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Promises in Morality and Law

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BOOK REVIEW

PROMISES IN MORALITY AND LAW

PROMISES, MORALS, AND LAW. By P.S. Atiyah.¹ Oxford: Clarendon Press. 1981. Pp. 218. \$29.95.

Reviewed by Joseph Raz²

J.L. Austin thought that philosophers have much to learn from lawyers and the law. No doubt philosophers and lawyers have a lot to learn from each other wherever their interests intersect. But until now philosophical analysis has done more to elucidate important legal concepts and distinctions than vice versa.³ P.S. Atiyah's *Promises, Morals, and Law* may redress this imbalance. In this book, one of today's most accomplished students of the common law examines the nature of promises and the grounds of their binding force. Written in Atiyah's characteristically vigorous and lucid style, the book is a philosophical treatise, but one that benefits from the author's ability to draw on his vast knowledge of English contract law. His use of legal examples is nontechnical and judicious, and presents no difficulty to the nonlawyer. On the contrary, it serves to illuminate and illustrate the author's drift.

The book deserves attention not only because it offers a radical reinterpretation of promising. It also raises wider and more important questions. Most obviously it makes the reader rethink his attitude toward the possible cross-fertilization of legal study and philosophy. But beyond that it raises the often neglected problem of the relation between the law and social institutions independent of it. There is no doubt that the practice of promising is not a creation of the law. Rather, it is like ownership and the family, which are rooted in moral precepts and in social conventions, and unlike the limited liability company, which is essentially a legal creation. This distinction need not be hard and fast to be of major importance

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² Fellow of Balliol College, Oxford. I am grateful to P.M.S. Hacker and A.M. Honoré for comments on an earlier draft of this Review, and to P.A. Bulloch, P.L. Davies, R.M. Dworkin, and J. Waldron for discussing the issues with me and for contributing many helpful suggestions.

³ This is particularly true of issues in philosophy of mind, in which J.L. Austin saw the law as an especially useful source of inspiration. While the philosophical analysis of writers such as H.L.A. Hart, A. Kenny, J.L. Mackie, A. White and A. Woozley has done much to clarify the confusions of the legal doctrines of criminal responsibility, philosophy has not yet found much inspiration in the law.

to both legal and moral thought. It raises the question of how to analyze and evaluate branches of the law dealing with situations shaped by informal social practices. Such is the problem of the relation between contracts and promises.⁴

Atiyah is particularly well qualified to address these weighty questions, and the book fulfills its promise in being a genuinely interdisciplinary study. Atiyah is not a philosopher using a few legal cases as illustration, nor is he a lawyer who uses the occasional philosophical argument. He is a great legal scholar who has studied the philosophical issues in detail and who speaks with equal confidence in both fields. With Charles Fried's *Contract as Promise*⁵ providing a useful contrast to Atiyah's treatise, we are particularly fortunate to have two such masterly studies of promises and contracts in one year.

Promises, Morals, and Law divides into two parts. The first four-and-a-half chapters survey some of the most common views of promising. These are found wanting, and the second part of the book develops Atiyah's own views on the subject. I will concentrate on the latter. But I will introduce some of my worries concerning Atiyah's approach by briefly commenting on the first part of the book.

I. ATIYAH AS CRITIC

The main value of the first part of the book is that it raises all the questions concerning promising that the author tries to answer in the second part, and it familiarizes the reader with Atiyah's style of thought. As a critical evaluation of alternative views of promising, it leaves a lot to be desired. Despite the length of this survey, only the utilitarian and social-practice views receive anything like adequate treatment (fifty-eight and seventeen pages respectively). All other views — including intuitionism, subjectivism, noncognitivist theories, Searle's famous derivation of "ought" from "is,"⁶ natural law, and the view that promissory obligations are instances of the obligation of truthfulness — are summarily dismissed. Atiyah's allocation of space reflects his sympathies. He cannot help feeling that natural law and intuitionistic theories are old-fashioned and obscurantist myth spinnings. He tries to deal them quick, fatal blows. But trying to do too much in a short space encourages a particular brand of self-defeating overkill. One

⁴ I will adopt the convention of regarding contracts as legally binding agreements, and will refer to promises or agreements when discussing moral or social institutions.

⁵ C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981), reviewed in Atiyah, *Book Review*, 95 *HARV. L. REV.* 509 (1981).

⁶ Searle, *How to Derive "Ought" from "Is,"* 73 *PHIL. REV.* 43 (1964).

is tempted to concentrate on the most glaring and oft-recognized shortcomings of familiar theories. At the same time, one is liable to overlook those same theories' hidden strengths, on which their current adherents hope to construct more defensible versions of the classical positions. I cannot be the only reader who finds that the view he favors is not discussed at all, while its long defunct relative is yet again exposed to public ridicule by Atiyah's rhetorical questions.

Atiyah's sympathies lie essentially with the utilitarians. His discussion of the utilitarian analysis of promising is detailed and sprinkled with acute observations. It is here that his attention to the law, especially the law of remedies for breach of contract, is most helpful and highlights various points often neglected by utilitarian writers. Atiyah, however, seems to be unaware of some of the recent developments in utilitarian theory. Don Regan's cooperative utilitarianism,⁷ Sartorius' utilitarian analysis of social norms,⁸ Hare's two-level utilitarianism,⁹ and other versions of motive and institutional utilitarianism have changed our view of the utilitarian explanation of promising, but these are not discussed by Atiyah. His final criticism of the utilitarian view is that "it fails to explain . . . why the harm which is suffered by the promisee from his disappointed expectations or reliance should be ascribed to the promisor. The mere fact that he has these expectations or has acted upon them cannot alone justify that ascription" (p. 127). But after all, utilitarians do believe in the principle of utility. That principle binds the promisor to avoid disappointing expectations, just as it binds everyone to maximize general welfare. Naturally, a utilitarian does not believe that a promise should always be kept, whatever the consequences. But there is no difficulty for the utilitarian here. Harm should always be avoided as long as doing so does more good than any alternative course of action. The fact that the promisor knowingly induces reliance on his future action provides, in normal circumstances, sufficient reason for a utilitarian to hold that the promise should be kept. People should be encouraged not to induce reliance lightly, and they are normally in a position to avoid the harm caused by disappointed expectations. Atiyah rejects this line of argument on the ground that it presupposes the unreasonably wide principle that, "if I intentionally induce you to behave in a way which causes you harm, I am responsible" (p. 65). But no such general principle is implied.

⁷ See D. REGAN, *UTILITARIANISM AND CO-OPERATION* (1980).

⁸ See R. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* (1975).

⁹ See R. HARE, *MORAL THINKING* (1981).

Both common morality and — in normal circumstances — utilitarianism limit promissory liability to the harm that is foreseeable and reasonably avoidable by the promisor. The underlying principle — duly qualified — does not entail, as Atiyah claims it does, that a surgeon is liable to a patient who is harmed in an operation and whose expectation he has raised, nor does it lead to any other anomalous consequences.

As I have already remarked, the value of the first part of the book is largely that it accustoms its readers to Atiyah's mode of theorizing. One crucial aspect of any theory of promising is its purpose. Does it purport to explain the nature of the common practice of promising and illuminate its underlying moral assumptions (the interpretive aim), or does it purport to provide a secure rational foundation for sound principles of promising even if these differ from the common practice (the critical aim)?¹⁰ Atiyah does not tell us which goal he is pursuing: "In this book I propose . . . to re-examine the nature and extent of promissory and contractual liability" (p. 8). This statement is ambiguous between the two goals. On occasion Atiyah seems to endorse arguments consistent with the second, the critical, objective. For example, he remarks that the existence of promises that do not raise expectations is no objection to utilitarian theory, which may simply claim that such promises are not binding (p. 54). To be sure, the existence of a practice of regarding promises as binding in themselves, regardless whether they raise expectations or not, is no objection to utilitarianism as a critical, often revisionist, moral theory. The fact that promises are regarded as binding in themselves shows, however, that utilitarianism can neither explain nor provide the foundation for the existing practice of promising. That Atiyah does not see here an objection to the utilitarians suggests that he is interested in the critical revisionist, rather than the interpretive, goal.

This being so, it is surprising that Atiyah places such confidence in the law, not only as a good (though not infallible) guide to common moral beliefs and practices (p. 138), but as the standard of moral validity as well. Let me use one of many possible examples to illustrate the point. Discussing some views about the making of promises, Atiyah writes:

An alternative, and perhaps simpler, suggestion is that a promisor need only communicate to the promisee an intention to assume an obligation. In this formulation it is immaterial

¹⁰ A theorist may of course have other goals in mind, such as a linguistic explanation of a "promise" and cognate expressions, but these two seem to be the most likely goals that Atiyah has set himself.

whether or not the promisor actually has the intention which he communicates, though it leaves open the question whether he must at least intend to communicate an intention to assume an obligation. In law, it is clear that he need not have the intention to do this — he may do it inadvertently, and many moral philosophers would agree with this result. But at any rate, on this view, the one thing necessary, in addition to the actual performance of the speech act, is that the act communicates the intent to assume an obligation, i.e. persuades the listener that the speaker intends to assume an obligation. Put in this way, there is little that a lawyer would need to quarrel with, provided that it is recognized that these are still not sufficient conditions for the creation of an obligation. (P. 102) (footnote omitted).

If Atiyah is indeed proposing rational foundations for a sound view of promising, why does it matter whether the law agrees with the proposed explanation of promising? It is normally thought that morality is the arbiter of law, that the law can be justified only if it conforms to morality. Atiyah's comments here and elsewhere suggest that he wishes to reverse their roles and to make law the arbiter of morality. Is this conservatism motivated by a lawyer's professional pride? The law, like any other sphere of human experience, is a source of ideas to the moralist and the political theorist. Yet this very same law is to be judged by morality, and legal rules cannot, as Atiyah occasionally suggests, be held up as the paradigm of perfection and the test of all morality.

Atiyah's style of argument is based on a belief that common practices are necessarily the moral yardstick by which to measure human conduct and that criticism of them is incoherent. The book's concluding passage speaks of this belief:

No contemporary lawyer can be unaware of the extent to which changing values have weakened, and in some areas quite destroyed, the belief in freedom of contract which was so prominent a feature of nineteenth-century thought. Any theory of promising which fails to take account of movements in opinion of this magnitude is in danger of ending up as an obsolete theory. Far from explaining the moral basis of promising in any absolute or eternal sense, such theories turn out to be firmly rooted in the ideology of nineteenth-century Western thought. (P. 215).

Given this belief, the philosopher has no other role than that of the sociologist depicting the mores of the age. In this task philosophers have failed and have been surpassed by legal theorists, for the law is closely in touch with the pulse of the time.

Could it be argued that there is a *via media* between the interpretive and critical tasks and that Atiyah is following it? It might be thought, for example, that the task is predominantly to interpret common morality, while criticizing some marginal aspects of it. Such a third way can no more be attributed to Atiyah than can the interpretive or critical approaches. He does not claim it as his own, and his rejection of both common morality and the common law is, as I shall show below, radical rather than marginal.

This large point leads to the second major methodological issue that surfaces in the first part of the book and that affects the whole of it. Recall Atiyah's assessment of moral theses according to whether or not they agree with existing law.¹¹ Let us assume that a philosophical explanation of promising is at variance with certain aspects of the law of contract. One possible conclusion is that contracts are not promises and that contractual obligations are not a subclass of promissory obligations or are perhaps even completely independent of them. This is a course followed by many. Atiyah does not so much as mention it. The book's unspoken presupposition is that contractual obligations are promissory ones and that contracts are promises. There is no other way to explain Atiyah's free use of legal examples to argue for a certain conception of promising and his failure to raise the question of the relation between promises and legal contracts. While the identity of contractual and promissory obligations may be a conclusion, it cannot be the premise of a discussion of either.

This point is worth emphasizing, for Atiyah is commonly regarded as a prominent exponent of the view that contracts are not promises — and many of his writings so attest.¹² Even in publications subsequent to *Promises, Morals, and Law*, he assumes this stance.¹³ But there is no trace of such dualism in the book. Here Atiyah is possibly an even keener monist than Fried. The difference between them is that, whereas Fried turns to philosophical accounts of promising to explain the law of contract, Atiyah purports to find in the law of contract the evidence for a completely novel account of promising.

II. PROMISES AS ADMISSIONS

Atiyah explains his view of the foundation of promissory obligations in the last chapter. Promises, he says, are a species of consent:

¹¹ See *supra* pp. 919–20.

¹² See P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 1–7 (1979); Atiyah, *Contracts, Promises and the Law of Obligations*, 94 *LAW Q. REV.* 193 (1978).

¹³ See Atiyah, *supra* note 5.

[I]t is true that in many cases the verbal formula 'I promise . . .' cannot, as a matter of language, be easily reduced to anything like 'I consent . . .' But the fact surely is that an explicit promise is an expressed willingness or consent to the state of affairs which the promise posits, or which will be required by its performance. (P. 178).

Atiyah does not explain the notion of consent, but he provides many examples of what he takes to be consent:

[W]e may say that a person has done something voluntarily, that he has agreed to do something, that he has acquiesced in something; we may say that a person has permitted, or given leave to another to do something; that he has abandoned, or renounced something, a right for example, or even an expectation; we say that a person has accepted something (an offer, for instance, or a service); we may say that a person has admitted something, or confessed to a charge. Each of these verbal forms describes a different way of indicating consent, or assent, to something, and this list is very far from being exhaustive. (P. 180).

This is a very wide notion of consent.¹⁴ It seems that one consents to whatever one is aware of and neither protests against nor tries to change, and to whatever one does, or intends to do, voluntarily. Promises are consents concerning future states and they carry intimations of a further consent not to change one's first consent. Binding promises are irrevocable consents of this kind.

Whether a consent is irrevocable depends on the balance of utilities. If regarding such consents as irrevocable serves interests greater than those sacrificed, then the consents are irrevocable — that is, the promises are binding. "[A] very common justification for treating a promise as binding is that the promise . . . is an admission, of the existence of some other obligation already owed by the promisor" (p. 184). Simple examples include a promise to pay a debt or a promise to pay a certain sum in compensation for a road accident for which one was responsible. In such cases, the obligation pre-dates the promise, and the promise is merely an admission of liability. Similarly, when promises are not added to the pre-existing obligation but are given in exchange for a benefit, as when I promise to give you ten dollars in return for the book you give me now, they are admissions of obligations arising out of benefits received (pp. 191-92). The same is true of conditional promises: "I promise to do *x* if *y* happens." In such cases no obligation arises until the condition is fulfilled.

¹⁴ For a different analysis of consent and its relation to promising, see Raz, *Authority and Consent*, 67 VA. L. REV. 103, 118-25 (1981).

The condition is an independent source of obligation. Consider, for example, the promise "I'll pay you ten dollars if you give me this book." Receiving the book is a source of obligation to pay its value, and the promise is an admission of such an obligation and of its specific value. It is an admission that receipt of the book creates an obligation to give you ten dollars.

In all these cases, the obligation — of which the promise is an admission — arises out of a benefit received. The other main source of obligation arising in ordinary instances of promising is reliance:

If I merely declare my intention to act in a particular way, it will often be unclear whether you are justified in acting on that declaration, so that, if you do act on it, and suffer loss, that loss is fairly attributable to me. To make an explicit promise is one way of helping to clear up the doubt which would otherwise arise. The promisor, by explicitly promising, is *admitting* that (insofar as it is for him to decide) he thinks the promisee will be justified in acting in reliance on him. (P. 192) (emphasis in original).

Atiyah's account of promissory obligations is complicated by various additional observations, but these do not affect his essential argument that there are no promissory obligations. In fact, promises are admissions of the existence of independent obligations arising because of benefits received by the promisor or because of harm the promisor has caused or may cause to the promisee.

There are three particularly important objections to Atiyah's analysis. First, it is the common view that promises are morally binding once made, but according to Atiyah's account, many promises do not give rise to obligations unless and until they are relied upon. Atiyah is fully aware of this problem and discusses it at some length (pp. 202–15). His arguments, however, are not wholly satisfying. They fall into two parts. First, he finds certain reasons why some promises should be held morally binding even though there has been no benefit to the promisor nor any harm caused or likely to be caused to the promisee. Second, he argues that, when those reasons do not apply, such promises are not binding; and even when they do apply, their weight is normally but little, and the promise, though binding, should not be given much weight.

But his reasons for holding some such promises as binding do not depend on regarding them as admissions of independent obligations. They are reasons for holding that the promises themselves create obligations. Atiyah is, I think, aware of

this. He may reply that his generalizations are not meant to be strictly without exception. He is quite happy to argue no more than that normally promises are admissions, and to allow for a few exceptions. But this reply will not suffice. Promises that, according to Atiyah's account, draw their binding force from reliance are very common; and in many, if not most, there is a gap between the times of promising and of reliance. Many of these numerous and ordinary promises are binding during this gap, not as admissions, but as independent obligations. These are not a few exceptional cases that need not affect the main account of promising.

More serious still is the question whether Atiyah's claim that such unrelieved-upon or not yet relied-upon promises should not be held binding, or at least should not be given great weight, is consistent with his fundamental methodological assumptions. Atiyah rests his case here on the claim that "[o]bligations normally arise from actions that create or reduce utilities" (p. 208). But he also maintains that "moral rules and moral obligations are the creation of the social group . . . [and therefore] it must be the group which ultimately decides what conditions justify the creation of moral obligations" (pp. 193-94). I have already shown that much of the argument of the book depends on this view, which is Atiyah's most fundamental claim about the nature of morality. But if so, then his admission that "[i]t is, of course, the case that current moral codes do treat promises as morally binding, and that the law generally treats them as legally binding" (p. 203) seems to settle the issue. There just is no room left, on his methodological assumptions, to claim that morally they are not, or should not, be binding.¹⁵

Weighty as these considerations are, they challenge Atiyah's conception of morality rather than his explanation of promising. Let me therefore turn to the second objection to his account. It concerns the interpretation of reliance-inducing promises as admissions. Suppose that it is important to you that one of us will attend a certain meeting. I promise to go to the meeting. Relying on me to be there, you make plans that make it impossible for you to attend. Once you have relied on me and made your alternative plans, I am bound to go to the meeting. According to Atiyah, my obligation does not arise from my knowing inducement of your reliance, nor

¹⁵ It is true that Atiyah can claim that there are nonmoral reasons why morality should change. But are not utilitarian reasons of the kind he invokes moral reasons? And is it acceptable to hold that morality serves some nonmoral purpose or is accountable to nonmoral considerations?

does it arise from the fact that I can now prevent some harm to your interests by attending the meeting. Both of these factors can obtain without any promise being made, and Atiyah denies that they always give rise to liability. The patient who relies on the surgeon's assurance and agrees to the operation is entirely reasonable in relying on the surgeon. Yet Atiyah uses this case as proof that knowingly induced reliance does not in every case create an obligation (p. 65).¹⁶ One is liable only when this reliance is legitimate. The legitimacy of the reliance is not, in Atiyah's view, a matter of reasonableness. To say that reliance is legitimate is for Atiyah just to say that it is the kind of reliance that creates an obligation (p. 192). When this reliance is induced by a promise, the promise includes an admission that the reliance is of a kind giving rise to an obligation. Because it includes such an admission, a promise differs from ordinary expressions of intention or of belief made with the knowledge that they may well induce reliance.

But this means of course that it is not the promise itself that creates the obligation. The obligation is created by other circumstances of the case. The promisor, knowing of the existence of these other circumstances, merely admits, by promising, that they exist and that he is under an obligation. The trouble with this account is that, while Atiyah has told us what does not create the obligation, he has omitted to tell us what does. To what does the promisor admit? He does not admit to an obligation created by the promise, for promises, in Atiyah's view, do not create obligations. Nor does he admit to an obligation created by knowingly inducing reliance, for this too does not, according to Atiyah, create an obligation. Indeed, if either communicating an intention to undertake an obligation (which is what promising is) or knowingly inducing reliance (which is what promising often involves) were sources of obligation, then promises would not be admissions to independently created obligations but would themselves create the obligations. But if the promisor admits to neither of these, there seems nothing left for him to admit to. If in all these cases there is any hidden source of obligation, of which promisors are aware and because of which they admit liability, then Atiyah has forgotten to tell us what it is.

My third objection to Atiyah's theory, though connected to the second, is more general and ultimately more damaging.

¹⁶ Atiyah has in mind the fact that the surgeon has no duty to compensate a patient if the operation fails through no fault of his own. Needless to say, the surgeon has the lesser obligation of doing his best for the patient.

If promises are admissions, they are not binding. They have some evidentiary value: why should a person admit liability unless he believes he is liable, and who is in a better position to know? But such admissions are merely one piece of evidence among others showing the existence or nonexistence of nonpromissory obligations. For common morality, however, promises themselves establish the existence of an obligation (unless some vitiating conditions exist, e.g., they were deceitfully obtained, or they are promises to perform an immoral act). Atiyah has two replies to this difficulty (pp. 195-202). He first points to reasons for regarding promises as conclusive. The problem with this argument is that it tends to show that promises are not admissions after all but independent sources of obligation, for this is what is involved in regarding them as conclusive of the existence of an obligation.¹⁷ Atiyah then attempts to meet this objection by drawing an analogy between promises and judicial judgments. Binding promises can be regarded as final and binding judgments by a promisor against himself. "[T]he promise is not the *reason* for the obligation any more than the judge's decision is *to him* a reason for the law which he declares" (p. 201). Just as the judge merely strives to state accurately a pre-existing legal situation, so the promisor is merely admitting to an independently existing obligation. At the same time, because the admission is, like the court's judgment, conclusive, it can sometimes be said to be itself a source of obligation.

Unfortunately for Atiyah's argument, to the extent that there is an analogy between promises and judicial decisions, it tells against him. It is an acknowledged legal doctrine that binding and final court decisions, whether correct or mistaken, are in themselves sources of rights and obligations. Once the plaintiff has obtained final judgment against the defendant, the defendant's original duty, on which the action was based, disappears and is replaced by a duty based on the court's judgment. In general, the law recognizes final binding power as an independent power to create rights and duties. If promises are like judgments, then they are themselves sources of obligations and not admissions of independent obligations.

Atiyah rightly says that the decision is not the judge's reason for giving it (p. 201). How can it be? Nor is the promise the promisor's reason for making the promise. Even saying that it is makes no sense. He is also right to intimate

¹⁷ The fact, acknowledged both by Atiyah and by me, that not all promises are binding is irrelevant to this issue. Just as I have to explain when a promise fails to create an obligation, so Atiyah has to explain when a promise fails to be a conclusive admission. Because the problem is common to both views, it militates against neither.

that the judge has an independent reason for giving the decision and that the promisor has a reason to make the promise he makes. Just as the judge's reason for imposing a duty on the defendant is often that he has already been under a similar duty arising from a different source (say from his liability for a road accident), so a promisor may promise to compensate a victim of an accident because he thinks himself responsible for the accident. But the fact that one has a reason for imposing or for undertaking an obligation does not show that these acts are not the imposition or the undertaking of obligations. Like judgments, promises are themselves sources of obligations. They differ in that, while some people claim that the only legitimate reason for a court's decision is that the legal situation has already been as the court declares it to be,¹⁸ no one but Atiyah claims that the only reason for promising can be that there is or will be an independent obligation on the promisor. Together, my three objections show both that promises are not admissions and that they do create obligations.¹⁹

III. THE FOUNDATION OF PROMISSORY OBLIGATION

I have argued elsewhere that promises are made by communicating an intention to undertake, by that very communication, an obligation.²⁰ There are in our society, and in many others, various conventional ways of communicating such intentions. While conventional ways of promising make it easier to promise, they are not, however, a necessary condition of making promises.²¹

Atiyah's reasons for rejecting this view are far from clear. Indeed, when he confronts it directly, he concedes that the modern lawyer finds little to quarrel with in it (p. 102). If he finds little wrong with this view, why does he disagree with it? I will approach this question indirectly by commenting on several, often misunderstood, features of promising. My aim is to highlight some characteristics of existing practices and their underlying presuppositions. It would, of course, be

¹⁸ Atiyah and I, among others, believe that such a claim is erroneous.

¹⁹ In his discussion of this point, Atiyah deploys his distinction between the internal and external viewpoints of promising (introduced in chapter five). I have not used his terminology, which I find confused and confusing.

²⁰ Raz, *Promises and Obligations*, in *LAW, MORALITY AND SOCIETY* (P. Hacker & J. Raz eds. 1977). The same view has been urged by others as well.

²¹ One may promise by communicating an intention in unconventional ways; and one could promise even in societies — if such ever existed — that do not recognize the practice of promising. Fried's remark, see C. FRIED, *supra* note 5, at 137 n.10, classifying me with those who emphasize the conventional view of promising, is therefore misleading.

wrong to pretend that either the law of contract or the common moral view of promising represents a coherent and unified view. Each is the product of shifting and conflicting trends. In focusing on some of these, I am also engaged in a revisionary moral argument. That choice represents a view of what is important and valuable in the existing practices.

One misconception is the view that it is self-evident that, if a person expresses an intention to undertake an obligation, then he is obligated. It is a peculiar fancy of contemporary moral subjectivism that, while it doubts the existence of obligations that the agent neither undertakes nor agrees to, it finds self-evident the proposition that a person is bound by his own undertakings. Atiyah is quite right to reject this fancy. All promises communicate an intention to undertake, by that very act of communication, an obligation, but they do not all succeed in doing so. Not all promises are binding. Whether a promise is binding depends on the reasons for holding promises to be binding. As I have explained elsewhere:

(PO) principles [which are the principles stating when promises are binding] present promises as creating a relation between the promisor and promisee — which is taken out of the general competition of conflicting reasons. It creates a special bond, binding the promisor to be, in the matter of the promise, partial to the promisee. It obliges the promisor to regard the claim of the promisee as not just one of the many claims that every person has for his respect and help but as having preemptory force. Hence (PO) principles can only be justified if the creation of such special relationships between people is held to be valuable.²²

The moral presuppositions of this conception of promising are the desirability of special bonds between people and the desirability of special relations that are voluntarily shaped and developed by the choice of participants.

It helps to consider promises not as a paradigm, but as an extreme form of voluntary undertakings, as one end of a wide spectrum. Prominent among our obligations to others are those we owe people and groups (e.g., the university or the country) with which we have long-lasting connections that are at least in part of our own making and subject to termination at will. These connections have normative as well as emotional, economic, and other aspects. We mold each one of them individually, but they all fall within socially or culturally recognizable patterns of both acceptable relations and deviations from them. Our relations with each of our neighbors

²² See Raz, *supra* note 20, at 227–28.

differ, but they are all variations of socially recognizable patterns of neighborly relations. Voluntary undertakings normally find their place within the framework of such relationships. Some — for example, marriage — are even created by an undertaking, and their formation is celebrated in ritual form. But voluntary undertakings play an important role in the development of all such relations, however formed, and their violation is often a cause or a sign of the loosening or disintegration of the relationship.

I prefer to talk of voluntary undertakings because many of them arise within the context of an ongoing relationship. The relationship, with its normative implications, provides the code by which actions and omissions are interpreted and their normative significance established. An act has different normative implications depending on its social context. All of these undertakings are voluntary to a greater or lesser degree in that, first, the agent is aware of their normative implications, and second, he can avoid them. Finally, the agent's belief that he will incur an obligation by his action is a positive reason for holding him bound by his action.

The voluntariness of obligations is a matter of degree inasmuch as the awareness of the precise content of the obligation undertaken and the ease with which the obligating behavior can be avoided are matters of degree. A duty incurred by avoidable behavior is not a voluntary obligation even if the agent is aware at the time of action that his behavior imposes an obligation on him, unless his awareness is part of the justification of the fact that he is so obligated. Otherwise his awareness is coincidental and does not affect the character of the obligation. This point is illustrated by the following example. Residence in a certain town makes one liable for a local tax. Taking residence in that town is avoidable behavior, and if I move to the town, I will be aware of the additional obligations acquired by the move. Nevertheless, my obligations are not voluntary ones for their justification is entirely independent of my awareness of my obligations. In this case, the justification for the obligation, let us assume, is that residents, who are the primary beneficiaries, should finance the benefits.

An actor's awareness of the normative consequences of his action can play two roles in justifying those consequences. It may function positively as part of the reason for those consequences, or it may function negatively by removing an objection to them. Compare a duty to pay customs duties on an imported television set with the duty to keep a promise. In both cases, the behavior incurring the duty (importing the

television set, making the promise) is avoidable. Promisors always know what they are doing (that follows from the notion of a promise), and importers either know or can easily find out about customs duties. I assume that customs duties are unjust and therefore unjustified unless known to the importers or at least unless the importers can easily find out about them. In this I take customs duties to be different from the local tax in the previous example on the ground that justice requires people to contribute to communal services and amenities wherever they live. People are entitled to know before they invest in goods the price they will have to pay for the right to possess and use them, and therefore people are entitled to know of customs duties in advance.

Customs duties are, therefore, justified only if those who incur them know that they incur them. But that knowledge fulfills a negative justificatory role. It provides no reason for imposing a duty. The positive reason for the duty is, let us say, the need to protect local industries or local wages. The state of mind of those who incur the duties is relevant only to remove a reason against the existence of the duties. Promissory obligations, on the other hand, are positively justified by reference to the state of mind of the promisor. Promises are binding because it is desirable to give effect to the intentions of the promisor. It is essential to the definition of voluntary obligations not merely that the state of mind of the agent is relevant to the justification of his obligations, but that it provides a positive reason for regarding the obligation as valid.²³

As I have already stated, promises are not the only — indeed, not even the most typical — kind of voluntary obligation. Consider a parent asking a new neighbor to babysit for him. Imagine that the conventions of neighborly relations do, and are known by that parent to, provide that he is thereby incurring an obligation to babysit for his neighbor if asked. The parent thus knowingly undertakes to babysit for the new neighbor. The reason he is obligated is that this is a useful aspect of neighborly relations that people should be enabled to develop if they so wish. The fact that the parent chooses to enter this kind of neighborly relationship is a positive reason for holding him bound by it.²⁴ But his action in

²³ I have used both legal and moral examples to illustrate the distinction as it applies in both morality and law. Needless to say, there may be differences of opinion concerning the justification of duties of the kind I have mentioned, but this does not undermine the distinction they illustrate.

²⁴ Atiyah's view that such obligations are due not to a voluntary undertaking but to benefits received misinterprets the situation. The parent owes an obligation to babysit to the neighbor, but not to his best friend or his mother if they babysit for

asking the new neighbor to babysit is not a promise. He did not communicate an intention to undertake an obligation. His purpose was merely to obtain a babysitter. He merely agreed to be obligated.

A point of vital importance is that the difference between voluntary obligations (e.g., the obligation to babysit) and non-voluntary obligations (e.g., customs duties), whose justification depends on the agent's knowledge, does not turn on the required state of mind of the agent, which is the same in both cases.²⁵ Because the terminological distinction is between voluntary and other obligations, it is tempting to think that the difference must be in the mental state of the obligated person. But the difference is entirely in the justificatory relevance of the agent's knowledge of the implications of what he does, and not in his state of mind.

To repeat, promises are but an extreme case of voluntary obligations. It is a mark of a healthy relationship that the number of explicit promises is small and that the boundary between explicit promises and other voluntary obligations is normally invisible. All of these phenomena are so pervasive that they often escape attention. Lawyers in particular are liable to overlook them, because their business so often concerns commercial contracts between strangers. Promises between strangers are the exception, and any attempt to understand the practice of promising by focusing on these unusual promises is only too likely to breed distortions. The same trap lies at the feet of philosophical individualism, which holds that promises are binding, independent of their social context, as manifestations of the sovereign will of a monadic individual. While not actually denying that promises and other voluntary undertakings are most common within the framework of ongoing relations, philosophical individualism, far from finding in this fact the purpose and point of promising, regards it as irrelevant.

The argument against the philosophical individualist is extremely important both in itself and in its wider implications for the nature of morality. Naturally, making that argument is not a task I can undertake here. Atiyah is to be commended

him. For the convention I have hypothesized does not apply to them; the personal relations involved are different, and all parties are aware of this. The fact that the benefit received in both cases is the same is immaterial.

²⁵ Where knowledge acts as a negative justificatory reason for imposing an obligation, actual knowledge is usually not required. That the agent could have easily gained it and knew that there might be some such knowledge to be gained is enough. For reasons of facilitating proof and preventing abuse, the law (which deviates here from morality) often requires no more in cases of voluntary obligations as well.

for his vigorous rejection of the individualist position. It is only to be regretted that he throws out the baby with the bath water and rejects the view that promises are an independent source of obligation altogether.

One implication of the individualist conception of promising is the view that all of the normative consequences of a promise are to be found in the promisor's intention. This belief affects even writers like Atiyah and Fried. Because both believe that legal contracts are promises, both find the existence of the implied terms — that is, the legal implications of a contract that are not the expressed intentions of the parties — to be worthy of special note. Fried solves the problem by saying that promises admit of gaps.²⁶ Atiyah regards it as another piece of evidence against the view that either promises or contracts are sources of obligation. Fried has the better of this argument. One need only add that the legal background of contracts does not differ in principle from the moral background of promises. Many of the normative consequences of promises are provided by general moral considerations rather than by the expressed intention of the promisor. Embedded as promises normally are in a framework of ongoing relationships and depending as they do on general moral considerations for their validity, it is no wonder that the normative consequences of a promise are only in part the effectuation of the expressed intention of the promisor. The law with its "implied conditions" is merely formalizing, articulating, and giving effect to moral practices (though it does of course occasionally deviate from them). This claim is inconsistent with the individualist conception, but entirely consistent with a recognition that promises create voluntary obligations.

We must, therefore, clearly distinguish between two questions. First, is the formation of promises entirely within the control of the promisor? Second, is the content of the promissory obligation entirely within the control of the promisor? I have suggested that an affirmative answer to the first does not entail an affirmative answer to the second.²⁷ Thus, while I join Atiyah in denying that the promisor has complete and

²⁶ See C. FRIED, *supra* note 5, at 57-73. Fried is wrong to claim, however, that the law itself is gapless. See J. RAZ, *Legal Reasons, Sources, and Gaps*, in *THE AUTHORITY OF LAW* 53 (1979).

²⁷ According to many theorists, the obligations of marriage are fixed by principle and are not subject to change by married persons. This belief is often combined with the view that couples may decide for themselves whether to marry or not, and that they can marry only by performing acts expressing their intention thereby to undertake the obligations of marriage. This is a clear example of the relative independence of the two questions.

exclusive control over the content of his promissory obligations, I do not join him in rejecting the view that promises are undertaken by communicating an intention to undertake an obligation.

IV. THE FOUNDATION OF CONTRACTUAL LIABILITY

Legal theorists often create the impression that there are only two possible conceptions of the law of contract. Either its purpose is to enforce promises or a certain class of promises (as Fried argues), or it is a hybrid of principles of liability based on tort and restitution, disguised so as to make their true nature obscure (which is essentially Atiyah's view). Supporters of either position concede that the law includes elements of both views, but claim that one or the other view predominates and usually that the predominant view is both the better one and the one toward which contract law is moving anyway.

I recommend a third view in these concluding remarks. The purpose of contract law *should* be not to enforce promises, but to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice. One enforces a promise by making the promisor perform it, or failing that, by putting the promisee in a position as similar as possible to that he would have occupied had the promisor respected the promise. One protects the practice of undertaking voluntary obligations by preventing its erosion — by making good any harm caused by its use or abuse.

Though much of the law is consistent with this view and many of its doctrines are actually motivated by it, it is not the sole underlying theory of the common law. The law reflects too many competing strands of thought. My argument that the law should be developed on the basis of this theory rests ultimately on its ability to reconcile two fundamental jurisprudential principles. First, the law is an open system,²⁸ that is, it seeks to support autonomous organizations, private arrangements between individuals, and a variety of norms not themselves part of the legal system. The law can and often does operate as an initiating system, as a means of creating and changing social arrangements. But it often acts in a supportive role, recognizing and reinforcing existing norms, practices, and institutions. The purpose of contract law is primarily supportive. It recognizes and reinforces the social practice of undertaking voluntary obligations. The second jurisprudential prin-

²⁸ See J. RAZ, *The Institutional Nature of Law*, in *THE AUTHORITY OF LAW* 103, 119-20 (1979).

ciple — which seems to conflict with this supportive purpose of the law — is the harm principle, which holds that the only proper purpose for imposing legal obligations on individuals is to prevent harm.²⁹

The fact that the law of contracts operates predominantly in a supportive rather than in an initiatory role affects various aspects of legal policy. It naturally affects the grounds for shaping and changing the doctrines of contract law. It affects one's judgment of the suitability of reform through the development of the common law as opposed to legislation. It bears on the desirability of codification and on the importance of knowledge of the law. It is not possible here to address any of these questions beyond remarking in general that, when the role of the law is entirely supportive (which is not true of contract law), then the law should faithfully follow social practices and individuals need have no inkling of the law in advance of a dispute. They can rely entirely on their knowledge of the social practice.

It would be wrong, however, to assume that, where the law's role is predominantly supportive, it has a merely passive function and does not influence the social practices it supports. Even when it serves merely to reinforce confidence in the reliability of existing practices, the law has an effect on social processes, for it acts as a conservative force, hindering influences that tend to undermine the practices it reinforces. In addition to reinforcing existing practices, the law serves to extend such practices. But for the support of the law, contracts between complete strangers would not be as numerous and common as they are. International treaties, contracts with the Crown in English law in the days when the Crown could not be taken to court without its consent, and contracts with public authorities that are void because they fetter those authorities' statutory discretion — all provide evidence that, even without the support of the law, agreements may be made between strangers. But it is plausible to assume that the supportive role of the law helps make contracts outside the framework of ongoing relations much more common by making them more reliable.³⁰

Because the predominant purpose of contract law is to support existing moral practices, one might expect that the

²⁹ The *locus classicus* of the principle is J.S. Mill's *On Liberty*. Mill supports the slightly narrower "harm to others" principle. For an excellent discussion of the principle, see C. TEN, *MILL ON LIBERTY* 52-67 (1980).

³⁰ Since such contracts merely extend the use of existing practices, the role of the law is supportive rather than initiatory. But this example demonstrates that the distinction I am drawing is not hard and fast, but is ultimately a matter of degree.

conditions of the validity of contracts will reflect common moral conceptions concerning the validity of voluntary undertakings. Doctrines such as the formation of contract, frustration, mistake, fraud, duress, unconscionability, and others based on public policy considerations might be expected to mirror common moral views. Though to a large extent this is indeed how the law ought to be, there are exceptions to this rule based on two considerations.³¹

First, though contract law by and large supports common moral practices, it can and should assume some initiatory functions as well. These reflect moral conceptions held valid by lawmakers, though not yet common in the community. The law may, for example, hold certain contracts or provisions in contracts invalid because they are racist.

Second, an important way that the law can protect the practice of undertaking voluntary obligations is to prevent people from taking advantage of the practice by making it appear that they have agreed to obligations when they have not. For example, people who do not make a promise but who knowingly, carelessly, or negligently behave in a way that creates the impression that they have done so should be made to compensate those who innocently rely on the supposed promise. The best way to hold them liable is by estoppel, by stopping them from denying that they have promised. In this area, the common law often applies an "objective test" for the formation of contracts.³² The result is that numerous valid contracts are not voluntary obligations at all.

This fact has, of course, often been commented upon both by those who regard the function of contract law primarily as the enforcement of promises and by those who regard it as a branch of tort law and restitution. What is sometimes neglected is that the nonpromissory liability recognized by contract law is based on the principle of estoppel and that its

³¹ There is another discrepancy between law and morality. Sometimes when the promisor is judged morally justified in breaking a promise, he is still morally required to compensate the promisee for the breach. In such cases the contract will normally be held to be legally valid, and its breach indistinguishable from unjustified breach. For reasons to be explained below, the law seeks to determine whether there is liability for damages, rather than whether a justified or an unjustified breach of contract has occurred.

³² There is, in effect, an irrebuttable presumption that behavior meeting the test is, if not a promise, then at least negligent in creating the impression that a promise was given. The justification for the legal practice of not distinguishing between genuine promises and these estoppel cases is that there is no difference in their legal consequences. Because the boundary between the two classes of cases is often difficult to establish, there is a strong reason for not building it into the legal rules that the courts are required to apply.

purpose is not merely to protect individuals from harm, but also to protect the practice of promising itself. For if people were often to let it appear that they have promised when they have not, the currency of promises would be debased and their appeal and utility greatly diminished. The objective test of contract formation is not an embarrassment to the view that the purpose of contract law is to support the practice of undertaking voluntary obligations. On the contrary, it is required by it. Paradoxical though it sounds, it is in order to protect the practice from abuse and debasement that the law recognizes the validity of contracts that are not voluntary obligations.

Whereas much of the preceding discussion is common ground both to those who regard the law's purpose as the enforcement of promises and to those who, like myself, think of it as primarily the protection of the practice of undertaking voluntary obligations, the preceding paragraph begins to show where these two views diverge. There are two main differences.

First, not all voluntary obligations are promises. But whatever reason there is for the law to protect the promising practice requires it to protect the wider practice of undertaking voluntary obligations of any kind. Its purpose in both cases is to enable individuals to make their own arrangements. The point is lost sight of by those who expect voluntary obligations to be distinguishable from other obligations according to the state of mind of the obligated person. They tend to commit either of two mistakes. Some notice that the required state of mind of the obligated person does not differ between voluntary obligations and many other (consented-to) obligations, such as customs duties, whose moral justification depends on the knowledge of the obligated. They then conclude that, because contract law deals not with a distinct class of obligations, but with a haphazard selection of consented-to obligations, it serves no distinctive purpose but is merely a branch of tort or restitution. Others see that many consented-to obligations, such as customs duties, are not voluntary obligations in the ordinary sense; they then commit the opposite mistake of identifying voluntary obligations with the narrower category of promises. These theorists see that contract law protects private arrangements between individuals, but they fail to characterize its function properly since they leave out of account or distort the character of voluntary obligations that are not promises.

Second, enforcing promises is no doubt one way of protecting the practice of undertaking voluntary obligations, but it is not the only way. I have just pointed to another — that

is, protecting individuals from abuse of the practice by those who let it appear as if they have promised when they have not. Protecting the practice of undertaking voluntary obligations is, therefore, a wider and more flexible goal that can be pursued by different means and to different degrees.

One important way of protecting the practice is by compensating promisees for harm caused by reliance on the undertaking. Such measures will sometimes amount to enforcing a promise, for sometimes specific performance or expectation damages are the only remedy capable of preventing or making good the harm caused by breach. But quite often a different and smaller measure of damages will do.

Those who, like myself, accept Mill's harm principle or some modified version of it will doubt the legitimacy of the law's adoption of a general policy of enforcing voluntary obligations. I believe in the harm principle in a form that does not preclude the law from encouraging moral, cultural or other valid goals, but which by and large denies the legitimacy of imposing duties on individuals in order to force them to behave morally or punish them for immorality. "Harm" includes institutional harm.³³ Preventing the erosion or debasement of the practice of undertaking voluntary obligations is therefore a fit object for the law to pursue.

It follows from the harm principle that enforcing voluntary obligations is not itself a proper goal for contract law. To enforce voluntary obligations is to enforce morality through the legal imposition of duties on individuals. In this respect it does not differ from the legal proscription of pornography. Compensating individuals for harm resulting from reliance on voluntary obligations is, on the other hand, a proper goal for the law. As far as this argument goes, supporters of the harm principle should favor reliance damages rather than expectation damages as a standard legal remedy for breach of contract. Contrary to often expressed views, the belief that the proper role of contract law is the protection of the practice of undertaking voluntary obligations does not necessarily lead to endorsement of an expectation-value measure of the legal protection of contracts.

The argument is, however, more complex and requires another twist. Since protecting the practice of undertaking voluntary obligations from erosion and debasement prevents harm, enforcement of contracts can be accepted if justified as a means to that end. Moreover, the frustration of expectations may itself cause harm for which the law may seek to compen-

³³ See J. FEINBERG, *SOCIAL PHILOSOPHY* 33-35 (1973).

sate. Finally and more generally, it may be wise legal policy to provide for expectation damages on the ground that to leave it to the courts to determine in every case whether reliance on the contract caused harm would lead to expensive litigation and frequent judicial mistakes. An ultimate judgment on the conditions under which enforcement remedies are appropriate requires a detailed consideration of various classes of contracts. Suffice it to say that, when enforcement remedies are appropriate, they are justified by the goals of preventing harm to the contracting parties and protecting the practice of undertaking voluntary obligations from erosion. The enforcement of promises is justified as a means, not as an end.

But does not this conclusion give the game away to the "death of contract" prophets? Does it not amount to an admission that contract law is based on liability in tort for the prevention of harm? To leap to this conclusion is to be guilty of a gross misunderstanding. The law must choose which harms to protect against and which not. The distinctive mark of contract law is that the harms it protects against are harms to the practice of undertaking voluntary obligations and harms resulting from its abuse.

V. CONCLUSION

I have taken the liberty of sketching my own view of promises and their relation to the law, for they show that, in spite of my criticism of Atiyah's theory, there is much we agree on. Atiyah has spotted many of the weaknesses of what he calls the classical theory of contract. In his other writings, he has rightly claimed that this theory assumes too simple a relation between contract law and the moral principles of promising. It is only to be regretted that he was led by his own acute observations to an untenable view of promises and to a distorted doctrine of their relation to the law. To some degree this may be due to the fact that the legal discussion of contracts, which usually abstracts them from their context, does not take account of the normal habitat of promises in the framework of ongoing relations. There is no denying that the law is an invaluable source of ideas and examples to the philosopher. But one should beware lest it present a distorted reflection of reality.