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A TALE OF TWO LAWS

*Barbara A. Black**

THE RISE AND FALL OF FREEDOM OF CONTRACT. By *Patrick S. Atiyah*. Oxford: Oxford University Press. 1979. Pp. viii, 791. \$49.50.

This is a splendid *big* book.¹ Patrick Atiyah has written a work of legal history as intellectual history, set in the broad context of three centuries of social, economic, and political development. A penetrating history of legal ideas merges, in this work, into a critique of the dominant ideas, for they are revealed to the historian as owing their existence not to their validity under the glass of eternity, but to the temporal and the cultural. What we think of today as contract, says Atiyah, is what we were educated to think in the nineteenth century. And what we were taught mistakes the nature of contractual liability, conceiving it, first, to be unitary, and second, to be essentially directed at the warranting of promise—at securing to a promisee that which was promised, or compensation therefor. But, Atiyah asserts, contractual liability is in truth diffuse. Three interests claim the protection of a law of contract.² In descending order of the strength of their claim, they are: the restitution interest (arising from the receipt of benefit), the reliance interest (arising from reasonable reliance on an express or implied promise), and the expectation interest (arising from an expectation that a promise will be kept).

It would seem that to the author, this is a natural order of precedence, perhaps enjoying just that eternal validity that he rejects for the entrenched view, but at the very least sounding deep in human experience (p. 4). It is this conviction which imparts to the work an earnestness and depth commanding respect and demanding attention. Atiyah does not, however, ask that we accept his priorities; he asks, rather, for recognition of the relationship between these interests and ultimate values,³ the better to weigh the values and get on

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1. Cf. Atiyah, Book Review, 77 *POL. SCI. REV.* 636 (1977) (reviewing Gilmore's *The Death of Contract* with the opening sentence, "This is a splendid little book.").

2. Atiyah here follows Fuller and Perdue, *The Reliance Interest in Contract Damages*, (pts. 1-2), 46 *YALE L.J.* 52, 373 (1936-1937).

3. "Promise-based liability rests upon a belief in the traditional liberal values of free

with the job of choosing among them.

It is fascinating to note the recent explosion of scholarly interest in, and controversy around, the history of contract, a subject one might once have thought not likely to excite the sensibilities, much less elevate the blood pressure. This book is an intriguing blend of existing scholarship on that now much-worked subject. Thus one finds much that is familiar, nor does Atiyah suggest otherwise, preferring simply to demonstrate the remarkable potential of the familiar. Taking his springboard where he finds it, he lands on his own feet. Influences most immediately visible (and acknowledged) in *The Rise and Fall of Freedom of Contract* are those of Fuller and Perdue (whose brilliant article apparently sparked the whole enterprise, and certainly supplies the analytic scheme)⁴, Simpson,⁵ Horwitz,⁶ Gilmore,⁷ and Friedman.⁸ A fitful, uneasy combination, particularly in view of some recent commentary and controversy. Atiyah, whose account of the common law of contract through the nineteenth century most closely resembles that of Morton Horwitz,⁹ tells us in the preface: "I believe that the general story I tell in this work is broadly in line with Professor Simpson's *History*, though I am not confident that he himself would endorse that view" (p. viii). Readers of Simpson's recent comments on Horwitz's work¹⁰ must share Atiyah's doubts. Sharers of Simpson's doubts about Horwitz's thesis must — really must! — read Atiyah. In this extended treatment of the subject, Atiyah has had the opportunity to develop fully certain themes necessarily dealt with more perfunctorily by Horwitz. At certain points, Atiyah's presentation serves as a neat — if fortuitous — rebuttal of Simpson.

I. THE LAW OF CONTRACT: THE FIRST HALF-TURN

Quickening through the eighteenth century, an anachronism by

choice," benefit-based liability is neutral, and reliance-based liability is positively "hostile to the values of free choice," involving, rather, values "closely associated with a paternalist social philosophy and a redistributive economic system." Pp. 6-7.

4. As Atiyah declares.

5. A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* (1975).

6. M. HORWITZ, *TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

7. G. GILMORE, *THE DEATH OF CONTRACT* (1974). But there is at least one essential difference between Atiyah and Gilmore. Contract's demise, to Gilmore, is conceptual; Atiyah sees (and mourns) the continued vitality of the very concept Gilmore thinks dead.

8. L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965).

9. Horwitz, however, is concerned primarily with American law, Atiyah exclusively with English.

10. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

1970, freedom of contract was in its "heyday" from 1770 to 1870 (p. 501). During that period, as contract, in tune and in common with the world around it, turned upside down, classical contract theory was hammered out. Even the fact of theory was a new departure; early English contract law muddled along without it (p. 139). That early law is, however, susceptible of description, or at any rate, of identification of salient characteristics.¹¹ According to Atiyah, it was concerned with fairness, with protection of the weak from the strong, broadly, with the imposition of external, community-rooted values — including those of just price and wage — rather than with the implementation of individual intent and will. And, as it happened, belief in the absolutely binding nature of promises rode low. Coherently, then, the promise occupied a subordinate position, being "neither necessary nor sufficient" for imposition of contractual liability.¹² The law was, "perhaps primarily," concerned with benefit and reliance; it was "consideration-based" rather than "promise-based." The law's concern with what had been done (with benefits received, with acts performed in reliance) and lack of interest in what had been said (in the mere fact of agreement) was expressed in emphasis on the part-executed contract and disdain for the wholly executory contract. "The notion that a promisee was entitled to have his *expectations* protected, purely and simply as such, as a result of a promise and nothing else, was not generally accepted in eighteenth-century law" (p. 142). We are told that it was not even entirely clear, in the eighteenth century, "that promises and contract were ways of creating wholly new obligations" (p. 141).¹³ In early law one might be bound because of an agreement, but it was understood that the *law* was doing the binding — and thus might, without apology, decline to do so if the agreement offended notions of fairness, or, conversely, might unembarrassedly bind one in the absence of agreement. In this system, what has come to be known as quasi-contract was doctrinally powerful, Chancery and the jury institutionally pre-eminent.

But the eighteenth century, pivotal as well as transitional,¹⁴ saw the stirrings of discontent with this state of the law and with Elizabethan regulation and protectionism in general. Still agricultural, still

11. Atiyah's chapters six and seven, pp. 139-216, discuss contract law and theory in 1770.

12. The promise served primarily an evidentiary function. *See* note 30 *infra*.

13. The tort-contract dichotomy so familiar to us was not then developed.

14. *See, e.g.*, pp. 90, 138, 146, 176. Somewhere in print in the last year or so there appeared a cartoon in which, seated in the Garden, Adam says, "Eve, we are living in an age of transition."

sparsely populated, England was nonetheless rushing headlong toward its commercial and industrial destiny — a national market and a market economy. The stage was set: Stability is essential to the functioning of a market economy, and in the years since the Glorious Revolution, multiple instabilities — political, financial, and legal — had been overcome.¹⁵ The need was great: In an era of febrile commercial and industrial activity, planning moves front and center; predictability is iron entrepreneurial necessity. And the demand was irresistible: “The new man of the 18th century was an individualist” (p. 41); freedom and competition were not to be denied him. England went from property to contract (pp. 102-12),¹⁶ and classical contract theory took shape around the executory contract, a fit device for the allocation of risk, a useful instrument of private planning. As “newer” — that is to say revived (pp. 140-41) — notions of the absolutely binding nature of promise took hold, contractual liability came to be thought of, and treated as, promise-based. The wholly executory contract became the paradigm, protection of mere expectation the norm. The time frame shifted, the eagle eye of the law now searching for the moment at which a party could no longer escape obligation, could no longer change his mind; the moment of contract formation, determined by newly emergent rules of offer and acceptance (pp. 446-48), became everything.

As it became clear that “wholly new obligations” might indeed be created by “promises and contract,” the role of law was obscured, and law itself degraded: The law might be necessary for enforcement of the parties’ agreement, but its opinion of the agreement, ideally at least, was a matter of the sublimest unconcern — its approbation was not sought, nor, therefore, its disapprobation permitted. The fairness of an exchange was irrelevant. “Freedom” to make the agreements one wished to make, confidence that if you were bound so was the other fellow, might be compromised by scrutiny of the content of the agreement, by its invalidation, or even adjustment, in the name of fairness. Thus, logically, equity — earlier the means of avoiding an unfair exchange — declined, and concomitantly the jury came under control, its power to right wrongs by reduction of damages in inequitable situations much curtailed (pp. 388-97). Consideration, potentially (and once) a meaningful check on the power of one individual to take advantage of another, dwindle

15. Atiyah tends to stress the stability of the eighteenth century — though not simplistically. *See, e.g.*, pp. 23-24, 33-34.

16. Freedom of property was a necessary precursor to freedom of contract. P. 85. For contract law and theory, 1770-1870, *see* chapters 14 and 15, pp. 398-505.

dled into insignificance as a requirement, its "substantive core . . . eliminated by the move to the executory contract" (p. 454). Nor, consent now having become the essence of contractual obligation, could the law impose contractual obligation in the absence of consent by protection of reliance and benefit as such. Quasi-contract and, more generally, liability for anything *but* promise, declined. In short, the promise had become both necessary and sufficient: One was free to bind oneself, free to depend on the other party's having bound himself, and freed of the threat of being otherwise bound.

II. THE POWER OF PROMISE

Thus we have the transformation of "The Good Old Law" (as Simpson has ironically dubbed it¹⁷ and Atiyah evidently regards it) into a law which Atiyah considers amoral¹⁸ and unfortunate. The propounder of this still-revisionist version of legal development must overcome tradition which despite earlier attack along these lines, represents for most people conviction, if not dogma. Atiyah, encountering familiar, anticipable hurdles, takes them with an élan and grace which are a joy to behold; point after point, time after time, an argument is made which, for acuteness, breadth, creativeness, candidness — for over-all quality — is nowhere surpassed in today's legal history scholarship. That is not to say that all fences are cleared. In my own judgment it remains unlikely that the executory exchange was as little regarded and as scantily protected before 1770 as Atiyah suggests. For that reason alone, the nineteenth century, even if it were as close to enthronement of the bare promise as Atiyah suggests, would not be the revolution that is also suggested. And the nineteenth century was a longer way from the rule of promise than this work suggests.

*Slade's Case*¹⁹ will serve to illustrate Atiyah's difficulties with pre-classical law and to symbolize a broader difficulty. Atiyah presents *Slade's Case* as an important step on the road to consensual liability: "it became easier to think of the liability . . . as the creation of the parties" (p. 120). Coke argued that there cannot be a contract *without* mutual promises or reciprocal agreement: Was that, Atiyah wonders, a new attitude, perhaps more innovative than it still seems to us (p. 120)? Well, perhaps, but it is not conceivable that *Slade's Case* — and the history of assumpsit in general — will not

17. Simpson, *supra* note 10, at 535.

18. Some of the "moral flavour" of the eighteenth century was carried over into nineteenth-century law, but evidently not much. P. 368.

19. 76 Eng. Rep. 1072, 4 Co. Rep. 91a.

raise doubts about the negligibility, in early law, of agreement, choice, promise (pp. 198-205). It is, needless to say, one of Atiyah's main tasks to allay our doubts, and he leaves no base untouched in tackling it.

One obvious answer, offered here and at the many points in the book where similar doubts crop up, is that one must not demand the impossible: ideas are not born in a moment, and do not die at a stroke; old and new traditions co-exist, happily or otherwise. "Neat history" is an oxymoron. The book is liberally sprinkled with caveats along this line,²⁰ and the reader must respect them. More impressively, the message is conveyed in the over-all tone of this book — in the author's moderation, balance, avoidance of the doctrinaire, deep sense of historical complexity — and the reader will respect this. On the other hand, all scales, sufficiently weighted, will tip, and the reader will also have to decide whether, finally, the overlappings, intrusions, anomalies, and contradictions overpower the thesis.

Another answer to our doubts about the unimportance of promise prior to the nineteenth century lies in Chancery, where, in any event, most contract litigation took place (p. 147). If the common law was rife with economic liberalism (pp. 112-38), Chancery traditions were paternalistic (p. 116). Atiyah's thesis, that "the law was inevitably and fundamentally concerned about the fairness of an exchange" (p. 168), does not depend *exclusively* on Chancery. Although admitting, in typically, engagingly, straightforward fashion, that "there has never been an overt principle of fairness in the common law of contract" (p. 146), the author, still typically and quite as engagingly, refuses to believe in the imperviousness of even the common lawyers to the morality of their time (p. 147). But the heart of the case lies in Chancery: First, Atiyah asserts that "Chancellors nearly always relieved against excessively unfair bargains . . ." (p. 116) — further than scholars have thus far been willing to go. Second, the author claims that when Chancellors refused relief, they were depending upon the jury to do equity; ultimate conviction here must rest on one's willingness to accept the widely, but not universally,²¹ held belief that jury control over damages ensured fairness.

20. *E.g.*, pp. 262-63, 404-05. On the fair exchange, see pp. 146-349 and 167-77. For a discussion of caveat emptor see pp. 178-80, 464-79. Caveat emptor, at least as vital in old as in classical law (or so one might easily conclude from the evidence here), is not helpful to Atiyah's thesis.

21. See Simpson, *supra* note 10, at 574-75. Atiyah recognizes, in the benefit context, that juries were not reliably upholders of customary morality. Judges, he says, took cases from juries when they did not trust juries to find implied promises in cases the judge thought demanded the finding.

Atiyah's argument on the fair exchange may or may not move the world to full agreement, but a more powerful argument for this point of view will not soon see the light of day.²²

In the end, however, Atiyah's most direct answer to the troubling implications of *assumpsit* is that the award of expectation damages was

largely unknown prior to the end of the eighteenth century, and . . . in the absence of that characteristic it is misleading to speak of wholly executory contracts, or of consensual liability. It is true that the recognition of "promise for promise" as constituting a ground of liability prior to performance or reliance must have contained the seeds of consensual liability. But this was not the consensual liability known to nineteenth-century lawyers. [P. 199.]

Atiyah here contrasts the award of *price*, as in the early period, with the later (as he believes) practice of awarding difference money. The expectation *interest*, as such, is not in focus in Atiyah's presentation — it was clearly protected in both periods. The point here is not the failure of early law to protect the expectation interest, but its fundamental unconcern with the executory contract. The difference formula eliminates the anticipation of plaintiff's return performance which, when independent covenant rules governed, lay behind the award of the price. It was assumed in the earlier period that the contract would be executed, defendant being entitled to enforce performance in a later action. The change was from expectation of performance to expectation of profit (pp. 428-29). Until that change, "it is not really possible to talk of a proper law of executory contracts" (p. 200).²³ The further and all-important step, taken later, is that the *executory* contract, becoming the paradigm, drove all rivals from the field. Even the part-executed contract, with elements of reliance and/or benefit was tested for, and valued only if in, congruence to the paradigm, the other, once essential, elements given no shrift.

22. Atiyah's argument moves from convincing reinterpretation of cases (*e.g. Sturlyn v. Albany*), through rethinking of the concept of "mere inadequacy," to adoption and ingenious adaptation of broad societal theory — Douglas Hay's *in terrorem* theory. P. 101. Atiyah uses this last in partial explanation of nineteenth- (and twentieth-) century misconceptions about the role of the Chancellor in ensuring fairness ("Chancellors nearly always relieved against excessively unfair bargains, *but did not want to say so . . .*"). P. 193 (emphasis added). Somewhat later the position is stated thus: "A considerable degree of flexibility in the attitude of Equity to hard and unconscionable bargains . . ." P. 448. One must remain doubtful about such statements as: "As the protection of the common sailor shows, Chancery's protective mantle was available for whoever could bring his case before the Court." P. 173. And here, as elsewhere, Atiyah is driven finally to pointing out that the eighteenth century was transitional — that the new morality (individualism and risk-taking) coexisted with the old, so that decisions which do not demonstrate a fundamental concern with fairness are examples of the nineteenth-century mentality in its infancy. P. 176.

23. For damages in the nineteenth century, *see* pp. 424-34.

That is the critical transition, critical because it culminates in reduction of protection of reliance and benefit, and Atiyah suggests that even if the expectation interest was, in early law, protected, so long as the interest lay in performance, this critical shift had not taken place.

There is no gainsaying the coherence and cogency of this argument; its ultimate force, however, must depend on the validity of the proposition that early law did *not* award difference damages. That is dubious, and in any case unknowable since, once again, jury control obscures. One would not, however, doubt an *increase* in the number of such awards, and an increased emphasis along the lines suggested.

The sufficiency of promise in the *nineteenth* century runs smack into consideration. When one sets out to prove that a "consideration-based" law was transformed into a "promise-based" law, any lingering traces of a consideration requirement — unless reduced to form, or better, fiction, or best of all, farce — are an embarrassment. While recognizing that Mansfield desired nothing more than the reduction to rubble of the requirement, most of us have thought that he did not succeed; Atiyah thinks otherwise (pp. 448-54).

One aspect of consideration manages to plague Atiyah early *and* late — that is, the moral obligation, or, really, past consideration, doctrine (pp. 162-64, 491-93). If benefit had the force in pre-1770 law that Atiyah suggests, the refusal of the courts to accept past consideration is at least anomalous. Atiyah adopts Simpson's insight here: when consideration, as in early usage, means no more than reason, the *best* consideration, because the best reason, is a moral obligation to do as promised. "Hence in the early history of consideration it must be appreciated that what has come to be called pre-existing 'moral' obligation . . . was not some curious aberration; it logically lay at the heart of the doctrine.'"²⁴ Mansfield's adoption of moral obligation as sufficient to support a promise was thus not the innovation it has been thought, but rather an affirmation of a concept that lay deeply rooted in history. But even if Simpson is right, it is Atiyah who has drawn dramatic implications from his thesis; it remains a problem for Atiyah that Mansfield's law was a reversal of the law as he found it. Similarly, the *nineteenth* century rejection of moral obligation works against theories that the bare promise was sufficient. Atiyah thus considers *Eastwood v. Kenyon*²⁵ "puzzling," invoking the "technicality" of consideration to defeat an express

24. SIMPSON, *supra* note 5, at 323, quoted in P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT at 140.

25. 113 Eng. Rep. 482 (1840).

promise (pp. 491-92). Moral obligation is maddening: The cases *enforcing* promises supported by moral obligation can support either theory — they may be used to show the court's concern with benefit, or with promise. What is calculated to drive theorists to drink is that, on the whole, we appear to see courts *failing* to enforce them. Past consideration doctrine confounds everything but bargain theory.²⁶

The extent to which bargain theory, even if fully in force in nineteenth century England,²⁷ disturbs Atiyah's thesis, is unclear. By refusing to protect unbargained-for-reliance, it is actually supportive of the necessity of promise; essentially, however, it seems radically inconsistent with the notion that the bare promise is sufficient. The argument must be that when the adequacy of a consideration is really irrelevant, when the law will enforce an exchange of something for nothing, when one may bargain away one's estate for a piece of paper (pp. 448-51), then bargain theory is problematic only in a few peripheral areas. Atiyah's depiction of *Foakes v. Beer*²⁸ as "a movement away from the idea that a bare agreement was always binding" (p. 440),²⁹ may appear to the reader less proven than asserted; it is possible nonetheless to argue that the doctrine of that case is, in this context, only marginally significant. But past consideration doctrine cuts a fairly wide swath — for that reason alone, and I think for others as well, bargain theory remains a hurdle.

A distinguishing feature of this work is that within its major theme — the rise and fall of freedom of contract — there is a minor theme — the rise and fall of the "sanctity of promise."³⁰ The obliga-

26. Atiyah's theory is that promise after consideration was not sufficient evidence of receipt of benefit: thus the doctrine of requests, with the request supplying the omission. Pp. 152-53.

27. It is hard to be sure of Atiyah's position on this. See pp. 463, 689-90, 776. Others have no doubt. See J. DAWSON, GIFTS AND PROMISES (1980).

28. 9 App. Cas. 605 (1884).

29. See also pp. 165-67, 438-40 on forbearances and compromise. Atiyah's suggestion that the doctrine of *Pinnel's Case* and *Foakes v. Beer* is abhorrent only from the perspective of promise is too narrow — desire to do away with that doctrine may reflect (among other things) a different estimate of the benefit of a bird in hand.

30. Promise, as a prominent theme, is immensely valuable but by no means problem free. For one thing, what the book contains of hyperbole resides almost exclusively in promise. Promise has never been both necessary and sufficient, or indeed either. There is at least one point at which Atiyah's promise-emphasis, in the form of a desire to stress the early negligibility of promise, seems to have led him into a fairly elementary error. In a system of law the heart of which is making people do what they ought to do, paying for benefits they received, and compensating for losses incurred in reasonable reliance, what, asks Atiyah, is the function of promise? His answer is that it is evidentiary, serving as *evidence* of the nature of the transaction, the identity of parties, and so forth. But promise serves a different and more important function in reliance than in benefit, for as Atiyah points out, it is promise which makes the reliance reasonable. The law is concerned only with *induced* reliance. Atiyah's recognition of this is signalled by a shift in terminology — promise, in reliance, is "justificatory." But on the

tory force of promise, lost sight of for a time, was rediscovered by Grotius and Pufendorf (pp. 140-41) and happily seized upon by the men of the Age of Enlightenment. It fit perfectly any number of needs and ideals of the time — commercial need, the ethic of self-discipline and self-reliance, the stress on principle. It was deducible from the premises of the economists and utilitarians, and constituted a first principle of social life (pp. 352-54). And so the principle of promise, of keeping one's promise, of the "sanctity" of promise, flourished. Indeed, a combination of lawyers, economists, and capitalists saw to its flourishing, deliberately inculcating the "propaganda" of the absolutely binding nature of promises.³¹ Given all this, in this Age of Principles (pp. 345-58), "[i]t is not surprising that during the period 1770-1870, the principle of due observance of promises became the pivotal key around which the modern law of contract was built" (p. 353). The question is what this "pivotal key" had to do with the decline in protection of the restitution and reliance interests. Readers may be puzzled by the author's positing of a certain see-saw relationship, in which an increase in protection of expectation led inevitably to a decline in benefit and reliance.³² As

whole, beyond perfunctory terminological recognition of a difference, Atiyah treats reliance and benefit as identical in their relation to promise. The promise, that is, is *subsidiary* in both. That proposition is far more convincing in the context of benefit than in that of reliance. It is true that this is harmless error, the material (and indisputable) fact being that the protection of the expectation interest is altogether different from the protection of *either* the reliance interest or the restitution interest. But it does distract.

31. These men were faced with the problem of "teaching social discipline to millions of rough, tough, largely uneducated, urbanized men and women" (pending establishment of the necessary bureaucracy, of an administrative machinery capable of remedying the mischiefs attendant upon the population explosion, the dislocation, the urbanization, and all the ills that industrial England was subject to). P. 358. England in 1770 was a society that largely ran itself; the resulting inefficiency may have had its value in "the simple, rural, preindustrial England of the early eighteenth century," p. 102, but the new world brought new problems:

In due course, a bureaucratic administrative machine had to be created to cope with these new problems. But that took time, and in the meantime, something else had to bolster up the inefficiencies of administration and law. Some new discipline was needed. It is part of the thesis of this work that that new discipline was found in Contract.

P. 102.

The mechanics of discipline through contract are complex and somewhat cloudy — involving, e.g. the form of individualism reflected in self-discipline and self-reliance, pp. 272-83, but one thing is clear:

[T]he absolutely binding force of bare promises was deliberately inculcated as an important guide to social behaviour in the period between (perhaps) 1750 and 1870. It was adopted as part of the code of honour of gentlemen, and taught by them and lawyers and economists to the mass of the people, and they did so, if I am correct, because it was a much simpler rule of social (and legal) discipline than the more complex rules which would have been needed if the problem had been broken down by asking *why* promises should be obeyed.

Pp. 654-55.

32. One wonders whether there is, behind this, some inchoate notion of the existence of a phenomenon which might be labelled "maximum toleration." A number of trends in the history of contract suggest that society will, presumably because it can only, tolerate just so much

he puts it, with the increased importance of promise, agreement, intention, there was inevitably a decline in the importance attached to other sources of liability (p. 455). Wherein the inevitability? And what connection does it have with the sanctity of promise?

While the multifariously problematic nature of the "sanctity" of promise tempts one to lengthy declamation,³³ here I merely suggest that it takes one just so far in construction of a law of contract. It takes one to enforcement of the bare promise as promised — that is, to the protection of the expectation interest. It might, if applied with the absolute rigor that Atiyah suggests is characteristic of a preference for principle (over the pragmatic), lead to enforcing even the rashest and most disastrous promises made by the weak, the incapable, and so forth. That is logical; horrible, perhaps, but logical. But it has no logical tendency to produce decline in imposition of liabilities which flow from the receipt of benefits or from justifiable reliance. There is no way to *deduce* this consequence even from the sanctity of promise. Indeed the obligatory force of promise has had, more often than not, the aura of morality — the odor, indeed, of sanctity! There is not a little irony (as well as illogicality) in its adoption being the occasion of the eradication of existing moralities with which it might as happily, and rather more obviously, coexist.

But "promise" is employed rather more generally, with implications broader than those naturally flowing from the "*sanctity*" of promise; it makes sense to prefer, in this context, the word "choice." If contractual liability is grounded in *choice*, then one can see the logic, at least, of the decline of benefit and reliance. With law reduced to the ancillary task of implementing the will of individuals, law must not merely enforce liability when it is taken on by the parties, but must also refrain from imposing it when it is not taken on by the parties. But logic is not necessity, nor yet, desirability. Behind society's adoption of an individualist ethos there were real societal conditions and at least *perceived* needs: for social discipline (itself assumed to be a necessary foundation for planning), for assured reliance on promises, for a means of allocating risk, for all the familiar things which the executory contract and the protection of expecta-

enforcement of *contractual* liability — or, perhaps one should say so much rigor in enforcement of contracts.

33. "Sanctity" is a loaded term. Consider the "sanctity" of a promise by a consumer not to sue General Motors for manufacturing and selling a defective and unsafe automobile. There may be good reasons for enforcing that promise (in the form of a disclaimer of warranty), but those who would invoke the "sanctity" of promise as one of them are operating in a world of their own. Atiyah obviously would not, but he may invite it by linking today's trends, such as consumer protection, with loss of belief in the "sanctity" of promise and indeed in *principle* itself. Pp. 649-59.

tion are said to have provided. Why was it *inevitable* that when these conditions and needs arose, the law would cease or reduce its protection of the restitutionary and reliance interests?

In partial explanation Atiyah tells us that:

Judges, along with other men, lost the sense that it was *just* to pay for benefit, or reliance, *without consent*. Inevitably, as men became convinced of the importance of the free-market, as they became more attached to the social ideals of individualism and self-reliance, as they came to accept (more or less) the atomistic view of society in which all relationships depended on free choice, they tended also to feel that it was unjust that a man should have liabilities thrust upon him which he had not agreed to bear. [P. 456.]

More cynical historians might write of this that we have truly discovered the “inevitability” of the decline: It turns out to be the inevitability of selfishness and greed. Indeed it would not even require cynicism to see such a development as simply a straightforward shrinking of the area within which law can stop people from working harm. Definition of freedom of contract as freedom from any obligation to pay for benefits received or expenses incurred in justifiable reliance would be nothing but a license, for all those cagey enough to avoid the ritual incantation, to hurt others with impunity.³⁴

It must be noted that, on the evidence in Atiyah’s very balanced account, the decline in benefit and reliance was not especially marked. This, while rather detracting from the overall thesis of radical change in the nineteenth century, does suggest that even if we incline to see the worst in such a decline, the worst was not very bad, or at least there was not much of it. Indeed, we are told, the decline was in a sense *conceptual*. Courts “came to perceive all liabilities as arising from contract, and from the consensualism they now took to underlie contract” (p. 455).³⁵ Thus, even when reliance or benefit was present, and constituted the “primary” source of obligation, liability was based on consent; when it was felt that the situation demanded imposition of liability, and there was no promise available to seize upon, courts implied a promise — at this time there was a sharp rise in the number of implied promises. Moreover, when the case could be made to fit the classical model, damages were awarded to cover the full expectation interest — which in reliance cases would usually result in a *larger* award than the reliance basis of the claim.

34. It certainly appears to have little to do (indeed, arguably to be negatively correlated in the case of reliance) with facilitation of planning. One more advantage to the capable. See Atiyah’s recognition that those who insisted upon freedom and competition “surely” wanted to be free of the burden of cossetting the less able and the feeble, and his defense of these new individualists. P. 76.

35. Note that the move is not only to consensualism, but to *contract*.

What was missing, we are told, was the idea that reliance could be protected "on its own." It is hard to estimate the extent to which this blind spot left reliance unprotected.

But the point is that Atiyah does not incline to see the worst in this development, although it is one that he deplors. Even here, discussing what others would treat shortly as patent moral deficiency, he avoids harsh judgment. He is prepared, even eager, to see Victorian capitalists as enlightened and humanitarian.³⁶ Moreover, and to me more interestingly, the author is similarly reluctant to impeach the motives or *bona fides* of the members of the legal profession.

III. LAW AND LIFE

Analysis of the role of law in society brings one willy-nilly to the legal profession, which mediates the relationship. Law sees life outside through the eyes of the lawyers; its ability to respond to society's needs is largely a function of the lawyers' astuteness in perceiving those needs, and wisdom and goodwill in formulating and guiding response. Atiyah does devote substantial attention to the men who made the law, bringing us details of their background, training, inclination, and capacity. A nice acerbity flavors much of his commentary on bench and bar; he is, one may safely say, not blind to the shortcomings of the profession. Lawyers, in this account "are," "believe," and "tend to do" certain things — few of them desirable. But while others, describing the same basic transformation of the law, may present a picture of manipulative, conspiratorial judges and lawyers, with a cool eye to the main chance for themselves and others of their class, and the ruthlessness, skill and intelligence to push it through, Atiyah engages in no such flattery.

Atiyah tells us that the nineteenth-century lawyers who were judges carried freedom of contract further than the class that benefited from it, or the philosophers who are accounted its evangelists;

36. Despite implications of manipulation, not to say conspiracy, in the "propaganda" of sanctity of promise, p. 654; despite both intellectual and moral reservations about free-market premises and conclusions; indeed, despite many of the awarenesses, insights and attitudes which have led others to "sinister or even Marxist" interpretation, pp. 390-39, Atiyah sturdily resists it. Of two major versions of nineteenth-century history, he selects the more benign. Pp. 220-26. In the absence of proof of deliberate exploitation, or of lack of concern for human suffering; in the light of proof that freedom for everybody was not just a cruel joke, but resulted, after a bit, in substantial gain for all, pp. 572-81; in the face of convincing evidence that neither capitalists nor philosophers were heart and soul committed to *laissez faire*, pp. 234-35, 321, and that the new middle classes were only, at worst, ignorant of social evils and concerned about taxation, bureaucratic corruption, and strong central government rather than opposed to social reform, pp. 238-50 — well there is only one conclusion to reach on this reading of the record and Atiyah reaches it. The question, of course, is whether he reads the record correctly.

the common law was way ahead of all other organs of government in fidelity to laissez-faire. And it was all due to one variety or another of ingrained inadequacy. In the first place, lawyers took political economy to be wholehearted in its advocacy of laissez-faire, failing to note the reservations — which were both wide and deep. “When lawyers encounter ideas from outside the law, as they do from time to time, they tend to absorb a smattering of those ideas . . .” (p. 235). Then, the legal profession missed a revolution in government; from quite early in the nineteenth century, massive government intervention and interference with freedom of contract were the rule, and the growth of a huge bureaucracy the fact. Unwelcome in many quarters, this was a silent revolution (pp. 231, 236-37): England stumbled into the modern regulatory state. But “lawyers may well have been slower to grasp the significance of what was happening than many other sections of the community” (p. 237). Finally, lawyers “tend to absorb a smattering of those ideas which may then remain with them, handed down from generation to generation, until they emerge from their narrow professional interests to look at the same problem perhaps fifty or a hundred years later” (p. 235). And that explains Dicey, a true representative of a conservative fraternity, who thought, and taught the world, that there really had been an Age of Laissez-Faire (pp. 231-37).

While the message of political economy lost something in the translation, it did at least get through. In contrast, the profession managed to avoid even hearing anything said by later economists, missing enlightenment on, for example, the merits of a redistributive legal system. Thus the exaggerated version of freedom of contract which had been gained through simplistic distortion of the message of the classical economists stayed firmly in place (p. 383). Atiyah describes external, accidental factors which led to the imperviousness of the profession to anything beyond itself from about 1870 on (pp. 292-94),³⁷ but it is hardly to be doubted that lawyers who had wished to keep abreast might have done so. However, their failure to do so will seem little cause for regret if one takes the author’s point that lawyers who make the effort to absorb economic theory “only succeed in understanding what was orthodox a generation or two back” (p. 669).

Now one might think that even a profession as chuckle-headed as

37. He notes especially the sharp separation of disciplines, the specialization which sent lawyers to the law, economists to what is now called economics, with the twain rarely, after 1870, to meet. Furthermore, political economy and utilitarianism had an “evangelical streak” which ensured propagation of the message.

this one would eventually notice a leviathan bureaucracy and a plethora of statutes. And to some extent, finally, it did. But judges did not wish to have this fact of life affect the theory of contract, preferring, indeed, the mortification of resort to a "semantic trick":

The common-law concept of contract retained its purity and its basis in the free market only by a process of definition. Everything which did not fit the scheme of the free market or of the general principles of contract law which were based on the free market was simply defined as not being part of the law of contract The law of contract became increasingly pure [Pp. 235-36.]³⁸

The judicial propensity for taking leave of reality was of course expressed most vividly in legal formalism (pp. 388-97, 660-71). That judicial philosophy, the author believes, was closely related to the rise of the market economy, and abetted the process of converting early contract law into classical contract law. But, writing of the early rise of formalism, Atiyah expressly rejects a "class-bias" interpretation, as neither demanded nor supported. He points instead to such very practical considerations as the need for a judicial system struggling with the explosion of population and of commercial and industrial activity to conserve time and energy. For example: Control of the jury may have arisen because of the need of commerce and industry for predictability; juries are also slow! Formalism, the author notes, did not reach its height until the 1920s and 1930s, long after the settling of classical contract theory. It would be possible to see in this "full flowering" the desire to consolidate gains made by the dominant classes, but Atiyah attributes it to the mediocrity of the judiciary in the period between World Wars.

One is tempted to conclude, or at least to entertain the suspicion, that for the historian who shares Atiyah's ultimate values, perception of the nature of contractual liability, and reading of nineteenth-century doctrinal development, the interpretive options as to lawyers, and especially judges, are few, and not happy. Again and again the choice appears to be dilemmatic: they are functioning either unintelligently or as conscious servants of a class. Atiyah, who finds no shortage of incompetence, and a pervasive shelving of the intellect by men in thrall to a single concept, discovers no knaves or lackeys.

IV. THE SECOND HALF-TURN

Atiyah points out that in the course of the last century or so, En-

38. This process "had important results on the way in which the common law developed, and on the value system which the legal profession carried over into the twentieth century." P. 236. As Atiyah points out, p. 236 n. 45, this idea was developed by Lawrence Friedman, but Atiyah puts the idea to rather special use.

gland has taken one more half-turn — righted itself, some of us, though not others, might think. If a revolution involves 360°, then, with a single, and singular, reservation, the English have now completed one. Modern collectivism and quasi-socialism resonate with the moralities of an earlier age; ideas of just price and just wage, for example, have revived. While *laissez-faire* was never the colossus it was for a time believed to have been, it now lies shattered and in ruins. Once again, enforcement of benefit-based and reliance-based liability thrives, while promise-based liability — indeed promise itself — has not the imperial power it once enjoyed. Quasi-contract has returned, and judicial discretion supplies what once was found in equity. Even tort law intrudes. Indeed, the role of contract itself has vastly declined. Statute does much, quasi-administrative procedures and the lawyer's office the remainder. When risk allocation is the task, devices other than the executory exchange are brought into play. The few pitiful leftovers belong to, and constitute, contract law. The classical model has, in a word, failed.³⁹

BUT! “Freedom of contract remains in theory the fundamental basis of the law . . .” (p. 687). The theory retains its charm for the legal profession, and its dominion over their conceptual universe — despite daily, incontestable, overwhelming evidence that it has little practical applicability and enjoys virtually no practical application; despite its lack of consonance with social ideology, even with the ideology of the *legal system* taken as a whole, even that of the common law beyond contract; and worst of all, despite its *wrongness*. “The shadow of the classical model [has been preserved] long after the substance ha[s] largely vanished” (pp. 681-82).

Atiyah places much of the responsibility for this misfortune on the shoulders of the legal academics of the 1920s and 30s and 40s — it was they, the treatise writers, who canonized classical theory, and they did so, you will not be surprised to hear, because they were undistinguished — formalists almost to the man (pp. 681-93). Atiyah illustrates the quite awesome influence which he attributes to these writers by a number of concrete examples; the upshot for classical contract theory, considered purely as theory, is not merely *continued*, but actually *increased*, vitality.⁴⁰

39. Atiyah attributes its failure to its inability to cope with externalities, with monopolies and other market failures, and with the problems of consumer ignorance. For a discussion of the failure of classical law, see pp. 681-715. For modern trends and doctrine, see pp. 716-79.

40. Atiyah sees its influence in the proposed abolition of consideration and the elimination of Statute of Frauds requirements. Such movements, which look progressive, may stand revealed, in the light and with the guidance of Atiyah's history and theory, as retrograde and even “perverse.”

A fairly obvious reaction to this would be to ask what harm is being done by this disjunction, this discordance between theory and practice. The author himself suggests that the practical consequences will be slight.⁴¹ But classical contract theory makes the common law's protection of reliance and benefit, and prevention of unconscionable overreaching, an uphill fight, with the cards stacked — in lawyer's language the burden of proof— against them. Of course, it is possible to shrug and say that if the common law has only to turn to *tort* when it is unable on classical *contract* theory to enforce a standard, well, we have seen that sort of thing before, in a process which seems as innocuous as it appears eternal. But the burden is on the party whose claim is unsound under classical contract law, however deserving by all standards prevailing outside that law. And the danger always remains that lack of imagination and even of broadly based technical skill, in judges, will result in dismissal rather than in the devising of tort doctrine to cover the case. A court whose members well understand the pervasive ideology of the times may nevertheless, in the grip of this one idea, consider itself bound to dismiss the claim that is not the very model of the model classical model.

Burdens of proof attach outside the courtroom as well as in, whether or not *eo nomine*, whether or not even recognized. Between those who espouse and those who oppose free-market principles,⁴² the burden has, since the nineteenth-century, attached to the latter: However prevalent interference may be, however much rule rather than exception, however true it is that much of the interference is in fact greatly desired by those supposedly in principled opposition, it is always interference that must be justified (p. 386). It is one aim of Atiyah's book to demonstrate that such a distribution of burden is unwarranted. And one need not concur in every interpretive nuance to accept the major thesis: Freedom of contract as we know it arose in comprehensible, if overdone, response to conditions and needs of a particular time and situation; it is therefore inappropriate to classify either particular interferences, or philosophic commitment to governmental regulation and protection, as violative of eternal, immutable, fundamental principle. In this I am in total agreement with

41. The primary consequence will be to *reduce* to reliance loss in appropriate cases, and to nothing, perhaps, in cases where nothing but unacted-upon expectation is involved.

42. According to the author: "at least in England there are, even now, few voices calling for a return to *laissez-faire*." P. 626. Some of us can remember when England did not have a drug problem, or racial unrest. Just you wait, 'Enry 'Iggins, just you wait!

Professor Atiyah, and I consider that he has done a major service in illuminating the history which illuminates that truth.

This volume will superbly serve the reader for whom it is an introduction to the subject; the specialist in the field will find in it an abundance of novel insight and provocative ideas. We have here a major scholarly contribution, and a splendid big book.