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Promises, Morals, and Law

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PROMISES, MORALS, AND LAW. By *P. S. Atiyah.* Oxford: Clarendon Press. 1981. Pp. 215. $29.95

In *Promises, Morals, and Law*, Professor Atiyah argues that previous explanations of the moral force of promises are misconceived, and advances a novel theory which grounds the obligation to keep promises in other socially accepted norms. His argument is highly interesting from several points of view. Newcomers to the philosophical debate about the moral force of promises may become familiar with the gist of prior doctrines, although nonutilitarian approaches to the problem receive rather short shrift from Atiyah;[1] those trained in philosophy may benefit from Atiyah's use of legal doctrine and illustrations to bolster his argument; and anyone interested in the moral significance of promising will benefit from Atiyah's sophisticated renewal of the attack on the utilitarian account of promises and a critical evaluation of his own theory.

Atiyah's theory derives directly from his critique of the utilitarians, so an examination of his argument properly begins with a description of the utilitarian view of the morality of promising.[2] Utilitarianism takes human happiness to be the ultimate measure of value and evaluates the goodness and badness of actions according to their consequences for happiness. Since productive cooperation vastly expands the potential for individual happiness by bringing the economic principle of comparative advantage into play, and since cooperation largely depends on mutual trust, deeming a promise as morally and legally binding on the promisor advances happiness and is therefore good. But in any given case the negative effect of a breach on the credibility of promises in general may be slight, and the benefits of breach may be very great. Therefore, the utilitarian views promises as binding except when breach would create more happiness than it would prevent, taking into account the specific benefits of breach, the cost to the credibility of promises, and the harm done to the particular promisee by the failure to perform.

Atiyah canvasses a wide range of objections to this utilitarian account, and concludes that for two reasons another approach must be devised:

> In particular, utilitarianism seems to leave us with two unresolved problems. First, the argument that promises are binding because of the expectations and the actions in reliance to which they give rise, seems to be imcomplete, as we saw previously. And second, neither rule utilitarianism nor act utilitarianism seems able to offer an acceptable explanation of why

1. Natural law and will theory are treated together in Chapter 2. Pp. 9-28. This category includes Locke, Lord Stair, Lord Kames, and Frances Hutcheson, and, with some doubts, Hobbes. Atiyah, however, principally refers to Grotius and Pufendorf. The main intuitionist he refers to is Sir David Ross. P. 87.

2. The sources of utilitarian thought are the works of Bentham and Mill. *See generally* J. BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in I WORKS (J. Bowring ed. 1843); J. MILL, UTILITARIANISM (O. Piest ed. 1953). For Atiyah's development of the utilitarian account of promising, *see generally* pp. 29-86. The leading authors he places in this category are Hume, Adam Smith, John Austin, Mill, and Henry Sidgwick.

> (or whether) a promise remains binding when it would be best on the whole to break it. [P. 86.]

Relying heavily on traditional contract law, Atiyah argues that the solution to both problems is to turn to other values and conventions to identify those promises which are binding according to such external rules, and those which can legitimately be broken although valid, according to the same set of independent norms.

Oddly enough, given Atiyah's argumentative resourcefulness and deep familiarity with the subject, neither the indictment of the utilitarian account nor the argument for reliance on external norms proves ultimately persuasive. To begin with, Atiyah's method virtually precludes dislodging a sincere utilitarian from his position. Atiyah's method relies heavily on counter-examples, repeatedly arguing that the utilitarian account leads to a result Atiyah himself, or contract law, or society at large, finds unpalatable. No wonder, then, that he rejects previous theories in favor of reliance on norms recognized by society; that is the only conclusion his method of argument would not automatically refute. But the sincere utilitarian really does believe that promises bind only when keeping them advances happiness; if this means that the utilitarian would make and keep a different set of promises than Atiyah, or the American Law Institute, or the King's Bench of the nineteenth century, that difference signifies a point of argument, not an argument itself.

This fundamental point becomes clearer in the context of Atiyah's specific objections. Atiyah's first objection depends on two lines of argument. First, Atiyah develops a series of promises generally recognized as binding but which the utilitarian need not honor because these promises do not give rise to reliance or expectation (pp. 53-63). Consider the case of the dying castaway, who extracts from his sole companion a promise that on his return to civilization the companion will unearth and dispose of valuables in some fashion stipulated by the promisee (p. 59). The stipulated purpose is, hypothetically, perverse, and charitable disposition of the valubles would work much benefit. The consistent utilitarian very reasonably maintains that the promisor should break his promise, and Atiyah cites Smart for this very conclusion (p. 61 n.41). But Atiyah claims that this stand discredits utilitarianism, because "to most philosophers this is simply unacceptable," since "[s]omehow it seems offensive to conclude that he will only be bound by the promise if he feels bound by it" (p. 61). This claim does no more than state a conclusion. Moreover, it ignores the moral corollary of promises under the utilitarian account. Making the promise alters the future calculus of benefits and costs in the decision of whether or not to perform, by implicating reliance interests in the credibility of promises generally and the particular interests of the promisee as well. When secrecy and death obviate the expectation and reliance interests, the utilitarian calculus returns to what it would have been but for the promise. Any moral theory of promises which admits the legitimate possibility of breach is always vulnerable to reduction to the "bound only if the promisor feels bound" formulation; the relevant question is when *should* the promisor feel bound, and when *should* the law compel performance.

Atiyah's second line of argument supporting his attack on the completeness of predicating promissory obligation on the promisee's utility *(i.e.,* reli-

ance) is more fundamental. Atiyah asks: What entitles the promisee to rely on a promise, even when its maker intends reliance to follow? For the unhappiness resulting from reliance on a promise later broken results as much from the promisee's reliance as from the promisor's breach. The moral question is not answered by the factual description that promisees tend to rely on promises. Atiyah concludes:

> It is, therefore, clear that the mere fact of expectations and of reliance (however intentionally induced) cannot alone create the grounds upon which promises are held to be obligatory. Something else is needed before this conclusion can be reached. The extra element, it is suggested, is compliance with some socially accepted values which determine when expectations and/or reliance are sufficiently justifiable to be given some measure of protection. These social values are needed to enable us to determine entitlements just as much as they are needed for similar purposes in order to support the recognition of property rights. Just as the State must make some initial allocation of property entitlements in order to support a system of property law, the moral code, if it is to recognize moral obligations concerning property rights, must make a similar allocation of entitlements. Equally the law of contracts and the moral code governing promises must make analogous allocations. It must be decided *when* one person is sufficiently entitled to entertain expectations, and to act upon them, so as to hold another responsible if those expectations, or conduct in reliance, are subsequently disappointed. [P. 68.]

For Atiyah, the source of these independent obligations in the legal context is, of course, the law of contracts.

But Atiyah's argument here neglects the original justification for relying on promises: cooperation depends on trust; binding promises enhance trust; and promises therefore contribute immeasurably to the productivity and happiness of society. By reference to a different external standard — the standard of utility, the felicific calculus, rather than contract law — the utilitarian arrives at the conclusion that promisees generally should be entitled to rely on commitments made to them. It follows that the disutility of frustrated reliance is the responsibility of the promisor and not the promisee. For if the alternative standard were presumed, that promisees relied on promises at their peril, significant reductions in productivity and happiness would result. Atiyah's claim regarding the completeness of the utilitarian account therefore seems misplaced, since the utilitarian can substitute the rule of utility for the social practices and standards Atiyah would instead depend on to locate the initial responsibility for the costs of reliance.

Atiyah's second objection to the utilitarian approach to promises proves no more persuasive. Atiyah claims that the utilitarian approach cannot explain "why (or whether) a promise remains binding when it would be best on the whole to break it" (p. 86). As an illustration, he argues that many promises of a similar variety might each be morally breached by a utilitarian, but that the utilitarian could not justify breach in more than a few instances because unhappy consequences would then follow. Each widow laboring to satisfy a mortgage, he argues, can justify repudiating the promise to pay made to the wealthy banker, but if very many did so, widows would soon find themselves unable to borrow money from banks (p. 79). Since Atiyah believes that rule utilitarianism is a charade (pp. 79-86), he

finds the objection fatal. The objection appears formidable, because the values invoked in its support are themselves utilitarian.

But the argument from similarly situated promisors does no more than demand a refinement of the utilitarian's calculus. True, each similarly situated promisor *is* justified in breaching, *unless* others follow suit. Thus the sincere utilitarian must include in his calculation of the harms of breach the likelihood not only that his own breach will adversely affect the general reliance interest, but also that one breach will lead to others, or will synergistically increase the effect of others which will occur independently. Where total happiness but for the breach, accounting[3] for these cumulative consequences, would exceed total happiness given the breach, the utilitarian cannot justify breaking the promise. Where total happiness but for the breach is less than total happiness given the breach, the utilitarian cannot justify keeping the promise. In short, utilitarian reasoning can lead to disutilitarian consequences only when erroneously applied.

Indeed, contract law, which Atiyah relies on repeatedly for illustrations and support, and ultimately as a guide to the morality of promises, tends to institutionalize the utilitarian view of promises. Atiyah argues that, legally, "it would be absurd even to contemplate a rule which said the promisor is entitled to break his promise whenever he thinks (even bona fide, and after due and careful reflection) that more good will be done by breaking than by keeping it" (p. 75). But, says Atiyah, it is perfectly reasonable to permit breach whenever a third party, such as a judge, arrives at this same determination, and he views the doctrine of voiding contracts contrary to public policy as an example of this judgment (p. 75).

But every promisor is always free to break his promise, *provided he makes good the loss to the promisee.* The rare cases where this requires specific performance exist only because damages cannot make good certain kinds of losses. This amounts to a policy regime which compels promisors to execute the utilitarian calculus whenever they contemplate a breach.[4] Since punitive damages are not awarded for contract claims, and no accounting in awarding damages is made for the general cost to the social reliance interest, traditional contract law, if anything, does more to encourage breach than would a meticulous performance of the utilitarian calculus.

Atiyah's approach to these perceived problems of the utilitarian account is intriguing. He argues that the obligation to keep a promise, and the permissibility of breach, turn on standards and practices, largely legal, external to the norm of the parties themselves. This view invites two serious objections. First, this approach depends on the validity of the external norms relied on to test the promisor's obligation. A military officer may naively but sincerely swear allegiance to the dictator, but then become disillusioned. The applicable law, the social practices of the rest of the officer corps, and benefits received from the dictator all support keeping the promise. Are the dictator's policies of aggression and genocide not grounds to move against him? If not, to what practices and principles can the officer

3. One element in the calculus would be the transaction costs of attempting to identify all the potential costs and the relative risks of error in either direction.

4. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW §§ 4.9-4.12 (1977).

refer to test the morality of breaking this promise? Only if one assumes an inner morality to the practices and rules referred to as guides to the obligatory forces of promises can such external norms lead to moral outcomes.[5] Twentieth century experience teaches that political power does not always execute its noblest potentials. But if external norms impose obligations only when the promisor accepts them as moral, Atiyah has really offered no guidance at all.

Second, where do these external standards come from? Ultimately they must derive from judgments made by outside parties regarding the legal or moral effect of promises made and broken in similar contexts. But how were these judgments arrived at? In the last analysis, promises could originally be evaluated only on their own terms, without recourse to external practices or standards. The derived use of these original judgments is no more legitimate than an evaluation of the promise as an original artifact. Atiyah would, in effect, honor norms about promises for no better reason than that they arose prior to the making of the promise. If predicated on awareness and consent to these external standards, such an approach is neither surprising nor objectionable. But Atiyah's purpose is to explain why certain practices may impose obligation without consent, and his external standards cannot claim the legitimacy of acceptance by those to whom he would apply them.

Atiyah brings to his task a wide knowledge of the law and philosophy of promissory obligation. He writes clearly and gracefully, devising many ingenious arguments and illustrations. But his ultimate thesis, that the binding force of promises depends on independent norms, rests on an unpersuasive attack on prior doctrine and an unwarranted faith in the morality of social practices and rules.[6]

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5. For a persuasive attack on the notion that legal and moral validity are identical rather than distinct normative categories, see Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593 (1958). *But see* Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

6. Atiyah's current book has also been reviewed by Raz, Book Review, 95 HARV. L. REV. 916 (1982); Collins, *Counsel to Philosophers,* 45 MOD. L. REV. 225 (1982); Raphael, TIMES (LONDON) HIGHER EDUC. SUPP. Aug. 28, 1981, at 13.