# BOOK REVIEW

# Freedom of Contract as Ideology

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THE RISE AND FALL OF FREEDOM OF CONTRACT. By P.S. Atiyah, D.C.L., F.B.A. Oxford: Clarendon Press. 1979. xi + 779 pp. £35.00.

Since Gilmore has already proclaimed the death of contract in this country,[1] American legal scholars should not be startled by its similar demise in England. Indeed, many American readers of Atiyah's book, *The Rise and Fall of Freedom of Contract*,[2] will no doubt experience an odd sense of deja vu, and wonder why the British are only now discovering what Americans learned so long ago. Nevertheless, despite our current mode of legal sophistication ("we are all realists now"),[3] American readers should be enlightened by Atiyah's detailed examination of free contract mythology in England. After all, until recently that same mythology dominated American legal thought: Upon its coherence hinged the claim that a formal system of rights could intelligibly define a boundary separating each individual's private sphere of legally protected autonomy from arbitrary public or oppressive private power.[4] The legal protection of that boundary was once held out as the best and only definition of freedom we could hope to achieve.

Of course, as classical contract doctrine collapsed, so too did the pretense that the boundary was real. Yet the effort to erect a new

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1. G. GILMORE, THE DEATH OF CONTRACT (1974).

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

3. *See* Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459, 460 (1979).

4. *See generally* A. Katz, Studies in Boundary Theory (1980) (on file at the State University of New York at Buffalo Law School Library); D. Kennedy, The Rise and Fall of Classical Legal Thought (1975) (same).

contract doctrine on the ruins of the old, like the effort, more generally, to reclaim for liberal legalism its lost coherence, has not transcended the forms and vocabulary of older orthodoxy. Freedom of contract has been conclusively labelled a naive myth, but the forms of that mythology still bind.[5] Atiyah's book is a striking illustration of that fact.

A brief summary of this long book will inevitably omit the wealth of scholarly detail which enriches it. Atiyah is a first-rate legal historian, and his wry description of doctrinal change often matches Gilmore's for spriteliness of style. Nevertheless, his greatest contribution lies in his sharp break with a conservative tradition which dominates English legal historiography. This tradition portrays the stately march of the common law through history as proceeding in a splendid intellectual vacuum, immune from the pressure of external political and economic influence. Traditional English legal scholars have succeeded in obscuring the inherent implausibility of that portrayal by focusing their attention on the relatively archaic and technical forms of common law procedure, thereby excluding the untidy period of seventeenth-century political revolution and the giant socioeconomic upheavals of industrialization from the realm of legal history.[6] In marked and welcome contrast, Atiyah explicitly sets out to describe the relation between modern legal thought and recent intellectual and economic developments.

The exact nature of those relationships has always eluded precise definition. Perhaps wisely, given the complexity of the theoretical debate on the subject, Atiyah avoids aligning himself with any particular school of thought: His goal is description, not explanation. As a result, his model of the relationship between law and social life is peculiarly amorphous. He blends an instrumental, active model (law as promoting or facilitating the needs and values of a changing society) with a reflective, passive one (law as depicting through its forms an otherwise intact social reality). This vague model has the virtue of absorbing Atiyah's many eclectic observations; it also allows

5. A glance at any modern contracts casebook reveals the inevitable adoption of classical structures, categories, and terminology. *See, e.g.*, E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS 656–756 (3d ed. 1980); L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 131–54 (3d ed. 1972).

6. For analyses of the "conservative" tradition, see Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9 (1975); Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law"*, 1977 WIS. L. REV. 81, 87–102; Feinman, Book Review, 78 MICH. L. REV. 722, 728–35 (1980); Horwitz, Book Review, 17 AM. J. LEGAL HIST. 275 (1973).

him to maintain a balanced, liberal viewpoint throughout the book.[7] Atiyah's model of relationships breaks down, however, with respect to two problems: contradiction and discontinuity. Contradiction means that the principle of free contract is incoherent *on its own terms*. This is different from saying that free contract's historical and intellectual strengths and weaknesses can be balanced. Discontinuity means that comparing the classical model of free contract to the social and economic reality of nineteenth-century England reveals opposition and denial, not mere reflection.

At his best moments, Atiyah is aware of those problems; nevertheless, he concludes his book by lamenting the death of free contract as if it were a lost reality. Thus, his book conveys a peculiar double message: "Free contract never existed, but how sad that it has passed." Had Atiyah confronted more directly the problems raised by contradiction and discontinuity, that message might have been replaced by a more critical level of analysis—one that explored more forthrightly law's role as legitimating ideology.

Since Atiyah's account tends to obscure rather than highlight the problems of contradiction and discontinuity, the brief summary of the book in Part I is followed by an outline of some of the dilemmas those problems raise. Part II focuses chiefly on the contradiction between market freedom and security of expectation. The concurrent presence of those conflicting values collapses the structure of free contract doctrine into a series of theoretically arbitrary choices between two contradictory goals. Part II also relates that doctrinal self-contradiction to the incoherence of the free bargaining model's distinctions between public and private, and between legal coercion and free will. Part III discusses the problem of discontinuity as it arises within Atiyah's own description of nineteenth-century English economic and social history. Finally, Part IV speculates about the source of Atiyah's nostalgia for the free contract ideal.

## I. THE RISE AND FALL OF FREEDOM OF CONTRACT

The classical ideal of free contract depended upon an abstract, and obviously unrealistic, model of contract formation. According to that model, only a voluntary exchange of promises (the traditional offer and acceptance) gave rise to contractual obligations. At the moment of exchange (and not a second sooner), a right of expecta-

7. Indeed, Atiyah finds strengths and weaknesses in virtually everything he describes, a range which extends from nineteenth-century radical labor organizing to Milton Friedman's political views.

tion sprang into being. The right was violated if either party failed to perform according to the agreed-upon terms.[8] This was, of course, precisely the model so critical to classical American legal thought: Unless judges could claim to be enforcing the will of the parties, they could be accused of arbitrarily and retroactively creating new legal obligations, an obvious invasion of the defendant's sphere of legally protected autonomy. Conversely, a judge's failure fully to compensate contractual breach would constitute a refusal—equally arbitrary and irresponsible—to protect the plaintiff's right of expectation—a right necessarily deemed no less "real" than the rights defining each party's initial sphere of individual freedom.

According to Atiyah, this classical view of the contract right was rooted neither in unalterable Reason nor in the Ancient Forms of the Common Law. Instead, supporting a point initially made by Morton Horwitz,[9] Atiyah argues that the classical view represented a marked departure from eighteenth-century legal paternalism. In the eighteenth century judges felt obliged not to enforce explicitly stated rights, but to do a substantive justice which was still conceived to be simultaneously moral and objective. This concern with substantive justice characterized equity courts in particular, where the majority of contract cases were heard; but it also influenced common law courts and the practice of juries, who were given broad discretion over damage awards. Legal paternalism meant the imposition of standards of good faith on contract negotiations and a refusal to enforce oppressive bargains. Within this tradition contract was not wholly distinct from tort: Obligations were in large measure defined by the customary duties inherent in a semi-feudal, hierarchical society. Similarly, damages were awarded to compensate actual reliance losses (or to prevent unjust enrichment), not to redress lost expectations. Courts thus viewed promises less as a source of liability than as evidence of a pre-existing obligation upon which the plaintiff could reasonably have relied.

Atiyah argues that the emergence of promissory liability for fu-

8. Atiyah notes that not only does the contract create a right prior to any performance, but it is even possible to sue and recover damages prior to the date of performance. P. 427. He poignantly describes the contract right as being reified, "as though it were a box which is first made and then broken." *Id.*

9. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 161–210 (1977); Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 936–56 (1974). For a contrary view, see Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979). Atiyah acknowledges a huge debt to Simpson's work, but notes that Simpson might not endorse THE RISE AND FALL OF FREEDOM OF CONTRACT. P. viii. Atiyah's book provides detailed and convincing evidence that Horwitz was right.

ture expectations was closely related to the emergence of laissez-faire market ideology in the nineteenth century. This ideology, premised on the newly conceived subjectivity of values, promoted a faith in the self-interested, freely bargained, value-exchange mechanism as the key to all rational economic thought. While economists explained the logic of supply and demand in free markets, Victorian moralists preached the utilitarian virtues of frugality, individualism, self-reliance, and promise keeping. Since the academic disciplines had not yet divided into separate camps, and since a relatively small circle of friends constituted the educated elite, these free market principles quickly filtered into the thinking of judges, and therefore into the specific content of contract doctrine.[10]

Atiyah does not directly tackle the troublesome question of causation, but he does connect nineteenth-century England's changes in value structure and legal doctrine to the rise of commercialism. Generally following Weber, Atiyah assumes that the new commercial classes required the certainty and predictability of fixed rules. Specifically, judicial recognition of purely executory contracts safeguarded the risk allocation vital to sophisticated economic planning. Moreover, judicial rhetoric about the importance of promise keeping helped discipline the masses for the orderliness and dependability required in an advanced commercial economy.

Shifting from an instrumental emphasis to a reflective one, Atiyah also suggests that the image of society as a collection of atomized, self-interested individuals accurately reflected the reality of the early phases of a free market. That same market reality was reflected in contract doctrine, with free will serving as a source of liability and its rules implicitly enforcing the value of self-reliance (*e.g.*, *caveat emptor*), rather than older paternalistic standards of fair value and just price.

Nevertheless, Atiyah emphasizes that the English legal system always embraced contradictory values of selfish individualism and traditional paternalistic altruism. Citing Duncan Kennedy, who has made a similar point about American private law,[11] Atiyah explains that even before old equity doctrines had completely died out, both

10. Some of the most interesting sections of the book trace that process of influence in detail. *See, e.g.*, Pp. 374–80 (description of Lord Bromwell). As Atiyah comments, not nearly enough is known about the lives of particular judges for us to understand the interplay between "external" moral/political ideas and a legal doctrine which judges themselves consider to be neutral and value-free. *Id.*

11. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725–37 (1976).

Parliament and the courts (although the latter less extensively) adopted new forms of paternalistic regulation to replace the old. There was never a pure period of individualism, when old and new versions of regulation did not overlap.

British economists eventually rejected the pure laissez-faire model, and a majoritarian demand for broad government services and economic protection replaced values of individualism and self-reliance. Meanwhile, the classical contract model failed to reflect the modern economic realities of mass production and corporate and state market domination. Although British judges remained stubbornly wedded to classical contract doctrine, only a few relatively insignificant commercial practices escaped legislative intervention. Finally, Atiyah claims, common law doctrine is catching up with reality. For example, judges have started to realize that in the modern bureaucratic state businessmen value flexible business relations more highly than fixed legal rights. Thus, English contract law now incorporates a more liberal allowance for discharge and modification. In addition, it is returning to a more tort-like emphasis on reliance and restitution as a source and measure of liability. That transition has blurred the once firm line between "a contract exists therefore expectancy recovery" and "no contract exists so no recovery at all."

At the end of the book Atiyah ambitiously promises to erect a new structure of contract law that will reflect modern values more accurately than does the classical doctrine. That new structure, he explains, will take account of reliance and restitution interests as well as expectancy; it will deal with the relationship between freely willed promises and actual reliance as alternative sources of liability; and it will recognize the distinction between unrestricted present exchanges and the protection of future risk allocation. This new structure will appear, he promises, in the second part of his study of the theory of contractual and promissory liability.

Since a resolution of the conflicting themes in contract law would require a new synthesis of dualities that have consistently plagued liberal thought—intent and deed, foresight and hindsight, subjective and objective—Atiyah's new enterprise is likely to result in a sophisticated liberal balancing of claims that remain stubbornly contradictory. The depth of that contradiction is explored in the following section.

## II. CONTRADICTION IN CONTRACT DOCTRINE

The integrity of classical formalism depended upon the coherence

of three highly abstracted categories: freedom of contract, property, and, more generally, liberty. These three categories were capable, however, of generating obviously contradictory arguments about specific issues. One of the most painful symptoms of the disintegration of formalism was the recognition of this contradiction. Even a judge determined to decide a case by free contract principles (or, for that matter, to decide a case according to free market principles) could find himself pulled in two quite opposite directions.

The covenants in restraint of trade issue is a clear example of this contradiction. As Atiyah points out, judges soon realized that the process of free contracting could destroy itself through agreements eliminating the threat of competition, and therefore eliminating all pretense of free exchange on an open market.[12] Reluctant to adopt the suspiciously paradoxical view that the law should interfere with freedom of contract in order to save it, English courts enforced obviously anticompetitive agreements.

During the same period, Americans enacted the Sherman Act—which prohibited all contracts in restraint of trade—to preserve the model of free competition. Yet, as Justice White noted in *Standard Oil Co. v. United States*,[13] if taken literally, the Act's language would destroy contract law: *All* contracts are in restraint of trade. This is true because enforcing secured risk allocation and protecting reasonable expectations necessarily conflict with market freedom and unregulated value-enhancing exchanges—the arguments upon which the legitimacy of free contract rests. Thus, the restraint of trade issue is not simply an outside, limiting case, different in kind from the inner core of contract law. *In every case*, a contract that is no longer value-enhancing to one party can be impeached by the claim that free traders would no longer agree to the exchange: Only *competing* principles of security can justify enforcement.

Every doctrinal dispute within the classical model is reducible to conflicting claims of security and freedom. Each such conflict might be perceived as a problem of messiness, caused by the common denominator of time. If formation and performance are not simultaneous, the world will have changed by the time performance comes due. Freedom logic requires a new formation process whenever performance is no longer in accord with the will of the parties. Only security logic can step in to demand enforcement. Ostensibly undertaken in the name of a barely remembered exercise of freedom, en-

12. Pp. 697–703.

13. 221 U.S. 1, 63 (1911) (opinion of the Court).

forcement is inevitably coercion—freedom has become unfreedom. The relation between coercion and freedom ultimately destroys the core of classical contract assumptions.

The doctrinal intractability of the problem is evident. Expanding doctrines of mistake and commercial impracticability, plus problems of modification, underscore the dilemma. Typically, one party seeks to escape a hard bargain by demanding discharge or modification. Notably, the arguments usually advanced in favor of free bargain and value-enhancing exchange are equally favorable to discharge or modification. Discharge and modification pose no threat to free value-enhancing exchange, which would be promoted; only the other party's security is threatened. Current doctrine resolves the conflict by asking whether the excuse advanced for modification or discharge is within the scope of actually or reasonably foreseen risk.[14] That resolution, however, seems simply another vocabulary for choosing between security and market freedom: The complaining party is either free to renegotiate or unfreely bound by the prior bargain. The point here is that free contract logic offers no solution.

Of course, the formal contract model hid this internal contradiction by positing a magic moment of formation, when individual wills created a right whose enforcement was necessary for the protection of free will itself: State coercion dissolved when viewed as merely protecting individual rights. This is why Fuller and Perdue devastated the formal model by showing that enforcing the expectation right is no more than a series of economic policy choices by the state.[15] Moreover, those policy choices are inevitably choices between *conflicting* rights: Enforcement is always drawn somewhere between the absolute protection of security and the total market freedom allowed by complete immunity.

Gilmore pointed out that when some unanticipated loss occurs (often the case when legal authority is invoked, since parties generally expect things to work well), the supposed "expectation" of buyer and seller are at odds.[16] If a seller breaches, courts have to choose between the buyer's right to complete security and the seller's expec-

14. *See, e.g.*, RESTATEMENT (FIRST) OF CONTRACTS §§ 454–69 (1932) (unchanged in tentative drafts of the Second Restatement).

15. Fuller & Perdue, *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52 (1936).

16. F. KESSLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS 1041–43 (2d ed. 1970).

tation of a more limited liability.[17] For example, *Hadley v. Baxendale*[18] used the device of foreseeability to mediate the complete security demanded by Hadley, and Baxendale's "right" to assume he had undertaken a less extensive risk. In each choice, for all the good arguments of the Hadleys of the world—about protecting the full security of transactions, and imposing the burden of loss upon the breaching party—there is a counterargument from the Baxendales about the stifling effects of such liability upon vigorous commercial activity. Those arguments can be reproduced at every level of choice;[19] in the process, the reified right of classical doctrine disappears.

The policy of enforcing the expectancy right involves choices not significantly different from basic formation decisions. Despite the mystical moment of formation posited by the classical model, when the offeror's and the acceptor's free wills meet in full accord, those decisions are not decisions *about* freedom, but *between* the claim for freedom and the need for security. To say the offeror's offer is irrevocable because of the promisee's acceptance is merely to say that the promisee's security is favored over the offeror's freedom to make a better deal elsewhere (or to withdraw from an exchange that is no longer value-enhancing). Modern formation doctrine, which favors "reasonable expectation" over formalistic claims of indefiniteness and lack of mirror-image acceptance,[20] would be viewed by a classical theorist as curtailing the offeror's complete control over the offer, and thereby arbitrarily invading her legally protected sphere of private autonomy. Yet formalist recognition of a binding contract at

17. Complete security could mean full consequential damages even if they are hopelessly speculative, or full performance even if ridiculously wasteful.

Conversely, where the buyer breaches, the court may have to choose between the seller's complete security—a captive buyer at a captive price—and the buyer's reasonable "expectation" that the seller will mitigate in the case of buyer breach.

18. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

19. *I.e.*, no liability versus the standard market price/contract price differential, market price/contract price versus consequential, foreseeable consequential versus full consequential. The market price/contract price differential is generally preferred, but apparently as a convenient and seemingly objective compromise. While it helps to objectify the market price as a substitute for the older fair price, it usually bears little relation to actual loss caused by seller breach, except in the commodities and stock markets. *See* F. KESSLER & G. GILMORE, *supra* note 16, at 1042–43.

The arguments over strict versus limited liability for expectation, doctrinally stated in terms like foreseeability, mitigation, and unreasonable waste, seem generally to reproduce the arguments in tort for strict liability versus negligence, contributory negligence versus no contributory negligence, etc.

20. *See, e.g.*, U.C.C. §§ 2–204(2) (indefiniteness of moment of formation), 2–207(1) (additional or different terms), 2–305 (open price terms).

the moment of formation was also a choice between contradictory alternatives. The fixed, formal line drawn between contract and no contract obscured that choice; but as the boundary becomes mushy, the choice becomes more apparent.

Notably, early liberal theorists like Adam Smith and David Hume recognized the internal contradiction which now expresses itself in doctrinal form, although they also sought to conceal it. Exchange, they claimed, was based on natural impulse and (subjective) desire. Like eating, drinking, and sex, it takes place without state or moral compulsion: It requires only release, not enforcement, for it provides a direct and "immediate" utility for the parties. Promise keeping, they thought, does not rest on the same foundation of desire. Instead, it requires the reasoned and objective justification of "ultimate" (rather than "immediate") utility; and its performance depends upon both moral discipline and state enforcement. Unlike the natural impulse to barter and to trade, promise keeping, like property, is part of the "artificial" virtue of justice.[21]

This mix allowed market theorists to argue for subjectivity and freedom as against overt state regulation in the name of an objective moral standard of fairness, yet still to argue for reasoned justice and objectivity as against the self-interested desire to break promises and (perhaps more important) seize the property of others. The result was a structure of thought which presupposed a world of voluntarism, subjective choice, and freely willed mutuality while *also* presupposing a world of objective external control, secured expectation, and a freedom constrained by the inequality of legally protected, accumulated advantage. The allusion to property is more than a metaphor, for in securing promises contract logic begets property logic, which defeats the premises of freedom thought to underlie contract logic. To recognize expectancy rights ostensibly generated by willing parties and to enforce them even against the will of one of those parties amounts to a generation of property rights over time. Their protection invokes the rhetoric of property doctrine—primarily through the language of secured expectation. The result is objectively protected advantage, with its inherent tendency toward accumulation and hierarchy.[22] Every exercise of will, so essential to the freedom of

21. A. SMITH, LECTURES ON JURISPRUDENCE 472–74 (R. Meek, D. Raphael & P. Stein eds. 1978).

Smith also describes as "passion" the desire of the many to level the wealth of the few. *See* A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 670 (E. Cannan ed. 1937) (1st ed. London 1776).

22. M. WEBER, LAW IN ECONOMY AND SOCIETY 188–91 (1954).

contract model, must take place under the constraints of both property and expectancy rights generated by the same system.[23]

The problem of will reveals the ultimate contradiction of the model. At one level, there is simply the problem of ascertaining states of mind. To protect the subjective by insisting on the objective seems inconsistent. Yet, classical contract doctrine sought to protect autonomy by a system of formal, predictable rules, which excluded extensive inquiry into the particulars of concrete circumstance, especially a moralistic inquiry into actual states of mind.[24] Thus there was a quick classical shift from a factual determination (by juries) of actual subjective intent to a legal determination of intent as formally expressed and reasonably interpreted. When the two differed (an area impossible to define with any precision), liability for breach of contract was, strictly speaking, liability for the tort-like negligent use of language.[25] This meant protection for the security of those who relied on formal written contract terms, and seemed, by its formal predictability, to be protecting rights, and therefore free will itself. Yet that formal protection was necessarily delivered at the expense of any claim that might be made in the name of its *actual* protection. The current parol evidence rule debate indicates that the subjective and objective dilemma remains unresolved.[26]

But the free will contradiction goes deeper than the problem of formal rules; ultimately, it impeaches the coherence of the free value-enhancing exchange mechanism. In theory, exchanges are a function of autonomous will, not legal force: While state control is required to secure *future* performance, a present exchange of goods or promises is a pure expression of voluntarism.[27] In turn, this expression of voluntarism required intelligible legal rules to separate free bargains from those formed under fraud, duress, or undue influence.[28] Dawson's

23. Of course, property rights, like contract rights, can also be seen as breaking down into theoretically arbitrary choices between freedom and security.

24. *See* O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 178 (1920) (discussing undesirability of inquiry into actual contractual intent of the parties); *accord*, Pp. 407-08.

25. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441, 441-43 (1929).

26. *See, e.g.*, Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 334-51 (1967).

27. As noted, Adam Smith had described exchange as based on natural impulse, involving no state influence or control. *See* note 21 *supra* and accompanying text.

28. These rules were necessary to maintain that judicially enforced contracts had been freely made. The classical claim was that doctrines like fraud and duress merely identified a pre-existing line between freedom and coercion. *See* P. 545.

brilliant essay convincingly demonstrated, however, that a natural separation simply does not exist. Instead, the legal boundary identifying freedom is a function of legal decisionmaking, and has varied over the course of history.[29]

In particular, it has arbitrarily excluded economic pressure from the legal definition of duress. That exclusion concealed the fact that coercion, including legal coercion, lies at the heart of *every* bargain. Coercion is inherent in each party's legally protected threat to withhold what is owned. The right to withhold creates the right to force submission to one's own terms. Since ownership is a function of legal entitlement, every bargain (and, taken collectively, the "natural" market price) is a function of the legal order—including legal decisions about whether and to what extent bargained-for advantages should be protected as rights. It is therefore wrong to dissociate private bargaining from legal decisionmaking: The results of the former are a function of the latter.[30] This conclusion dissolves the theoretical distinctions between public and private spheres, and between free and regulated markets. Since the inner sphere of free bargaining and the outer framework of fixed rules collapse into each other, the problem of state coercion in the ideal of free contract is not simply a messy inconvenience caused by temporal change; it is a problem deep in the core of the ideology itself. The assumption that the state was not implicated in the outcomes of free market bargaining was *never* true—a quite different point from saying, as Atiyah does, that it is *no longer* true.

Still, the image of the autonomous bargainer was a powerful one, profoundly believed in by those who added to its credibility by constructing around it the elaborate structure of contract law. There may be reasons in concrete experience that made this particular myth more credible in the early nineteenth century than it is today.[31] Nevertheless, the problem of contradiction undercuts the conclusion that legal doctrine mirrored reality and progressively served its needs. The legal myth was too obviously only an ideological myth. If the free contract ideal seemed to accurately reflect life under capitalism, that is surely in large part attributable to the power of the ideology, rather than to the accuracy of the reflected image.

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29. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

30. *See* Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

31. *See, e.g.*, Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601, 607–14 (1977); Horwitz, *The Legacy of 1776 in Legal and Economic Thought*, 19 J.L. & ECON. 621, 628–29 (1976).

## III. DISCONTINUITY IN CONTRACT DOCTRINE

The classical model of contract formation could never have matched social and psychological reality. Simply as a matter of language, parties cannot fully communicate to each other; nor can their words completely capture the future.[32] The language they use is as much social as individual, its meaning colored by context and, at the time of enforcement, by judicial hindsight and interpretation.[33] Thus, all contracts are in part implied contracts; all express conditions really constructive covenants.[34] Future exchange based entirely upon individual promise is nonexistent—and always has been.[35] The individual is never wholly autonomous from social life.

Moreover, the picture Atiyah draws of commercial life in nineteenth-century England does not depict the discrete, autonomous units of classical doctrine. Rather, he notes that it was the *interdependence* of commercial life which prompted the use of executory contracts as a planning device.[36] His description of commercial decisionmaking as dictated by the momentum of capital investment conveys an almost Marxist image of control, not an image of freedom.[37]

Atiyah points out that early nineteenth-century businesses were either sole proprietorships or partnerships. Individualism ended with the emergence of giant corporations and other hierarchically orga-

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32. *See* MacNeil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 726–35 (1974).

33. *See* Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381 (1941).

34. 1 A. CORBIN, CONTRACTS §§ 18–19 (1950 & Supp. 1980); 3 *id.* § 562; F. KESSLER & G. GILMORE, *supra* note 16, at 116–19.

35. I. MACNEIL, THE NEW SOCIAL CONTRACT 8 (1980).

36. *Id.* In earlier articles, however, MacNeil suggested that continuing relations were more typical of modern commercial life. *See, e.g.*, MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. L. REV. 854, 865–901 (1978).

37. Atiyah describes the interdependence of economic entities: "Now in the highly volatile commercial and industrial activity I have described . . . , it does not seem surprising that businessmen came to demand a greater degree of legal protection for careful planning. Vast sums of money depended on the skill with which men could now plan; the mill owner needed to buy his supplies of cotton in advance, so that it would be available in a continuous flow; he needed to be assured of his labour supply in advance for the same reasons. Or again, the landowner thinking of investing in the mining of coal on his lands, might need the safety of forward contracts relating to the carriage of coal, when it was dug. Merchants exporting and importing the hugely increased flow of commodities had to plan future shipments with some regularity with the aid of the new brokers who were springing up everywhere . . . ." P. 421. Apparently the commercial need for continuing relations rather than just one-shot transactions has not been only a twentieth-century phenomenon. If so, the tendency to exclude the relational element from contract doctrine would not be attributable to reflection of reality, but perhaps to the internal pressure of the ideology itself.

nized institutions. The observation is useful; but it is also true that these "individuals" were hardly self-reliant units. Instead, their size and instability made their survival utterly dependent on the fluctuating economy.[38]

Within this context of interdependence, Atiyah suggests that actual business practice never fit the model of cutthroat competition.[39] Rather, nineteenth-century practice was more akin to modern commercial behavior[40] than to a model of fixed rights and formality. Indeed, it would be surprising if the need for flexibility and good faith dealing were new to commercial life.

Atiyah also argues that successful commercial development required the classical model rules. Like contract doctrine itself, however, this instrumental argument raises contradictory arguments about what commercial classes really need. For example, they supposedly want secured expectations for the sake of future planning, but they also require that liability be limited by the *Hadley* rule and by statutory provision for the limited liability of corporations.

Moreover, the actual results of the particular rules associated with commercial class interest are difficult to gauge. Part of the problem lies with the discontinuity, not only between legal doctrine and social practice, but also between treatise law and the law as applied. For example, the rule of *caveat emptor* seemed to favor commercial classes; nevertheless, it was never applied with any rigor in England, and as between merchants, could always be countered by a security-based argument for protecting reasonable expectations of decent quality.[41] At any rate, commercial development did not come

38. This threat, as described by Atiyah, could be fearsome: "The threat of failure, of bankruptcy, of personal financial disaster, was ever present to the industrialists and financiers of the early nineteenth century. . . . In a period when hectic booms alternated with financial panics and there was no such thing as limited liability, the business magnate and the public investor were haunted by specters of bankruptcy and the debtor's jail. . . . For one man's failure often triggered off a whole series of other failures. Innocent partners, guarantors, and creditors could go down in the holocaust when a major business failure occurred." P. 229 (citation omitted).

39. P. 477.

40. For a description of the use of contract in modern business practice, see Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507 (1977); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

41. Apparently, judges were as concerned with these commercial policies as they were concerned with protecting sellers from unbargained liabilities. P. 479.

This is *not* to argue that particular doctrines cannot be manipulated to subsidize capital accumulation by imposing costs on workers and consumers, or, at key times, to favor the growth of particular industries. *See* M. HORWITZ, *supra* note 9, at 161–210. The point here is that a more generalized claim about the relationship between law and a free market confronts

grinding to a halt because the judiciary ignored *caveat emptor*.[42]

Atiyah downgrades the substantive inequality of contracts between employers and workers during the nineteenth century, insisting that the real freedom of workers has been underestimated. But even Adam Smith admitted that contracts between owners and workers were far from free.[43] And a striking irony emerges from Atiyah's own description of the process of disciplining the nineteenth-century working class. The virtues of independence and free choice were preached to workers as part of this disciplining process, even while industrial life disrupted their lives and imposed oppressive workplace conditions.[44] Ironically, Atiyah suggests that had workers been *really* free, they would have chosen to retain their pre-industrial patterns of life, not to submit to the brutal coercion of nineteenth-century factory discipline.[45]

There is nothing original in observing the irony of coercion imposed in the name of freedom. Atiyah *almost* recognizes that irony, yet he never explores contract law's role in making actual domination appear free, natural, and rational. Atiyah's failure to explore this irony derives from his nostalgia for the myth of past economic freedoms.

## IV. NOSTALGIA, FREEDOM, AND THE MODERN STATE

The mood of Atiyah's last section is one of slightly saddened resignation. As public regulation strangles a once free market, the val-

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the same freedom/security, competition/combination dilemmas of free contract and free market theory.

42. As Macaulay has so often pointed out, the particular rules of contract doctrine that legal scholars take so seriously may be largely irrelevant to successful enterprise. *See* Macaulay, *supra* note 40.

43. *See* A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, *supra* note 21, at 64–86 ("It is not, however, difficult to foresee which of the two parties must . . . force the other into a compliance with their terms." *Id.* at 66.). Even Atiyah acknowledges that the "[f]reedom to starve was no freedom." P. 527.

44. Atiyah elaborates: "In many of the early cotton mills time-keeping was enforced by stringent methods. Workmen were often severely "fined" for unpunctuality, and in some mills it was the practice to lock the gates excluding those who were only a minute or two late. . . .

". . . In the case of apprentices and children, even beatings were not unknown . . . . Dismissal, and even blacklists maintained by groups of employers, were naturally the ultimate and readily available sanctions. These codes of discipline were, of course, unilaterally imposed by the employers . . . ." Pp. 274–75.

45. Atiyah comments that "there is something faintly absurd in this educative process by which the poor were vigorously taught what they were supposed to want 'by nature'." P. 284.

ues of individualism and self-reliance are inevitably submerged in the bureaucracies and impersonal majoritarianism of the corporate state; the loss of freedom of contract is the loss of freedom itself. It is troubling to find this nostalgia in a scholar who, at his more critical moments, knows the supposed freedom of the past was false, both in theory and in social practice. While the modern political and economic experience might no less be one of domination, the resurrection of old myths will not make the modern problem go away.

The content and tone of Atiyah's book suggest three explanations for his nostalgia. First, and most regrettable, Atiyah identifies only with history's educated elite. For example, he describes the task of disciplining the English lower class as one clearly undertaken by the "us" of the past.[46] Similarly, he assumes that sober and industrious workers could advance themselves, and that only spendthrift, low-life debauchery kept the majority in poverty. Indeed, the image of a drunken, violent lower class that he conveys[47] is now widely recognized to be a creature of the Victorian elite's conscientious desire for self-justification. Inevitably, it was a dehumanizing caricature, fostering a "we/they" consciousness. While historians can never wholly surmount the problem of "winners' history"—the fact that losers do not write the documents of our intellectual past, leaving only the experience of winners readily accessible to us—it is possible to be more sensitive to those biases.[48]

Atiyah's implicit elitism leads him to generalize his distorted account of the nineteenth-century working class to the level of universal truth. He assumes that free market life is a fair game with objective rules, so that winners are simply proving their superiority over losers.[49] At least Atiyah recognizes that work in nineteenth-century England was often scarce, and brutally oppressive and underpaid when found; and he admits that a fair game with fixed rules is not an accurate description of economic life.[50] But he achieves this balanced view at the expense of self-contradiction.

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46. Thus, in explaining why utilitarian theorists felt the need to inculcate principles which, upon analysis, seemed to break down, he comments: "[I]f we today still had to face the same problem of teaching social discipline to millions of rough, tough, largely uneducated, urbanized men and women we might well feel the same." P. 358.

47. *E.g.*, P. 267.

48. *See, e.g.*, E. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1968).

49. *See* P. 648. And Atiyah asserts that "[T]hese freedoms tended, then as now, to be of most value and to have most reality for a small minority; the energetic, able and enterprising rarely form a majority of any group of human beings." P. 528.

50. P. 288.

A second explanation for Atiyah's nostalgia lies in his love of legal form. Atiyah views the breakdown of classical doctrinal categories with considerable misgiving,[51] despite their acknowledged practical elitism.[52] His lament for the passing of their rigor and elegance is at least understandable. Viewed in retrospect, Williston's majestic doctrinal structure may have been silly, but Corbinesque appeals to reasonableness and justice appear sloppy and formless by comparison.[53] Williston's structure was, at least, a real structure, however misguided. Perhaps much Willistonian dogma survives simply because it provides a challenging intellectual game to learn and teach in law school—more fun than the close attention to commercial detail required by thorough-going realism.

Atiyah knows the old categories have collapsed, but he is convinced he can create new ones—especially around the notions of reliance and benefit—which will solve the twin problems of incoherence and irrelevance. That, of course, is always the great hope of treatise writers: both to improve upon the naive legal past and to make sense of the social present through forms of legal thought. My suspicion, however, is that using new vocabulary will solve nothing. Reliance breaks down, like expectation, into contradictory arguments about security and market freedom. Courts may, for example, carry out the logic of secured reliance by awarding full expectation damages;[54] lost opportunity costs make reliance and expectation easily interchangeable concepts. Conversely, reliance may have as many damage recovery limits as does expectation.[55] Similarly, formation problems do not vanish because they are expressed in the new vocabulary. Just as good an argument can be made for protecting an offeror's potential reliance on being free to make alternative deals as can be made for protecting the security of an offeree's potential reliance on the existence of an obligation.[56] And, while reliance is often

51. *See* p. 679.

52. *Id.*

53. In the absence of a theory of substantive justice, they are no less self-deceiving. The same can be said of the U.C.C.'s repeated reference to commercial practice as a source of legal standard, in the absence of investigating the real social/economic conditions which may make most fair, equal, good faith bargains illusory. A real community of freely forged shared values would require a transformation of economic life not envisioned by the U.C.C.'s drafters.

54. Note, *Once More into the Breach: Promissory Estoppel and Traditional Damage Doctrine*, 37 U. CHI. L. REV. 559, 559, 565–82 (1970).

55. *See, e.g.*, L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182, 189 (2d Cir. 1949) (reliance damages should not exceed expectancy); Security Stove & Mfg. Co. v. Amer. Rys. Express Co., 227 Mo. App. 175, 180–84, 51 S.W.2d 572, 575–77 (1932) (implying that reliance expenses may be recovered *so long* as they are not unreasonable or economically wasteful).

56. Professor Llewellyn preferred the latter in his discussion of the mailbox rules, but

used to escape formalities like the statute of frauds, perfectly good *reverse* reliance arguments are bound to arise, reasserting the claims of formal realizability by arguing the unreasonableness of reliance prior to the signing of a written document. New legal categories do not solve old problems, which lie deep in our structures of economic and political thought. They only express them differently.[57]

The inability of legal categories to supply solutions is closely related to the circularity of legal forms. Reliance and benefit do not exist independently; they exist only when and to the extent the legal order chooses to recognize them. Fuller and Perdue made this point about the expectation right;[58] it is no less true of reliance or benefit.

Nevertheless, the categories of contract law Atiyah suggests as being more "relevant" for the future—reliance and benefit—do raise interesting questions about the relation between legal form and historical context. The return of many old natural law notions—unconscionability, good faith, reliance-based liability, and standards of reasonableness and substantive justice—is an intriguing development. The last section of Atiyah's book is appropriately titled *The Wheel Come Full Circle*.[59] Corresponding similarities between eight-

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did not pretend that reference to reliance magically resolved the question. *See* Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II.*, 48 YALE L.J. 779, 795 (1939).

This is not to say that the modern shift to reliance-based liability has not been important. Its chief significance lies in collapsing the once firm boundary between contract and no contract. *See, e.g.*, Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965). Since boundary conceptions pervade modern legal thought, the shift to reliance might more usefully be analyzed as part of a general trend formation in legal consciousness.

57. Significantly, as Robert Gordon has pointed out, self-consciously "modern" contracts opinions have already resulted in a description of reality which, in its own way, is no less mythical than the reality described by formalism, and which tells us a good deal more about the impulse of the legal elite to create myths than it does about the reality they describe. This is made apparent by the contrast between the appellate opinions printed in R. DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW (1978), and their complex factual backgrounds, which Danzig also provides. In Karpinski v. Collins, 252 Cal. App. 2d 711, 60 Cal. Rptr. 846 (1st Dist. 1967), for example, one finds a simple moral tale in which an oppressive creamery operator uses his superior bargaining power to extract illegal rebates from a desperate dairyman. By ordering a return of the rebates, the court purported authoritatively and realistically to resolve the situation it described. When more fully researched, however, the facts reveal a "darkling plain on which plaintiff and defendant are linked with dozens of other small businessmen in a complex tangle of mutual exploitation and necessity," a plain on which the case itself is only a fairly trivial incident, and to which the court's substantively rational normative premises are largely irrelevant. Gordon, Review of Danzig's Capability Problem in Contract Law, University of Wisconsin Materials for Contracts 54 (1980) (copy on file at the State University of New York at Buffalo Law School Library).

58. Fuller & Perdue, *supra* note 15, at 53.

59. P. 716. The title of this section reminds one of Machiavelli's observation that myths of the past always return, in new forms.

eenth-century mercantilism and the modern regulatory state[60] might suggest some deep causal relation between economic structures and structures of legal thought. On the other hand, judges and legal thinkers may be appealing to natural law simply because convincing alternatives to formalism have not been created. This appeal has accurately been labeled "The half-hearted appeal to truth,"[61] since it does not really suppose a resurrection of a theory of objective value, nor can it suppose a society of shared values that transcends pluralism. Without a medieval cosmology to support it, or else some dramatically new synthesis of subjective and objective, the appeal to natural law is bound to be bankrupt.

A third explanation for Atiyah's nostalgia lies in his perfectly valid conclusion that life in a modern corporate state is not a life of freedom. Atiyah accurately describes modern democracy as consumerism in a controlled marketplace of prepackaged political ideas: Mass voting is only a hollow symbol for what it might mean to directly participate in the shaping of our social and economic life. Classical contract doctrine, by its emphasis on choice and free will, implicitly appeals to a longing for a more positive form of freedom, even while it simultaneously denies that possibility by erecting false conceptual distinctions—like the one dividing public from private.

Perhaps it is impossible to fully understand the function of legal doctrine, especially a doctrine so ideologically significant as contract law, without at some point examining that dual process of evoking and then denying deeply felt social ideals. For example, early liberal theorists like Harrington had self-consciously appealed to a radical republican and sectarian tradition of voluntarism in order to justify dismantling a traditional hierarchy which had conceptually united law, politics, the economy, and religion. With the disruption of that unity came the threat of a voluntarism which would continue to assume precisely those same unities, but within a context of economic equality and of citizenship by direct and concrete participation.[62] A good deal of convoluted intellectual theorizing went into showing that radical voluntarism was not, in fact, the single obvious alternative to traditional hierarchy; particular attention was given to show-

60. *See generally* K. POLANYI, THE GREAT TRANSFORMATION (2d ed. 1957).

61. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 61.

62. *See generally* N. COHN, THE PURSUIT OF THE MILLENNIUM (1957); D. LITTLE, RELIGION, ORDER, AND LAW: A STUDY IN PRE-REVOLUTIONARY ENGLAND (1st ed. 1969); J. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

ing that one could argue for voluntary exchange on the market without destroying the legitimacy of an unequal distribution of property. Theorists like Hume understood the crucial role that a supposedly objective, apolitical framework of legal rules would play in that intellectual enterprise. He commented, for example, on the need to generate a multitude of law books as evidence of the autonomous rationality of legal principle. Of all the legal categories which were generated, perhaps freedom of contract appealed most directly to the utopian element of liberalism—the belief in the potential of human freedom to form a basis for social organization. Perhaps, too, much of the contradiction within contract theory itself can be traced to the falseness of celebrating voluntarism while at the same time attempting to deny its most utopian forms—almost as if, so to speak, the initial incoherence of severing old unities would always come back to haunt liberal legal forms.

Atiyah's nostalgia is most appealing when it can be recognized as a longing for the utopian element in contract law. His only mistake lies in attempting to find this freedom in a legal form that was also designed to mask its suppression.