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Preface
Robert Braucher and the Restatement (Second)
of Contracts

Arthur Taylor von Mehren†

The Restatement (Second) of Contracts was begun in 1962; the American Law Institute adopted and promulgated the completed work in May 1979. This revision and modernization of the first of the original Restatements is in large measure the work of two exceptional individuals and scholars who served with distinction and devotion as Reporters: Professor, later Justice, Robert Braucher of the Harvard Law School, and Professor E. Allan Farnsworth of Columbia University School of Law. Professor Braucher resigned as Reporter in January 1971 upon his appointment to the Supreme Judicial Court of Massachusetts. Roughly half of the work on the new Restatement thus had been completed when he was succeeded by Professor Farnsworth.

This Symposium issue of the *Cornell Law Review* contains thoughtful analyses of the provisions of the new Restatement and touches on many issues of great intellectual interest and practical importance: In what measure does this Restatement innovate; are its provisions intellectually coherent and practically sound; and what can “restatement” contribute to law and legal science in the last quarter of the twentieth century?

My brief remarks do not deal with these or other intellectual or philosophical issues; I celebrate the qualities of mind and spirit that the first Reporter—Robert Braucher—brought to his task. The sad occasion for such celebration is Robert Braucher’s death in August 1981, a few months before the Restatement (Second) of Contracts was published.

Braucher was born in 1916. He received his A.B. from Haverford in 1936 and his LL.B. from Harvard in 1939. Thereafter he practiced law for some two years with Hughes, Richards, Hubbard & Ewing in New York City. From 1941 to 1946 Braucher served as a fighter pilot and intelligence officer with the United States Army Air Forces. In 1946 he joined the Harvard Law Faculty as a Visiting Professor, becoming a Professor in 1949. In 1971 he resigned to accept appointment as a Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, a position that he occupied with distinction until his death.

Braucher’s teaching and scholarship were primarily in the fields of

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Contracts and Commercial Transactions, though he was knowledgeable in a great many areas, among others, legislation, government procurement, and equal opportunity in employment. He co-edited, with Lon Fuller, the second edition of *Basic Contract Law*, with Arthur Sutherland and Bertram Willcox, the first edition of *Commercial Transactions* and, with Arthur Sutherland, three subsequent editions of the latter. Among his many civic and professional activities were service on the School Board and the Board of Selectmen of Belmont, as Chairman of the Subcommittee of the Permanent Editorial Board of the Uniform Commercial Code responsible for Articles 1, 2, 6, and 7 of the UCC, as Reporter for the revision of UCC Article 9, and as Chairman of the National Commission on Consumer Finance. He was for many years the Massachusetts representative on the National Conference of Commissioners on Uniform State Law. At the time of his death, he was a life member of the American Law Institute and a member of its Council.

The man who achieved these things and much more had a marvelously quick, active, and forceful mind. He delighted in both knowledge and argument and responded as few can to the play of ideas and the challenge of debate. He had deep convictions but was largely free from prejudice and remarkably open to new ideas. The American Law Institute did well when in 1962 it entrusted to him the task of being Reporter for the new *Restatement of Contracts*.

The task of the original restater is difficult; that of those who, as Braucher did, undertake revision of existing Restatements borders on the impossible unless, as was largely true in the case of the Restatement (Second) of Conflict of Laws, the field has undergone a sea change. Williston faced in the first Restatement of Contracts the challenge of creating an intellectual structure adequate to contain and order his era's juristic thought and experience in the field of contract. Braucher and Farnsworth were denied the advantage of writing on a clean slate. Theoretically, beginning again from scratch might well have attracted them, but Reporters must work in an institutional context and tradition that imposes many constraints and denies many options. The American Law Institute is an institution with a diverse membership and a commitment to restating, rather than fundamentally reshaping, the law. It was perhaps particularly difficult to depart from the structure and solutions of the first Restatement of Contracts, for that "work was a legendary success, exercising enormous influence as an authoritative exposition of the subject."¹

The *Restatement Second* has not fundamentally changed the conceptual structure of American contract law. However, although the Reporters did not reconceptualize the field of contract, they modified the

¹ Wechsler, Foreword, RESTATEMENT (SECOND) OF CONTRACTS vii (1981).

intellectual premises and structure of the first *Restatement* in ways that are subtle and profoundly important. These modifications result both from the acceptance of black letter that departs significantly from the first *Restatement*² and from the provision of commentary that explains rules and principles in functional rather than dogmatic terms.

Robert Braucher began the delicate task of modernizing and reshaping the *Restatement* while maintaining the original's general framework. The task required not only great juristic ability but also diplomatic skill. Considering the restraints of tradition and of institutional structure within which they worked, one can only admire the extent to which Braucher and Farnsworth innovated and modernized.

As an Adviser, I had the privilege of participating in the Reporters' efforts to achieve change while maintaining continuity. It was often a fascinating and always an intellectually rewarding experience. But there were other satisfactions and memories that came from association with Robert Braucher. In the 1960's, when the Advisers met on occasion in Atlantic City, it was a joy to go swimming with the Reporter before our morning sessions. On another, more frigid occasion, a blizzard caught us in Philadelphia; Braucher and I walked that day through deep snow to enjoy an excellent lunch at a nearly empty Bookbinders. I shall never forget driving to or from an Adviser's meeting with the Reporter at the wheel showing both in skill and speed that he was still nostalgic for the life of a fighter pilot.

There are many other memories of Robert Braucher that will long remain with me: the fun that my wife and I had when we introduced the Brauchers to Rome. Our joint associations with Japan and our mutual Japanese friends. Our last time together, a couple of weeks before his death, when, despite his weakness he still had the intellectual quickness and curiosity that so characterized him. All this and much more remained vivid in memory. Had there been no *Restatement (Second) of Contracts*, I should never have come to know so well and so intimately a great jurist and a remarkable human being. It is no small satisfaction that the *Restatement* preserves for posterity a part of the intellectual heritage of a rare talent and a dear friend.

² Consider in this connection, for example, various provisions in the *Restatement Second* dealing with consideration, unconscionability, and damages.

SOME PREFATORY REMARKS: FROM RULES TO STANDARDS

E. Allan Farnsworth†

At the outset I wish to express my gratitude to the editors of the *Cornell Law Review* for marking the *Restatement Second's* publication with this Symposium. Surely all who participated in the making of the *Restatement Second* share this feeling. In the case of my distinguished predecessor, Justice Robert Braucher, this Symposium adds to that intellectual immortality to which every scholar aspires. Although neither religion nor mythology details the afterlife of Reporters, one hopes that they are not denied access to the law reviews.

If there is a common theme in the articles that follow, it is the difficulty in stating black-letter rules of contract law in the light of what Richard Speidel refers to as the "shift from rules to standards"¹—a shift inspired by the "realists"² and encouraged by the Uniform Commercial Code.³ John Murray writes that this shift requires "a careful recognition of Llewellynesque leeways,"⁴ and he endorses the Code's underlying philosophy of "the necessary pliability of rules."⁵

Robert Hillman also speaks of "the challenge of effective rule promulgation."⁶ In focusing on the *Restatement Second's* rules relating to contract modification, as exemplifying "the problems for drafters of rules,"⁷ he laments that they fail to reflect the shift from rules to standards—omitting what he sees as "the goals of contract modification law."⁸ Melvin Eisenberg explains that generally the course of contract law has involved movement from articulation of a principle through highly particularized rules to "an attempt to derive contract law through logical deduction from received axioms."⁹ Directing his attention to the *Restatement Second's* definition of consideration, he faults it for reflecting a

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¹ Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785, 786 (1982).

² *Id.* at 788.

³ *Id.* at 790.

⁴ Murray, *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 737 (1982).

⁵ *Id.*

⁶ Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680, 680 (1982).

⁷ *Id.*

⁸ *Id.*

⁹ Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982).

movement from the high ground of "general principle" to the low ground of "particularized rules."¹⁰ Robert Summers, on the other hand, in returning to the general requirement of good faith, concludes that there the *Restatement Second* solves the problem of "conceptualization"¹¹ in a way that is "superior . . . to its Uniform Commercial Code counterpart."¹² Furthermore, James White, in analyzing the much more specific rule on assurance of performance, suggests that the courts themselves may accomplish the shift to which Speidel refers.¹³ He finds that what is cast as a simple rule—an uncomplicated device with narrow procedures to be invoked formally—has been used by courts "as a tool for judicial modification of the law in the best common-law tradition,"¹⁴ a tool offering "enormous judicial discretion in its application."¹⁵

Tempting as it is to reply to each of the criticisms in this Symposium, I shall confine my comments to a few of the criticisms in the pieces by Burnett Harvey and Robert Hudec. These criticisms are directed at aspects of Chapter 16, Remedies, one of the chapters for which I was responsible as Reporter, and they raise questions regarding that chapter's use of standards couched in terms of "reliance" and "justice."¹⁶

Robert Hudec's criticisms begin with section 344, Purpose of Remedies, which states that the remedies with which the chapter is concerned serve to protect one or more of three interests of the promisee, designated as the "expectation," "reliance," and "restitution" interests.¹⁷ It defines the promisee's reliance interest as "his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made."¹⁸

Hudec rightly observes that section 344 "is meant to affirm Fuller and Perdue's general policy analysis" set out in their seminal article.¹⁹ He thinks that the *Restatement Second's* expansion of explicit reliance rem-

¹⁰ *Id.* at 642.

¹¹ Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 816 (1982).

¹² *Id.* at 825.

¹³ White, *Eight Cases and Section 251*, 67 CORNELL L. REV. 841, 843-44 (1982).

¹⁴ *Id.* at 844.

¹⁵ *Id.* at 859.

¹⁶ I shall not attempt to respond to their discussion of § 158 and § 272. See Harvey, *Discretionary Justice Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 666, 673 (1982); Hudec, *Restating the "Reliance Interest"*, 67 CORNELL L. REV. 704, 713-18 (1982).

¹⁷ In view of Hudec's observation that the reliance interest figures only occasionally in other sections, see Hudec, *supra* note 16, at 706, two comments are in order. First, the number of occasions on which *one* of the three interests figures in the black letter of the remedies chapter is by no means insignificant. Second, the reliance interest figures implicitly in a number of other sections, such as § 90. (Because the Institute generally discourages the re-opening of sections that have once been laid to rest, there was no occasion to consider whether § 90 should make reference to § 344, which was written over a decade later.)

¹⁸ RESTATEMENT (SECOND) OF CONTRACTS § 344 (1979).

¹⁹ *Id.* at 710.

edies will bring "difficult issues of application . . . into the open,"²⁰ and he hazards that "the role of the reliance interest . . . is to invite such development."²¹ Hudec leads the reader through a sophisticated analysis of the possible consequences of this experiment, coming generally to sound conclusions, and yet he fears that courts will reach misguided results. This fear seems to me to be exaggerated.

He finds section 344 "a most curious black-letter proposition," in that it "states no rule."²² Yet he fears that the section's "identification of a separate reliance interest, parallel to and of equal rank with interests of expectancy and restitution,"²³ may have implicit in it the notion of an entitlement to damages based on the reliance interest comparable to the traditional entitlements based on the concepts of expectation and restitution. Hudec's first instinct was the right one: Section 344 "states no rule," and it was not meant to be read as implying a general right to damages based on reliance.²⁴

Hudec's concern that a rule lies concealed in section 344 carries over into his reading of section 349. That section gives the injured party, as an alternative to damages based on his expectation, "a right to damages based on his reliance interest . . . less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." He correctly points out that under this section, "reliance damages should not knowingly exceed the amount that would have been recovered if the promise had been performed."²⁵ In other words, the injured party's expectation, if proved, operates as a ceiling on his recovery. After he reaches this sensible conclusion, however, his fears as to section 344 lead him to speculate that because *section 344* "includes all reliance on the contract, even reliance that exceeds the value of the expectancy,"²⁶ a reader of the *Restatement Second* would be justified in ignoring the clear language of *section 349*, language with which Hudec himself had no difficulty.

This concern surfaces again when Hudec discusses an excerpt from the commentary to section 349, which states that "recovery for expenditures under the rule stated in this section may not exceed the full contract price."²⁷ He rightly observes that if "contract price" is used in its usual sense, "the quoted passage would be a correct statement of the expectancy ceiling for [what Hudec calls] direct reliance expenditures," but not "a correct statement of the expectancy ceiling for [what Hudec

20 *Id.* at 734.

21 *Id.*

22 *Id.* at 707.

23 *Id.* at 709.

24 *Id.* at 707.

25 *Id.* at 711.

26 *Id.*

27 *Id.* at 728 (quoting Restatement (Second) of Contracts § 349, Comment a (1979)).

calls] 'consequential reliance expenditures.'"²⁸ He fails to observe, however, that the statement quoted from the commentary appears in the context of a simple example that does not involve what Hudec calls consequential reliance. The commentary, after discussing the case in which "the injured party was to supply services such as erecting a building," goes on to say that "the injured party may, if he chooses, ignore the element of profit and recover as damages his expenditures in reliance," but cautions that "recovery for expenditures under the rule stated in the section may not exceed the full contract price."²⁹ Taken in its context, this is an entirely proper reference to the contract price as a limit in connection with what Hudec calls direct reliance expenditures—a limit with which Hudec has no quarrel.

The message that comes through to me from Hudec's article is that while he sees some risks in the *Restatement Second's* elevation of the reliance interest to black letter, those risks need not materialize given a reasonable reading of black letter and commentary. In this context, the shift to black letter seems justified.

Burnett Harvey's criticisms are directed primarily at section 351(3). That subsection states that a court "may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."³⁰ This was intended as what might be called an "unfettering" provision. By it the American Law Institute said in effect: "Most courts have in the past dealt with this problem covertly by ostensibly applying the requirements of foreseeability and certainty; we believe that enlightened courts will in the future face the problem openly as one of disproportionate compensation."

Although Harvey describes this as "an innovation lacking any antecedent in the first *Restatement*,"³¹ and believes that it "could sanction results that would be startling indeed,"³² he seems to see merit in the "*raison d'être*" of section 351(3): curbing "manipulation of the foreseeability test" and "encouraging judicial candor."³³ If this is so, his quarrel with section 351(3) is limited to the way in which it is drafted and particularly to its lack of specificity in two respects.

First, he regrets "the indeterminacy of the range of adjustments authorized by section 351(3)."³⁴ He is particularly critical of section 351(3) for not indicating that a court may limit damages by excluding

28 *Id.*

29 RESTATEMENT (SECOND) OF CONTRACTS § 349, Comment a (1979).

30 *Id.* § 351(3).

31 Harvey, *supra* note 16, at 667.

32 *Id.* at 669.

33 *Id.* at 671.

34 *Id.* at 674.

loss incurred in incidental reliance while allowing loss incurred in essential reliance. Second, he objects to reliance on the the formula "if . . . justice so requires in order to avoid disproportionate compensation" and thinks that it would have been better "to identify and mention the other factors that may give content to the requirements of justice."³⁵

If he is arguing that these two matters should have been dealt with by expanding the black letter, I disagree. To introduce into the black letter the possibility of allowing recovery for essential but not incidental reliance would raise the difficult problem of attempting to define these two kinds of reliance.³⁶ I think that the words "or otherwise" make it sufficiently plain that the examples preceding those words are not an exhaustive list. To add a list of factors to which a court might resort in determining what justice requires seems to me equally undesirable given that the very purpose of such an unfettering section is to invite courts to generate, on a case by case basis, the criteria that have not developed because of the use of covert techniques.

To add to the commentary would have been a less serious matter. But to add what? Harvey makes a good start:

the degree of the defendant's fault; suspicion that the plaintiff's loss could have been avoided if he had exercised reasonable care; the extent to which the context in which the contract was made provided an opportunity for bargaining and the inclusion of a provision excluding responsibility for certain kinds of loss; and judicial preference for the protection of capital values over the protection of income, profits or opportunities.³⁷

He recoils from proposing this as *his* definitive list, however, saying that "careful analysis of the cases might result in the elimination of some of these factors or the addition of others."³⁸ Nevertheless, he concludes that without some list such as this one, the use of a standard couched in terms of "justice" in section 351(3) "portends the impairment of much of the law of contract damages that has been patiently developed over

³⁵ *Id.* at 677.

³⁶ Hudec's extensive discussion of the meaning of essential and incidental reliance illustrates this difficulty. See Hudec, *supra* note 16, at 723-28. The *Restatement Second's* only reference to these terms is a tentative one, to the effect that preparation for performance or actual performance "is sometimes called 'essential reliance,'" while preparation for collateral transactions "is sometimes called 'incidental reliance.'" The purpose of this was not to distinguish between the two, but merely to indicate that reliance was not to be excluded from consideration under § 349 merely because it might be designated as "incidental."

³⁷ Harvey, *supra* note 16, at 677-78 (footnotes omitted).

³⁸ *Id.* A quite different list of factors has been suggested by another of the contributors to this Symposium. See Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 798 (1982) ("Damages for breach by a consumer of an executory contract to purchase relatively homogeneous services or goods should normally be measured by a replacement-price or cancellation-charge formula, even though such a rule places another limit on the fullest reach of the bargain principle." (emphasis added)).

the past century or so.”³⁹

Even granting Harvey’s premise—that it would have been desirable to include, at least in the commentary, a list of factors such as the one he gives—his conclusion seems too severe. Section 351(3) does not invite a court to do something unprecedented; it only invites it to do openly what it would otherwise do covertly.⁴⁰ To assume, as I do, that a court could make judicious use of such encouragement, even if couched in terms of a standard of what “justice . . . requires in order to avoid disproportionate compensation,” is not, I hope, to repose too much confidence in judicial discretion.

Having begun with a note of gratitude, let me close with a note of regret. Valuable as the thoughts in this Symposium are at this time, how much more useful they would have been had they been expressed in time to have been taken into account while the *Restatement Second* was being prepared. If the questions raised by Harvey and Hudec, for example, could have been better dealt with in the Comments, how helpful it would have been to the Reporter if they had been raised in time to have been considered while the Comments were still subject to revision.⁴¹ Although I can speak only for my own experience, a Reporter is not inundated with suggestions for substantive improvement during the several months between the publication of the tentative draft and the following annual meeting of the Institute’s membership, the time when such suggestions have their greatest impact.⁴² More widespread participation in the process of restating could not but improve the final product.⁴³ And even with such improvement, scholarly writers looking forward to taking aim at that product would scarcely have to fear that it would be so flawless as to eliminate the occasion for symposia such as this one.

³⁹ Harvey, *supra* note 16, at 679.

⁴⁰ It may be worth noting here that judicial discretion such as that which § 351(3) encourages is in the direction of *limiting* damages, a discretion that a court already has to a considerable extent under the well-accepted limitations of certainty and foreseeability.

⁴¹ After a draft has been approved by the Council and made available as a tentative draft, it is considerably easier for the Reporter to change commentary than black letter.

⁴² Forms inviting suggestions are included in the tentative drafts. Suggestions may of course be made by persons who are not members of the Institute and, indeed, nonmembers may speak but not vote at the annual meeting. Although there may be less drama in making a suggestion in writing than in taking the floor at the annual meeting, it was my experience that written suggestions were more effective—and, in any case, the two are not mutually exclusive.

⁴³ One reason that the sections discussed by Harvey and Hudec did not get more attention was that those who made suggestions paid little attention to the language of the sections themselves, but instead concentrated on attempting to extirpate the references to economics from the Introduction and the adequacy test from the sections on specific performance and injunctions.