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Stanley L. Paulson

Washington University, St. Louis

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JUS NON SCRIPTUM AND THE RELIANCE PRINCIPLE

Stanley L. Paulson*†

I.

Customary law, of enormous interest and importance historically, has for the most part yielded to other forms of law in domestic legal systems, a shift marked by the advent of a modern doctrine of precedent in eighteenth- and nineteenth-century England and by enactment of the great codes in nineteenth-century Europe. That a similar shift is under way in international law is evident from the inroads made by treaty law into areas formerly governed by customary law. Yet customary law has by no means run its course in the international sphere, where new fields of law not infrequently emerge through the formation of customary legal norms.¹ For instance, following technological developments that made exploitation of the resources of the continental shelf possible, customary legal norms served from the beginning to control this exploitation.² The pattern holds in emerging fields of international law—customary law develops first, followed by treaty law.

Whether the context be historical or contemporary, domestic or international, the philosophical question of the nature of customary

* Alexander von Humboldt Foundation Research Fellow, Faculty of Law, Free University of Berlin; Assistant Professor of Philosophy, Washington University (St. Louis). Ph.D. 1968, University of Wisconsin-Madison; J.D. 1972, Harvard University.

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1. Throughout the article I use the substantive expression "norm" rather than the more familiar "rule"; unlike "rule," "norm" leaves open the question of generality, permitting me to speak indifferently of general and particular customary, or unwritten, laws. This usage and its rationale follow Raz, *Voluntary Obligations and Normative Powers* (symposium), 46 *ARISTOTELIAN SOCIETY, SUPP. VOL. 79* (1972).

2. See Lauterpacht, *Sovereignty over Submarine Areas*, 27 *BRIT. Y.B. INTL. L.* 376 (1950); A. SLOUKA, *INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF* (1967). The Convention on the Continental Shelf, April 29, 1958, [1964] 15 *U.S.T.* 471, T.I.A.S. No. 5578, codified the preexisting customary law and, in certain respects, went beyond it.

legal norms persists. English legal philosophy has offered precious little help on the question. Legal positivists in England, disposed to understand the law as a manifestation of state authority, have greeted claims about customary law with skepticism.³ For John Austin, whose *The Province of Jurisprudence Determined* remains the *locus classicus* of legal positivism, custom must be adopted by the courts if it is to be regarded as law.⁴ "At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state."⁵

Nonpositivist legal philosophers in England have looked more closely than the positivists at English customary law—what we know as the common-law tradition.⁶ They have not, however, provided anything like a satisfactory analysis of its nature. C. K. Allen, whose *Law in the Making* bears the stamp of Maine, Pollock, and Vinogradoff, rather than that of Bentham, Austin, Holland, and Salmond, contends that "[f]or the most part, custom arises spontaneously from actual social practice, which soon acquires an imperative character through the focus of convenience, imitation, and instinctive traditionalism."⁷ These lines from Allen's work, known generally for its lucidity, fairly represent the level of discourse on the nature of customary law among nonpositivist legal philosophers in England.⁸

3. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 30-33 (H.L.A. Hart ed. 1954); J. BENTHAM, *OF LAWS IN GENERAL* 192-95 (H.L.A. Hart ed. 1970); T. HOLLAND, *JURISPRUDENCE* 56-65 (13th ed. 1924); J. SALMOND, *JURISPRUDENCE* chs. 6, 9 (7th ed. 1924).

H.L.A. Hart includes custom as one of the sources of law to which appeal may be made in identifying norms as legal norms, thereby suggesting a place for customary law within the framework of the domestic legal system. See *THE CONCEPT OF LAW* 97 (1961). However, Ronald Dworkin argues, correctly I believe, that the inclusion in *The Concept of Law* of custom as a source of law is precluded by one of the fundamental notions in Hart's legal positivism, namely the "rule of recognition." See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 42-44 (1967), reprinted under the title *Is Law a System of Rules?*, in *ESSAYS IN LEGAL PHILOSOPHY* 25, 56-58 (R. Summers ed. 1968).

4. See J. AUSTIN, *supra* note 3, at 30-33, 163-64; 1 J. AUSTIN, *LECTURES ON JURISPRUDENCE* 36-37 (5th ed. 1885); 2 *id.* at ch. 30.

5. J. AUSTIN, *supra* note 3, at 31.

6. For a suggestive statement on the English common law as customary law, see A.W.B. Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES)* 77-99 (A.W.B. Simpson ed. 1973).

7. C.K. ALLEN, *LAW IN THE MAKING* 129 (7th ed. 1964). Allen provides a statement of the common-law "tests" for customary law, familiar from Blackstone and others, but pursues the matter no further.

8. See H. MAINE, *ANCIENT LAW* ch. 1 (1861); F. POLLOCK, *Laws of Nature and Laws of Man*, in *ESSAYS IN JURISPRUDENCE AND ETHICS* 53-59 (1882), reprinted in

On the Continent, a general theory of customary law has been developed—what I term the Continental theory; it identifies formation and validity as the central issues in the analysis of custom and customary law.⁹ Yet the Continental theory, notwithstanding its longevity and continuing favorable reception among international lawyers,¹⁰ is ridden with problems. In particular, as I argue in the following section, the theory fails for want of a coherent position on the formation issue. In the course of my argument, I suggest a classification of the norms of customary law in terms of a generic category broader in scope than “customary law,” namely “*jus non scriptum*” or “unwritten law.” No mere refinement of terminology, the broader classification permits a new approach to the troublesome formation issue. I use this classification as a point of departure in the remaining sections of the paper, where, working with a concrete historical example, I develop rudiments of a theory of the formation and validity of unwritten legal norms. The key is the reliance principle, adapted to contexts of unwritten law. I provide an analytical statement of the principle and show that it explains the acquisition of rights and the imposition of duties in some contexts of unwritten law, while avoiding the problems of the Continental theory.

II.

François GénY, in his *Method of Interpretation and Sources of Private Positive Law*, offers what has proved to be an influential statement of the Continental theory:

In its exterior manifestation . . . customary law is a fact, or rather a complex of facts, which reveal a legal sentiment. The formation of customary law in effect presupposes that through a sufficiently long series of repeated acts there arises a constant practice related to some social situation. This is the fact element which is the necessary substratum of custom. But this is not all. In order that a factual relation recognized by usage becomes a positive legal relation, it is necessary that the practice from which it arises give it a color of necessity (*opinio necessitatis*) and thus impose it as a rule supported by public sanction. Only in this sense does the practice reveal a legally relevant sentiment.¹¹

JURISPRUDENCE AND LEGAL ESSAYS 164-68 (A. Goodhart ed. 1961); P. VINOGRADOFF, *The Problem of Customary Law*, in 2 COLLECTED PAPERS 410-22 (1928).

9. For my brief statement of the Continental theory, drawn from F. GénY, see text at notes 11-15 *infra*.

10. See, e.g., I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6-11 (2d ed. 1973); Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 42-49 (1962).

11. F. GÉNY, METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW No. 110, at 218-19 (2d ed. J. Mayda transl. 1963) (footnotes omitted). MÉ-

Gény's statement highlights not only the two issues identified by the Continental theory, but also the "factual" and "psychological" elements by means of which the theory speaks to these issues. One issue concerns the formation of custom: What is required to consider a given practice as a customary practice? The Continental theorist answers with a factual element, familiar in one form from the English common-law adage that custom must have existed from "time immemorial" and expressed in the Continental theory in terms of such quantitative determinants as frequency and duration. Gény, speaking to the formation issue, expresses the factual element as a "usage consist[ing] normally of . . . practices which because of not contradicted repetition have become so continuous and constant that their stability has been established."¹²

A second issue identified by the Continental theory concerns the validity of law: What is required to transform a given customary practice into customary law? Here the Continental theorist answers with a psychological element, often expressed in terms of the doctrine of *opinio juris sive necessitatis*, a doctrine that requires, in Gény's formulation, a belief or "sense of obligation" that "must color usage to give it the true character of customary law."¹³ A customary legal norm—as distinct from a mere customary practice—exists when the affected parties believe or opine that they are bound to act in accordance with the practice. For Gény, the role in the Continental theory of the factual and psychological elements is clear: "These two elements which we have just defined—the usage and the sense of legal necessity—seem to me . . . sufficient, as well as necessary to constitute a norm binding on the interpreter."¹⁴

The issues of formation and validity in the Continental theory invite closer examination. The answer to the formation question, which Gény gives in terms of usage or "a sufficiently long series of repeated acts," is quantitative in nature. That is, the aspect of a practice that marks it as customary is repetition, a certain level of frequency of the acts identified by the practice. But if Gény is correct, does that not suggest that there are other quantitative determinants as well? Continental theorists have, in fact, offered a number of determinants, including frequency, duration, generality, con-

THODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, first published in 1899, is a major jurisprudential statement on the interpretation and sources of French private law. Emphasizing custom as a binding source of law, Gény takes the Continental theory from the nineteenth-century German historicists, von Savigny and Puchta, and restates it in an idiom more congenial to the modern reader.

12. *Id.* at No. 119, at 244.

13. *Id.* at 246.

14. *Id.* at 248-49 (footnote omitted).

sistency, and uniformity.¹⁵ Frequency, as Gény states, is the repetition of acts within a given period of time, and cognate renderings of the other determinants are easily provided. Duration is the length of time a practice persists. Generality, the number of parties to a practice. Consistency, the ratio of the actual use of a practice by a given party in a given period of time to its possible (optimal) use by that party in that period of time—the ratio, in other words, of opportunities actually taken to opportunities afforded. Uniformity is the ratio of the number of parties actually adopting a practice to the number of parties afforded the opportunity to adopt it. These quantitative determinants divide naturally into two groups. Frequency, duration, and generality are used to ascertain particular quantities of acts, of time, and of parties. Consistency and uniformity are used to assign particular ratios, namely of actual to possible frequency and of actual to possible generality.

The existence of a customary practice is established, then, by showing that the practice may be described in terms of some concatenation of the quantitative determinants. Or so the Continental theorist would have us believe. A problem fatal to the enterprise arises, however, when we apply the determinants, a problem not of ascertaining a particular quantity (frequency, duration, generality) or assigning a particular ratio (consistency, uniformity), but rather of interpreting that quantity or ratio. What level of frequency, what period of duration, what degree of generality, what particular ratios are required if a given practice is to be considered customary? To answer such questions would require appropriate standards for applying the quantitative determinants to different types of practices. In international law, for example, it would be absurd to interpret in the same way the factual elements of the slowly evolved customary legal norms governing states' rights to territorial waters and the factual elements of the quickly developed norms governing state sovereignty over air space. The applicable quantitative determinants may be the same, but the standards for applying them must differ. Unfortunately, the requisite standards are nowhere to be found, either in the Continental theory or elsewhere.

I believe the problem of a lack of standards may be circumvented by distinguishing two formation issues—the formation of a customary practice (the issue posed by the Continental theory) and the formation of an unwritten legal norm. In the Continental theory, the is-

15. See, e.g., 1 F. VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 137-39 (W. Holloway transl. 1867). For recent statements by international lawyers, see I. BROWNIE, *supra* note 10, at 6-7; Waldock, *supra* note 10, at 43-45.

sues of formation and validity are serially ordered; there is no occasion to consider the validity of customary law unless the existence of a customary practice has already been established. This serial ordering is plausible if, as in the Continental theory, the conditions for the formation of a customary practice are distinct from the conditions for legal validity. Indeed, they are distinct as long as the formation issue is understood to pose what might be termed a sociological question about the formation of a customary practice. There is an alternative. Rather than considering the formation of a customary practice, one may consider the formation of an unwritten legal norm. The result is that the conditions for formation and the conditions for validity are not distinct, but are (as shown in section IV) identical.¹⁶ When the formation conditions obtain, the norm in question is *eo ipso* valid. Whether the norm is customary is only contingently related to the issue of the formation of the norm; that is, a norm satisfying the formation conditions may or may not be customary. By attending strictly to the issue of the formation of unwritten legal norms, one bypasses the quantitative determinants of the Continental theory and thereby circumvents the problem of a lack of standards for interpreting these determinants.

But is this shift in issues from the formation of a customary practice to that of an unwritten legal norm warranted? The question invites attention to a tacit assumption of the Continental theory that customary law is, as an object of study, the generic category. However obvious it may appear on first glance, the assumption proves to be mistaken. Paradoxically, what we speak of as customary law is a class of norms broader in scope than any class of norms sociologists or anthropologists would recognize as customary. Indeed, the expression "customary law" is a misnomer, and the classification it suggests is misleading, as international lawyers' talk of "instant custom" demonstrates.¹⁷ A new classification is called for, one which reflects the fact that not all "customary" legal norms are actually customary. Adopting Justinian's expression "*jus*

16. It is not trivial to claim that the conditions of the formation and validity of unwritten legal norms are identical. Consider the public law of a domestic legal system, a context wherein these conditions are not identical. The satisfaction of the conditions for the formation of a legislative norm establishes a presumption in favor of the legal validity of the enactment; but the strength of the presumption is determined by, *inter alia*, how well the enactment coheres with more fundamental law, not least of all, constitutional law. Where such coherence is wanting, the presumption in favor of validity may be rebutted by appeal to the more fundamental law. A condition of the validity of the norm is thereby provided by the more fundamental law, which, however, is not a condition of formation.

17. See, e.g., Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25, 69-70 (1970), and material cited therein.

non scriptum,"¹⁸ I suggest unwritten law as the generic category. The shift in issues to the formation of unwritten legal norms is warranted, then, because unwritten norms comprise the generic class.

This class of norms, ordinarily termed "customary law" and here termed "*jus non scriptum*," is defined for my purposes by two characteristics. First, it is a class of *unwritten* norms. Second, and less obviously, it is a class of norms *independent of domestic law*. That is, the norms in question are not governed by the promulgated norms of a domestic legal system; norms (in particular, unwritten norms) that are governed by domestic law, for example, the law of contracts, are thereby excluded. Perhaps the best historical example of *jus non scriptum*, as defined here, is the Law Merchant. A relatively self-contained body of unwritten norms of commercial and maritime law, the Law Merchant existed apart from domestic law until the seventeenth and eighteenth centuries, when it was absorbed into the common law in England and was codified on the Continent (in a form distinct from that of the ordinary civil law).¹⁹

Thus far this article has been concerned with the issue of formation. The Continental theory poses a second issue, that of the validity of customary law. Here a psychological element, introduced by means of the doctrine of *opinio juris sive necessitatis*, serves in the Continental theory to distinguish between a customary practice and a customary legal norm. Géný says that the psychological element "consists of a feeling among the persons who [conform to the customary practice] that they act on [the] basis of an unexpressed rule which is binding for them as a rule of law."²⁰ This psychological attitude lends legal validity to what otherwise would be simply a customary practice.

The *opinio juris* doctrine emerges from Géný's statement as subjective and less than convincing.²¹ Here too, there is an alternative.

18. JUSTINIAN, INSTITUTES, bk. 1, tit. 2, § 3.

19. See 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 60-154 (1924); 8 *id.* at 99-300.

20. F. GÉNY, *supra* note 11, at No. 119, at 248 (footnote omitted).

21. Moreover, some formulations of the *opinio juris* doctrine are logically vicious; they stipulate that there be a belief, or evidence of a belief, that the customary practice is "requir[ed]" by *existing* law. North Sea Continental Shelf Cases, [1969] I.C.J. 3, 44. See 1 L. OPPENHEIM, INTERNATIONAL LAW § 17, at 27 (8th ed. H. Lauterpacht 1955). The logically vicious character of such formulations, ruling out by their own terms the possibility of new customary law (*i.e.*, customary law not "required" by existing law), has long been recognized. See 1 F. VON SAVIGNY, *supra* note 15, at 140-42; Kelsen, *Théorie du droit international coutumier*, 1 REVUE INTERNATIONALE DE LA THÉORIE DU DROIT 253, 261-65 (1939).

In some recent statements of the Continental theory, the *opinio juris* doctrine is expressed in a weaker, "presumptive" form. That is, when the "factual" element has been established, the "psychological" element is presumed to have been established, and the burden of proof rests with the party who would rebut the presump-

The adaptation of the reliance principle to contexts of unwritten law implies, *inter alia*, that rights may be acquired and obligations imposed apart from any belief or psychological attitude that the acts or forbearances in question are in conformity with law. Various forms of the reliance principle are evident in the law. For example, the principle is familiar historically as the rationale for the equitable doctrine of estoppel.²² In contract law, one form of the principle provides a basis for contractual liability (sometimes termed "promissory estoppel").²³ In property law, another form of the principle provides a rationale for the doctrine of prescription.²⁴ What is the underlying notion in these various forms of the principle? It is the idea that when one party acquiesces to an act of another party, engendering in the acting party an expectation of and then reliance on continued acquiescence, the result may be the formation of a legal relation between the parties.²⁵ I pursue this idea at length in the sections that follow, looking first to a concrete example of how parties acquire rights and impose obligations in a context of unwritten law, an example drawn from the 1951 *Fisheries Case* (United Kingdom v. Norway),²⁶ and then moving to an analytical statement of the conditions for such rights and obligations. Although the example I use as a vehicle for developing the conditions of the reliance principle

tion. For a leading statement, see Sørensen, *Principles de droit international public*, 101 RECUEIL DES COURS 1, 47-51 (1960).

22. "The vital principle [of equitable estoppel] is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1879).

23. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT OF CONTRACTS § 90 (1932). See RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft Nos. 1-7, 1973). Section 90 of the *Restatement* has been widely adopted by the courts. For a well known case in point, see *Fried v. Fisher*, 328 Pa. 497, 196 A. 39 (1938).

24. Although the reliance principle is not referred to by name in property law, the conditions associated with the principle, one party's assertion of a "right," a second party's acquiescence thereto, and so on, are evident in, *inter alia*, the acquisition of easements by prescription. See, e.g., *Parker & Edgerton v. Foote*, 19 Wend. 309 (Sup. Ct. of Judicature of New York 1838). See also *Romans v. Nadler*, 217 Minn. 174, 14 N.W.2d 482 (1944). For a Hohfeldian statement, see Cook, *Legal Analysis in the Law of Prescriptive Easements*, 15 S. CAL. L. REV. 44 (1941).

25. Here, and in what follows, I am indebted to Fuller, *Human Interaction and the Law*, 14 AM. J. JURISPRUDENCE 1 (1969), reprinted in *THE RULE OF LAW* 171-217 (R. Wolff ed. 1971), and to MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INTL. L. 115 (1957).

26. *Fisheries Case* (United Kingdom v. Norway), [1951] I.C.J. 116. See also Waldock, *The Anglo-Norwegian Fisheries Case*, 28 BRIT. Y.B. INTL. L. 114 (1951). The Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639, codified law on the territorial sea.

concerns relations between states, I believe these conditions are applicable, *mutatis mutandis*, to relations between persons as well. I emphasize the international context, for problems of customary law are of special interest there,²⁷ but that is not to say that the ensuing analysis is peculiar to the international field.

III.

Coastal states delimit and exercise exclusive jurisdiction over their territorial waters, and the validity under international law of Norway's delimitation of her territorial waters was the fundamental question before the International Court of Justice in the *Fisheries Case*. The major issues raised in the case—the determination of the state's coastal boundary and the location of the "outer limit" of the state's territorial waters²⁸—may be resolved by several competing methods of delimitation.

The most widely accepted method is that of *tracé parallèle*: The coastal boundary is determined by the low watermark along the coast, and the outer limit of the territorial waters is then located by tracing, four miles seaward from the coastal boundary, a line that "follow[s] the coast in all its sinuosities."²⁹ Norway contended that *tracé parallèle*, though a workable method of delimitation for states with regular shorelines, was unsatisfactory in the case of a variegated shoreline. The coastal area in dispute, a bleak and largely barren area lying wholly within the Arctic Circle, included

the coast of the mainland of Norway and all the islands, islets, rocks and reefs, known by the name of the "skjaergaard" (literally, rock rampart), together with all Norwegian internal and territorial waters. The coast of the mainland, which, without taking any account of fjords, bays and minor indentations, is over 1,500 kilometres in length, is of a very distinctive configuration. Very broken along its whole length, it constantly opens out into indentations often penetrating for great distances inland

Within the "skjaergaard", almost every island has its large and its small bays; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local popula-

27. Three excellent monographs devoted to customary international law have appeared in recent years: A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* (1972); K. WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* (1964).

28. Another issue is the distance between the coastal boundary and the outer limit—the breadth, in other words, of the state's maritime belt. Norway's four-mile maritime belt was acknowledged by the United Kingdom in the *Fisheries Case*, although a three-mile belt had elsewhere become more or less standard. See Waldock, *supra* note 26, at 125.

29. See [1951] I.C.J. at 128.

tion which inhabits the islands as it does the mainland. The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the "skjaergaard".³⁰

Because the method of *tracé parallèle* was not workable in practice, Norway had resorted to a different method of delimitation, that of "straight lines." Her coastal boundary was determined by selecting as "base points" the outermost islands and islets of the "skjaergaard" and then connecting these base points with straight lines; the outer limit of her territorial waters was determined by measuring four miles out from the straight lines. The United Kingdom instituted proceedings before the International Court to challenge this practice, arguing that a 1935 Norwegian decree, declaratory of Norway's method of delimitation, was invalid.

The situation, then, is one in which an unwritten norm of international law, applicable to the coastal states, prescribed *tracé parallèle* as the method of delimitation, while Norway delimited her territorial waters by a different method, that of "straight lines." How was Norway to establish that her practice, though a departure from the general legal norm, did not violate international law? She argued, in effect, that her use of a method of delimitation other than that prescribed by the general norm, coupled with notice to other states, constituted an assertion of a right to the use of the variant method; that other states, cognizant of her practice, had acquiesced thereto; that their acquiescence had engendered, on Norway's part, an expectation of continued acquiescence; and that, acting on this expectation, she had developed her northern fishing industry and had thereby acquired a right to the use of the variant method.

Was Norway's practice accompanied by notice to other states? A number of nineteenth-century Norwegian decrees, declaratory of preexisting legal practices, are important here. The first was the Norwegian Royal Decree of 1812: "We wish to lay down as a rule that, in all cases when there is a question of determining the limit of our territorial sovereignty at sea, that limit shall be reckoned at the distance of one ordinary sea league [four miles] from the island or islet farthest from the mainland, not covered by the sea. . . ." ³¹ In the 1812 Decree, Norway asserted the one-league (four-mile) figure of the breadth of her maritime belt and added, significantly, that the distance was to be measured from the outermost islands and

30. [1951] I.C.J. at 127.

31. [1951] I.C.J. at 134.

islets, thereby declaring that they were to be the "base points" for determining her coastal boundary.

The 1812 Decree did not, however, describe how the lines between the base points were to be drawn. Norway's decrees of 1869 and 1889 construed the 1812 Decree on this question. The 1869 Decree, written in response to the presence of Swedish fishing boats off the Norwegian coast, reads (in part):

"My Ministry assumes that the general rule . . . recognized by international law for the determination of the extent of a country's territorial waters, must be applied here in such a way that the sea inside a line drawn parallel to a straight line between the two outermost islands or rocks not covered by the sea, . . . and one geographical league northwest of that straight line, should be considered Norwegian maritime territory."³²

The 1869 Decree, in other words, defined the territorial waters as extending one league seaward from straight lines drawn between adjacent base points.

With straight lines in use elsewhere only to enclose certain bays, how did other states respond to Norway's assertion of a right to use a "straight-lines" method to delimit her coastal boundary? Although it had been the presence of Swedish fishing boats off Norway's coast that had prompted the 1869 Decree, France alone protested. Moreover, after Norway had explained her "straight-lines" rule,³³ France, while maintaining her position on the principle of the matter, indicated a willingness to accept the particular delimitation laid down in the 1869 Decree as resting upon "a practical study of the configuration of the coast line and of the conditions of the inhabitants."³⁴

In her 1889 Decree, Norway again construed the 1812 Decree in terms of the "straight-lines" method, and no state protested. The only other significant nineteenth-century proclamations on the question were the Norwegian whaling laws of 1881 and 1896, which established a one-league (four-mile) whaling limit by drawing straight lines between base points, a limit not contested by the affected country, the United Kingdom.³⁵ In 1906 and 1908, to protest British trawlers off her coast, Norway issued documents that were, again, declaratory of preexisting legal practices.³⁶

In the 1951 *Fisheries Case*, Norway was able to argue that neither her proclamations on the "straight-lines" method nor her use of

32. [1951] I.C.J. at 135.

33. [1951] I.C.J. at 135-36.

34. [1951] I.C.J. at 136.

35. See Waldock, *supra* note 26, at 119.

36. [1951] I.C.J. at 137.

the method in applying the 1812 Decree had met with protest from other states.³⁷ In response to the United Kingdom's counter-argument that "the Norwegian system of delimitation was not known to it,"³⁸ the International Court replied:

As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies *a fortiori* to the Decree of 1889 . . . which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice.³⁹

The International Court saw Norway's unilateral decrees of 1869 and 1889 as declaratory of a practice in use along the whole of the Norwegian coast. General tolerance by states of Norway's practice, marked by their failure to protest her proclamations declaratory of the practice, constituted acquiescence to her nonconforming "straight-lines" method of delimitation. And, in the view of the Court, Norway had relied on continued acquiescence in developing her fishing industry, thereby acquiring a right to the variant method.

This example from the *Fisheries Case* represents one means of acquiring rights in a context of unwritten law; I want now to develop an analytical statement of the process.

IV.

Imagine a situation wherein parties—that is, persons or states—are governed by a norm of unwritten law. The norm prescribes that the parties (*A*, *B*, and so on) are to do *x*. (Here "*x*" ranges over types of acts, such as observing a common boundary between adjacent parcels of land or, as illustrated by the *Fisheries Case* in the international field, delimiting territorial waters by the method of *tracé parallèle*.)

Suppose now that party *A*, taking courage, asserts against *B* a "right"—the expression is ambiguous here—to do *y*.⁴⁰ (Here "*y*"

37. See [1951] I.C.J. at 138.

38. [1951] I.C.J. at 138.

39. [1951] I.C.J. at 139.

40. Throughout the present section of the paper I specify which of two interpretations of the ambiguous expression "right" is, in any particular instance, appropriate—an indeterminate interpretation or a determinate one. In situations where it is not clear whether the claimant is asserting a privilege or a correlative right, an indeter-

ranges over types of acts not compatible with act x , not compatible in the sense that joint compliance with both the norm prescribing the doing of x and a second norm prescribing the doing of y is not possible.) In the unwritten law context, A 's assertion of a "right" is typically a matter of A 's actually doing what he claims to have a "right" to do—actually encroaching on the adjacent parcel of land or actually delimiting territorial waters by, say, the method of "straight lines."

B , cognizant of A 's assertion, may respond in either of two ways. He may protest A 's assertion of a "right" to do y , which preserves the existing legal situation; that is, where A 's assertion is met with protest, the general norm governs the situation as before. Alternatively, B may acquiesce to A 's assertion, which changes the legal situation. Through B 's acquiescence, A acquires a "right" to do y . What does the "right" provide? In Hohfeldian parlance, it provides to A a privilege vis-à-vis B to do y , that is, it releases A from an obligation vis-à-vis B to forbear from doing y .⁴¹

At this first stage in the reordering of rights and obligations, that of assertion and acquiescence, the assertion of a "right" yields to the asserting party a privilege because the responding party acquiesces to the assertion. A second stage in the reordering of rights and obligations under unwritten law holds open to A the prospect of something more than a privilege. Suppose A , having acquired through B 's acquiescence the privilege vis-à-vis B of doing y , now exercises that privilege, and B for his part continues to acquiesce. B 's behavior in time engenders in A legitimate expectations of continued acquiescence, and A , relying on B 's continued acquiescence, undertakes a new course of action, z . (Here " z " ranges over types of acts that A would not undertake but for B 's continued acquiescence to A 's doing y .) Finally, B knows that A is undertaking a new course of action, z , in the expectation of B 's continued acquiescence to A 's doing y . In this situation, A has more than a privilege to do y ; he has acquired, again in Hohfeld's language, a correlative right vis-à-vis B to do y .

What does the correlative right provide? Unlike the acquisition of a privilege, the acquisition by A of a right implies that B has incurred an obligation vis-à-vis A . That is, A 's right to do y , acquired by reliance on B 's continued acquiescence, imposes an obligation on

minate interpretation is appropriate, and the expression "right" appears in the text in quotation marks. On the other hand, where the claimant is unequivocally asserting a correlative right, a determinate interpretation is appropriate, and the expression appears without quotation marks. The distinction between privilege and correlative right, developed at some length in the present section, follows Hohfeld. See generally, W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1919).

41. See *id.*

B to forbear from interfering with *A*'s doing *y*. Reliance on continued acquiescence marks the transition from the acquisition by *A* of a privilege to his acquisition of a correlative right.

To summarize the conditions for the formation of the norm governing the new legal relation between *A* and *B*:

1. *A* asserts a "right" vis-à-vis *B* to do *y*, and *B*, cognizant of the assertion, acquiesces; *A* thereby acquires a privilege vis-à-vis *B* to do *y*.

To do *y* is to depart from the norm governing the preexisting situation. In the unwritten law context, one typically asserts a "right" to do something by actually doing that thing. *B*'s cognizance of *A*'s assertion may be either *B*'s actual knowledge of the assertion or the knowledge that *B* could reasonably be expected to have.

2. *B*'s acquiescence to *A*'s assertion or to *A*'s repeated assertions engenders in *A* legitimate expectations of *B*'s continued acquiescence.

The notion of legitimate expectations is unequivocally normative in nature, and it underscores the normative dimension of these conditions generally.

3. *A*, now doing *y* with the expectation of *B*'s continued acquiescence, relies thereon for a new course of action, *z*, that *A* would not have undertaken but for *B*'s continued acquiescence to *A*'s doing *y*.

Here *z* is an activity dependent on *y*, in the sense that *z* would not have been undertaken without the acquisition of the privilege to do *y*. In the *Fisheries Case*, for example, "*z*" represents the growth in Norway's fishing industry spurred by the favorable delimitation of her territorial waters.

4. *B* is cognizant not only of *A*'s doing *y* but also that *A* is undertaking *z* in reliance on *B*'s continued acquiescence to *A*'s doing *y*.

B can reach *A*'s doing *z* only by protesting *A*'s doing *y*; *B* cannot directly reach *A*'s doing *z*. If the United Kingdom, for example, had been unhappy with the expansion of Norway's fishing industry, her protest, to be legally efficacious, would have had to have been directed at Norway's favorable delimitation of her territorial waters and not at the expanded fishing industry itself. Further, the kind of act represented by "*y*" must remain the same; Norway, for example, could not substitute for her "straight-lines" method of delimitation a still more favorable method. Finally, *B*'s cognizance of *z*, as *B*'s cognizance of *y*, may be either actual knowledge or knowledge reasonably ascribed to *B*.

The *reliance principle*, adapted to contexts of unwritten law, may be formulated in a hypothetical statement. The conditions stated above are to be found in the protasis of the hypothetical, and the result of satisfying them, in the apodosis. That is,

If conditions 1., 2., 3., and 4. obtain, then, *ceteris paribus*, *A* acquires a correlative right vis-à-vis *B* to do *y*, and *B* incurs an obligation vis-à-vis *A* to forbear from interfering with *A*'s doing *y*.

Satisfaction of these conditions marks an application of the reliance principle, and the result is the formation of an unwritten legal norm. Applications of the principle illustrate how one party's acquiescence to another's course of action can engender expectations that yield a legal right to the action.

Thus formulated, however, the reliance principle is insufficiently broad in scope. The *Fisheries Case* presents a situation in which a departure from a preexisting norm culminates in the formation of a new norm of unwritten law, and I have developed my conditions for the formation of unwritten legal norms from this type of situation. Yet there may be no preexisting norm. It may, instead, be the case that all parties are "privileged" to do what they will—a situation in which a Hobbesian state of nature leaves all parties at liberty. The formation of unwritten legal norms in the continental shelf context, to which I alluded in section I, is a case in point. Before 1945, there was virtually no law concerning the continental shelf.⁴² When prospects to exploit the resources of the continental shelf arose from developments in technology (which in turn were prompted by the need for petroleum during the war), countries asserted "rights" to exercise exclusive jurisdiction over offshore submarine areas, and they did so in a context wherein parties were not encumbered with preexisting obligations. When the assertion of the "right" was met with acquiescence, the asserting party came to expect and then to rely on continued acquiescence. This reliance, in turn, led the asserting party to initiate a course of action that otherwise would not have been undertaken (namely, industrial investment for oil exploration, drilling, and the like). At this point, the asserting party acquired the right in question, and the acquiescing party incurred an obligation to forbear from interfering with the exercise of that right. The difference between the *Fisheries Case* and the case of the continental shelf is the presence of a preexisting norm in the one situation and its absence in the other—what I term, respectively, a preexisting *legal* situation and a preexisting *alegal* situation.⁴³

42. A. SLOUKA, *supra* note 2, at 45-46.

43. The assumption of a preexisting alegal situation does not presuppose any

How might the conditions for the formation of unwritten legal norms be revised to reflect this difference between the legal situation and the alegal? In the legal situation, imagine, as before, that the parties (*A*, *B*, and so on) are governed by a norm of unwritten law, which prescribes that they are to do *x*, and that "y" ranges over types of acts not compatible with *x*. As we have seen, when *A* asserts a "right" to do *y* and the assertion is met by *B*'s acquiescence, *A* acquires a privilege vis-à-vis *B* to do *y* (which is to say that *A* is released from an obligation vis-à-vis *B* to forbear from doing *y*). Now imagine, in the alegal situation, that *A* again asserts a "right" to do *y*, and *B* again acquiesces. Unlike his acquiescence in the legal situation, *B*'s acquiescence in the alegal situation is not a normative phenomenon; it does not change *A*'s rights or obligations. Whereas in the legal situation *A* acquires a privilege vis-à-vis *B* to do *y*, in the alegal situation every party has enjoyed the privilege of doing *y* all along. *A*, in the alegal situation, cannot be said to acquire a privilege at all and, therefore, cannot be said to acquire it as a result of *B*'s acquiescence. Neither *A*'s rights nor his obligations change at this first stage of assertion and acquiescence.

The conditions for the formation of unwritten legal norms can be rewritten, by noting two variations, to reflect the alegal situation. First, the latter clause of condition *I.*, has no application in the alegal situation and may be omitted; the result of the omission is a new condition for the alegal situation, namely *I'*, which reads:

I'. *A* asserts a "right" vis-à-vis *B* to do *y*, and *B*, cognizant of the assertion, acquiesces.

Second, the verb "to acquiesce," as it is used in the two versions of the first condition (namely *I.* and *I'*.) is systematically ambiguous. Acquiescence is a normative phenomenon in condition *I.* but simply

position on the issue of *non liquet* in international law. *Non liquet* raises a question of the completeness of international law or, more precisely, a question of whether a court "otherwise endowed with jurisdiction" may refuse to adjudicate a claim owing to "the absence or insufficiency of the applicable substantive law." Lauterpacht, *Some Observations on the Prohibition of 'Non liquet' and the Completeness of the Law*, in *SYMBOLAE VERZIJL* 196, 199 (1958). See also Stone, *Non Liquet and the Function of Law in the International Community*, 35 *BRIT. Y.B. INTL. L.* 124 (1959). If *non liquet* is prohibited, which is to say that a judicial decision for either complainant or respondent will be forthcoming in any case in which the court has jurisdiction, then international law is "complete." (Following Lauterpacht and Stone, *supra*, I do not consider the trivial sense of completeness in which "what is legally not forbidden is legally permitted." H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 529 [2d ed. R. Tucker 1966]). But it is complete only in the sense that the court will decide all disputes within its jurisdiction, even those that are not *in fact* covered by existing international law. In these latter cases, the court's decisions are constitutive of the law, and the completeness of international law in this sense is compatible with the assumption in the text of a preexisting alegal situation.

factual in condition *I'*. (In the remaining conditions, however, acquiescence is normative in both the legal and the alegal situations; in both, acquiescence culminates in a change in the parties' rights and obligations.)

Taking account of condition *I'*., the reliance principle may be reformulated to provide for its application in both situations, legal and alegal. Specifically, the first of the conditions may be expressed as a disjunction, the disjuncts of which are *I.* and *I'*. That is,

If conditions *I.* or *I'*., 2., 3., and 4. obtain, then, *ceteris paribus*, *A* acquires a correlative right vis-à-vis *B* to do *y*, and *B* incurs an obligation vis-à-vis *A* to forbear from interfering with *A*'s doing *y*.

Which disjunct, *I.* or *I'*., applies in a given case? Similarly, which reading of the systematically ambiguous expression "to acquiesce" in the first condition is appropriate? Both questions are answered by determining which type of situation exists at the outset, a legal or an alegal one.

As formulated here, the reliance principle is of general application. The *Fisheries Case* is representative of the acquisition of rights and imposition of obligations in a preexisting legal situation. Control of the exploitation of the resources of the continental shelf—an unwritten law context from its beginnings with the Truman Proclamation in 1945⁴⁴ to the 1958 Geneva Convention on the Continental Shelf⁴⁵ (and beyond, in the case of states not party to the Convention⁴⁶)—is representative of the acquisition of rights and imposition of obligations in a preexisting alegal situation.

In concluding this analytical statement of the reliance principle, several caveats are in order. First, although the principle plays a pervasive role in the law⁴⁷ and although my latter formulation of the principle is sufficiently general to apply to both legal and alegal situations, it does not follow that the principle applies in the formation and validity of all unwritten legal norms. Fundamental legal problems in the field await resolution—for example, whether or not a new state is bound by existing unwritten legal norms, and, if so, how the validity of those norms is to be understood vis-à-vis that state. Meanwhile, the scope of unwritten law is unclear. The Continental

44. The Proclamation (issued on Sept. 28, 1945) declared, *inter alia*, that it was the policy of the United States to regard "the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation" as "reasonable and just." 10 Fed. Reg. 12,303 (1945); 13 DEPT. STATE BULL. (1945).

45. The Convention on the Continental Shelf, April 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578.

46. North Sea Continental Shelf Cases, [1969] I.C.J. 3.

47. See text at notes 22-24 *supra*.

theory and the reliance principle aside, other bases for the formation and validity of unwritten legal norms have been offered,⁴⁸ one or more of which will be necessary if some unwritten legal norms are indeed beyond the scope of the reliance principle.

Second, the principle as I have formulated it speaks to bilateral relations between parties (states or persons), yet many unwritten legal norms are multilateral. In the settlement of disputes by mediation or adjudication, a multilateral norm may be analyzed into a number of bilateral relations, which suggests a hypothesis about the formation and validity of multilateral norms. It may be supposed that the multilateral norm, comprised of a number of bilateral relations, is formed by applying the reliance principle to each of the bilateral relations. In the context of the *Fisheries Case*, for example, such bilateral relations would include those between Norway and the United Kingdom, between Norway and France, and so on.⁴⁹ However, this is only one hypothesis on the question of multilateral norms, and other bases for their formation and validity must be explored as well.

Third, even in a strictly bilateral context, my formulation of the reliance principle is deceptively simple. To fill it out and reveal something of the complexity hidden by the "*ceteris paribus*" clause, I expand my context in the following section and consider the application of the principle to parties generally—that is, either states or persons. This expanded context, as will be evident below, affords a look at certain constraints on the application of the reliance principle, some of which are not germane to the international context.

V.

Questions about the scope of the law have been of considerable interest to legal theorists. How far does the law reach, for example, in settling disputes, in facilitating private arrangements, in constraining governmental power? Or, adopting von Jhering's familiar char-

48. For the range of possibilities see Verdross, *Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts*, 29 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 635 (1969). Aside from what I have termed the Continental theory, see text at notes 11-15 *supra*, the classical consent theory is the most familiar of the theories Verdross discusses in his useful survey. For the standard text on the classical consent theory, see F. SUÁREZ, A TREATISE ON LAWS AND GOD THE LAWGIVER bk. 7 (J. Waldrom transl. 1944). (Book 7 of *DE LEGIBUS, AC DEO LEGISLATORE*, first published in 1612, is an unusually rich philosophical statement on customary law generally). For a modern statement of the classical consent theory, see Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419 (1961).

49. See A. SLOUKA, *supra* note 2, at 156-75.

acterization of a right as a "legally protected interest,"⁵⁰ which of a party's interests are legally protected, and why?

A sociohistorical theory of legal development, such as that outlined by Roscoe Pound, offers one type of answer to questions about the scope of the law.⁵¹ The history of legal development is a history of more or less distinct stages. The beginnings, what Pound calls "archaic law," are marked by peacekeeping activities—for example, the regulation of self-help and self-redress. With the emergence of legal forms, Pound's archaic law yields to "strict law." After several further stages, legal evolution culminates in the "socialization of law," where concern for societal interests supplants the characteristic legal preoccupation with the interests of individuals. Yet if helpful in comparing the scope of the law at various stages of its historical development, a theory such as Pound's is less helpful in determining the limits of legally protected interests in any given period.

Another type of answer to questions about the scope of the law may be found by looking to the parties to a prospective legal arrangement and, in particular, to the nature of their relationship to one another. The range of possible relations between parties may be understood, as Lon Fuller suggests, in terms of "the notion of a spectrum . . . running from intimacy, at the one end, to hostility, at the other, with a stopping place midway that can be described as the habitat of friendly strangers."⁵² Suppose, now, that the parties to a prospective legal arrangement have conflicting or potentially conflicting interests that the arrangement promises to protect through the application of the reliance principle. Can these interests be "legally protected" if the relation between parties is at one end or the other on the spectrum?

At one extreme, imagine that the parties are warring states whose interests conflict on, *inter alia*, control of a river that marks a common boundary. Their conflict of interests on a particular issue—here, their common boundary—occurs in a context of profound dissensus on underlying values.⁵³ At the other extreme, imagine that the parties are loving husband and wife, and that at the bidding of the husband, the couple plans an evening out, but that later, after she has made plans for the evening, he reneges on the invitation.

50. 3 R. VON JHERING, *GEIST DES RÖMISCHEN RECHTS* § 60 (5th ed. 1906).

51. See 1 R. POUND, *JURISPRUDENCE* 363-456 (1959); Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 *HARV. L. REV.* 195 (1914).

52. Fuller, *supra* note 25, at 27.

53. I take the expression "dissensus" (and also "consensus" *infra*) from Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 *J. CONFLICT RESOLUTION* 26 (1963).

Though their interests conflict on a particular issue—here, the evening—the conflict occurs not only in a context of consensus on underlying values but, more importantly, in a context of intimacy.

In the case of the warring states, the dissensus on underlying values may render the reliance principle unworkable. Given the dissensus, there may be no good reason to suppose that one state could harbor legitimate expectations of continued acquiescence by the other state and rely thereon for a new course of action. In the case of the married couple, application of the reliance principle would tend to undermine the relation of intimacy, for the principle would impose legal obligations to act or forbear from acting in a context in which personality, not specific acts, structures the relation.⁵⁴ In the middle range of the spectrum, where the paradigmatic relation is one between “friendly strangers,”⁵⁵ there is neither a dissensus on underlying values that renders unworkable the reliance principle nor a relation of intimacy that tends to be undermined by the imposition of legal obligations.

The situation in practice is more complicated than these tidy examples suggest. Warring states sometimes recognize arrangements of unwritten law—for example, they may comply with the customary laws of war. But this comes as no surprise, for there may be no dissensus on the particular values (protection of civilians, proper treatment of prisoners of war) advanced by the laws of war. Some relations that would hardly be described as intimate—a businessman invites a customer to dinner⁵⁶—are nevertheless conducted on the model of familial intimacy. Yet there is nothing surprising here either, for the dinner invitation carries with it the pretense of a relation based on personality, not on specific acts; the application of the reliance principle, imposing obligations to act or forbear from acting, would tend to undermine that relation.

That the reliance principle ordinarily applies in the middle range of the spectrum is part of what is meant by the “*ceteris paribus*” clause of the principle.

VI.

I have argued that the reliance principle accounts for the forma-

54. See Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 330-34 (1971), and material cited therein.

55. The concept of the stranger is Simmel's. See THE SOCIOLOGY OF GEORG SIMMEL 402-08 (K. Wolff transl. 1950), cited in Fuller, *supra* note 25, at 9.

56. See *The Invitation to Dinner Case*, in H.M. HART & A.M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 477-78 (tent. ed. 1958), reprinted in PHILOSOPHY OF LAW 185 (J. Feinberg & H. Gross eds. 1975).

tion of norms of *jus non scriptum* or unwritten law. Acquiescence by one party (a person or state) to an act of another, engendering in the acting party an expectation of and then reliance on continued acquiescence, may culminate in the formation of a legal relation between the parties; the analytical statement of the reliance principle specifies, in both legal and alegal situations, conditions for such a relation.

Why has the reliance principle received so little attention in legal philosophy? I suspect that the answer lies in the fact that we are beholden, unwittingly as often as not, to a positivistic theory of the nature of the law, a theory that regards law as the imposition of authority and, in John Austin's view, rules out customary law altogether.⁵⁷ The sway of Austin's theory—regarded for a century by English writers as the "official theory" in jurisprudence and influential in America in the guise of legal realism—accounts, in no small part, for the lack of attention paid to the reliance principle in legal philosophy. For it is customary law, or what I have termed *jus non scriptum*, that highlights the role of the reliance principle in the law.

57. See text at notes 3-5 *supra*.