A BASIC RATIONALE
FOR CONTRACT LAW

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INTRODUCTION

Since Professor Gilmore wrote his famous book *The Death of Contract*¹, it would seem that this branch of the law of obligations has been more discussed than ever in the English-speaking countries. Suffice it here to recall Atiyah's *The Rise and Fall of Freedom of Contract*² and *Promises, Morals and Law*³; Fried's *Contract as Promise*⁴; Macneil's *The New Social Contract*⁵;

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Posner and Kronman's *The Economics of Contract Law*; and Eisemerg's articles on a "Responsive Model" of Contract Law. Finnis, Raz and Levin and McDowell have also published important contributions in this area.

It seems clear, after reviewing this literature, that there is need to go back to first principles and consider explicitly the basic purposes that the law of contract should serve before taking a position in controversial issues in contract theory such as expectation versus reliance and restitution damages, the extent to which the intentions of the parties should be respected by the law, the role of doctrines like privity, causa and consideration, and the advisability of merging contractual and delictual bases of obligation.

Accordingly, the purpose of this article is to re-examine the question of the ultimate rationale and justification of the law of contract. The method used will be to analyze the philosophical foundations of two views of contract law which have been held in the English-speaking world, the "classical" theory and the more recent "Death of Contract" proposals. It is hoped that by uncovering the ultimate assumptions behind these conceptions and


subjecting them to criticism it will be possible to see clearly the connections between ultimate philosophical premises and specific legal rules. While this analysis concerns two doctrines which have arisen within the common law tradition, it is hoped that it will be of interest to lawyers working within different traditions. There are two reasons for entertaining this hope. In the first place, the Anglo-American doctrines to be examined have close parallels in civil law systems. Secondly, these doctrines are studied only as a means of approaching the more general issue of what should be the fundamental purpose of the law of contract in a sophisticated modern society; it is clear that arguments put forward in this regard transcend the borders between specific legal traditions.

The last part of the article will examine summarily the controversial issues in contract theory referred to above. The purpose of this is to illustrate how the basic rationale of the law of contract which is proposed here can cast light on the study of specific problems of more immediate interest to lawyers.

THE CLASSICAL THEORY OF CONTRACT

In many ways the law of contract in the Anglosaxon world is a creature of the XIX Century. The common law had recognised what today we call contracts far earlier than this period, but in those earlier times it consisted primarily of rules about particular contracts. The distillation and elaboration of a body of general principles applicable to all types of contracts was largely the work of the last century\(^1\). It is not surprising, then, if we find that those

11. In BLACKSTONE'S Commentaries, published in 1765, general issues of contract are dealt with very briefly in a few sections of vol. II, ch. 30 and vol. III, ch. 9. In all, only 28 pages are devoted to them. There are, however, lengthy discussions of the rules applicable to individual contracts. By contrast, books such as LANGDELL'S Casbook on Contract, published in the U.S.A. in 1871, and POLLOCK'S Principles of Contract or ANSON'S Principles of the
principles were greatly influenced by the liberal and intensely individualistic ideology prevalent in the century of *laissez-faire*.

The classical theory of contract, as developed by English judges and writers during the XIX Century, was based squarely on the ideal of freedom of contract. Its central feature was the autonomy of *Law of Contract*, both published in the U.K. in 1876 and 1879 respectively, focus almost entirely on general principles.

12. The intellectual foundations of this individualistic philosophy had been elaborated in the XVIII Century, even though they had older roots, notably in Locke, Hobbes and, further back, in Luther.

13. One should be precise at this point. As P. S. Atiyah has shown in *The Rise and Fall of Freedom of Contract*, Oxford 1979, it is quite wrong to think of XIX Century England as a society where *laissez-faire* reigned supreme. There were many other competing strands of thought and, at least after 1830, "the new middle classes set about the creation of a wholly new kind of society in which administrative powers and processes replaced, as modes of social and economic control, the discipline of free choice and freedom of contract" (p. 231; see also pp. 238-250). But he also points out that "ideals based on *laissez-faire* may well have had more influence on the judges and on judge-made law than they did on any other organ of the State" (p. 235). What happened is that the judges and textbook writers built a refined model of "contract" based on pure free-market principles, while all the modifications to those principles which the legislature introduced with increasing frequency were "simply defined as not being part of the law of contract, but of some other special and exceptional body of rules-company law, or factories legislation, or building regulations, or sanitary laws, or any one of a hundred other different branches of social or economic activity" (p. 236). L. M. FRIEDMAN has described how a similar process took place in the U.S.A. during the same period in *Contract Law in America*, Madison 1965.

14. While the following paragraphs refer directly only to the position in the U.K., similar ideas became prevalent in the U.S.A. with a slight time lag. In the end, because they were protected constitutionally, they became even more powerful in that country. See *Algleyer v. Louisiana*, 165 U.S. 578 (1897) (Fourteenth Amendment "liberty of contract" prohibits State from regulating property owners contracting for marine insurance with foreign insurance company); *Lochner v. New York*, 198 U.S. 45 (1905) (Fourteenth Amendment "liberty of contract" prohibits State from regulating the maximum hours per day or week a bakery employee may work); *Adkins v. Children's*
of the free choice of the parties to make their own contracts on their own terms. *Prima facie*, all contracts were entitled to the protection of the law and were to be held void only on the clearest grounds of illegality, immorality or opposition to public policy (very restrictively construed). As Parke B. said in *Egerton v. Bronwlow*¹⁵:

"Prima facie, all persons... are free to make such contracts as they please, and are morally and legally bound by them".

Jessel M.R. made this point forcefully in *Printing and Numerical Co. v. Sampson*¹⁶:

"If there is one thing which more than another public policy requires, it is that men of full and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice".

Classical theory saw all the effects of a contract as depending entirely on the intention of the parties; in no way as being imposed by the Courts or by the law. The Courts did not make contracts for the parties, nor did they adjust the terms agreed to by them; it was assumed that the parties were the best judges of their own interests. A consequence of this was that the courts assumed a purely passive and interpretative role; another was a refusal to read into the contract anything which the parties had not provided for, and insistence that terms could be implied only when it was absolutely necessary to make the contract workable; another consequence was that doctrines like duress or mistake, which had been based in the XVIII century on simple ideas of fairness, came to be explained as being cases of defective assent. It is also of

*Hospital*, 261 U.S. 525 (1923) (Fifth Amendment "liberty of contract" prohibits District of Columbia from prescribing minimum wages for women).

¹⁵. (1853) 10 E.R. 359 at pp. 408-409.
¹⁶. (1875) L.R. 19 Eq. at 465.
interest to note that when, in order to avoid situations of extreme injustice, the courts were forced to depart from the intentions of the parties, as in cases of frustration of the contract, they still attempted to justify their intervention as giving effect to "implied terms" of the contract.

Finally, as Atiyah has observed, "The Courts were unwilling to examine what motivated a contracting party to act in any particular manner. If a buyer of goods, for example, had a right to reject the goods because the seller delivered them one day later, the buyer's rights would be scrupulously insisted upon without pausing to enquire into why a man exercised his rights in a particular manner, for that was the prerogative of the right-holder alone" 17.

What were the intellectual underpinnings of this ideal of freedom of contract? If there is an idea which stands out as fundamental to XIX Century social and political thought, it is that of the "Autonomy of the Will". Put simply, this doctrine says that each human being is born free and his dignity demands that he should obey only himself: his will is sovereign and it can accept only those obligations which it imposes on itself. The idea of a man being under a duty which he himself had not freely accepted either directly or indirectly 18 seemed unintelligible to many at that


18. It was commonly accepted within that ideology that man had some (rather minimal) duties imposed on him by the law of the State; but they were ultimately traced back to a postulated Social Contract, which had been assented to, at least tacitly, by all men, by which each individual was supposed to have surrendered his individual autonomy in return for a like surrender by others which made social life possible. Even though Social Contract theories as such were not defended explicitly in England in the XIX Century, the essential point is that in the liberal view which prevailed in that century it was only through the continuing free choice of free individuals that societies and political communities existed. As R.H. TAWNEY has said "The conception of men as united to each other, and of all mankind as united to God, by mutual obligations, arising from their relation to a common end, ceased to be impressed upon men's minds" (The Adquisitive Society, London 1921, p. 14).
time: only "autonomous" actions were seen as really moral, as the authentic actions of a self-respecting man.

It is not surprising, then, that within this climate of ideas the law of contract came to hold pride of place within the law of obligations: self-imposed obligations were seen as the paradigm of all obligations, and the sanctity of contract was widely regarded as the keystone of the social and legal edifice. Promises had to be kept precisely because one had bound oneself to them by a sovereign will. Conversely, there was a strong tendency to restrict obligations which were not based on an element of free choice or consent. During that period tort law was almost completely restricted to the protection of property rights and a man's personal integrity. The modern law of negligence was almost completely undeveloped. That period also marked the nadir of the law of quasi-contracts.

CRITIQUE OF THE CLASSICAL THEORY OF CONTRACT

In many ways the evolution of contract law during the XX Century has represented a constant movement away from the consequences of the ideology of the previous century. This evolution can be characterized by a frank recognition that the intention of the parties cannot be the basis of all contractual obligations and therefore that many of the so-called "implied terms" are nothing but rules of law to be incorporated to the contract in the absence of a contrary agreement and sometimes in spite of it; by the triumph of an objective theory of interpretation of the terms of the contract; and by a pervasive regulation of the terms of many contracts, especially of contracts of employment, money-lending, tenancies and consumer contracts. It is obvious that the dogma of the autonomy of the will is no longer the basis of the common law rules of contract. And it is worth noting that this process of change has not been primarily the result of the deliberate
application of a different ideology to the law of contract. Rather, it has been a process guided by pragmatic considerations as the courts and the legislatures found in issue after issue that a strict application of the autonomy of the will conception and its associated contractual dogmas would inflict a real injustice on the weaker members of the society, which could in no way be justified by appealing to an often purely theoretical "respect for their dignity as autonomous moral agents".

The abandonment of a concept of contract law based on the ideal of the autonomy of the will can only be applauded. The many ways in which that concept can be criticized may perhaps be summarized in the following arguments.

In the first place, it is clear that the picture of the contracting parties as autonomous subjects freely laying down obligations on themselves is highly idealized. There are many contracts in whose formation the individual will of a person plays a very limited role. Only a tiny fraction of contracts represent anything like an explicit agreement of the parties. The overwhelming majority of contracts are embodied in printed forms, prepared by one party and offered to the other on a take-it-or-leave-it basis. In contracts to which this does not apply, the terms which the parties really agree to —whether explicitly or implicitly— are often only those essential to the contract as they envisage it; the parties usually do not address their minds at all to what should be done in many possible contingencies. Even commercial contracts between corporations

19. Slawson asserts, probably correctly, that "Standard form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral arrangements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts" (W. D. Slawson, Harv. L.R., 84 (1971), 529.

20. As Lord Sands said in James Scott & Sons Ltd. v. Del Sel (1922) S.C. 592 at 597, "A tiger has escaped from a travelling menagerie. The milk
are very often made by using standard contracts common in a whole industry which incorporate all manner of terms whose effect is only in the most general way "intended" by the parties. One must conclude that if a man's only real obligations are those he has imposed on himself by an act of will, most contracts fail to impose any obligation.

Secondly, there are doctrines which are necessarily implied in the concept of the autonomy of the will, if the latter is going to make sense at all. This is the case with doctrines like that of the Social Contract or some version of the doctrine of the General Will. Without having recourse to them it is impossible either to accept the theory of the autonomy of the will or to justify the many non-contractual duties which even the most libertarian State has to impose on its citizens. However, by now these doctrines have been exploded as thinly disguised myths. Without them the only political doctrine that a consistent defender of the autonomy of the will can defend is some form of libertarian anarchism.

Thirdly, if the source of obligation is nothing more than the act of will, the obligation should arise as soon as the act of will is completed. It is clear, however, that there is an almost unanimous opinion, both in legal and moral contexts, that before a promise is binding it must, at least, be communicated to the promisee. Therefore, the act of will cannot be, by itself, the source of the obligation.

girl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract, but, even so, it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the contract".


22. R. NOZICK attempts something close to this in Anarchy, State and Utopia, Oxford 1974.
Fourthly, the doctrine of the sovereignty of the will is ultimately self-contradictory. The true reason why a man should keep a promise he made last year cannot be that he has imposed that obligation on himself by virtue of his sovereign will. If that were the case, his own will, which presumably is still sovereign, could today decide to remove that obligation. This argument is parallel to one quite well-known in constitutional theory: it is impossible for an absolute monarch to bind himself for the future for, being absolute, any law he makes today for himself, he can abrogate tomorrow.23

Finally, and most basically, proclamation of maximum autonomy of the will as an ultimate and absolute ideal is based on recognizing one single intrinsic human good, that of freedom or autonomy. Now to be able to act on one's own initiative, to have scope for shaping events and to determine how to conduct one's life, to be able to choose responsibly projects and commitments, not to be a puppet in somebody else's hands reduced to a machine-like or animal-like status..., all of this is certainly a great human good. In fact the history of Western man has been described by Christopher Dawson as a long quest for freedom; even more, it can be said that the recognition of the value of freedom is practically universal, and there is no people, however lacking in political capacity or experience, that is entirely insensitive to its appeal. But while all of this is most certainly true, values such as life and health, knowledge of truth, appreciation of beauty, friendship and good fellowship in community, and reasonableness in directing one's life, are equally intrinsic goods which people can seek without ulterior purpose and enjoy for their own sake.24 Other

23. It is impossible for a monarch to bind himself for the future and remain an absolute monarch. But, of course, there have been examples of monarchs granting octroi constitutions, i.e. constitutions which limit for the future their authority to make laws.

24. For a more complete epistemology of the basic human goods see G. GRIZEZ and R. SHAW, Beyond the New Morality: the Responsibilities of
basic intrinsic goods can be identified, and there are still others which are aspects or combinations of these basic goods, or means to attain them. In fact, any reasons we may have for saying that autonomy (or freedom) is something good, worth pursuing, also apply to the other values listed above. All of them can be described as aspects of human flourishing and human well-being, and all of them are worth having, irrespective of whether a given person has the time, talents or inclination to effectively pursue them. This topic cannot be further discussed here, but it is clear that if autonomy were the only real good, then all genuine agreements (i.e., cases of duress, mistake, fraud, etc. excluded) should be kept; there would be no reason to cut down the free expression of individuals, at least for as long as this did not interfere with the freedom of others. On the other hand, as soon as it is recognized that human good is multifaceted and that the different dimensions of human well-being cannot be reduced without remainder to autonomy, the prohibition against ever interfering with a genuine act of will becomes far less tenable. Without going further, one can ask, for instance, why should an agreement between A and B which is unfair to B and greatly to his disadvantage (and thus damaging of the goods of fellowship and reasonableness) be enforced by public powers? Insofar as autonomy is only one aspect of human good, it is no longer obvious that the common good will be enhanced by protecting autonomy while disregarding other human goods. And it is interesting in this connection to notice that the very people who defended the doctrine of the autonomy of the will (anarchists always excluded) implicitly admitted that autonomy could not be the only good, for if it were,


25. But the point made above should be kept in mind. If autonomy were the only good, that would be a reason to hold, not that all agreements must be kept, but rather that no agreement needs be kept. This point is waived in the text for the sake of the present argument.
any version of the social contract theory in which men had originally surrendered part of their autonomy would become nonsensical. What good could men possibly obtain in exchange for their surrendered autonomy if autonomy were the only good?

THEORY OF THE NON-BINDING NATURE OF PROMISES

Professor Atiyah's ideas on the nature of promises and contracts have attracted wide attention during the last years. They will be discussed here not because of their direct influence—Atiyah's work is too recent to have had much impact on the law yet—but because they can be seen as a well articulated exposition of views which can justify important recent proposals, especially those associated with the "death of contract". By criticizing now the contentions of the Oxford professor, we will be laying down the groundwork for some of the positions we will defend later.

The key feature of Atiyah's account is that he does not view promises as important sources of obligations. He thinks that many obligations which are usually regarded as being promise-based are not really such.

Thus, for instance, let us consider an agreement whereby A lends B £100 to be repaid three months later. Most lawyers would see this transaction as an example of a contract where A's obligation to pay B £100 in three months' time is based on his agreement (promise) to do so. But Atiyah is emphatic that the true justification of A's obligation is the fact that he has received £100 and, the transaction not being a gift, he will of course have to pay them back. In other words, the obligation is based not on the promise, but on the justice of making restitution of the benefit received.

26. It is of interest to point out, however, that he moderates his earlier statements on this issue in his Essays on Contract, London 1986, pp. 44-45.
Similarly, if A promises to deliver 100 machine parts to B for B to use in his factory, and, relying on this promise, B fails to make alternative arrangements to obtain the parts he needs, Atiyah asserts that the true basis of A's obligation to supply the parts or pay compensation for his failure to do so, is not A's promise but the fact of B's reasonable reliance on A's assurance and the potential or actual harm to B's interests.

Does Atiyah think, then, that promises have no significance? Not quite. In his own words "where obligations arise out of the rendering of benefits or from acts of reasonable reliance, the presence of an explicit promise may... serve valuable evidentiary purposes" 27. Thus, in the case of a loan of money, "[the promise] helps to avoid doubts about the nature of the transaction. The possibility of a gift is ruled out by the express promise to repay... Then again an explicit promise may help settle many minor or ancillary terms, and it is worth reflecting on how and why this is the case. Suppose, for example, that the borrower promises to repay the loan with interest at a specified rate... [this] functions very like a conclusive admission. If the court is to search for a fair and reasonable rate of interest, the rate which the borrower has agreed to pay is good evidence that that is in fact the fair and reasonable rate. Good evidence, but not conclusive evidence. For if the agreed rate of interest is extortionate, or if it has been obtained by fraud or misrepresentation the promise to pay will not bind" 28.

Likewise, in reliance cases the main function of the promise will be to serve as evidence that the promisee was really justified in relying on the promisor.

But even if all of this were admitted for the purpose of argument, we would surely still be left with purely executory promises in cases where the promisee has not relied on the promise

28. Ibid., pp. 207-208.
in any way nor conferred any benefit on the promisor. In modern legal systems a party is held liable on such a promise and most people would certainly think that the promisor was also morally liable. Thus, if A engages to buy a car from a car dealer at a certain price, delivery and payment to be effected two weeks later, A is held to be under a legal (and moral) obligation to keep to the agreement even prior to any action of B in reliance on the agreement. What is Atiyah's view of these situations?

First, he says that these situations are comparatively very rare, for reliance normally follows hard on the heels of the making of mutual executory promises. Moreover, he asserts that in any case the strength of the obligation created is very weak; in order to substantiate this last point he calls attention to the mitigation of damages rule whereby the innocent party to a breach of contract cannot recover damages for a loss which he has, or could have, avoided by taking reasonable steps following the breach; accordingly if the promisee can obtain substitute performance elsewhere at no additional cost he is expected to do so; thus where a seller fails to deliver goods but equivalent goods are available in the market at or below the contract price, or where an employee resigns without giving adequate notice but an adequate replacement can be hired without delay, the sanction for the breach of contract will in fact, be, nil. This, in Atiyah's view, reflects the low binding quality that society puts on such unpaid for and unrelied upon promises.

This view of the moral foundations of promises has important consequences for contract theory. The main one is that the distinctiveness of the law of contract within the law of obligations is blurred. Those promises which, in Atiyah's view, are binding because of the reciprocal benefit which the promisee had conferred on the promisor could easily be assimilated to cases traditionally classified as "quasi-contract" or "restitution"; in fact, all the more important issues dealt with under these rubrics concern precisely the obligations which may in certain cases result from the conferral
of unsolicited benefits. And those other promises which in Atiyah's view become binding by virtue of the promisor relying on them can be seen to have a close family resemblance to tort cases, for it is characteristic of tortious or delictual liability that it arises as consequence of harm done to others. Thus, referring to the modern attitude of making a vendor of defective goods strictly liable to anyone who uses the goods and not only to those who buy them, Atiyah says: "if we ask, further, why the obligation should be imposed, we will find, in most cases, that the twin elements of benefit and detriment underlie the judgement. In this particular case, for instance, it would be widely agreed that the vendor gets the benefit of the sale, that the purchaser or user relies upon him to distribute goods which are not dangerous, and that these two factors, together with the fact that the sale is a voluntary transaction, suffice to justify the obligation". As a logical consequence of this approach he advocates avoiding any sharp divisions of the law of obligations into contract, quasi-contract and tort. He thinks that "a more adequate and more unifying conceptual structure for the law of obligations can be built around the interrelationship between the concepts of reciprocal benefits, acts of reasonable reliance, and voluntary human conduct".

CRITIQUE OF ATIYAH'S THEORY

This theory about the foundations of contract law is open to serious criticism. First and most clearly, while it is true that in many cases liability is based both on a promisory and on a reliance-or-benefit basis, this in no way proves that the promise has no effect in creating the obligation. If a man is standing on two legs and it can be shown that one of the two could by itself bear his

29. P. S. ATIYAH, op. cit., in n. 2 at p. 222.
30. Ibid., p. 223.
entire weight, it does not follow that the other leg actually performs no function. Atiyah's only argument for holding that promises by themselves create only very weak obligations is to say that that seems to be the prevalent view in modern society. Of course, this rests on a most inadequate view of morality as the creation of the social group. But even accepting his assumptions Atiyah's case cannot stand. He grants that "it is, of course, the case that current moral codes do treat promises as morally binding, and that the law generally treats them as legally binding"\(^{31}\). Besides, the only positive proof he offers of the low binding quality which society attaches to pure promises is the existence and effects of the rule of mitigation of damages referred to above. But this rule can be justified as an attempt to prevent harsh and unscrupulous promisees from reaping unmerited windfalls at the cost of promisors who, often through no fault of their own, have become unable to keep their undertakings\(^{32}\). It is always the case that the law has to try to reconcile many conflicting aims and policies in situations of great complexity, but nobody thinks of arguing, for instance, that strict rules of evidence which result on many murderers going free show that the law places a low value on the protection of human life. And in situations where the mitigation rule is not applicable the courts are quite ready to uphold purely executory promises in all their strictness. In *White & Carter (Councils) Ltd. v. McGregor*\(^{33}\) the House of Lords held that advertising contractors who had agreed to display advertisements for the respondent for three years were entitled to refuse to accept

\(^{31}\) P. S. Atiyah, *op. cit.*, in n. 3, p. 203.

\(^{32}\) An illustration may be helpful here. A orders several pieces of furniture from B, a carpenter. The day after placing the order A is posted by his company to a different town and therefore has no further use for the furniture. According to the rules of damages, A is liable to pay B all the profit B would have obtained from the contract even though nothing had been done under it and B had been put to no expense or inconvenience. But in most cases like this the rule of mitigation of damages will prevent such a harsh result.

\(^{33}\) [1962] A.C. 413.
his repudiation of the agreement. Although the repudiation took place on the same day that the contract was made the appellants were held entitled to sue for the price and were not limited to an action for damages. From such cases it must be concluded that the law's recognition of the binding force of promises per se is greater than Atiyah would have us think\textsuperscript{34}.

Again, to say that the promise has a purely evidential value involves consequences that contradict the spontaneous moral convictions of most people as well as the practices of the courts. It is true that the fact that all persons whose interests are affected by a certain arrangement have freely consented to it has a prima facie evidential value in showing the fairness of that arrangement. But if the promise were truly only one piece of evidence, it would have to be contrasted with other pieces of evidence, which perhaps would point in different directions; and there would be no guarantee that in a case of conflict of evidence between the promise and the other pieces of evidence, the promise would carry the day. This can be seen clearly by elaborating on the example of a loan transaction offered above. If the only source of the obligation to pay interest were the fact itself of the loan the agreement of the borrower to pay a certain rate of interest would tend to show that the rate was fair and reasonable as between the parties. But if the true function of the court were to ascertain what was a fair and reasonable rate in the circumstances of the case, the court would have to consider many other factors, several of which would in all likelihood be given more importance than the fact that the parties themselves had agreed to a given rate and thus presumably thought it fair. Factors such as the state of the money markets at the time, the risk of the transaction, the credit worthiness of the borrower and the collateral he had been able to offer, etc... would have to be explicitly discussed in every case. It is quite obvious that this does not

\textsuperscript{34} A similar decision was reached by the Court of Appeal in \textit{Centrovincial Estates plc v. Merchant Investors Assurance Co. Ltd.} (1983) Com L. R. 158.
happen and that outside cases where the rate agreed upon violates some statute, or is unconscionable in the circumstances of the case or where a vitiating condition as fraud or duress exists, the court applies as a matter of course the rate agreed upon. Is it not clear that the court is giving effect to an agreement of the parties rather than seeking to ascertain an objective standard and using the agreement for evidential purposes only? And is it not clear that almost everybody would agree that this is the proper function of the courts in these cases\textsuperscript{35}? In this issue it is Atiyah \textit{contra mundum}.

Finally and perhaps most importantly, the main objection which can be addressed to Atiyah's conception is that he seems to completely fail to appreciate the value of personal autonomy. He thinks that there has been "a decline in the belief that the individual has the right to determine what obligations he is going to assume, and an increased strength in the belief that the social group has the right to impose its own solution on its members, dissent as they may"\textsuperscript{36}, he also states that "the social group today is still willing to delegate considerable autonomy to its members; and it does this (in this sphere) largely by enabling them to admit, more or less conclusively, that circumstances exist in which the group recognizes the existence of obligations. But the modern social group has much more difficulty in recognizing the right of individuals to create obligations in circumstances where the group itself does not recognize the existence of obligations"\textsuperscript{37}. We have already challenged at one point the accuracy of his description of the prevalent convictions on this issue, and the last years have shown even more clearly that people can respond quite positively

\textsuperscript{35} In itself this argument only shows that Atiyah's thesis does not agree with the moral opinions of most people. But, given his assumption that morality is the creation of the social group, it is far more damaging against him.

\textsuperscript{36} P. S. ATIYAH, \textit{op. cit.}, in n. 3, p. 130.

\textsuperscript{37} \textit{Ibid.}, p. 194.
to political proposals which tilt back towards personal liberty the
balance between individual freedom and group regulation. Be that
as it may, the radical problem is caused by Atiyah's view of
morality as "the creation of the social group... it must be the group
which ultimately decides what conditions justify the creation of
moral obligations"\textsuperscript{38}. This radically conventional view of morality
leaves the theorist without any standpoint from which to criticize
the commonly accepted morality; accordingly, Atiyah goes on to
postulate without further qualification that autonomy should be
dee emphasized by the law in favour of community views. But there
is no good reason why the theorist should be so subservient to
commonly accepted values; even if it were the case that the
conventional morality of a given society has little or no
appreciation for the good of individual autonomy, it surely is not
meaningless for the theorist to discuss how far that assessment is
correct, especially if the theorist is trying to provide a rationale for
promissory and contractual obligation. Because he accepts a radical
devaluation of the value of individual autonomy without furnishing
any reasons why such a devaluation should be considered
desirable, Atiyah's proposals are radically defective.

While this last point will be further elaborated in latter part of
this article\textsuperscript{39}, it will be helpful if some illustrations of the
implications of Atiyah's theses are given here. In some countries,
for instance, the details of the conditions of employment in
particular industries were fixed by law in such detail that almost no
scope was left for the determination of the conditions of service by
the parties. Even if it is granted that this was or is the only way
to protect the generality of workers from exploitation by
unscrupulous employers, it should be apparent that this protection
is bought at some cost to many other employees and employers
who, for many legitimate reasons, could have preferred different

\textsuperscript{38} Ibid., p. 193-194.
\textsuperscript{39} See below, "The Merger of Contract and Tort".
arrangements. As a matter of fact, once economic development has rendered less pressing the need for protecting weaker workers, the tendency almost everywhere has been to relax the regulation by law of conditions of employment\(^{40}\). But nothing in Atiyah's principles allows one to take into account the essential value involved here.

Atiyah himself refers to the issue of product liability. He would like to bypass the traditional contractual basis of this type of liability in order to justify the imposition on vendors of strict liability to buyers and users on the basis of the facts that "the vendor gets the benefit of the sale, that the purchaser or user relies upon him to distribute goods which are not dangerous, and that these two factors, together with the fact that the sale is a voluntary transaction, suffice to justify the obligation"\(^{41}\). Now it may be the case that in consumer sales there are good reasons to impose on the vendor this strict liability, irrespective of his wishes and of the wishes of the buyer. If such is the case, it will constitute an example of how some people who are perfectly able to take care of themselves may have to surrender the freedom to structure their relationships in the way they think proper in order to ensure a more perfect protection of those others –perhaps a majority– who might otherwise be imposed upon. But to deny this freedom also to businessmen contracting with each other at arms length is far less justifiable. If a party is ready to accept a greater risk –including perhaps risks towards third parties– in return for a lesser price

\(^{40}\) Atiyah observes on several occasions that contemporary ethics is more paternalistic than it was the case in the XIX Century. It may be opportune here to comment that paternalism looks on men as incapable children rather than as responsible adults. In so far as it may be true that present day arrangements tend to be paternalistic, they should be criticized rather than blandly accepted. Paternalism may be justified towards people who, for one reason or another, are unable to take care of themselves, but even in this case it should assume the role of a temporary educator rather than that of a permanent dictator.

(perhaps because he can insure more cheaply or because he can protect himself more effectively against the relevant risks) to deny him the possibility of doing so would unnecessarily cramp his autonomy. And in a law of obligations based on the concepts of "reciprocal benefits, reasonable reliance and voluntary conduct"42, this could easily be the common fate of the parties to all relationships. The law would determine the duties of parties to each type of relationship and the only freedom left to individuals would be to decide to enter into a given relationship or refrain from doing so, for this is what "voluntary human conduct" seems to amount to in Atiyah's framework.

It seems that Atiyah has overreacted against the dogma of the sovereignty of the will by going to the opposite extreme and has failed to see, or at least has radically devalued, the good involved in the law giving men the opportunity to modulate many of their own obligations and commitments. But once it is explicitly recognized that freedom is a real good and a most valuable component of the common good, the reasonable objective for the law is to protect and guarantee each man's right to exercise his capacity for initiative while trying to prevent his exercising it to the detriment of the common good. A proper implementation of these elementary principles will call for technical instruments to defend the common good from the possible attacks of individual freedom43, not for a complete denial of that freedom.

A BASIC RATIONALE FOR THE LAW OF CONTRACT

This paper does not aim at establishing the foundation in morality of promissory obligation, but at examining the basic rationale of the law of contract. The basic issue from this

42. Idem.
43. See below, "Freedom of Contract and Justice in Exchanges".
perspective is to show the ways, if any, in which the regulation and enforcement of contracts by those in authority fosters the common good, that is, the good of the society as a whole.

Basically, contracts allow people to assume voluntarily some legal obligations and to shape at least some of them according to their own desires; they give people the chance to exercise a measure of control over their relationships, commitments and duties, fostering in this way, as we have seen, the important human goods of freedom and initiative.

But contracts should not be seen only, or even primarily, as instruments of individual expression. They also provide a way of establishing co-operation over time among several persons. This co-operation needs not be directed to the achievement of purely selfish objectives. Its object might be the promotion of some political ideas, or carrying out some charitable work, or doing business in partnership, or raising a family and providing mutual support in marriage. But whatever may be the objective, if two parties are going to engage in a lasting co-operation, each of them must be able to rely on the other behaving in a certain way, not only now but also in the future. And the law can increase the reliance of one party on the future conduct of another basically through two different mechanisms: it can either provide that the second party will behave in a certain way irrespective of his wishes, or it can give him the scope to voluntarily commit himself to act in a certain way. This second way is the technique of contract.  

Human beings need to co-operate with others in thousands of ways if they are to survive and develop their potentialities. So co-operation there must be—in necessary enforced co-operation—, all theories of sovereignty of the will notwithstanding. What the

institution of contract adds to this basic certainty is the possibility of establishing even large-scale co-operation (one can think of a large limited liability company with tens of thousands of shareholders and employees) while still preserving the good of individual freedom.

Agreements are possible without the protection of the law, and even if there were no law of contract there would still be a social practice of making promises and moral and social norms would protect it, as they now do, imposing on people the duties of paying their debts, keeping their promises and generally being truthful and acting in good faith in their dealings with each other. But on the basis only of this practice and of the voluntary observance of the moral duties attached to it, many agreements would be far less reliable than they are now. It is clearly the case that agreements between complete strangers, agreements involving large numbers of people, and agreements intended to operate for a long period of time would be far less reliable and, therefore, far less common, if they did not have the support of the law. And, of course, the law will also be quite useful in giving precision, clarity and certainty to many of the obligations involved in the performance of agreements, in providing a machinery for the settlement of disputes among the parties, etc.

The above considerations can be summarized by saying that the justification for the law to protect and reinforce the social practice of promising is simply that this practice is very much for the common good, enhancing as it does not only the good of individual autonomy but also those of co-operation and trustworthiness; and, in so far as it is an empirical truth that private initiative is, at least in some situations, more effective than public enterprises, it also promotes efficiency in the attainment of objectives.

At the same time we have already insisted above on how there is no question of seeing individual autonomy as the only intrinsic human good, or even as an overriding one. There is therefore no
reason of principle to allow contracts to become a vehicle for the perpetration of injustice or for the domination of some human beings by others. In so far as the basis for protecting the practice is the promotion of the common good there is no a priori reason why one aspect of that common good (those just mentioned in the last paragraph) should be allowed to completely overshadow other equally important aspects of the same common good (the promotion of just relationships and fair dealing, the protection of the weak members of the society, the fostering of common bonds, etc.).

Perhaps a brief consideration of the main differences between Atiyah's position and that defended here may help to understand better both of them. Atiyah seems strangely to narrow his focus and pay attention only to the parties to the contract. Thus if a party has neither relied on the contract nor paid for it, the only harm he will suffer in case of breach is the disappointment of his expectations; Atiyah concludes that if this is the case there is comparatively little reason to keep the contract and this will have but little binding force. It can be seen that the rationale offered here differs in two key respects from Atiyah's. First, it emphasizes the effect of breaching the contract on the common good, not only on the other party. While this is also the key to a proper understanding of promises in morality, it should be especially obvious that the common good is the proper vantage point from which to consider the way in which the law should treat promises. And from the point of view of the common good what is primary is the need to protect the institution of promising and to encourage people to rely on it and use it in ever more creative ways so as to progressively make possible more ambitious forms of voluntary co-operation. Secondly, while Atiyah concentrates on the harm that the breach of a promise will cause, the account offered here is not so restricted. There is no good reason to confine the purpose of the law to the avoidance of harm. The law does often concern itself, and rightly so, with fostering the common good in a positive way.
Therefore the consideration that if promises—even purely executory promises—are protected, richer modes of voluntary cooperation will become accessible to the community provides a good reason for the state to protect them through the medium of the law.

The above considerations should be read with precision. The contention is that the law should protect the practice of promising, not that the whole of what at present is classified as the "law of contract" should do this and nothing else; far less that it actually does so. Therefore if some or many of the rules of law currently classified as "contract" can be shown to have the function of protecting reliance, or avoiding unjust enrichment, or allocating the risks and losses of social interaction on the basis of non-promissory principles of justice, or protecting unsophisticated or unskilful bargainers, this in no way affects the thesis of this paper.

Even if this is granted, however, nobody should be in a hurry to argue that the law of contract, as structured nowadays, is a mere disparate collection of unrelated odds and ends without internal unity. As Raz has pointed out "the nonpromissory liability recognized by contract law is based on the principle of estoppel and... its purpose is not merely to protect individuals from harm, but also to protect the practice of promising itself. For if people were often to let it appear that they have promised when they have not, the currency of promises would be debased and their appeal and utility greatly diminished... Paradoxical though it sounds, it is in order to protect the practice [of undertaking voluntary obligations] from abuse and debasement that the law recognizes the validity of contracts that are not voluntary obligations."45. Related observations could be made in respect of the other possible objectives of the law mentioned in the last paragraph.

CONTROVERTED ISSUES IN CONTRACT THEORY

All of the above discussion might appear to be highly abstract and somehow remote from more mundane realities. In order to better appreciate the import of the conclusions reached there it may be useful to see the light they can cast on some controverted issues of contract theory.

It may be useful to make it clear, before proceeding any further, that there is no question of engaging here in that procedure, so dear to the representatives of the rationalist school of Natural Law, of trying to deduce a complete legal system from a few basic precepts. What specific rules are appropriate to a given time and place depends in many important ways on contingent factors which cannot be incorporated in any purely abstract model. And beyond this, as Finnis has often forcefully pointed out\(^{46}\), following the teachings of Aquinas on this point\(^{47}\), a specific legal rule can be rationally connected with a partially indeterminate general principle without necessarily having a pure logical connection with it. As Finnis has said "there can be a particularization of general ideas, commitments and principles by... legislators and jurists, by steps none of which is itself necessary, and all of which could have been in some respect different—so that there is, in these myriads of instances, no uniquely correct solution— but all of which are reasonable and none of which could without risk of error have been taken randomly or without regard to coherence with the larger whole constituted by the initial general idea or ideas of value, commitment of principles and by the steps already taken"\(^{48}\).

47. Thomas AQUINAS, Summa Theologiae, I-II, 95, 2.
But if this point is clear, it will be of interest to examine the light that the general principles discussed in the first part of this paper can cast on more practical issues.

**Expectation Damages Versus Reliance or Benefit Damages**

There have been frequent arguments in the literature on what should be the appropriate measure of damages to award to the innocent party in case of breach of contract. The leading case in common law jurisdictions is *Hadley v. Baxendale*\(^{49}\) in which it was decided that the innocent party was entitled to "expectation damages", that is to say, to be put in the same position as he would have been had the contract been carried out. The measure is *lucrum cessans* as opposed to only *damnum emergens*. Therefore, as a general rule, the innocent party is entitled to any profits he would have made had the contract been performed, that is, to the value of his "expectation", and this even if he has conferred no benefit on the other party before the breach and no detrimental reliance has taken place. Many academic lawyers have criticised the law in this respect and have contended that, at least in many cases, "reliance damages"—i.e. compensation for the actual losses suffered because of reliance on the contract— or "benefit damages"—i.e. compensation for the benefits conferred on the party in breach so that this will not benefit from any unjust enrichment—would be more adequate.

As a general rule the thesis that it is a proper function of the law to protect and strengthen the practice of promising will tend to favour the award of expectation damages in case of breach, for this measure of damages makes it as expensive to breach as to carry out

\(^{49}\) (1854) 9 Ex. 341.
the exchange (e.g. in situations where the market price of goods a party had promised to deliver at a certain price has gone up in the meantime) and therefore will tend to promote the fulfilment of promises. The expectation damages rule also allows the parties to plan on the basis that the contract will be performed, knowing that in any case they will at least receive the equivalent economic value of that performance; failure to enforce contracts to their full extent would reduce the willingness of people to enter into and plan on the basis of contracts. Finally, even if in some cases reliance damages could have been a more fair remedy there is the important practical consideration that in most cases expectation damages are approximately equal to the cost of reliance but much easier to measure; to leave it to the courts to determine in every case whether reliance on the contract caused harm would lead to expensive litigation and frequent judicial mistakes thereby reducing the reliability of contracts.

The above is only a general rule and exceptions can certainly be appropriate in certain classes of case. Foremost among them are cases where there has been no real agreement between the parties but the law, in order to promote the reliability of contracts, decides to hold the party at fault — e.g. by making a unilateral mistake, or by using words which could reasonably be understood as constituting an offer though he did not intend them so— liable as if


51. This was basically Fuller's justification of expectation damages (FULLER & PERDUE, "The Reliance Interest in Contract Damages (pt. I)", Yale L.J., 46 (1936), 52 at pp. 61-62). See also E. Allan FARNSWORTH, "The Past of Promise", Co. L. Rev., 69 (1969), 576 at pp. 596-597. On this issue Atiyah suggests that the contract-breaker should have the onus of showing that the promisee did not rely upon the contract (Essays on Contract, London 1986, p. 171). It is not clear that this solves the problems. Elsewhere in the same book (p. 114), in the context of a different argument, the same author illustrates the benefits of not having to prove, or disprove, reliance. For a fuller consideration of many of these issues see M. A. EISEMBERG, "The Bargain Principle and its Limits", Harv. L. Rev., 95 (1982), p. 741.
he had really agreed. In these cases the real basis of liability is delictual rather than contractual and accordingly a powerful argument of principle can be made for the thesis that the party at fault should only be liable on a conventional tort basis for the other party's costs (i.e. reliance damages) rather than on a contractual basis for the other party's expectations\footnote{For the case of unilateral mistakes the rule proposed in the text is gaining force in the U.S.A.: see Restatement (Second) of Contracts, section 153 (1979). In respect of cases where "objective interpretation" is applied Whittier has put the case well: "Under the present law the non-consenting party is liable on the contract itself if [he carelessly led the other party reasonably to think there was assent]. The chief unfortunate result of this state of the law is that he is bound to the contract though the other party is notified of the mistake before the latter has changed his position or suffered any damage. To hold one liable for a merely careless use of language which causes no damage whatever to the party to whom the language is addressed is certainly inconsistent with principles generally applied. If D drives down Michigan Avenue, Chicago, in a careless manner but no one is hurt, can any of those who might have been hurt sue D?", WHITTIER, "The Restatement of Contracts and Mutual Assent", Calif. L. Rev., 17, 441 at pp. 441-442.}. Other very important exceptions are cases where expectation losses cannot be reliably computed, cases where reliance losses exceed the expectation value of the promise, and breaches by consumers in contracts for sale by merchants of relatively standardized goods\footnote{See M. A. EISEMBERG, \textit{op. cit.}, in n. 51, pp. 794-798.}.

\textit{Third Party Beneficiaries}

An aspect of the rule known in common law systems as "privity of contract" is not really in doubt: one may not be obligated by an agreement to which one is not a party. The issue which has caused more trouble is whether a contract for the benefit of a third party (\textit{stipulatio alteri}) can be directly enforced by the third party beneficiary. Civil law systems have widely recognised a right of action on the contract to the third party beneficiary and the same
has been done in many common law jurisdictions\textsuperscript{54}. But the U.K. and other common law jurisdictions still insist on disallowing enforcement by the third party, even if the principle is shot through with exceptions.

There are many considerations which are relevant to this argument\textsuperscript{55} and a review of them would be out of place here. But in connection with the topic of this paper it is certainly possible to state that in so far as it is accepted that to protect the institution of promising is a proper function of the law, the doctrine of privity of contract is an anomaly which stands in great need of special justification, and this justification has not been forthcoming. Any principle that in certain circumstances\textsuperscript{56} will allow a promisor who has received performance to ignore his or her promise certainly undermines the integrity and dependability of the contract institution.

\textit{Consideration Versus Causa}

Perhaps the most characteristic trait of the common law of contract vis-a-vis civil law systems is the requirement of consideration for the validity of a contract. An Englishman, we are told, is bound not because he has made a promise but because he has made a bargain\textsuperscript{57}. Bargains are agreements in which the promise of each party is "purchased" by the other. For a bargain to exist the parties must exchange value or promise to do so. The

\begin{itemize}
\item \textsuperscript{54} All the jurisdictions in the U.S.A., Ghana, South Africa.
\item \textsuperscript{55} A good discussion and a strong plea for the abolition of this rule can be found in R. FLANNIGAN, "Privity -The End of an Era (Error)", \textit{L.Q.R.}, 103 (1987), p. 564.
\item \textsuperscript{56} Usually after the death of disappearance of the original promisee, or where the promisee, while still intending the benefit, does not wish to incur the litigation or other costs of enforcing the contract.
\item \textsuperscript{57} FURMSTON, CHESHIRE and FIFOOT, \textit{Law of Contract}, 1986, 11\textsuperscript{th} ed., pp. 67-68.
\end{itemize}
value forthcoming from either party is what is called "the consideration". Accordingly a promise to make a gift is made without consideration and is not binding on the promisor; an exception is allowed in many jurisdictions to a promise made under seal.

The doctrine of consideration has been under sustained attack for many years. Two main arguments have been put forward in its defence. It has been argued that it reflects the belief that a promise per se is not necessarily binding\textsuperscript{58}. As this belief has already been criticised in this paper, there will be no need to add anything here. Others think that consideration is useful as a rough and ready test of the readiness of the parties to undertake "legal" rather than merely "good faith" obligations\textsuperscript{59}. This paper is not the place where to assess in detail the rather dubious force of this second argument. What is clear is that as a result of the existence of this doctrine agreements entered into \textit{serio ac deliberato animo} end up being held to be unenforceable in ways that are often unexpected for the parties. Agreements liable to be considered void for lack of consideration include such commercially important instances as a promise to keep and offer open, a banker's commercial credit, a promise to accept a lesser sum in full settlement of a debt for a larger one and re-negotiated contracts where the duties of one of the parties remain unchanged. It is clear that the doctrine allows "the most cynical disregard of promises solemnly undertaken"\textsuperscript{60}, thereby undermining the purpose of the law of contract as spelt out before. However, to argue that the law should aim at the protection of the institution of promising does not commit one to the view that


\textsuperscript{60} \textit{Sixth Interim Report of the Law Revision Committee}, 1937, Cmd. 5449.
the law should enforce all promises as such. The State may fairly take the position that to attempt to use its compulsory processes to reinforce some classes of promise would cause greater harm to the common good than the breach of some of those promises would do. But in order to reflect this type of problem the civil doctrine of *causa* seems a much better instrument, because of its greater flexibility, than the common law doctrine of consideration.

**The Merger of Contractual and Delictual Obligations**

There is nothing "necessary" about the great divides that traditionally have separated in common law systems Contract, Tort and Restitution (or quasi-contract), the three more important areas of the law of obligations. It is well known that the law of obligations is structured within civil law systems as a more unified whole sharing common basic concepts. And it has often been pointed out that the wide gulf that exists in common law between duties which are voluntarily assumed (contract) and duties which are imposed by the law (tort and restitution) is to some extent artificial. Both types of duties commonly arise from some voluntary act of a party, whether a promise, a statement or a deed, which brings him into a relationship with other party on which duties are exacted. As a matter of fact the main interest of many who argue for a greater recognition of this fundamental unity of the law of obligations is to overcome the distasteful consequences imposed within the area of contract by the doctrines of consideration and privity and one can fully sympathize with this aim.

It should not be forgotten, however, that in many respects tort and contract serve ideals which pull in different directions. That of tort is that in any given situation a minimum acceptable standard of behaviour be fixed by the law; that of contract that any two parties should be given freedom to regulate the legal rights and duties
between them as they see fit\textsuperscript{61}. While both ideals have necessarily to be accommodated by any viable legal system, those proposing a merger of contract and tort often intend in practice a substitution of contract principles by tort principles through minimizing the room given to the parties to shape their own legal relations. Thus Gilmore, one of the main apostles of the fusion of contract and tort, has explicitly stated that "we are fast approaching the point where, to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift; where any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed. When that point is reached there is really no longer any viable distinction between liability in contract and liability in tort"\textsuperscript{62}.

This statement contains a good deal of wishful thinking, even in respect of the law in the U.S.A. But we may retain from it the thesis that once "the point" which Gilmore refers to in it is reached, contract will cease being a meaningful category; and conversely, for so long as that point is not reached, contract will retain a measure of independence from tort. We will now review the very serious problems which would arise if that point were ever reached.

In the first place, it should be clear that if contract is not recognized and given wide scope, flexibility of arrangements is likely to suffer. Those legal regulations are likely to be adopted which are satisfactory for the majority of the people involved (e.g. employment rules which take into account the needs and interests of mature male full-time workers) while the needs of minority groups (e.g. women, students, young and old workers, part-timers, etc.) will tend to be neglected. Even if eventually the regulations are particularized to take into account the needs of those minority groups, then sub-groups will be neglected. Only the great


\textsuperscript{62} G. GILMORE, \textit{op. cit.}, in n. 1, p. 88 (emphasis added).
multiplicity of solutions provided by the free interplay which contractual solutions make possible is likely to be flexible enough.

Secondly, if the law were to cease protecting bare expectations serious problems of uncertainty would have to be faced. If only reliance makes a promise enforceable, what set of facts constitutes reliance? "In one important sense, reliance is ubiquitous. The fact of a promise can always serve to deter further contracting. For example, if A promises to sell B a cow, then, ten minutes after the promise, B can justifiably claim to have relied on the promise by not looking elsewhere for a cow."63 Again, a form of relying on a contract is to enter into another contract with a third party which depends on the first contract for its performance. Thus a builder relies on his agreement with a sub-contractor in order to agree to execute a project at a certain price. Now it might be urged that entering into the second contract cannot be reliance on the first contract until some action is taken relying on that second contract, for until then the second contract will not become binding. So, how much reliance should there be to justify the enforcement of contractual obligations? And the difficulty in determining the point in time at which reliance takes place will arise not only before the court in case of dispute but also, and more disturbingly for the needs of commercial life, at the time of performance: the parties will often just not know whether there exists a valid legal obligation to perform. In summary, if the test of obligation is the presence of reliance, the standards for determining whether obligation exists necessarily become vague and unpredictable.

Thirdly, if reliance were to be the test for determining the existence of an obligation, in the absence of reliance there could be no obligation. Then, as Levin and Mc Dowel have pointed out, "members of the business community who routinely make executory bilateral contracts, often without thereafter significantly changing their position in any demonstrable way, would find

themselves without enforceable deals... Parties would be forced to change their plans artificially, even to begin execution of the contract just to seal the bargain"64.

Fourthly, as Fried has argued65, it is circular and incoherent to suggest that the protection of reliance should be the reason for enforcing promises. There is no general moral principle that if B suffers harm by relying on A, then A has done some wrong to B. Fried's example is that if one person rents an apartment because his neighbour plays chamber music, the neighbour does no wrong by deciding to play elsewhere. In other words, in respect of promises reliance is not a sufficient basis of obligation, but is protected as an incident of protecting the practice of promising.

Fifthly, there are important differences between contractual and delictual liability in the common law. The most important one is that in contract expectations are protected, while in tort cases only reliance damages are usually recoverable. The merger of contract and tort would therefore have the effect of making only reliance damages recoverable in contract situations. We have already seen that there exist weighty arguments against the law following this policy.

Finally, and most fundamentally, the idea of "voluntary creation of obligation" cannot be supplanted by that of "voluntary action" (with the subsequent obligation being created by the law) without a substantial reduction of human freedom and spontaneity. As Finnis has argued "a practice or practical doctrine according to which obligation came into being... whenever one expressed one's intentions of acting in the future, or whenever one expressed such intentions knowing that others might rely on one, would in each case be a practice or practical doctrine too restrictive of individual autonomy and self-direction, too cramping of human expressiveness and communication"66. Thus, if A announces his intention

64. Ibid., p. 80.
65. C. FRIED, op. cit., in n. 4, p. 10.
of building a public swimming pool, does he thereby become liable to anybody who had bought a pair of swimming trunks, if later on he fails to carry out his intention? To give legal protection to bare reliance would entail an unjustified and impractical restraint on individual liberty; people would have to be careful never to announce their intentions for the future in order to avoid unwittingly incurring onerous obligations.

A similar point can be made in respect of merging contract and restitution. If a stranger puts fertilizer on may land, as a result of which I am enabled to grow a bumper crop, must I pay for the fertilizer, even if I never requested it? The traditional answer in English law absolved me from liability; the person who fertilized my land without my requesting him to do so is considered to be an "officious intermeddler", a volunteer whom even equity will not aid. Some exceptions to this principle are necessary in special cases such as emergencies, but it is far from clear, to say the least, that the present position of the law is indefensible; why should I be deprived of the choice whether to spend money on a new barn rather than on fertilizer?

In the end the whole argument comes to the point that while freedom and autonomy is not the only human good it is nevertheless a great good and well worth protecting. And far more powerful arguments than any yet brought forward by any "death of contract" theorist will be necessary in order to show that men's freedom to make their own arrangements in substantial areas of their lives, for so long as they do not conflict with the common good of the society, should be radically curtailed.

*Freedom of Contract and Justice in Exchanges*

In the XIX Century the principle of freedom of contract was carried very far indeed. Once it was assumed that the basic

justification for the law to enforce contracts at all was the respect due to the autonomy of individuals who give themselves their own law, it would have been self-contradictory for the law to contrive to limit or even thwart this autonomous will in the process of ensuring its efficacy. But if the enforcement of contracts by the law is based on the common good of the community, which is promoted by allowing individuals a measure of autonomy to make their own arrangements and structure their own relationships, the argument for giving unrestricted free rein to the autonomy of the will collapses. If enforcing the contract will harm the common good in some ways, it cannot be presumed any more that the contract should be enforced. The harm to the common good which is likely to result from restricting the autonomy of individuals by curtailing in given ways freedom of contract will have to be compared to the harm caused to prejudiced parties and to the overall standards of fairness of the society by leaving more issues to private agreement. Of course a strictly objective comparison of these factors will be impossible to achieve as it would demand comparing incommensurables. But it will always be possible to effect a prudential comparison within the framework of commitments and values of a given society. In these matters Aristotle's advice that one should not demand greater precision than the subject-matter can admit is most appropriate.

An alternative and more limited argument to try and still save the libertarian conception of maximum freedom of contract rests on pointing out that a person ought to be considered to be the best judge of his own interests. Atiyah's answer seems perfectly adequate: "In fact, all democratic Western societies have massive bodies of law—retirement pension laws, compulsory medical insurance, compulsory liability insurance law, and so forth—that demonstrate our considerable sympathy for one who wrongly

68. ARISTOTLE, Nicomachean Ethics, 1094 b 23, 1098 a 27.
calculates... The proposition that a person is always the best judge of his own interests is a good starting point for laws and institutional arrangements, but as an infallible empirical proposition it is an outrage to human experience"\textsuperscript{69}.

This argument could be made more radical by defending a totally subjective theory of value. Thus T. Hobbes argued in the \textit{Leviathan}\textsuperscript{70} that "the value of all things contracted for, is measured by the Appetite of the Contractors: and therefore the just value, is that which they be contented to give". The earlier classical contract theorists, as well as many judges, rested some of their main arguments on such a theory. It is important to realize that such a view simply assumes that is is \textit{impossible} to assign a value or a range of values to any good or service on a rational basis. The examination of such an assumption could lead us very far, but for the purposes of this paper it will be enough to observe that a court can compare the price that a party to a contract has engaged to pay with a market price or a cost price and then give due weight to other tangible or intangible benefits offered by the seller as well as to the seller's costs, his reputation, the normal range of price variation, etc... There is nothing impossible about any of this and in fact common law courts engage often in this type of estimates in order to review the fairness of some contracts. Some examples are off-market contracts between a beneficiary and his trustee or between a director and his company.

We can conclude that there is nothing wrong in principle with the idea that in some cases society can establish objective standards of conduct which are to prevail over freedom of contract and that cannot be evaded in any circumstances, even on the basis of consent or agreement by the parties affected. Similarly, there is in principle nothing anomalous in the idea of the law prescribing certain criteria for the construction of contracts which may have the


\textsuperscript{70} (1651) 75.
effect to add to, detract or modify from what the parties have explicitly or implicitly agreed. It is perfectly possible that the specific rules laid down on these issues by a given legal order be unwise, or too restrictive of the legitimate autonomy of people; or that they give too much unchecked power to officious judges to intermeddle in private agreements. But if this is the case such norms will be defective because of these specific defects, not because of their breaching a supposed general principle of respect at all costs for private agreements. The real difficulties in this area arise in the consideration of more specific issues, not at the level of general principles; this is the reason why we will now briefly consider some of the main problem areas.

The first issue concerns the protection of naive, uninformed or dependent people and of those in situations of grave need, so that others will not be allowed, through the vehicle of contracts, to take advantage of them. Here, by the nature of the case, the remedy has often to be left to the judges, to determine after the event. Civil law systems have tendend to give wide powers in this area to judges to reform the contents of contracts in appropriate circumstances (e.g. unsophisticated bargainers, inequality of bargaining power, monopolistic position, etc.) through the doctrines of good faith, *boni mores* or public policy, and abuse of right. In the common law world American jurisdictions tend to be bolder in invoking public policy and "unconscionability"71, but the general tendency has been to use more closely defined rules such as estoppel, laches, nominate torts, determinate applications of public policy

71. For instance, section 2-302 of the Uniform Commercial Code allows a court to strike out unconscionable clauses or even the whole contract. Also the *Restatement (Second) of Contracts*, sec. 208, 1979. Another interesting development is the emerging American rule that a party is not bound by a provision of a contract, even if he has signed it, if he had no actual knowledge of it and it is wholly unexpected and grossly unfair (e.g. because it has never before been included in contracts of that nature). See e.g. *Restatement (Second) of Contracts*, sec. 211, 1981.
and the discretionary elements in remedies in equity\textsuperscript{72}. Through these means the courts are often able to reach similar solutions to those arrived at in civil law systems but, because of their being narrower, they are less readily extended to novel situations. Perhaps influenced by this, judges in common law countries have sometimes tended to wait for a lead from the legislature.

Whichever system is used the basic consideration should be to protect those who need protection without thereby reducing excessively the overall level of reliability of contracts by rendering them vulnerable to discretionary judicial review on the basis of unspecific criteria and without depriving the parties to be protected of their right to contract. An object lesson in the dangers of "protection" is provided by the American case \textit{Williams v. Walker-Thomas Furniture Co.}\textsuperscript{73} in which a furniture company located in a ghetto area of Washington D.C. sold on credit household items, including an expensive stereo, to a welfare mother. The credit arrangement was that each purchase price was added to all previous debts and all purchases were deemed to be leases until all outstanding debts to the company had been paid. When the defendant defaulted on a purchase the plaintiff company sued for possession of all the items bought over the previous five years. It was held that the contract was unconscionable. Without trying to criticize this specific decision, it is important to realise that if ghetto welfare mothers are allowed to escape the consequences of promise-breaking, they will soon be unable to get any credit; and it is also of interest to note that a later report by the Federal Trade Commission\textsuperscript{74} found that the security practices of ghetto furniture


\textsuperscript{73} 350 F. 2d 445, 18 A.L.R. 3d 1297 (D.C. Cir. 1965).

stores of the District of Columbia were defensible and their profit margins were equal to or lower than those of similar stores in other neighbourhoods: the higher costs of selling and of collecting in credit sales, as well as the higher risk of default mean that the selling practices in a ghetto must be more stringent if there are to be credit sales at all.

A second area of problems is related to cases where an unforeseen change of circumstances renders the contract significantly more onerous for one of the parties or makes it pointless. If the contract is not to become a vehicle of injustice courts have to be given powers to adjust the resulting losses or the duties of the parties. Also in this issue civil law courts, through the doctrine of good faith, have wider powers to adjust the duties of the parties than those given to common law judges by the rules of frustration. But the basic considerations in both systems are similar. On the one hand the common good demands stability of contracts. Accordingly the principle of fidelity to the contract must be upheld and those who enter into contracts must count with the possibility of changes of circumstances. But, on the other hand, fairness requires not treating the parties, and not allowing them to treat each other, as pure gamblers unless that is the substance of their agreement. Once these general principles are taken into account, the specific regulation of these problems by a given legal system can never be a question of pure deduction from them.

Perhaps the most difficult issue in all this topic is that of contracts where no party has unfairly imposed on the other and where there has been no supervening change of circumstances to unbalance the agreement, but where, nevertheless, a clear lack of balance in the obligations of the parties can be discerned: there may be formal reciprocity in the sense that there is give and take on both sides, but in fact the reciprocity does not exist. In cases where there was no specific intention by one party to benefit the other it can be said that there is an element of injustice in the exchange,
and, as such, the enforcement of the contract by the law is contrary to the common good. However, to give power to the judges to either invalidate or modify this type of agreements would probably reduce so greatly the reliability of all contracts that it would tend to result in a far more serious damage to the common good. In practice the English rule which does not attempt to authorize the judge to investigate the adequacy of consideration is probably wise. In some special cases (e.g. legislation prescribing "fair rents" and how to compute them) the legislature may prescribe in advance some conditions to be met by all contracts in order to ensure an approximate equality in the exchange; but the experience with this type of legislation has not been too happy. Generally speaking it is true to say that the more a given legal system tries to protect substantive justice in contracts the more certainty will be impaired. In the end it is a matter for the prudence of the legislator to determine for each specific type of situation how these two objectives should be balanced.

CONCLUSION

This paper has endeavoured to establish three basic theses. First, that the practice of promising is very much for the common good in which it greatly enlarges the area of freedom available to the citizens while still making it possible for them to co-operate in large, complex and long-lasting undertakings; accordingly there are very good reasons for the law of contract to go beyond protecting the fact of reliance and preventing unjust enrichment, and take steps to protect and strengthen the practice of promising itself.

75. In the absence of fraud, duress, etc. the only situation under the common law in which it is possible to help the improvident party to an unbalanced contract is where exclusion clauses are so wide that actually one of the parties is under no obligation at all. In this case there is such a radical lack of reciprocity in the contract that there is no consideration at all and accordingly the contract is void.
The second thesis which this paper has defended is that there is no justification for attributing any special efficacy in creating obligations to acts of will, taken by themselves. The ultimate justification for the legal enforcement of promises lies rather in the fact that this serves the common good of the society; and it is precisely the need to protect this common good that can justifiably lead public authorities to deny full effect to the "will of the parties" when this would produce an injustice.

The third main thesis of this article is that when the analysis is pushed back the ultimate essential question turns out to be to determine with precision the status and mutual relations of the basic intrinsic human goods. The root cause of the insufficiencies of the theories we have examined lay precisely in a faulty answer to this question. The position defended in this article is that freedom is one of those basic aspects of human well-being, but that it is not the only one, nor more basic or important than the others.

It is possible to derive light from these basic principles in studying some more specific problems of the law of contract, and we have endeavoured to show this in the last sections of this paper. But in the last analysis it is clear that in framing particular rules much depends on the specific circumstances of a given society and on its peculiar scale of values. As Justice Holmes well said, "it is a fallacy to believe that a system of law can be worked out like mathematics from some general axioms of conduct"76.
