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Ought We Keep Contracts Because They Are Promises

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OUGHT WE TO KEEP CONTRACTS BECAUSE THEY ARE PROMISES?

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INTRODUCTION

It is a widespread practice to define contracts as promises of a certain sort. The following is typical: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as duty."[1] It is natural to infer from this kind of definition that reflection upon the nature of promises, as these are understood by the layman outside a legal context, will be a reasonable first step towards an understanding of contracts. This is, indeed, an assumption I shall make, although we are told in a recent introduction to the law of contract, immediately following the above definition, that "the word 'promise' is being used in this definition, and in the whole law of contract, in rather a special sense."[2] Thus, a cash sale in a shop is a contract, whereas it may be held that, in making an ordinary promise, the promiser is binding himself to some future conduct.

Although this may not be quite correct, since one can promise a present and a past fact (that something is or was the case), the important point is that English-speaking people, unacquainted with special legal terminology, would not dream of saying that promises are involved in a simple cash sale.[3] But, we are told, the artificiality and oddity of this way of speaking is diminished when it is realized

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1. P. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 23 (1971). This is the definition of the American Law Institute, RESTATEMENT (FIRST) CONTRACTS. *See* A. CORBIN, CORBIN ON CONTRACTS 5 (One Volume Edition, West 1952).

2. P. ATIYAH, *supra* note 1, at 23-24. I am not of course overlooking the further question—Upon which principles is it decided to enforce promises?

3. For further discussion of the inaccurate claim that all promises involve the commitment to do a future deed see *infra* note 5.

that, in this context, *promise* is used to mean *contractual promise*. Contracts are indeed promises, but not just any old promise will do; only contractual promises qualify as candidates. How would you identify a contractual promise? Well, it is not an ordinary promise, but a promise that constitutes a contract. Fine logic, if you like useless circular definitions. The fact of the matter is that many contracts, as described by lawyers, are peculiarly unlike ordinary promises. Of course, you can overcome this difficulty by claiming that lawyers have a concept of promise all their own. But this cannot be what legal theorists are intending when they say that contracts are legally enforceable promises. P. S. Atiyah, from whose work I have been quoting, sees nothing seriously wrong with this definition, although he does not consider it quite accurate, since, as most people would readily agree, the law does not, literally speaking, force people to keep their contracts. In saying that contracts are legally enforceable promises, you cannot be using the word promise in a special legal sense to mean contractual promise: if you did, your claim would be purely tautological, and no room would be left for promises that are not legally enforceable. This is fatal to the definition of a contract, for the definition purports to tell us how to distinguish contracts from promises that are not contracts.

Charles Fried makes it abundantly clear that, in maintaining that contracts are promises, he is not using *promise* in a special legal sense. Fried claims that the moralist of duty, with whom he agrees, "sees *promising* as a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise. The moralist of duty thus posits a general obligation, of which the obligation of contract will be only a special case—that special case in which certain promises have obtained legal as well as moral force. But since a contract is first of all a promise, the contract must be kept since a promise must be kept."[4]

Sometimes concepts are so severely modified to save a definition that they become useless. I want to explore the possibility that this may have happened in the characterization of contracts as promises. I shall also argue that there is no moral obligation to keep promises as such, and that an obligation to keep contracts can consequently not be founded on the obligation to keep promises. We must always seek the source of the moral obligation to keep promises and contracts in other values than the mere fact that a promise was made or a contract struck.

4. C. FRIED, CONTRACT AS PROMISE 17 (1981).

THE NATURE OF PROMISE

The first task must be to examine the nature of promises in non-legal contexts, in order to see how far this concept of a promise can help to throw light upon the nature of legal contracts. It must be stressed that promises are essentially statements, although some philosophers have explicitly denied this. The mistake these philosophers made was to think that since to promise was to perform a speech act, and since this act seemed to be the act of committing oneself to doing something, this ruled out the possibility that promises were statements.[5] Is it not absurd to suggest that when a person says, "I promise to return your book tomorrow," he can be asked, "Is that true?" Does this not clearly reveal that, although in promising you are committing yourself to doing something, you are not making statements? But, although it may seem absurd to suggest that "to return your book tomorrow" may be true or false, this is a philosophically unimportant accident of language. The same promise can be made by saying, "I shall return your book tomorrow," and then adding, "and that is a promise," or, "You can count on it." "I shall return your book tomorrow," seems to be a statement and, "I shall return your book tomorrow and I shall not return your book tomorrow," is plainly self-contradictory. The self-contradictory character of, "I promise to return your book tomorrow, but I shall not return your book tomorrow," is only thinly veiled by the structure of the English language.

In committing yourself to doing something, you are committing yourself to the truth of the proposition that you will do what you are promising to do. Unless the statement that you will do what you promised to do turns out to be true, you have not kept your promise. This is sometimes obscured by the claim that promises are statements about the speaker's intention. This does, I believe, intro-

5. Harrison, *Knowing and Promising*, MIND N.S. Vol. LXXI (1962). My own criticism of this view in, *And That's A Promise*, 18 PHIL. Q. (July 1968). Atiyah, in his PROMISES, MORALS AND LAW charges many philosophers (unnamed) with the error of insisting that promises are not statements and that one cannot promise facts. P. ATIYAH, PROMISES, MORALS AND LAW 162 (1981). In my *And That's A Promise*, I stressed that promises are essentially statements and distinguished salesman's promises, that guarantee the nature of something, from what I called ordinary promises, i.e., promises to do something. A. D. Woozley (*Promises, Promises*, 90 MIND (April 1981) in commenting upon Atiyah's discussion note (88 MIND 351) rightly takes Atiyah to task for failing to see the important difference between promising to see to it that something is done and promising that something is the case, or will be the case, that is not in one's power. Philosophers as a group are repeatedly represented by Atiyah as unable to see this, that and the other. These charges are frequently not substantiated by him.

duce a confusion into the discussion of this point by Fried, who, in discussing the wrongness of lying and breaking promises, writes: "When I speak falsely I commit myself to the truth of my utterance, but when I promise falsely I commit myself to act, later. Although these two wrongs are thus quite distinct there has been a persistent tendency to run them together by treating a false promise as a lie after all; a lie about one's intention."[6] But, in promising to do something, you are not just making a statement of your present intention, you are saying that you are in the future *going to do* something. Only if that statement about the future turns out to be true, will it be correct to say of you that you kept your promise.

It is absurd to present as the only two alternatives, that the promise either is a statement about the promiser's intention at the time the statement is made, or it is not a statement at all, but a commitment. It is a commitment, indeed, but one that is necessarily made by making statements to the effect that you are going to do what you are promising. This becomes obvious if you ask yourself what the promisee is interested in. He is clearly, generally speaking, not so much interested in the present sincerity of the promiser as he is in his future deed. He may even trust a deceitful promise and confidently base his actions upon the belief that the lying promiser will turn out to be as good as his word. The promisee may base his confidence upon the belief that the promiser will have second thoughts about the moral propriety of deceit in this case: he may be confident that further reflection, or forthcoming further information, will convince the promiser that breaking the promise would be immoral or imprudent. I say "breaking the promise" for false promises are clearly promises, a point that Fried appears to have forgotten when he writes: "Promising is more than just truthfully reporting my present intentions, for I may be free to change my mind, as I am not free to break my promise."[7] This seems to rule out false promises. Could it be that lawyers' talk about the meeting of minds in dealing with contracts is here casting such a deep shadow that we are prevented from seeing clearly that sincerity is not a necessary condition for making promises? There may be a similar reason why Atiyah slips into talk about unexpressed promises, although in other places he seems to appreciate the fact that promises are of necessity symbolic communications. All threats must likewise be overt, though only verbal threats are symbolic expressions. But, as we shall see

6. C. FRIED, *supra* note 4, at 9.

7. *Id.* In the paragraph preceding the one from which I have quoted Fried shows that he realizes the need to make room for false promises.

later, the concept of a threat differs in other important respects from the concept of a promise. The following quotation from Atiyah seems to be quite absurd. Having made the observation that promises and threats are normally made "because a promiser *wants* something," Atiyah goes on as follows: "But it is possible to make promises or threats which do not seek to induce conduct, though it is hard to conceive any reason for *communicating* a promise or threat unless it is at least intended to induce expectations, pleasant or unpleasant."[8]

It is not just difficult, but conceptually impossible to make a promise and keep it to oneself, except in the special sense in which we talk about making promises to oneself. Just imagine an employee, who wants to be promised a raise at the end of the year, being met with the response from the employer that such a promise had already been made, only it had not been communicated. It is even more obvious that one cannot make a verbal threat, and not express it. Could the prosecution in a murder trial meet the claim that the accused did not threaten the victim by saying that the threats were of the uncommunicated variety, the accused just kept his threats to himself?

I have been stressing that promises are overt symbolic acts, and that to promise is necessarily to commit oneself to the truth of a statement, as well as to the doing of a deed. But making true statements is not the only way in which one person conveys information to another, nor is making false statements the only way in which people can be deceived. Thus, someone may be depending upon my being at home because I told him that I would be. This could constitute a promise in the appropriate circumstances. But, I may also have behaved in such a way as to lead him to believe that I am at home *without* any verbal or other *symbolic* communication. When I do this it cannot constitute a promise. One may also count as a promise the emphatic invitation to the promisee to depend on one's word about a present occurrence or to rely on something being the case. Statements such as, "This machine is in perfect working order, I promise you," are frequently heard. Although I grant that one may promise present facts, I shall in what follows sometimes write as if promises essentially relate to the future. When a promise is made, people have a right to expect the promiser to intend to do what he promises to do or, indeed, not to do. A promise is not just a statement that one intends; it is, I repeat, an assertion that one will do the promised deed.

8. P. ATIYAH, *supra* note 5, at 157.

I have already mentioned that making true statements is not the only way in which information is conveyed. Thus, I can induce the belief that I am at home, in my absence, by having the lights switch on and off automatically, cancelling the delivery of the morning paper, etc. But deception based upon the use of natural signs alone cannot be described as a false promise. If you take making statements to be a linguistic act, it must be realized that this concept has to be understood broadly—so as to include nods and headshakings when these are made to do duty for language. Promises can be made by the use of a variety of codes, some of which may be adopted for use on a special occasion only. The code may be intelligible only to the promiser and the promisee.

When one has seen that promises are essentially categorical assertions, the next question to ask is, "What is distinctive about them?" I suggest that they differ from mere predictions and representations in that they specially *invite* complete reliance, or entitle the promisee (and sometimes also others, to whom the promise becomes known) to expect what is promised with complete confidence. But it may be argued that this is also true of emphatic verbal threats. There is nothing odd about putting up a sign reading "Trespassers will be prosecuted! This is not just a threat, it is a promise." Unlike mere vague verbal threats, promises make a categorical assertion that something is the case, will be done, or will be the case. This is true even of conditional promises. They assert that if something is done (or is the case, or will be the case) something else without a doubt will be done or will be the case.

Usually an emphatic verbal threat, like other threats, would be taken to promise something evil or unwelcome to those to whom the threat is addressed, even when the threat is made for the benefit of the threatened person. Promises are taken to be different, in that what is promised is considered to be welcome to the promisee. I put it in this way because threats as well as promises may benefit the threatened person. However, he would not consider himself to have been threatened, unless he found the proposed act somehow unattractive. He may of course realize that what looked to him like a threat was meant as a favour, and that the promiser would for that reason think of himself as making a promise and not as making a threat. What is meant as a promise can be taken as a threat and vice versa. But notice that when a verbal threat is made in such a way as to invite the threatened person to *count* completely on the threat being carried out, it becomes entirely natural to characterize the threat as a promise. The basic characteristic of all promises is

that they are symbolic acts that involve a complete commitment to the realization or the reality of what is promised.

THE OBLIGATION TO KEEP A PROMISE

It may, of course, be no less immoral to mislead people by the use of natural signs than by the use of symbols. In the following two cases one may feel that there is little to choose between the immorality displayed, but in only one of the cases can the immorality be characterized as the breaking of a promise.[9] Case 1. A has an automobile accident and is sufficiently injured not to be able to get to the nearest telephone to call for help. An acquaintance, B, on approaching in his car, slows down and clearly sees A's predicament, but A does not manage to shout to him. It is obvious to A that B is fully aware of the situation and, believing him to be a kind person, his mind is now at ease, since he banks on B's going for help. Case 2. The second case is like the first except that A manages to shout to B, "Will you call for help?" And B answers, "Sure," or, "It's a promise," or "Count on it," or simply, "Don't worry." B is in no hurry and calling for help costs him nothing.

If he does not seek help, B's immorality is not very significantly different in these two cases, though only in Case 2 does it consist in the breaking of a promise. If there is a difference it lies in this: in Case 2 the injured person is given greater assurance that help will be obtained by B. This may lead A to depend upon this to his disadvantage. He might, for example, not attempt to obtain help from a subsequent driver passing. But, this involves no difficulty for the analysis I am proposing, since it is precisely this kind of consequence that, on my view, makes the keeping of a promise obligatory. We can say the obligation was created by a promise in the second case, because only in that case was a symbolic act performed by the promiser. B plainly acquired an obligation in Case 1 because of his discovery of the accident and his knowledge that A must be depending upon him to call for help, but it would be entirely incorrect to claim that he promised to do this.

Discovering what is distinctive about promises reveals that there is no *prima facie* moral obligation to keep them in a well-established meaning of that expression. Whether or not it is morally

9. Árdal, *Promises and Reliance*, 15 DIALOGUE 54-61 (March 1976), and MacCormick, *Voluntary Obligations and Normative Powers*, Proceedings of the Aristotelian Soc'y, Suppl. at 79 (1972).

obligatory to keep a promise depends entirely upon the content of the promise and the interest of the parties concerned in performance or non-performance. By "the parties concerned" I do not mean to limit myself to the promiser and the promisee. A promise may well affect the interests of third parties, including what we may vaguely call the general public. The view that I am advocating is not to be construed as naively utilitarian, for the interests that can be brought to bear on the issue may involve questions of fairness as well as *quantities of welfare* or *utility*. My view is thus consequentialist though not utilitarian.

But what I am advocating may still seem to be obviously wrong, for the attack on the utilitarian view about the obligation to keep promises has sometimes taken the form of objecting to the consequentialist aspect of this doctrine. The obligation to keep a promise is, it has been claimed, based upon the past act of promising and not upon the consequences of that act. What makes promises particularly embarrassing for the utilitarian has been taken to be the alleged fact that promises are in their essential nature formulae, or expressions, for placing oneself under an obligation. Thus, Sir David Ross took promise-keeping to be a typical example of what he called a *prima facie* duty.[10] Such a duty became a real or actual duty, if not overridden by a *prima facie* duty of greater stringency. This means that when you promise to do an immoral deed you inevitably place yourself under some moral obligation to do it. If you have another *prima facie* duty that clashes with it there would always be some conflict of duties. A similar view has been advanced more recently by A. R. Grice who writes that "The proposition that A promised to X implies that A has an obligation to X if he can."[11] He characterizes the relation between what he calls abstract obligation and actual obligation as follows:

> "A has an abstract obligation to actions of the class X"

and

> "A can do an individual action X falling under that class"

and

> "X does not also fall under any class of actions by virtue of which A has an abstract obligation not to do it implies A has an actual obligation to do X."[12]

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10. SIR W. DAVID ROSS, FOUNDATIONS OF ETHICS (1939), particularly, Ch. 5.
11. G. GRICE, THE GROUNDS OF MORAL JUDGMENTS 46 (1967).
12. *Id.* at 44.

To every abstract obligation there is a corresponding abstract right. We are told that whenever it is the case that A has an abstract obligation to do X there is a reason for his doing it "better than any in terms of his independent interests."[13] Grice then goes on: "If the abstract obligation is to do something immoral there is a better reason still for his *not* doing it. But still his reason for doing it is better than any in terms of his independent interests for doing anything. Thus, instead of looking after the night watchman while his companion cracks the safe, he [the robber] following his inclination, consorts with a lingering female, he has acted against better reason. And when he later visits his confederate in prison to apologize, the bitter recriminations which he receives are fully justified."[14]

This account is, I believe, confused. Assuming that the criminal act is immoral, there is no moral obligation of an abstract kind to keep the promise to perform it; and the promisee has no *moral* right at all to criticize the promiser. This can be more clearly seen if you take a crime that is more obviously immoral than robbery without violence. The promiser promises to shoot the guard if necessary to prevent him from shouting for help. He finds that he cannot do it because he concludes that the deed would be immoral. He clearly would not have a conflict of *duties*. In a case in which he may believe the promisee did not realize that he was expecting the promiser to do something immoral, the promiser may have another duty resulting from the promise, and this may be confusing the thinkers that I am criticizing. This other duty would consist in minimizing the hurt to the promisee. One feels this obligation would tend to disappear if the promisee was morally unjustified in accepting the promise, and knew it. Of course there is another sense of "right" that may here be confused with a moral right. The moral promisee may have had a right based on *good evidence* for his confidence in the promiser's promise. The promiser may always have been reliable in the past, and there is thus a clear sense in which the promisee may have every right to expect him to cooperate this time. But though the promisee is naturally disappointed, the promiser had no morally acceptable reason for doing the promised deed, and moral recriminations for failing to keep the promise are therefore entirely out of place.

It is sometimes thought that all ordinary informal promises are such that, unless it is impossible to keep them, or the obligation is

13. *Id.* at 85.
14. *Id.*

overridden by a stronger obligation, the obligation remains and the promisee has a perfect moral right to claim performance, if the promisee has not absolved the promiser from the obligation. Again, I think this is wrong. Let us take the case of lovers who promise to be sexually faithful. The time comes when neither could care less about the sex life of the other. That knowledge alone seems to me to dissolve the moral obligation entirely. Notice that I'm not claiming that the couple can't absolve each other from the obligation. I am making the stronger claim that neither party has a right to insist on holding the other to the promise. If one of the parties had become uninterested in faithfulness because of total loss of interest in sex, she/he would have had no moral justification for holding the other to the promise, should he/she be in a position to do so. Of course, some people may insist that the promiser had handed over to the promisee the right to decide whether the promised act should or should not be done. But to think thus, is to fall into the trap of allowing oneself to be governed by a general rule that leads to morally unacceptable results.

The inference from the occurrence of a promise to an obligation to do what is promised is broken-backed from the start; there is no presumption in favour of the conclusion that one should carry out threats. It is only when the promise seems to be beneficial that one has a reason to believe that, all things being equal, a promise ought to be kept. To see the source of the obligation to keep promises in the obligation to carry out vows is unacceptable for the same reason. Not all vows are morally acceptable. Vows can be made to carry out treats as well as to honour promises. Although it may sometimes be morally obligatory to be as good as one's word in such circumstances, it is clearly not always or even usually so.

Although there is no limit (except logical impossibility) to what can be promised, power is needed to carry out promises. Promises are not taken seriously when made by people believed not to be in a position to honour their word. The power to keep promises, and thus to have promises accepted, can be used for good or for evil. It is, of course, true that promises may help to further cooperation. But insofar as they are made to particular people, they may be used to serve the interests of these people and may not at all be for the benefit of the general public. It is easy to imagine an oppressive society in which the oppressors are the only people who have something to gain from making promises to each other, the oppressed citizens not having sufficient liberty to be in a position to make promises of any consequence. In such a society there would not be a general moral obligation to keep promises. To show that the prac-

tice of promising serves efficiency is not to justify it morally, for efficiency is not a moral value.

The principle of freedom of contract (legally binding promises, on the theory under discussion) can be used as an oppressive tool. Thus, H. L. A. Hart points out how the Supreme Court of the United States "ruled unconstitutional, under the due-process clause, social and economic welfare legislation of every sort, statutes fixing maximum hours, price controls, and much else."[15] Thus, minimum wages for women and maximum hours of work for bakers could not be fixed by law because such limitation upon the freedom of contract was deemed unconstitutional. No wonder the critics charged an attempt to ". . . erect a Magna Carta for big business."[16] Thus, to assess whether the making and keeping of promises is desirable, one needs to know the setting of this practice and what purposes it serves. It is only appropriate to talk about "the sacred obligation to keep promises" if it is presupposed that these promises are not used to serve ethically unacceptable ends. One must reject the claim Fried appears to make, that there is a general principle of a moral kind that promises ought to be kept, from which one can deduce the obligation to keep them in particular cases.

THE DIFFERENT NATURE OF CONTRACT

If it is untrue that all promises serve socially acceptable ends, it seems less than surprising that "no legal system has ever enforced all promises and no legal system ever will."[17] However, the significance of this claim lies in the fact that many morally unobjectionable promises are not legally enforceable, nor would it be in the public's interest to enforce them. But before I say something about the difficulties of using principles such as consideration to mark off contracts as legally enforceable promises, more needs to be said about the way in which the concept of a promise would have to be modified if the thesis that contracts are promises is to be saved. If my account is correct, that promises are overt symbolic acts, there do not seem to be any promises involved in cash sales—although, as we have seen, these are talked of as contracts. Similarly, to board a bus is taken to involve entering a contractual relation, and no promises seem to be exchanged. However, we are told a promise is there,

15. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 972 (1977).

16. *Id.*

17. Reiter, *Courts, Consideration and Common Sense*, 27 U. TORONTO L.J. 439 (1977).

but that it is an implied promise. The same is taken to be true of vending machines. But, in neither case need anything be said, and one can understand Atiyah when he suggests that it is because people in cases of this kind are ". . . bound by an obligation that we generally feel impelled to imply a promise."[18] But this impulse should be resisted, for there is no reason why an obligation should not be imposed upon people by what is tacitly understood. Only a misinterpretation of the nature of promises generates the need for them as necessary creators of acquired obligations.

There is widespread tendency to see all assumed obligations as necessarily resulting from promises, but Atiyah could hardly be more widely off the mark than when he writes: "To the lawyer at least, it would seem clear that the only purpose of trying to decide whether a statement is a promise is to decide whether the statement carries an obligation with it."[19] To decide that a promise was made is one thing, to decide that it ought to be kept is quite another. Thus I may have promised to meet someone in London at a particular time, but there is an unpredictable and unavoidable delay. If I am within reach of a telephone I could be expected to phone the promisee to tell him why I could not keep my promise, and I would expect him to continue to believe that I made that promise to meet him, for it is the fact that this promise was made that constitutes my reason for phoning him. I did precisely what I ought to have done if I took the means of transport that was likely to be most efficient. Yet I did not do what I promised.

Atiyah's position is peculiarly hard to understand, for he goes on to claim, surely correctly, that other statements, such as threats, can give rise to obligations. But, if you conclude that a certain statement was a threat rather than a promise, and your only interest in deciding that it was a promise was to decide that it created an obligation, then in concluding that it was a threat rather than a promise, you have only failed to *establish* that it gave rise to an obligation. But, since Atiyah claims that both promises and threats *can* give rise to obligations, it seems on the face of it strange to suggest that it can be of no interest to decide whether, in a particular case, an obligation arose from a threat or a promise. Atiyah himself discusses at some length how obligations can arise from threats in cases of repudiation of contracts. Thus, in a case when A threatens to abandon the contract unless B agrees to new terms, A may be

18. P. ATIYAH, *supra* note 5, at 174.

19. Atiyah, *Promises and the Law of Contract*, 88 MIND 410, 414 (July 1981). It seems clear that he meant to include in the class of lawyers academic lawyers like himself.

bound by his threat if B explicitly accepts A's repudiation, or relies on it. After B has taken A's threat seriously enough to act on it, B will not be permitted to go back on his words (threat). B has a right to take A's threat as a promise in cases of this kind. But most threats cannot be characterized as promises. Excluded are all non-verbal threats (those not made by the use of symbols) and verbal threats that do not invite reliance because they are not emphatic enough. Atiyah's view seems to be that all concern with the meaning of words is a *merely* verbal exercise and therefore of no importance. He treats the distinction between threats and promises in this way, and therefore fails to appreciate that verbal threats, unlike ordinary promises, do not rule out the possibility that you may change your mind; only emphatic verbal threats may do this. But, when they do, such threats are naturally characterized as promises.

One of the reasons for taking consideration to be the mark of a contract has to do with the importance of contracts in business transactions in which it can be reasonably assumed that the parties to the contract are motivated by the desire for profit. The parties could be depended upon to be serious only if they had something to gain by the transaction. You sell present gain for a promise, or a promise for a promise. In the latter case, consideration would come in the form of loss of trust if one of the parties does not honour his promise. This is a prudential motive. Further prudential motives are provided by the law securing remedies to the innocent party at the cost of the guilty one, thus diminishing, if not removing, the loss of the plaintiff or the gain of the defendant. The reason moral philosophers have paid so little attention to mutual promises of the conditional kind I have just mentioned is that there is little mystery about the legal or prudential source of the obligation. In the case of mutual promises (executory contracts), each party makes a conditional promise and when one party fails to honour the agreement, the other party clearly is absolved from the obligation, which was conditional upon performance, or at least the serious will to perform.

But what puzzled philosophers was the source of a *moral obligation* to keep promises. How could one come to be morally bound to perform an action simply because one said one would perform it? This puzzle cannot be solved by showing that the promiser would be sued or lose trust if he did not perform. To complain, as Atiyah does,[20] that philosophers have failed to see that the most common

20. For a discussion of this issue, characteristically contemptuous of the contribution of philosophers, see P. ATIYAH, *supra* note 5, at Chapter 6, 138, 142-43.

reason for being absolved from the duty to keep a promise is that the other party failed to keep his part of the bargain, totally misses the point of the problem facing the moral philosopher in the case of mutual promises. He wants to know why it is morally wrong not to do what you promised to do. It is not difficult to see why non-performance releases the other party from his firm obligation when her/his promise was conditional and the condition is not met. Only if the condition is met does non-performance constitute failure to do what was promised.

I now want to give some further reasons against the claim that one needs to appeal to promises to explain contractual obligations. The obligation in each case must be sought in other values. Examination of impossible promises reveals, I believe, that they do not necessitate the introduction of implicit promises. The problem arises entirely from a faulty analysis of the nature of a promise. It is claimed that one cannot make promises that it is impossible to keep. The argument depends upon a premise that I have rejected, and it runs in something like the following way: Promises essentially involve placing oneself under an obligation (*prima facie*) to do what one promises to do. But, ought implies can, and one cannot do the impossible. Therefore, it is impossible to promise to do the impossible. This is of course, nonsense, unless what is promised is logically impossible, self-contradictory or unintelligible for some other reason. In *MacRae v. Commonwealth Disposals Commission*,[21] the Court obviously came to the right decision in rejecting the plea of the seller's offer of a non-existent oil tanker, on the ground that it was impossible to contract (promise) to sell a non-existent ship, and that the contract was therefore void. But is it necessary for one to say that the sellers promised that the wreck existed, unless one is already committed to the view that contracts are promises? In the context, to promise the right to salvage oil from an oil tanker, the location of which is furthermore specified, is *to promise explicitly* the right to *real* salvageable oil from a real tanker. There is no need at all to postulate an implied promise. It seems most unnatural to say that the existence of the tanker was promised, although it is clear that an offer to sell the wreck on the understanding that it contains salvageable oil entitles those to whom the offer is made to assume that the oil is not non-existent oil and that the wreck is a real, rather than a non-existent, wreck. We here have a case of what is

21. McRae v. Commonwealth Disposals Commission, 84 C.L.R. 377 (1951). *See* discussion A. Honore, *References to the Non-Existent*, 68 PHIL. 302 (1971), and P. ATIYAH, *supra* note 8, at 155.

tacitly understood and consequently *need not be promised.* There is no conceptual difficulty either about selling the non-existent or about promising the impossible, though the seller and the promiser cannot honour their commitments in such cases.

But, it is no less artificial to postulate a promise to explain the obligation to pay a debt. Thus, Ian MacNeil, in discussing the transaction of buying gas, describes promise as, perhaps, a slightly hidden element, for ". . . either the tank is filled before payment or after; in either case credit, and with it promise occurs . . . . the time is so short that the failure to pay or the failure to deliver paid for gasoline would be viewed as deliberate from the start, and hence a theft, rather than a breach of promise initially intended to be kept. (An implied promise is nevertheless present, at least in the mind of the innocent party)."[22] There is an obvious sense in which, on my account, perfectly good sense can be made of what is implicitly promised. When a man promises to sell a tanker he may be implying a promise to sell a ship, the context making it obvious that the tanker is not a motor vehicle. But there is only one promise in this case; the "implied promise" indicates only what we would be licensed to say and expect to be the case on the basis of the promise made. In the case of the tanker taking the form of an advertisement in a newspaper, the promise is still an overt symbolic act. But MacNeil's implied promise is quite different. It may exist only in the mind of the innocent party. It is supposed to be there because to think that the thief has incurred an obligation is, on his view, to think that he made a promise. But the conventional rules governing our monetary system are so firmly established that it is taken for granted as not needing to be promised that even at self-serve gas stations, you are incurring a debt by filling up your gas tank. Not only need the culprit have made no overt promise to incur the obligation, he need not even have had any "promise existing in his mind."

The strain in the relation between the concept of a promise, on the one hand, and that of a contract, on the other, is evident when you see Corbin maintaining that there is no difference in principle between a contract made by an express symbolic act, and one implied by non-symbolic behaviour. The first, but only the first, can constitute a promise, on my account. But, Corbin points out that "parties who have made an express contract to be in effect one year (or any other time) frequently proceed with performance after the expiration of the year," and the courts may decide that the parties

22. Macneil, Values in Contractual Relations (1981) (unpublished manuscript).

have "agreed in fact" to renew the contract.[23] Now, it may well be a wise procedure to take the parties in a situation of this kind to be agreeing tacitly to a renewal of the contract without promises being exchanged, but, to insist that a tacit promise must be postulated to explain the continued contractual obligation seems to me to be sheer prejudice, and not in the least illuminating. It is much more natural to say that the court presumes a tacit agreement in such cases. This we can understand. But a tacit promise is too much like an "unexpressed promise," a strictly unintelligible expression.

If one looks at contracts "implied in law" the absence of a promise is obvious. One of the examples Corbin gives is this: "A finds B's house afire and his cattle starving and renders service and incurs expense in saving and feeding them. In some states, B is under a quasi-contractual duty of reimbursement."[24] Corbin himself has made the most appropriate comment here. He says, "While the word 'assumpsit' literally means 'he promised,' it was easy for the courts to create the fiction of a promise in these cases, to say that the law implied a promise, and then to refuse all opportunity to the defendant to deny it. The action of debt was older than assumpsit; and in very many instances a debt existed without being either created or accompanied by a promise to repay it."[25]

The paradox evident in Corbin's statement can be avoided. There is no need to deny the right to claim truthfully that no promise was made. All that needs to be done is to give up the erroneous view that the obligations in these cases arise from promises. It may be claimed that to talk about promises in this way does no harm, if one simply remembers that implicit and fictitious promises *are not really promises*. But, such insensitivity to the dangers of abusing words will not do. Fictitious promises may not be promises, but the whole point of the exercise seems to lie in the classification of them with promises. Since promises are essentially overt symbolic acts, one does not want to give support to the view that there may be promises belonging to a purely mental sphere, or a metaphysical world in which fictitious promises dwell. After all, David Hume was quite right to insist that promises are not private mental acts, but overt symbolic acts, and Thomas Reid in calling them "social acts of mind" is insisting upon their essentially public nature.[26]

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23. A. CORBIN, *supra* note 1, at 27.
24. *Id.* at 29.
25. *Id.*
26. *See* D. HUME, A TREATISE OF HUMAN NATURE Book III, Part II Section 5 (L. Selby-Bigge ed. 1888), and THE WORKS OF THOMAS REID, D.D. 664-69 (Sir W. Hamilton Bart eighth ed. 1895).

In an apparent attempt to assimilate contracts to promises Atiyah writes: "If promising is derived from the rules of a social practice of promising, one might have thought that the answer to these questions [whether one can promise present and past facts] must be found in the rules of the practice, and the *law of contract* is the nearest we have to a statement of those rules."[27] If promises are necessary for the creation of contractual obligations it seems to follow that the law of contract partly consists in the rules of the practice of promises. It would however leave out entirely legally non-enforceable promises. But Atiyah himself rightly draws attention to the fact that certain contractual obligations do not seem to need promises for their explanation. The examples he takes are the already mentioned cases of a man entering a bus becoming liable to the obligation to pay the fare, and of a man who orders a meal in a restaurant thereby incurring the obligation to pay for it. In neither case does the obligation seem to depend upon a promise. This is stressed by Atiyah, who writes: "The lawyer explains these obligations by saying that there are implied promises."[28] But Atiyah strongly suggests that he believes that this explanation is erroneous. He seems to agree with me that promises are not needed here. Thus, he writes: "The concepts of property, of debt, and of obligation antedate the concepts of promise and contract."[29] On this view it seems odd indeed to claim that the law of contract is descriptive of the rules of the practice of promises. But Atiyah has a conjuring trick up his sleeve. He claims that the paradigm case *of a promise* is the implicit promise. This would seem to mean that to order a meal at a restaurant is a clearer or more typical case of promising than an explicit promise to pay the bill on a certain day because you forgot to take money with you to pay for your meal. Surely this is nonsense, although it may well be more common for obligations to be acquired by actions *that lawyers describe as implying promises* than by explicitly promising. This does nothing to justify postulating implicit promises to account for pre-existing obligations. There is no time here to enter into Atiyah's complex account of promises as consent and admissions, but I cannot see the justification for claiming, for example, that promising to pay for the consequences of an accident is an admission that you were responsible for it. Compassion may lead me to do this, and this in no sense commits me to accept *responsibility* for the accident. To promise to pay for the destruction caused by an arsonist is not to admit that

27. P. ATIYAH, *supra* note 8, at 161.
28. *Id.* at 173.
29. *Id.* at 174.

you are that arsonist. To consent to the terms of a contract is also quite different from admitting that the terms are fair. You may not be able to do better than come to an essentially unfair agreement.[30]

Freedom to enter contracts voluntarily has been closely associated with individualism and competitive business. With increase in social welfare arrangements comes the realization that this freedom can lead to undesirable results. Perhaps people need to be protected against freely entering into contracts that are harmful to them. The courts would not uphold a contract in which one person promised to become a slave to another. Certain clauses limiting responsibility may be prohibited by law and insurance firms may be legally required to print certain clauses in prominent type that have previously been hidden in the small print. It is a significant feature of this development that recognition is given to the fact, stressed in this paper, that when it comes to contracts and promises, the content is of central importance when the questions of responsibility and liability are raised. The other important point is that the difference between a promise and a legal contract is highlighted. A contract that is void because it is unconscionable or illegal never was a contract, whatever promises may have been given by the parties with full knowledge of what they were doing. Only by separating the question of the identifying features of contracts and promises from the question of the obligation created by them can these points be clearly made.

IMPLICATIONS FOR LEGAL DECISIONS

Certain features of the difference between the concept of a promise, on the one hand, and legal contract, on the other, can be illustrated by reference to the case of *Gilbert Steel v. University Construction Ltd.*[31] The case can also serve to illustrate the practical danger of concentrating on the promises that appear to have been made, to the exclusion of other aspects of the behaviour of the protagonists in a contractual dispute.

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30. *Id.* at Ch. 7. Atiyah thinks one can infer a change in *the concept of a promise* from changes observable in decisions by the courts in contract disputes. I think this is erroneous although in playing down the importance of promises as basic sourses of obligation, Atiyah's account has much in common with my own.

31. The description of the case is here grossly oversimplified. For illuminating discussions of this case, *see* Reiter, *Courts, Considerations and Common Sense, supra* note 17, and also Reiter & Swan, *Contracts and the Protection of Reasonable Expectations*, and Swan, *Consideration and Reasons for Enforcing Contracts*, both in *Studies in Contract Law* (B. Reiter & J. Swan eds. 1980).

G. S. made a contract with U. C. to supply steel at a certain price for the construction of apartment buildings. Before the first building was completed, the parties met, and an oral agreement was reached that the price be raised due to increase in the price of supplies of steel to G. S.. A written contract was drawn up, but it was not signed by U. C., though sent to them. However, no protest was made when the invoices showed the higher price and, what is more, U. C. started to make payments in round sums, which in view of later events, were clearly designed to leave a debt to G. S. when the first building was completed. The judge did not accept the defense that the verbal agreement had been given under duress, but ruled against the plaintiff on the ground that there had been no consideration for the verbal agreement, and that consequently the plaintiff had done no more than what he was obliged to do under the original contract.

The judge asks, "Why should the defendant have given up their protected position under the contract dated October 22, 1969?" (Written contract). The appeal judges ask, "Where then was the *quid pro quo* for the defendant's promise to pay more?". It appears that the decision that there was lack of consideration is here due to the notion that the defendant had no motive to enter a new contract that was less advantageous than the one already entered into. For this reason, the courts judged his promise not to be binding legally. But, it was argued (by Mr. Morphy) that the facts gave rise to a moral obligation. This was accepted by the trial judge who nevertheless failed to see this as a reason for finding the verbal promise binding in law because "not every moral obligation involves a legal duty, but every legal duty is founded on a moral obligation."[32] Of course it is true that there are any number of moral obligations that result from promises that are not enforceable by the courts. But something is seriously wrong with the judge's claim that all legal duty is founded on a moral obligation. If he were to follow this principle he should have decided in favour of the plaintiff, for after the verbal agreement, the occurrence of which the judge accepted, G. S. had no moral obligation to supply steel at the old price, and they were given further reasons for considering themselves absolved from this duty by the deliberately deceitful actions of U. C.. If G. S. had a legal duty, and this was the judges verdict, it was certainly not based upon a moral obligation in this case.

32. Gilbert Steel Ltd. v. University Construction Ltd., 36 D.L.R.3d 507 (1976) (the trial judge quoting Lord Coleridge).

I have argued that, as it turned out, it was easier for G. S. to get out of its moral obligation than its legal obligation. The gap between the legal and the moral aspects of this case is further demonstrated by the fact that, to quote Barry Reiter, "There would certainly have been no difficulty had G. S. required a new written contract under seal, before commencing deliveries after 1 March 1970 (the oral agreement). On the court's reasoning, there would have been no difficulty had the Gilberts merely required a new written contract (even without the seal) expressly rescinding the October contract."[33] From a purely moral point of view a written promise would never be morally binding when the same oral promise would not be binding at all. The written promise might give greater security to the promisee, because it is less easy to get away with breaking the promise. The evidence is more indelible, and this might give the promisor an added prudential motive, but not a stronger moral motive, to be as good as his word.

That the decision in G. S. v. U. C. was unjust was plain even to the judge, who thought he was nevertheless forced to reach it as an officer of the law. Barry Reiter, in criticizing the decision, undertakes to show both that the rule applied is not the law and that it never was the law. His argument that the unjust decision could have been avoided consistently with the law seems to me persuasive. But, clearly, one cannot take it for granted that an application of legal principles will always secure justice. Underlying Reiter's attitude is great optimism. "The judges," we are told by him and John Swan, "have an uncanny ability to arrive at proper decisions, decisions that show a careful balance being struck between the factors that must be considered even though the judge, any more than the horse trader, cannot always make explicit the factors and reasoning process that led him to his decision."[34] If the decisions are the proper or best decisions, all relevant values considered, this means that the decisions must be morally acceptable because a decision that is not morally acceptable is not acceptable at all. Nothing can make a decision acceptable if it is morally unacceptable. The highest court of appeal is the moral one. Although judges may be endowed with superior moral sensitivities, it is only to be expected that they may find it difficult at times to discover in legal precedents a morally acceptable story that will be seen to justify the best decision in a novel case.

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33. Reiter, *Courts, Considerations and Common Sense*, *supra* note 17, at 452n.
34. Reiter & Swan, *supra* note 31, at 2-3.

Barry Reiter has shown convincingly that, in the case of G. S. v. U. C., the court could have come to the fairer decision of finding for the plaintiff. I am not going to go over that ground again, but certain observations about the alternatives that could have been adopted may help the general purpose of this paper, which is to downgrade the obligation to keep promises as a source of contractual obligation. Thus, if more attention is paid to the general behaviour of the parties, apart from the situation *when the contract was made* and the *oral promises exchanged*, it may become clearer that unjust enrichment would have been an appropriate principle for securing justice. Furthermore, it seems clear that whether a "modification" of a contract should be treated as a new contract depends upon the importance to the contracting parties of the modification concerned. In a business contract, the price of the commodity sold is of the essence of the contract and it seems entirely unreasonable to claim that an obligation to deliver at a lower price would continue after a new agreement has been reached, with respect to an increase in price: Of course the promisee must be protected against a unilateral decision to increase the price of the commodity, combined with the claim that the new price quoted rescinds the former contract. But here the situation is quite different for, although U. C. did not intend to be bound by the verbal agreement, they deliberately behaved in such a way as to lead G. S. to believe that they intended to pay the higher price. Seriousness of purpose was amply (though fraudulently) indicated by U. C., and consideration was not needed for demonstrating such a purpose. It must be some symbolic consideration that the judge deemed to be needed here, for "the law is not concerned with whether the consideration is adequate."[35]

The whole issue is made to hinge upon whether the promises given verbally were given with consideration. But, could it not be said that U. C., by their behaviour, implicitly promised to pay the higher price by not protesting when it appeared on the invoices. But, there would have been no more consideration for that implied promise. To claim that the implied promise is the paradigm and ought to be given precedence for that reason, is most implausible. The judges were clearly right not to take U. C.'s immoral behaviour

35. P. ATIYAH, *supra* note 1, at 71. It seems to be an orthodoxy to treat consideration as symbolic rather than substantial. Thus, Freid, "The law is not at all interested in the adequacy of the consideration." C. FRIED, *supra* note 4, at 29. But there may be difficulties about deciding what can count as *serious* consideration. I don't see at the moment how to go about seeking a solution to this problem.

as an implicit promise. The crucially significant feature of the case is the deceit evidenced by U. C.'s change of method of payment, and this clearly cannot be represented as a promise of any kind. But U. C.'s deceitful behaviour is immoral *for the same reason as a deceitful promise* and ought to have been given decisive weight. That it was not given such weight appears to have been due to the mistaken idea that the only thing that needs to be considered in deciding a contract dispute of this kind is whether a promise of the right kind had been broken.

The doctrine that all contractual obligations derive from a promise can be saved only by extending the concept of promise beyond its natural bounds. This is a most unsatisfactory procedure, for the ordinary meaning of the term is always there ready to confuse the issue. The nature of promises remains unaffected by the changes that may have occurred in the application of the law of contracts. This is not, of course, to say that the importance the person in the street attaches to promises may not influence and be influenced by the decisions of the Courts in contract cases.