the nation-state itself as a massive contract relation. This is consistent with contractual behavior *qua* conventional action: the modern state may be viewed as a solution to the most important and comprehensive of all coordination problems. Macneil appears to be unaware of a remarkably similar claim made by Fuller on the basis of section 90 as the model for customary law, conceived as a language of social interaction, as being the heart of all modern legal systems.²²

Rather than just a topic of anthropological study of primitive societies, customary law is a language of interaction, a stable set of expectancies, a program for living together. Not only is it essential to our understanding of enacted and adjudicative law (the base lines of customary law), it is in fact necessary for their existence. All the various substantive and procedural areas of law serve primarily to set the terms of people's relations among each other; they facilitate human interaction even when they include restraints as well as enabling provisions. In developing his theory, Fuller points to and argues for a close analogy between contract law and customary law in general, and then takes as his model for customary law a generalization of section 90.

Customary law is at home across the entire spectrum of social contexts, which range from the most intimate (the family) to the most hostile (enemies), with the most open (the middle ground occupied by friendly strangers), the area where contract and statute are most at home.

Fuller takes contract law, in the sense of the 'law' made by a contract, as the model for customary law in general, and proposes a definition of customary law based on section 90. Enacted law, according to Fuller, shares the middle (open) ground of social contexts with contract. This area, populated by friendly strangers, is

22. Fuller, *Human Interaction and the Law*, in *THE RULE OF LAW* 171 (R. Wolff ed. 1971).

characterized by an open relation not prestructured by the bonds of kinship or the repulsions of shared hostility which are the marks of the two extremes of the social context spectrum. In the middle area, the basic necessity is to impose rules that will serve to set limitations (base lines) which people must observe in their interactions with one another, leaving them free, within those limitations, to pursue their own goals. Thus, law must deal with defined (kinds of) action, not with dispositions of will or attitudes of mind. Enacted law combines with the organizational principles implicit in customary law; these principles create an effective ordering by silent processes reflecting neither the individual's moral sense nor the threat of sanctions.

Generalizing from section 90, Fuller offers the following "principle," an alternative to the notion (*opinio necessitatis*) of repetitive actions motivated by a sense of obligation, as the test for the creation and existence of customary law.

Where, by his actions toward B, A has (*whatever his actual intention*) given B reasonably to understand that he (A) will in the future in similar situations act in a similar manner, and B has in some substantial way prudently adjusted his affairs to the expectation that A will in future act in accordance with this expectation, then A is bound to follow the pattern set by his past actions toward B. [emphasis added]

This creates an obligation by A to B, a two-party customary law, as in making a contract. If the pattern of interaction followed by A and B spreads through the community, then a rule of general customary law will have been created and will become part of a complex network of reciprocal expectations, i.e., a system of customary law.

Here, then, is Fuller's 'test' for a language of interaction, a stable set of interactional expectancies, a program for living together, an explication of what he calls "complementary expectancies." It seems as if Fuller is striving towards but not reaching the Hume-Lewis notion of convention. Indeed, there is an awareness of the distinction I have drawn between conventional action and convention itself. But his section 90 model is fatally defective, in part, I believe, because he characterizes the middle ground of the spectrum of social contexts as being open and occupied by friendly strangers. Moreover, even if his section 90 model did capture the essence of Hume-Lewis convention, it is hardly sufficient to explain social or moral obligation: Hume had to invoke utility and disinterested sym-

pathy; and Dworkin has plausibly argued that we must find a principle underlying a social practice if it is to impose a social obligation.²³

However, Fuller is surely correct in emphasizing that we need something more than mere behavioral uniformity to explain the existence of customary law, at least in so far as it is constitutive of social practices or conventions. Unfortunately, while the insight is there, the theory proposed is inadequate. Section 90, we recall, is an alternative to the Holmes-Williston notion of consideration (enshrined in section 75)²⁴ as the mark of a legally enforceable contract, a sufficient condition for a promise to be legally enforceable. As already noted, the essence of consideration, what Holmes called "reciprocal conventional inducement,"²⁵ may be stated as follows:

Given a promise by A to B on condition that B fulfill a request of A, the satisfaction of that condition by B in response to A's request constitutes the consideration for A's promise.

Section 90, on the other hand, requires no more than

- i) a promise made by A, and
- ii) something done by B,

such that ii) is an objectively foreseeable (causal?)²⁶ consequence of (i). There is a promise by A. But instead of something done by B in response to a request by A which is a condition of A's promise, section 90 merely requires action in reliance by B, which need only be causally connected with A's promise. As we have already noted, at the micro-level, a section 90 transaction may or may not constitute a conventional-action exchange relation.

Fuller correctly states that mere regularity of behavior is insufficient to constitute customary law; something more is needed. That something more, he thinks, is to be found in section 90, the essence of which he thinks is captured in his principle of customary law. But then the connection between A's action and B's action need only be causal: A's intentions are stated to be irrelevant and B's intentions are not even mentioned. Hence B's action in relation to A's action need only be objectively foreseeable. There is no glimmer of Hume's insight that in order for a social practice to arise from the

23. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

24. *RESTATEMENT (SECOND) CONTRACTS* § 75.

25. O. HOLMES, *THE COMMON LAW* 230 (M. Howe ed. 1963).

26. *RESTATEMENT (SECOND) CONTRACTS* § 90.

actions of A and B, what each does must be explainable by reference to what the other does which refers back to what the first does: that what each does must manifest the Gricean intention: if you (will) do so and so, I will do so and so. As noted earlier, conventional action requires mutuality of reference at the level of intentions: the self-conscious rower intends his strokes to coordinate with those of the other which are intended to coordinate with his. But instead of this subjective reciprocity of interpersonal mutuality of reference of coordinated behavior, Fuller can offer no more than the objective foreseeability associated with causation. Moreover, a general practice cannot, as Fuller seems to think, be understood simply as the sum of a large number of separately explainable actions.

Fuller's section 90 model operating in the area occupied by friendly strangers is not even suitable for what is called a pure coordination problem in which two or more agents have no real conflicts of interest but need to find the pattern of combined action that will be most advantageous to each separately. And it can in no way explain, as Hume's convention does, how a social practice could arise in a social context marked by partially conflicting interests. To see this, let us first consider the Prisoners' Dilemma, the classic model of a partial conflict problem: a Humean convention, we must remember, comes into existence, i.e., evolves, not to solve a pure coordination problem but to solve a partial conflict problem. In the Prisoner's Dilemma, there is conflict because the pay-offs to the prisoners (players) differ in such a way that each can gain an advantage at the expense of the other; but it is partial because it is *not* a zero-sum game: some possible outcomes are better than others for both players taken separately.

The dilemma arises as follows. Prisoners A and B are thought to have committed a major crime but the prosecutor has only sufficient evidence to convict them of some lesser offense. He deals with the problem by placing the prisoners in a situation in which they will feel constrained to confess to the major crime even though if they refrain from confessing they cannot be convicted. A and B are taken into custody and separated. The prosecutor then tells each prisoner separately that

- i) if both do not confess to the major crime, each will get one year in jail;
- ii) if both confess to the major crime, each will get five years in jail; and
- iii) if one confesses, implicating the other who does not, the confessor will be released and the other will get ten years in jail.

In terms of years in jail, the strategic problem has the following pay-off matrix (A's pay-off first, B's pay-off second):

		B		
		Do not Confess	Confess	
		1	2	
A	Do not Confess	1	(- 1, - 1)	(- 10, 0)
	Confess	2	(0, - 10)	(- 5, - 5)

From the standpoint of self-interest, the strategy of *Confess* for either prisoner "strictly dominates" the strategy of *Do not Confess*: A2 strictly dominates A1, and B2 strictly dominates B1. No matter what the other prisoner is assumed to do, it is always best for this prisoner to confess: for A, the second row is better than the first, no matter which column he is in; and for B, the second column is better than the first, no matter which row he is in. So their self-interest will lead them to the lower right-hand corner of the matrix (- 5, - 5), the equilibrium outcome, as a consequence of confession by each, whereas they both would have been better off at the upper left-hand corner of the matrix (- 1, - 1), the optimum outcome, the consequence of neither confessing. Even if A and B could cooperate, the outcome would not be affected: although they agreed (promised) not to confess (- 1, - 1), it would still be in the interest of each to break the agreement (- 5, - 5), irrespective of whether each assumed the other would also break the agreement or not. Thus, the Prisoners' Dilemma nicely captures a conflict between what seems individually better from the standpoint of self-interest (- 1, - 1) and what seems to produce the best overall result (- 5, - 5). It also shows that the result of acting individually from rational calculation (- 5, - 5) is not the most rational collective outcome.

Now let us consider once more Hume's example of two men rowing a boat and suppose also that they want to cross the river and that each is lazy and selfish. Then in terms of the physical effort to be made by each, they would be faced with a pay-off matrix something like this:

		B		
		Do not Row	Row	
		1	2	
A	Do not Row	1	(0, 0)	(0, - 10)
	Row	2	(- 10, 0)	(- 5, - 5)

Each will say to himself: if the other is going to row, I prefer not

rowing to rowing (A: (0, -10); B: (-10, 0)); and if the other is not going to row, I prefer not rowing to rowing (0, 0). But then they will not get across the river, even though, *ex hypothesi*, it would be better for each on his own if they got across by sharing the work (-5, -5). Hence, it is necessary that they each believe that the other would row if and only if he did so himself. But this belief is not entailed by the argument from dominance since your decision whether to row or not depends on mine (rather than on an assumption about my unknown-to-you decision) and I can encourage you to row by rowing myself. This, it will be observed, is the converse of the Prisoner's Dilemma: the result in this case of acting individually from rational calculation (-5, -5) is in fact the most rational collective outcome.

Again, a contractual (promissory) agreement is not a solution because each would have the same motive for breaking the agreement that he had before for not rowing (A: (0, -10); B: (-10, 0)). Hence, we need conventional action, agreement in action without any promises having been exchanged: each can say to himself, "Perhaps the other will row if and only if I do." So each starts to row and watches the other at the same time. Cooperation is then maintained by each party's readiness to use the sanction of non-cooperation: If and only if you row, I will row.

Thus, partial conflict situations can be solved without promise or external sanctioning authority or specifically moral sentiments, though Hume uses this pattern of social interaction to build a theory of moral sentiment. This two-person solution can be expanded to solve a many-person partial conflict situation by treating the latter as made up of a series of two-person situations. In this way, the rules constitutive of the social artifices and respect for them evolve out of conventions and conventional action. This is so even if the parties start from unequal bargaining positions, as long as the resulting compromise (-5, -5) is to the advantage of each as compared with his own initial position.²⁷ The notion of convention thus captures the intentions, and their motivations, which constantly underlie and maintain a Humean system of justice and Fuller's system of customary law: to the extent that customary law is constitutive of social practices, Hume's convention explains its *esse*; Fuller's section 90 model does not.

The artificial virtues that go with the social artifices which

27. This treatment of Hume's rowers draws on J. MACKIE, HUME'S MORAL THEORY Ch. VI (1980).

evolve via convention based on self-interest are expressible in the principles conceived by Dworkin as underlying the artifices *qua* social practices;²⁸ and the rules that evolve from conventional action and which are constitutive of those social practices form part, if not all, of what Fuller calls customary law. Fuller's section 90 model, having dropped the promise of section 90 itself, is left with nothing sufficient to generate the obligations he says it creates. And Hume's convention, which does not need promise, must be supplemented by what he calls moral sentiment—a function of the perceived utility of the artifices as a whole and disinterested sympathy with the public interest—in order to create socio-moral obligations.

Convention & Social Solidarity

At the micro-level, we have noted, Macneil's exchange relation extends beyond conventional action to section 90 transactions having a social context too general to permit the attribution of reciprocal Gricean intentions to the participants. And at the macro-level, a consideration of, for example, the nation-state, would, one would think, take us even further from realistically specifiable conventional action and Gricean intentions. Indeed, at this level, we seem to have nothing but social solidarity²⁹ to look to.

Macneil believes that Durkheim's notion of social solidarity generated by the division of labor is the cement of the exchange relation. It marks that cooperative trust which holds parties together enough to prefer exchanging to killing or stealing; it exists in a social context of partial hostility characterized by conflicting self-interest. Indeed, to the extent that it involves limited altruism, it conflicts with self-interest. It requires mutuality in the sense of some kind of evenness in exchange. Restitutive law is therefore seen as providing both the base lines and the glue of social solidarity.

Contract solidarity is social solidarity making exchange work by generating trust and an interest in the welfare of other participants. Its sources are both internal and external: in the case of the former, webs of interdependence created by the exchange relation itself; in the case of the latter, the sovereign law of contract.

Contract solidarity is seen by Macneil as the norm holding exchanges together; it is a necessary condition of the possibility of exchange. Its essential demands are mutuality or reciprocity and some

28. R. DWORKIN, *supra* note 23.

29. I. MACNEIL, *THE NEW SOCIAL CONTRACT* 90-108 (1980).

evenness in exchange. The key question posed is: Will conditions continue so that each of us will desire to and be able to depend on the other? But to answer this question, we need something more than the external aspect of Durkheim-Macneil; we need to consider the hermeneutics of social solidarity also; and that takes us back to Hume, Austin and Grice; to the two rowers and the Prisoners' Dilemma; to conventional action, convention and Humean utility.

Social solidarity, and therefore contract solidarity, is cooperative trust in a social context of partial hostility. In Humean terms, it is greed controlling greed; it is reason-dependent; it involves a general sense of common interest.

In the beginning, says Macneil, was society, in the sense of the smallest viable social unit. The natural social unit, according to Hume, is the family. In a state with just such units (Macneil's beginning society) there is, according to Hume, no natural motive to act justly, i.e., honestly, with respect to the property of strangers. A modern society in Hume's sense—a state having the conventions of property, promise and government—reflects the fact that individuals have great appetites but no natural advantages; and this creates a need to unite. Societies, moreover, remedy three inconveniences: by joining forces we increase our productive power; by division of labor we are more able to perfect a craft or art; and collectively we are more secure. However, it is not sufficient for there to be advantage in union; we must see what is wrong and see what needs to be done. The union must be reason-dependent, rather than accidental.

But how did we get from that very restricted type of social order to the more extended and remote? How did we come to extend stability beyond the family? Hume answers:

By convention, a general sense of common interest; which sense all members of the society express to one another, and which induces them to regulate their conduct by certain rules. I observe that it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually expressed, and is known to both, it produces a suitable resolution and behavior. And this may properly enough be call'd a convention or agreement between us, tho' without the interposition of a promise; since the actions of each of us have

a reference to those of the other, and are perform'd upon the supposition, that something is to be perform'd on the other part.³⁰

It is therefore Humean convention that is the mechanism of social solidarity.

According to Macneil, solidarity and reciprocity are essential to the survival of human beings in society because people are inconsistently both selfish and social at the same time; they are in the most fundamental sense of the word, irrational.³¹ But in that case, how could they have evolved from people in nature to people in society? Only, Hume argued, because they were rational as well as selfish. Given greed and limited resources, we see that we would do better in a state of society than in a state of nature. Greed controls itself by "an alteration of its direction" so as to correct and regulate itself; and this is reason-dependent. We see what is wrong with a certain state of affairs and see what needs to be done. The social union is therefore reason-dependent. How, then, could it be irrational for selfish people to be social?

Well, in deciding what to do, if faced with two alternatives, there are the problems posed by the Prisoner's Dilemma and the rower's dilemma; and if faced with three or more alternatives, the problem of Arrow's Impossibility Theorem.³² The latter states that any process for making collective choices which satisfies six conditions is inconsistent in a certain sense. Those conditions are:

1. Unanimity: if everyone prefers alternative A to alternative B, then A is society's choice.
2. Non-dictatorship: no one person's choice is controlling.
3. Scope: there must be at least three alternatives.
4. Independence of Irrelevant Alternatives: only available alternatives may be considered.
5. Binary generation: alternatives are to be compared pairwise.
6. Transitivity of Preference: if individual *i* prefers A to B and B to C, then *i* prefers A to C.

Conditions 5 and 6 constitute social rationality; the inconsistency referred to is social inconsistency in the sense of failure to satisfy 5 and 6. Conditions 5 and 6 also require condition 3: transitivity re-

30. D. HUME, *supra* note 4, at 490.

31. I. MACNEIL, *supra* note 10, at 8 (1982) (unpublished manuscript).

32. K. ARROW, *SOCIAL CHOICE & INDIVIDUAL VALUES* (1963).

quires the binary comparison of at least three alternatives. The theorem states that if the process for making social choices satisfies conditions 1-4, then it cannot satisfy conditions 5 and 6; or, what amounts to the same thing, it cannot satisfy conditions 1-6 simultaneously.

Condition 4 in effect requires that for any pair of alternatives, in making a choice we consider only information concerning that pair; it also ignores the intensity of the preferences of individuals for their particular choices. Arguably, rationality of social choice requires that we consider both intensity of preferences and *all* possible alternatives rather than just all available alternatives. Thus, if condition 4 is dropped, there is a way out of Arrow's paradox.

It should also be noted that Gibbard has shown that when social choices are generated by voting schemes—i.e., schemes which make social choice depend entirely on individuals' professed preferences among the (at least three possible) alternatives—then if the scheme is non-dictatorial, it is subject to individual manipulation.³³ In the sense employed by Gibbard, an individual "manipulates" a voting scheme if, by misrepresenting his preferences, he secures an outcome he prefers to the "honest" outcome, i.e., the choice the community would make if he expressed his true preferences.

Although the equilibrium outcome in the Prisoner's Dilemma is not optimal, it is certainly not irrational "in the most fundamental sense of the word"; and the same is true of the converse version of the two rowers. In cases involving three or more alternatives, irrationality must be understood in the restricted sense of Arrow's theorem, the plausibility of which depends on the plausibility of condition 4. When the nation-state is considered as an ongoing macro-level exchange relation, it will be manifested most fundamentally in social choices. So if condition 4 is dropped, the macro-level exchange relation is as potentially rational as the micro-level exchange relation. Indeed, at the macro-level at which social choices would involve exchange relations, it is difficult to see how any alternative could be irrelevant.

We may conclude, therefore, that social solidarity reflects rationality rather than irrationality "in the most fundamental sense."

33. Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 *ECONOMETRICA* 587 (1973).

THE NATURE OF AN EXCHANGE RELATION OBLIGATION

In relational contract, says Macneil, both the content and the source of the obligations come from the relation itself, out of slowly evolving patterns of custom and law, and tend to be diffuse and ill-defined. Moreover, the ongoing relation itself creates obligations just as it defines the content of the obligations.³⁴ This kind of obligation is likened by Macneil to the sociologists' notion of commitment: it grows out of the 'investment' in the relation (and the linking norms of expectation, reliance and restitution?) made by the other party.³⁵ This can be made more precise in the case of a conventional action exchange relation.

In the case of those exchange relations based on promise, the primary performance obligation is promissory. But what about those exchange relations not based on promise, nor on status, role or kinship? What is the nature (source and content) of an obligation when the 'obligating factor' is conventional action *sans* promise etc.?

The essence of conventional action, we recall, is inter-personal mutuality of reference at the level of intentions, which requires something of the form:

if you do (will do) something,
then I will do something.

It is thus a 'declaration' of intention *sans* promise, etc., manifested by what is done. Consider the following:

- (a) S says to H: I'll be there.
- (b) H says to S: Is that a promise?
- (c) S replies (i) Yes.
(ii) No.

Both responses in (c) are meaningful. In (c)(i), S's obligation is clearly to be there; in (c)(ii) it is not. But it does not follow that S has *no* obligation in (c)(ii). So the question is: In what way could S be obligated in (c)(ii)? Consider (c)(i) again. The *most* that H is entitled to expect is that S will be there. And if S does not show up, the *least* that H is entitled to expect is an excuse—which, if unsatisfactory, would entitle H (and others) to rebuke S. Now consider (c)(ii). If we do not have the convention of promise, the declaration falls into the more general convention of language use in communication, the obligation of which generally is truthfulness rather than the perfor-

34. I. MACNEIL, *supra* note 29, at 17.

35. Macneil, *The Many Futures of Contract*, *supra* note 1 at 786.

mance of some action in the future. So if S does not show up, either (1) he did not speak truthfully, or (2) he changed his mind, or (3) he was prevented from being there, or (4) he forgot. If (1), then S did wrong and H is entitled to rebuke S. Responses (2) and (4) indicate that S is unreliable: (2) may call for an excuse; while (4) is simply an unsatisfactory explanation. In the case of (3), S will be excused if he was prevented by circumstances beyond his control. But if H is not entitled to (strongly) expect S to show up in (c)(ii), what more than an explanation or excuse could H expect? Well, one could say that H is *at most* entitled to expect something from S which is "more than" an explanation or excuse but "less than" S's being there, such as an indemnification, substitute, or alternative, e.g., S's sending someone else in his place.

Thus, the source of the obligation imposed by exchange relation *qua* conventional action *sans* promise, etc., is the "declaration" of intention (Gricean meaning) entailed by conventional action and the truthfulness it requires; and its nature is that of indemnity, substitute or alternative. This is compatible with part, at least, of the wide range of remedies which Macneil associates with the relational contract, including not only compensatory damages, but also mediation, arbitration and compromise. And if the exchange relation is conditioned on good faith, then the expectation, reliance and restitution interests associated with promise will also be protected. Indeed, good faith is one of the underlying principles which requires the protection of those interests, if not *the* underlying principle.

EXCHANGE RELATION AND GOOD FAITH

According to Macneil, norms are the way people do and ought to behave; they are principles of right action. The basic norms or principles of contract law "grow" out of the primal roots of contract. Intermediate norms or principles "emerge" from the patterns of basic contractual behavior and supply principles to test specific rules of contract law and determine how the basic norms are to be effectuated in given situations; they are general principles of justice behind legal rules.³⁶ One such intermediate norm or principle of right action in contractual behavior is that of good faith.

How does the norm or principle of good faith "emerge" from the pattern of conventional action exchange relations? If the conventional action is also promissory or based on status, role, kinship or gratitude, the good faith principle could reflect rules associated with

36. I. MACNEIL, *supra* note 29, at 38-39.

promise, status, role, kinship or positive morality. But what of conventional action *sans* promise, status, role, kinship or gratitude? How does the principle of good faith "emerge" from a conventional action exchange relation *simpliciter* in a social context of partial hostility?

Let us refer once more to the pay-off matrix for the Rower's Dilemma. The bottom right-hand corner (-5, -5) indicates that it would be better for each on his own if he got across the river by sharing the work. A classical promissory agreement is not a solution because each rower would have the same motive for not rowing he had *sans* agreement (A (0, -10); B (-10, 0)): let the other do the work. Moreover, the appointment of a third party authorized to enforce the agreement would not alter this. Rather, as we noted, the solution is conventional action *sans* promise. Cooperation is maintained (negatively) by each party's readiness to use the sanction of non-cooperation: if and only if you row, I will row. In a more positive sense we may also say that cooperation will be maintained as long as each party acts in good faith, i.e., puts his weight behind the oar. Thus, the possibility of sanctions—internal or external—is not of itself sufficient to maintain cooperation. Rather, the possibility of sanctions serves to remind us that, as a practical matter, the relation will not persist without good faith on both sides.

Macneil links good faith to procedural regularity.³⁷ This suggests that the emergence of the good faith norm may be susceptible to an explanation along the (Platonic-Aristotelian) lines of Fuller's notion of the morality of law.³⁸ The social context of partial hostility obviously of itself entails little in the way of good faith. Rather, it is reason that demands it: good faith is a rational constraint on partial hostility *qua* social context of cooperative conventional action.

From a conative stand point, conventional cooperative action is purposive and an exchange relation is a means-end relation; as such, they belong to the realm of practice rather than the realm of theory. For Plato and Aristotle, practice is concerned with purposive behavior, the means-end relation between actions and outcomes, the rules, conventions and principles of conduct. A practice or craft may involve either

- (i) doing something, the means, ordered to some end; or
- (ii) doing something, the means, producing an instrument for attaining some end.

37. *Id.* at 68.

38. L. FULLER, *THE MORALITY OF LAW* (1969).

In either case, the practice will have its principles, rules or directives. Those principles may be likened to a recipe for making something:

If you want to attain (or make an instrument for attaining) a certain end, then you ought to do so and so.

This sort of hypothetical directive-principle is determined solely by the means-end relation; it is immanent to the craft or practice; it exists solely by virtue of the means-end relation and does not reflect matters external to that relation. Given the means-end relation, the relevant principles are necessary hypothetical directives or rules for a certain kind of purposive behavior and conformity to them imparts to the means (and instrument) certain necessary characteristics: the end, as we say, justifies and explains the means.

But the principles of the practice and so the characteristics of the means (and instrument) resulting from conformity to those principles are not *logically* necessary because we cannot determine what they are until certain presuppositions and assumptions are made about the end in view, assumptions other than that the means works, that the end eventuates, assumptions and presuppositions going to the sort of end envisaged and so to the way in which the end is to be realized. Nor are they causally necessary characteristics. It may be true that doing so-and-so is the cause of satisfying the desire for the end. And when doing so-and-so produces something instrumental for attaining the end, that instrumentality itself is not the cause of satisfying the desire for the end. Given the practice, however, we can say that the principles and the characteristics imparted to the means (and instrument) are practically, though neither logically nor causally, necessary; and the presuppositions and assumptions about the end desired are the reasons why the end justifies the means (and instrument), and are the determinants of the kind of principles and the characteristics imparted to the means.³⁹

An exchange relation may be thought of as a practice or means-end relation involving conventional action as means and cooperation as end. The only presuppositions or assumptions regarding the end are a social setting consisting of the four primal roots in a context of partial hostility. Good faith may then be thought of as an internal principle of procedural regularity, a principle immanent to an exchange relation, a hypothetical directive to the participants:

39. See Mullock, *The Inner Morality of Law*, 84 ETHICS 327 (1974).

If you each want to attain ongoing cooperation, then you each ought to recognize the expectation and reliance interests of the other.

Otherwise the exchange relation will not persist, i.e., its temporal dimension makes good faith a practical necessity.

If partial hostility means that complete good faith on both sides is an ideal, then good faith may be regarded as a norm of aspiration rather than of duty. Given the antecedent if-clause, however, the ought becomes unconditional and socially binding, a social and rational limitation on selfishness. And if the exchange relation persists, the conventional action involved will be characterized by some degree of good faith.

CONCLUSIONS

The hermeneutical approach adopted herein yields the notions of a Gricean intended exchange and Humean conventional action such that every case of the former entails the latter, while the latter does not entail promises. A Gricean intended exchange therefore goes beyond classical contract theory. However it does not embrace those section 90 transactions in which the promise is unconditional and the social context insufficient to impart the Gricean meanings necessary for conventional action. Nor does it cover those section 90 transactions in which the promise is conditioned on gratitude for past favors. Since there are no such restrictions on Macneil's exchange relation, its nature cannot be completely captured at the micro-level by a conventional-action exchange relation. Similarly, the generality of the obligation of a Macneil exchange relation cannot be completely accounted for by the relative generality of the obligation of a Gricean intended exchange. This unboundedness reflects Macneil's belief that the concept of an autonomous individual is not a useful tool for social analysis.

At the macro-level at which the nation-state is viewed as a massive ongoing exchange relation, the Hume-Lewis notion of convention seems preferable to Fuller's section 90 concept as a model for the complementary expectancies involved in customary law *qua* a program for living together within the framework provided by enacted law. Convention, moreover, may serve as the mechanism of social solidarity and the guarantor of its rationality.

In the case of exchange relations not based on promise, status, role or kinship, i.e., a "pure" conventional action exchange relation, the source of the obligation is the "declaration" of Gricean intention,

i.e., utterer's meaning, entailed by conventional action and the truthfulness it requires; and its nature is that of indemnity, substitute or alternative. Furthermore, if such exchange relations are to persist, the conventional action involved will be characterized by some degree of good faith as a matter of practical, rather than logical or causal, necessity.

As for those Macneil micro-level exchange relations which are not conventional action exchange relations, neither the source of the obligation, nor the source of the good faith norm can be accounted for by the hermeneutical approach adopted herein.