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Essays on Contract

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BOOK REVIEWS

ESSAYS ON CONTRACT. By Patrick S. Atiyah. Oxford University Press, Oxford: 1986. Pp. vi, 363. $29.95.

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Patrick Atiyah has a message to deliver about contract law and is prolific in delivering it. Contract law, he maintains, is not, and should not be, about promises and the expectations engendered by promises. Rather, contract law is connected with what people *do*. Promises are relevant to prove and clarify circumstances surrounding transactions, but restitution, reliance and custom are the proper reasons for the creation of contractual legal obligations.

Atiyah's present collection of *Essays on Contract*, written over a career of several decades, but revised for this present publication, is perhaps best understood against the background of his best-known work, *The Rise and Fall of Freedom of Contract*,[1] which delivers a similar message from an historical perspective. In the idyllic era that preceded 1770, he there argued, the law was only peripherally concerned with promises and the protection of promissory expectations. In the usual contract case, the promise performed but an evidentiary function while the substance of contract law was rooted in customary, restitution, and reliance-based obligation. After about 1770, the argument continues, the school of liberal economics, personified by Adam Smith, came to dominate thinking about trade, and infected the thinking of lawyers, judges, and law-book writers who came to see contract as based solely or primarily on emanations from the intentional expression of the will of autonomous individuals.

The influence of the liberal economists on 19th century thinking about contract law is a well known phenomenon. Williston, a writer of the type Atiyah would describe as a classical contract scholar who suffered from an excess of economic liberalism, had long ago noted this influence. In 1921 he wrote that "[e]conomic writers adopted [the gospel of individual freedom]. Adam Smith, Ricardo, Bentham, and John Stuart Mill successively insisted on freedom of bargaining as the fundamental and indispensable requisite of progress, and imposed their theories on the educated thought of their times with a thoroughness not common in economic speculation."[2]

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1. P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

2. Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366 (1921).

This statement by Williston has been quoted in three recent editions of a contracts hornbook as a truism.[3]

Thus Atiyah's observation that economic liberalism affected the thinking of the legal profession and therefore, its thinking about contract law has no claim on novelty. What seems to be new is his assertion that *the promise*, the key element in economic liberalism's view of contract, played an insignificant role in contract law thinking prior to about 1770. Other historians who have gone over the same ground seem generally to disagree and conclude that medieval and renaissance contract law were heavily freighted by the notion that come Hell or high water promises must be kept.[4] My own nodding acquaintance with the historical sources impels me towards general agreement with Atiyah's critics.[5]

Whatever the merits of the historical debate between Atiyah and his critics, this history can be viewed as merely a preamble to his thinking about modern contract law expressed in *Essays on Contract*. Although the question of the nature and obligatory effect, if any, of a promise has a philosophical dimension, this review will limit itself to some of the legal consequences of promissory liability. The primary such consequence raised in these essays is the extent to which the court may go beyond the expressed intention of the parties, including the fair factual inferences of their intent. That is, to what extent may the court import community standards of decent behavior and fair risk allocation to flesh out the obligations of the parties or, indeed, to impose solutions to questions which the parties failed to address in their agreement. Atiyah is a professor of English law at Oxford. He is, of course, intimately acquainted with the contract law of England and the thinking of English scholars about that law. To the American reader, descriptions of current English common law whether by Atiyah or those he criticizes often appear anachronistic; indeed, frozen in time. Atiyah's often radical attacks upon current English law seem, at times, to be calls for re-invention of the American wheel; at other times for the invention of devices that neither he nor anyone else has yet crafted.

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3. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 5-6 (3d ed. 1987).

4. *E.g.*, McGovern, Book Review, 66 MINN. L. REV. 550 (1982).

5. *See, e.g.*, Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1647), holding that a tenant must pay rent despite his expulsion from the premises by the King's enemies, stating "when the party by his own contract creates a duty or charge upon himself, he is forced to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

If we turn to literature where we learn ideas about law held by the general population, the convicted rapist in Chaucer's *The Tale of the Wife of Bath* does not for a moment question his duty to honor his promise to return to court to be beheaded or pardoned and, despite his distaste, to marry the old crone who claimed him in marriage pursuant to another promise. G. CHAUCER, *The Tale of the Wife of Bath*, in CANTERBURY TALES 334 (J. Nicolson transl. 1934).

Atiyah repeatedly asserts that under traditional contract theory the court imposes no obligations upon the parties; it merely enforces obligations voluntarily assumed by the parties. However tenaciously English theory may cling to this notion, it has never been gospel in the United States. The early case of *Quick v. Stuyvesant*[6] may serve as an example. Adjoining landowners in the City of New York exchanged portions of their properties so as to facilitate their ability to subdivide the land and maximize the number of usable lots that could be created. The legislature intervened and the power to lay out new streets in the City of New York was preempted by a commission appointed by the state. The commissioners produced a street map inconsistent with the arrangement agreed to by the parties. In litigation between successors in interest of the original parties, the court ordered a partial reconveyance of land to the party whose expectation of benefit was thwarted by intervening state action. Chancellor Walworth explained the relief as follows:

> The event which has happened was not contemplated by either of the parties at the time, and therefore was not provided for by their agreement. . . . If such an event had been foreseen, it would unquestionably have been provided for. . . . Where, from any . . . want of foresight of the parties, or other mistake or accident, there would be a failure of justice, it is the duty of this court to interfere and supply the defect or furnish the remedy.[7]

This is not the place to trace in detail the development of the idea that the court can add to or qualify the express terms of a contract. In England the courts limit their activist role in contract cases almost entirely to finding "implied terms," a phrase that indicates they are at least ostensibly carrying out the intention of the parties. It is in the face of this anachronistic thinking (or non-thinking) that Atiyah launches his radical assault contending that contract obligations are only minimally connected with the intention of the parties.

In the United States, by the middle of the 20th century, contract scholarship had evolved to the point where it well understood (but not consistently) that the court as an agent of the state has a strong role to play in the administering contract disputes. Corbin's magisterial treatise emphasized the "constructive condition."[8] This phrase overtly recognizes that which the term "implied" condition masks. As Corbin states:

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6. 2 Paige Ch. 84 (N.Y. Ch. 1830).

7. *Id.* at 91-92.

8. A. CORBIN, 3A CONTRACTS § 632 (1960).

> [a] fact or event may be a condition of a contractual right or duty, even though the parties had no intention that it should so operate, said nothing about it in words, and did nothing from which an inference of intention can be drawn. . . . It is operative as a condition for the reason that courts have held or will hold it so on grounds of justice that are independent of expressed intention.[9]

Atiyah appears to want to do for English law what others (Corbin being the foremost among them) did for American law decades ago. One difficulty with Atiyah's approach is that he looks to tort law as the source of fairness, justice, and fluidity of technique.[10] This seems an unnecessary source of confusion. For example, the Uniform Commercial Code is replete with imposed gap-fillers, as well as fluid principles of good faith, reasonableness, and conscionability. No one seems to regard these statutory provisions as rules of tort law. Rather, they are seen as measures for the proper administration of private agreements — the very essence of contract law.

Nonetheless, some American courts and scholars are in agreement with Atiyah and have imposed or favored the imposition of obligations upon parties to private agreements that go beyond the terms of the agreement, characterizing the imposed obligations as a tort rather than a contractual duties.[11] In so doing, they may have been prisoners of what I have referred to as the anachronistic notion that a contract is totally tied to the intentions of the parties and seek to find an escape from this mythical prison.

One might ask whether it makes any real difference if a particular obligation is described as *ex delicto* or *ex contractu*. Aside from obvious consequences of these classifications such as the choice of statute of limitations and measures of damages, lawyers (as well as the rest of humankind) do much of their thinking by classification. The concept of tort carries with it much baggage, most of it involving communitarian concerns such as public safety and risk distribution. Contract law, instead, recognizes the primacy of the parties' agreement. Unless one has an ideological impulse to reverse these concerns, maintenance of the contract-tort dichotomy appears properly to highlight justifiable differences between these two kinds of concern.

Atiyah's discussion of damages illustrates aspects of his central thesis.

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9. *Id.*

10. *See* P. ATIYAH, ESSAYS ON CONTRACT 121-50 (1986).

11. *E.g.*, Seaman's Direct Buying Service, Inc. v. Standard Oil of Cal., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984); Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 355 (1986).

Traditional contracts scholarship has looked to the expectancy interest as the primary contract interest and expectancy damages as the paradigm of remedies for breach of contract. The desired goal is that the injured party should be placed in the same economic position as he or she would have enjoyed if the contract had been fully performed. Atiyah sees little sense in this principle which he sees as part of the "sagging structure of classical contract theory." He claims that the measure of damages was in classical theory thought to involve no interventionist action by the courts, but was based on the promise principle. Here, as elsewhere, he has set up a straw man. Putting aside the refusal of courts to enforce agreed upon penalties, in orthodox theory are expectancy damages really based solely on the promise? The answer is very clearly not. Although important decisions in England and in the United States attempted to tie at least consequential damages to the "tacit agreement" of the parties,[12] this attempt that has largely been rejected by courts in both countries. This rejection is based on the simple proposition that it is the law and not the parties that determines the extent of recovery.[13] It is also clear (at least to me) that this intervention by the court does not make the calculation of consequential damages a rule of tort law.

Atiyah stimulates. Often he is radical, but the ideology behind the radical attacks defies neat classification. Utopian? This review concentrates on a few aspects of his thinking. He expresses other thoughts. A few examples. "[M]odern society has plainly rejected the values of the market."[14] This thought may startle the current leadership of the Soviet Union, China and much of Africa, not to mention Thatcher and Reagan. Product liability scholars may be interested to learn that tort law only settles disputes, it has no deterrent function.

For a law book, this is a good read, but I find little to agree with. The author's primary target is the expectancy principle. The last word on such principles is with the legislature. In the United States, at least, legislation has adopted the expectancy principle in the Uniform Commercial Code, both in its remedial provisions[15] and in provisions facilitating the assignment of expectancies (accounts) even where the right to payment has not been earned by performance. That legislative protection of the expectancy interest is not merely a parochially American phenomenon is

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12. *See* British Columbia Saw-Mill Co. v. Nettleship, L.R. 3 C.P. 499 (1868); Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903).

13. *See* J. CALAMARI & J. PERILLO, *supra* note 3, at 595-96: "The 'tacit agreement' test was based on the dubious assumption that damages for breach are based on the contracting parties' implied or expressed promise to pay damages in the event of breach, rather than upon a secondary duty imposed by law as a consequence of the breach."

14. *Id.* at 18.

15. *See* U.C.C. § 1-106 (1987).

shown by the protection accorded the expectancy interest in the United Nations Convention on Contracts for the International Sale of Goods, a product of capitalist, socialist, and third world cooperation.[16]

16. United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, art. 74, *reprinted in* 19 I.L.M. 668: "Damages for Breach of Contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."