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# DISCRETIONARY JUSTICE UNDER THE RESTATEMENT (SECOND) OF CONTRACTS

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A striking feature of the Restatement (Second) of Contracts is its frequent resort in black-letter formulations to the standard of "justice." In some instances the standard is stated affirmatively—"as justice requires"—while in others the approach is negative—"to avoid injustice." Yet nothing of consequence appears to depend on this linguistic choice, although intriguing philosophical issues might be implicated by the divergent forms of the justice mandate.<sup>1</sup>

Those familiar with the semantics of the first *Restatement* will recognize that the drafters of the *Restatement Second* did not coin the critical phrases that make outcomes highly discretionary and dependent on a court's perception of the demands of justice. The most familiar resort to such discretion appeared in the first *Restatement* in section 90, which called for enforcement of promises that have induced substantial and foreseeable reliance "if injustice can be avoided only by enforcement."<sup>2</sup> Three other sections accorded similar discretion.<sup>3</sup>

By contrast, a hasty and not necessarily exhaustive review of the *Restatement Second* reveals nineteen sections in which the articulated norm includes either the requirements of justice or the avoidance of injustice. Such raw statistics must be discounted, however, in assessing the extent to which the recent restaters have augmented judicial discretion through a standard of justice. Four of the new sections merely track substantially similar provisions of the first *Restatement*.<sup>4</sup> More important,

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<sup>1</sup> See E. CAHN, *CONFRONTING INJUSTICE* 5-14 (1966).

<sup>2</sup> *RESTATEMENT OF CONTRACTS* § 90 (1932).

<sup>3</sup> *Restatement* § 337 provided for the recovery of interest as damages for breach of certain kinds of contracts "in the discretion of the court, if justice requires it." Section 354 authorized a court in listed circumstances to decree, "on such terms as justice may require," specific restitution of land, goods, and choses in action. Section 359 restated the traditional equity view that the shaping of a decree for specific performance rests in the discretion of the court and that the decree "may be granted on such terms and conditions as justice requires." Some other sections, such as § 387, refer to what is "just" but limit the open texture of the standard by reference to specific factors that are to be taken into account.

<sup>4</sup> Section 90, stating the doctrine of promissory estoppel, appears in both Restatements, but the *Restatement Second* adds an important provision to make clear that both the basic liability question and the nature of the available remedies are subject to the requirements of justice. The other counterpart provisions are *Restatement* § 337 (interest as damages) (now covered by *Restatement Second* § 354), *Restatement* § 354 (specific restitution) (now reformulated

however, the promissory estoppel doctrine, which found expression only in section 90 of the first *Restatement*, now appears in ten different sections of the *Restatement Second*.<sup>5</sup> We are left with five new sections<sup>6</sup> in which the felt imperatives of justice provide the crux of the legal norm.

This essay is concerned with only a small sector of the broad terrain ceded by the *Restatement Second* to discretionary justice. The focus will be on section 351—entitled, somewhat obscurely, “Unforeseeability and Related Limitations on Damages”:

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the ordinary course of events or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

(3) 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.<sup>7</sup>

Subsections (1) and (2) stake out familiar territory and require little comment. My concern is with subsection (3), an innovation lacking any antecedent in the first *Restatement*. I will consider first its meaning, purpose, and remedial consequences. Thereafter, I will ask whether it is broad enough, as framed, to serve the purpose offered as its justification. Finally, in searching for some determinate content of the justice standard, I will consider whether its use in section 351(3) is appropriate.

Subsection (3) obviously is not directed merely toward refinement or limitation of the foreseeability requirement laid down in subsections (1) and (2): It assumes that requirement has been met and imposes *cumulatively* another limitation. In beginning the inquiry into the meaning of the new limitation one might note its placement in a section initially devoted to the foreseeability requirement, the reference to that requirement in subsection (3) itself, and the prominence of the remedial option of excluding the recovery of “profits.” All these factors combine to suggest that the new limitation affects only claims for special or consequential damages and, even more narrowly, claims for “profits” as that term is conventionally used in cases applying the foreseeability test. Indeed, discussions of section 351(3) in the Institute gave little indication

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in *Restatement Second* in § 372), and *Restatement* § 359 (discretionary shaping of a decree for specific performance) (now contained in *Restatement Second* § 358).

<sup>5</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 84, 86, 87, 89, 90, 94, 129, 139, 150 & 332 (1979).

<sup>6</sup> *Id.* §§ 15, 158, 272, 351 & 371.

<sup>7</sup> *Id.* § 351.

that participants contemplated more than this narrow interpretation.<sup>8</sup> Two of the three Illustrations of section 351(3) involve the exclusion from recovery of profits in the narrow sense,<sup>9</sup> and some scholarly comment has referred to the section as a "limitation on consequential damages."<sup>10</sup> The cases cited in the Reporter's Note as providing support for subsection (3) involved typical business profits.

Nevertheless, analysis of section 351(3) casts doubts on these first impressions and strongly suggests not that the discretion conferred relates merely to consequential damages, but that the full expectation interest is subject to discretionary exclusion. Let us start with a wider view of Restatement systematics in the treatment of remedies. *Restatement Second* sections 350 to 352 present the three basic limitations on damage recovery: avoidability, unforeseeability, and uncertainty. To the unforeseeability limitation, as has been noted, is appended the critical justice-based limitation on recovery, under the opaque title "Unforeseeability and Related Limitations on Damages." Although the term "Related" may suggest that section 351(3) presents only a subordinate qualification to the foreseeability test, evidence exists that a grander, or more general, status was contemplated for it. Reporter Farnsworth explained to the Institute that, "having a somewhat grandiose idea"<sup>11</sup> about the discretionary limitation, he originally had placed it as the first subsection of section 367, which limits damages for emotional distress, but that on the urging of the Council he had moved it to a "less prominent position."<sup>12</sup> The proffered justifications for this change were the limited case authority for the limitation and that relevant discussion in treatises and texts appeared "in connection with *Hadley v. Baxendale*."<sup>13</sup> It seems certain, however, that Professor Farnsworth continued to believe that section 351(3) stated an over-arching limitation beyond foreseeability, and that it meant that "if the court thought it was right, it need not give the full expectation measure."<sup>14</sup>

A careful parsing of the language of section 351(3) sustains the conclusion that the discretion recognized is indeed as broad as Professor Farnsworth suggested. If discretionary adjustment is to be made, the court's remedial options under section 351(3) are threefold: (1) exclude the recovery of profits, that is, isolate this particular part of the expect-

<sup>8</sup> See 56 ALI PROCEEDINGS 336-49 (1979).

<sup>9</sup> RESTATEMENT (SECOND) OF CONTRACTS § 351, Illustrations 17 & 18 (1979). Illustration 19, based on the well-known case of *Sullivan v. O'Connor*, 363 Mass. 579, 296 N.E.2d 183 (1973) (plastic surgery on entertainer's nose disfigures face), does not involve business profits in the conventional sense, and the decision excluded any recovery other than reliance losses.

<sup>10</sup> Young, *Half Measures*, 81 COLUM. L. REV. 19, 25 (1981).

<sup>11</sup> 56 ALI PROCEEDINGS 338 (1979).

<sup>12</sup> *Id.* at 339.

<sup>13</sup> *Id.* at 338-39.

<sup>14</sup> *Id.* at 338.

tancy interest and refuse to protect it; (2) limit recovery to the protection of reliance, that is, exclude all protection of expectancy; (3) "or otherwise" limit damages.

So expanded in reach, discretionary justice under section 351(3) could sanction results that would be startling indeed. General damages, usually calculated on market-based formulae, are clearly at the core of the expectation interest, although they are rarely, if ever, denominated "profits" or discussed explicitly in terms of the foreseeability requirement. We need only a little imagination to visualize a case in which such damages might become so inflated by price shifts in a volatile market that a court, if it believed it had discretion, might conclude that "justice" required some limitation on recovery. If the "right" to expectation protection is properly subject to a discretionary limitation, even though the loss involved was foreseeable, then barring that discretion where the loss is foreseeable because it occurs in the ordinary course of events, but permitting discretion where the loss is foreseeable because of known special circumstances, is a result difficult to justify.<sup>15</sup>

If the adjustment of the damage remedy in section 351(3) can extend to the full exclusion of expectation recovery, we need to ask whether other interests implicated in contract remedies can be similarly affected. This question shifts our focus to reliance and restitution. We can put aside the restitution interest for the moment because it almost invariably arises from a part performance that is highly foreseeable, rarely presents serious problems of uncertainty, and most important, involves a benefit conferred on the wrongdoer. I will assume, therefore, that full protection of the restitution interest is almost definitionally incapable of inviting a justice-based limitation. Is this also true of reliance losses?

Comparison of the two Restatements on protection of the reliance interest is instructive. Because the first *Restatement* was prepared before the publication of Fuller's classic essay,<sup>16</sup> its drafting was not influenced by the *Interessenjurisprudenz* that he developed. Still, the damage remedy contemplated by the first *Restatement* embraced at least limited protection of the reliance interest. As Fuller's analysis stressed, however, protected reliance was limited to actions "in performance of the contract or in necessary preparation therefor."<sup>17</sup> Furthermore, the contract price set a ceiling on such reliance recovery. Preparatory expenses were not recoverable "unless they [could] fairly be regarded as part of the cost of

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<sup>15</sup> Professor Young, although referring to § 351(3) as a "limitation on consequential damages," deals with "some sale-of-goods cases" in which it might "seem equitable to fix the recovery at half the difference between the market value of the goods and the contract price." Young, *supra* note 10, at 28. This is not to suggest that Professor Young emerges as a proponent of such discretionary "half measures," but only to illustrate the reach of § 351(3).

<sup>16</sup> Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52 (1936).

<sup>17</sup> *Id.* at 89-96.

performance in estimating profit and loss." Any part of the contract price already received and the value of any necessary materials still on hand were to be deducted from the recovery, and the defendant, by proving that the plaintiff would have experienced a net loss through full performance, could compel the deduction of that loss from the amount of the reliance proved.<sup>18</sup> The aim was to ensure that the damage remedy would not leave the plaintiff in a better position than would have resulted from full performance by both parties. This carefully restricted definition of the reliance interest rejected compensation for what Fuller called "incidental reliance."

Although the courts have not adopted Fuller's terminology, numerous cases decided before and after the appearance of his analysis certainly have protected incidental reliance.<sup>19</sup> Responding to Fuller's criticism of the first *Restatement* and to those decisions, the *Restatement Second* expressly expands the concept of protected reliance to include that which is incidental.<sup>20</sup> The earlier restrictions on protecting this expanded reliance interest have been retained, however.<sup>21</sup>

The *Restatement Second's* Illustration of protected incidental reliance clarifies the concept and delimits the scope of this protected interest:

A contracts to sell his retail store to B. After B has spent \$100,000 for inventory, A repudiates the contract and B sells the inventory for \$60,000. If neither party proves with reasonable certainty what profit or loss B would have made if the contract had been performed, B can recover as damages the \$40,000 loss that he sustained on the sale of the inventory.<sup>22</sup>

B's reliance in this case is "incidental" because in acquiring the inventory he was in no direct sense performing, or preparing to perform, his contract obligation to buy the store. The Illustration itself clearly indi-

<sup>18</sup> RESTATEMENT OF CONTRACTS § 333 (1932).

<sup>19</sup> Fuller & Perdue, *supra* note 16, at 91-93, collects many cases. More recent cases include *Applied Data Processing, Inc. v. Burroughs Corp.*, 394 F. Supp. 504 (D. Conn. 1975); *C.C. Hauff Hardware, Inc. v. Long Mfg. Co.*, 260 Iowa 309, 148 N.W.2d 425 (1967); *Dialist Co. v. Pulford*, 42 Md. App. 173, 399 A.2d 1374 (1979).

<sup>20</sup> RESTATEMENT (SECOND) OF CONTRACTS § 349 (1979). While the black-letter rule refers specifically to "expenditures made in preparation for performance or in performance," *id.*, Comment a says that the protected reliance interest may "consist of preparation for collateral transactions that a party plans to carry out when the contract in question is performed, and this is sometimes called 'incidental' reliance." *Id.*, Comment a.

<sup>21</sup> RESTATEMENT (SECOND) OF CONTRACTS § 349; *id.*, Comment a (1979). The black-letter rule retains only the privilege of the breacher to prove, and have deducted from the reliance expense, a net loss that the aggrieved party would have suffered through full performance; the other restrictions appear in Comment a. Fuller insisted that although the contract price was a proper ceiling on essential reliance, it should not so confine recovery for incidental reliance. Fuller & Perdue, *supra* note 16, at 75-80. Although *Restatement Second* § 349 expands protected reliance to include the incidental, it rejects Fuller's distinction and insists, in Comment a, that "recovery for expenditures under the rule stated in this section may not exceed the full contract price."

<sup>22</sup> RESTATEMENT (SECOND) OF CONTRACTS § 394, Illustration 4 (1979).

cates that the term "incidental" cannot be equated with "minor" or "trivial." To the incidental loss of \$40,000 in the Illustration might be added other substantial losses in readily imagined cases, for example, if B had spent \$50,000 on an advertising campaign and spent or committed another \$50,000 for the wages of employees he no longer needs by reason of A's breach.

The protection of reliance is subject, of course, to all of the basic limitations on the damage remedy. The foreseeability requirement applies<sup>23</sup> and may enable courts, if they continue to administer the requirement with the flexibility easily detected in their decisions,<sup>24</sup> to reject large claims grounded on incidental reliance. Section 351(3) finds its *raison d'être* in curbing such flexibility, however, when it is achieved through manipulation of the foreseeability test.<sup>25</sup> Much can be said for compelling or at least encouraging judicial candor. So if courts often have imposed a justice-based limitation on truly foreseeable losses under the pretense that they were merely applying the foreseeability requirement, one might applaud the effort of section 351(3) to provide a doctrinal warrant for courts, doing openly what in the past they had to do covertly. No obvious justification exists, however, for encouraging candor where the justice-based limitation is imposed on expectancy damages, while continuing to rely on manipulation of the foreseeability test where the damage claim involves a reliance interest.

To what extent, if at all, does the discretionary justice authorized by section 351(3) apply to reliance-based damage claims? In the deliberations of the Institute, Professor Reitz explicitly raised this matter, pointing out that "the size of incidental reliance can approach if not exceed lost profits," and asking whether it would be appropriate to expand the section 351(3) principle to embrace incidental reliance claims.<sup>26</sup> The Reporter's curious response to this suggestion merits full quotation:

I think I would be a little reluctant to do that. We are on fairly thin ice. It seems to me that where there is a distinction between incidental and essential reliance, one would certainly read the words "or otherwise" in Subsection (3) as permitting a court to distinguish between those two situations if it found it appropriate to do so. My difficulty in making the suggestion in the Comments is that I don't

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<sup>23</sup> *Restatement Second* § 351(1) and (2) imposes the foreseeability requirement on damages, without distinction among the interests defined in § 344, and Comment a stresses that "[a]lthough the recovery that is precluded by the limitation of foreseeability is usually based on the expectation interest and takes the form of lost profits . . . , the limitation may also preclude recovery based on the reliance interest. . . ." *Id.* § 351, Comment a.

<sup>24</sup> For discussions of this flexibility and the techniques through which it achieved, see D. DOBBS, *HANDBOOK OF THE LAW OF REMEDIES* 803-17 (1973); W. McCORMICK, *DAMAGES* 571-75 (1935).

<sup>25</sup> 56 ALI *PROCEEDINGS* 337-38 (1979).

<sup>26</sup> *Id.* at 339.

recall any case in which a court has thought it appropriate to do so—that is to say, there was both essential and incidental reliance in this case—and we are going to let you recover for the one but not for the other.<sup>27</sup>

In the light of this response, how should one expect discretionary adjustment of the damage remedy under section 351(3) to impinge on reliance-based recoveries? One of the listed remedial options is to exclude any protection of expectation and to ground damage measurement exclusively on reliance. Discretionary adjustment of reliance damages or discrimination between essential and incidental reliance, however, if undertaken at all, is shrouded by the seemingly unlimited range of remedial choice spanned by the phrase “or otherwise.” If the choices that the phrase provides the court are as open-ended as they appear to be, why were the first two remedial choices specified at all? That is, would the meaning of section 351(3) have been different if it had declared, more simply and directly: “A court may limit damages for foreseeable loss in any way that in the circumstances justice requires . . .”? Finally, the assigned reason for rejecting Professor Reitz’s suggestion of an explicit discrimination between essential and incidental reliance—lack of supporting authority—makes the apparent concession that the discrimination might be made under the “or otherwise” phrase appear peculiarly disingenuous.

The refusal to subject reliance-based damages to explicit discretionary adjustment under section 351(3) stands in sharp contrast to the treatment of reliance recoveries under other sections. We need not linger over the *Restatement Second*’s various applications of promissory estoppel. It suffices to point out that all of these formulations invoke the standard of justice to identify enforceable obligations *and to guide the shaping of an appropriate remedy*. Furthermore, it is familiar to the point of triteness that in working out the remedial consequences of a discharge based on mistake, impracticability or impossibility, and frustration, courts often provide the protection of nonbenefit-conferring reliance in a restitutionary action.<sup>28</sup> The *Restatement Second* does not support granting such relief on a restitution theory; the restitution remedy is carefully limited to instances in which a benefit has been conferred.<sup>29</sup> Coupled with this attempted purification of the grounds for restitution, however, appears one of the striking innovations of the *Restatement Second*—an entitlement to the protection of reliance that confers no benefit against an innocent party whose liability cannot be explained as damages.

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<sup>27</sup> *Id.* at 339-40.

<sup>28</sup> As illustrative cases, see *Kearns v. Andree*, 107 Conn. 181, 139 A. 695 (1928); *Angus v. Scully*, 176 Mass. 357, 57 N.E. 674 (1900).

<sup>29</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 370 & 371 (1979); see Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37, 38-43 (1981).

Sections 158 and 272 provide that where contract obligation is discharged because of mistake, impracticability, or frustration, relief may be provided in highly flexible, discretionary ways: by severing the agreement into pairs of equivalent performances; by granting restitution for benefits conferred; or by protecting the reliance interests of the parties even where the reliance has conferred no benefit.<sup>30</sup> In authorizing the protection of reliance in an action that cannot be conceived as either contract enforcement (damages) or quasi-contract (restitution), the familiar semantic formulation appears: such relief will be granted where the ordinary rules and doctrines will not avoid injustice and the court is moved to relieve on such terms as justice requires.<sup>31</sup> Neither the Comments nor the Illustrations explicitly discriminate between essential and incidental reliance, but all reliance protection under this new and still unclassified theory of liability is subject to discretionary adjustment under a justice-based standard.

The making of finely-tuned, justice-based discriminations in granting reliance protection under the circumstances embraced by sections 158 and 272 may be rationalized on the ground that the obligor is not a wrongdoer, and one may distinguish the circumstances involved in section 351(3) on the ground that a breacher is not entitled to such protection. Arguably, even a wrongdoer is entitled to a safeguard against overextended promissory risk where the safeguard screens out only some expectancy protection, though such a safeguard might not be warranted where the claimant's interest is the more appealing and philosophically more compelling reliance interest.<sup>32</sup> If such a rationale underlies the drafter's reluctance to authorize explicitly in section 351(3) different treatment of different types of reliance, it escaped articulation in either the informal discussions within the Institute or the Comments.

In the main, we have come to live comfortably with the basic choice of our law of contracts not to extend damage liability along the full length of the causal chain running from a breach. Denial of recovery on the ground that the loss was avoidable is probably easiest to justify because of the intimate connection of the mitigation principle with ideas about causation.<sup>33</sup> The limitation of recovery to losses that can be

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<sup>30</sup> See RESTATEMENT (SECOND) OF CONTRACTS §§ 158 & 272 (1979).

<sup>31</sup> *Id.* §§ 158(2) & 272(2).

<sup>32</sup> See Fuller & Perdue, *supra* note 16, at 56-57.

<sup>33</sup> Judge Cardozo observed that

[w]hat is meant by the duty [of a wrongfully discharged employee to mitigate damages by taking other employment] is merely this, that if he unreasonably reject, he will not be heard to say that the loss of wages from then on shall be deemed the jural consequence of the earlier discharge. He has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act.

McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 359, 169 N.E. 605, 609 (1930) (Cardozo, C.J., concurring).

proved with reasonable certainty finds justification in the primary objective of the damage remedy—to compensate for the loss of, but not knowingly improve upon, the claimant's full-performance position. Most difficult to justify philosophically is the foreseeability requirement, with the artificiality that attends its application in many circumstances. In view of the problematic nature of its basic justification, its common inadequacy as a shield from claims that are easy to view as excessive, and its manipulability in the more invidious sense of that term, the foreseeability requirement appears to be a prime candidate for replacement, refinement, extension, or supplementation. Whether the *Restatement Second's* response is appropriate, however, or even the best that could be devised at this time, remains an open question.

Thus far, the indeterminacy of the range of adjustments authorized by section 351(3) has been stressed. Remaining for consideration is an even more basic question: When, or in what circumstances, is a court entitled to move at all into that range? The simple answer to that question—when the court concludes that justice so requires—must be refined and extended as much as possible in an effort to give the justice standard a more determinate content.

On initial presentation to the Institute in 1979, section 351(3) was more open-textured than the final version. It offered only a court's perception of the requirements of justice as the basis for an overriding limitation on recovery for foreseeable losses.<sup>34</sup> Not surprisingly, a number of participants in the Institute's discussions expressed concern over the obvious compromise of the value of predictability imposed by a justice-based limit on damage recovery. Such expressions tended to elicit a standard response—that such a semantic formula had been incorporated earlier in many other sections, section 90 being most often mentioned, and had become familiar “restatementese.”<sup>35</sup> It is difficult to avoid the feeling that less reliance on semantic habit and more consideration of different needs and purposes in differing contexts might have been useful. This is not the place to undertake such an effort, but consideration of the function of the justice standard in section 90 may provide a needed caution against the unexamined transfer of a verbal

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<sup>34</sup> The version of § 365, printed in Tentative Draft No. 14, is as follows. The bracketed portions were deleted and the underlined words were inserted by the Reporter when he brought the subsection up for discussion:

(3) [Even if the party in breach had reason to foresee the loss as a probable result of his breach when the contract was made, 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.

RESTATEMENT (SECOND) OF CONTRACTS § 365 (Tent. Draft No. 14, 1979) (emphasis added); see 56 ALI PROCEEDINGS 337 (1979).

<sup>35</sup> 56 ALI PROCEEDINGS at 338, 348-49.

formula from one problem context—and *Restatement* section—to another.

Section 90 of the first *Restatement* set out several objective components of the promissory estoppel doctrine and a final, supplementary standard of avoidance-of-injustice. What role was the justice-based standard intended to play and what content has it acquired? Professor Williston probably accorded it the sole function of cautioning against any enforcement of the promise if restitutionary relief in quasi-contract would be adequate.<sup>36</sup> In judicial statements of the doctrine, the avoidance of injustice frequently is stated as a separate test, but in application the primary focus has usually been on the factual components: foreseeable and reasonable reliance of a substantial kind induced by a promise. The import of the decisions is that if the factual showing has been made, the necessity of enforcement to avoid injustice is merely the resultant conclusion, embracing perhaps more judicial review than that typical of fact determinations and, possibly, some flexibility in devising a remedy short of full protection of expectancy.<sup>37</sup>

In the *Restatement Second's* expanded version of section 90, the justice-based test is restated in a new final sentence to subsection (1): "The remedy granted for breach may be limited as justice requires." Is there warrant for ascribing to this provision any larger purpose than to inter finally the legacy of Willistonian conceptualism, which led to an insistence that if a promise is to be enforced on any ground—formality, bargain exchange, or reliance—the same remedial consequences must follow: full enforcement?<sup>38</sup> The drafters of the new section 90 wanted to assure remedial flexibility under a grant of discretion to protect expectancy, reliance, or restitution interests, as seemed appropriate. Insistence that, in a bargain exchange, losses from breach that satisfy general

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<sup>36</sup> See 4 ALI PROCEEDINGS 91, 103-04 (1926).

<sup>37</sup> See, e.g., *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), in which the court declared that promissory estoppel rested on fact determinations by a jury and a policy decision by the court that liability was essential to avoid injustice. The court concluded that injustice would result if plaintiffs were denied relief. It gave no indication, however, that on the basic liability issue, the justice standard depended on anything other than the court's reaction to the objective facts found by the jury. The court regarded the justice standard as authorizing discretion in shaping an appropriate remedy. If the justice standard is accorded any identifiable role in establishing liability grounded on promissory estoppel, therefore, that role is either or both of the following: (1) authorizing the court to oversee, i.e., second-guess, jury determinations on essentially factually issues, and (2) permitting a remedial flexibility not available where the ground for enforcing a promise is either formality or bargain consideration. For another illustration of the misleading character of a court's listing of the injustice-avoidance test as part of the grounds for promissory estoppel liability, see *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967). Although the court there declared that justice did not require invocation of the doctrine of promissory estoppel, it held the complaint demurrable because the defendant had fully performed its promise. See generally Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 482-94 (1950).

<sup>38</sup> See 4 ALI PROCEEDINGS 103-04 (1926).

requirements of contract damages should be left uncompensated if a court's undefined and unconfined sense of justice so dictated would appear to be a long step beyond this limited purpose of the justice-based test in section 90. Yet the drafters offered little justification for the long step; it was made to appear that the issue with respect to the justice criterion in section 351(3) was indistinguishable, in purpose or content, from that in section 90, and that the earlier acceptance of that standard conferred a general benison on the resort to discretionary justice.

Without expressly challenging this claim of transferability, numerous participants in Institute discussions questioned the grant of open-ended discretion in section 351(3), as it was originally presented. Alternative approaches were suggested, and these deserve brief mention.

(1) *Tacit agreement*—The alternative to section 351(3) first proposed did not seek to innovate, but rather to return to a once-popular but now largely discredited limitation on recoverable damages: a requirement that a loss be not merely foreseeable but also one for which the promisor, at least tacitly, had agreed to be responsible. Supported by the authority of Holmes and accepted by the federal courts,<sup>39</sup> the tacit agreement test, although never able to replace the more lenient foreseeability standard of *Hadley v. Baxendale*,<sup>40</sup> was often invoked to restrict promissory liability. Although traces remain, it is not widely accepted today and the *Restatement Second* explicitly rejects it.<sup>41</sup> Not surprisingly, therefore, the proposal that the discretionary limitation of section 351(3) be replaced by a tacit agreement requirement encountered resistance. Its major proponent withdrew his motion to substitute it; thus, no vote is available to reflect even roughly the support it might have enjoyed.<sup>42</sup>

The conventional arguments against the tacit agreement test are familiar and need no repetition. Its fictional underpinning becomes clear if one reflects on the probable infrequency of contracting parties' considering or having any intention with respect to the remedial consequences of a breach. To seek and give effect, not to a generalized agreement to be responsible for certain kinds of loss, but rather to an express or implied agreement that some losses are not to be within the range of the promisor's responsibility, might appear more realistic.<sup>43</sup> But in the probable absence of any clear indication of an intention to include such an exclusionary term in the contract, what factors would support its implication? If some reliable catalog of such factors could be developed, would not direct reliance on them to guide the judicial limitation of

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<sup>39</sup> *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903).

<sup>40</sup> 9 Ex. 341, 156 Eng. Rep. 145 (1854).

<sup>41</sup> See *RESTATEMENT (SECOND) OF CONTRACTS* § 351, Comment a (1979).

<sup>42</sup> See 56 ALI PROCEEDINGS 340-43 (1979).

<sup>43</sup> For use of this approach in another context, see *Restatement Second* § 21, which rejects any necessity to find an intention that a promise be legally binding but gives effect to a manifested intention that a promise shall not affect legal relations.

recoverable damages, rather than an attempt to root the limitation in a fictional intention, be more sensible?<sup>44</sup>

(2) *The test of disproportion*—The yearning for a determinate content to limitations on the damage remedy soon focused Institute discussions on the factor of disproportion between the damage claim asserted and the value received by the breacher in exchange for his promise. Appreciation of the significance of this factor is longstanding. Scholars have frequently included such disproportion among the factors influencing courts in manipulating the standard foreseeability test.<sup>45</sup> Little persuasion was required, therefore, to move the Reporter to introduce into the black-letter rule of section 351(3) the disproportion between value received and liability asserted.<sup>46</sup> As finally formulated, the language postulates a justice standard “in order to avoid disproportionate compensation.” This coupling of a stated purpose to the making of a discretionary adjustment seems to suggest that a court must find that the claim involves “disproportionate compensation”; that is, disproportion is a *necessary condition* to a justice-based limitation on damages.

The question remains whether disproportion is not only a necessary but a *sufficient* condition. If it is, did the drafters need a justice-based criterion at all? What would have been sacrificed if the concluding conditional clause of section 351(3) had been framed in these terms: “. . . if it concludes that in the circumstances the compensation sought would be disproportionate to the price received by the promisor”? If the answer is that no sacrifice would result, then the reference to the requirement of justice appears to be potentially harmful surplusage. If substantive sacrifice is asserted, however, one must then ask: is it not possible to identify and mention the other factors that may give content to the requirements of justice?

Scholars have identified several factors that appear to influence the courts in their manipulation of the foreseeability test: disproportion and the degree of the defendant's fault;<sup>47</sup> suspicion that the plaintiff's loss could have been avoided if he had exercised reasonable care; the extent

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<sup>44</sup> Judge Charles D. Breitel, in whose favor Mr. John Frank withdrew his motion to substitute a tacit agreement requirement for the discretionary limitation in § 351(3), moved to adopt the following substitute: “‘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 the arrangement’—this is the important thing—in the particular circumstances was not intended to embrace a disproportionate extended liability.’” 56 ALI PROCEEDINGS 342-43 (1979). Judge Breitel's motion probably was grounded on a theory that an intention that certain losses should not be within the risks assumed by the promisor could be implied from the disproportion between the extended liability asserted and the value received by the promisor. Judge Breitel's motion was defeated by a vote of 93-54. *Id.* at 345.

<sup>45</sup> See D. DOBBS, *supra* note 24, at 816; W. MCCORMICK, *supra* note 24, at 574; Fuller & Perdue, *supra* note 16, at 88.

<sup>46</sup> See 56 ALI PROCEEDINGS 346-47 (1979).

<sup>47</sup> W. MCCORMICK, *supra* note 24, at 574-75.

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.<sup>48</sup> A careful analysis of the cases might result in the elimination of some of these factors or the addition of others. If the restaters accept a law-reform mission as part of their effort, as seems to be the case, their own determination of the policies justifying a discretionary limitation of damage liability might extend the list even further. Insofar as the appropriate factors to guide discretion can be specified, they ought to be listed as exhaustively as possible, in order to provide a more determinate content to the requirements of justice. This approach has, in fact, been employed in section 139 of the *Restatement Second*, which uses promissory estoppel to overcome a defense grounded on the statute of frauds. In section 351(3), however, only disproportion merits black-letter mention, although the Comment makes two other factors relevant: informality of dealing that may indicate that the parties did not make a careful attempt to allocate all risks, and a noncommercial setting for the promise.<sup>49</sup>

Invocation of the ideal of justice in the formulation of legal doctrine should not be disquieting. Yet upon movement from the postulation of an ideal to the use of "justice" as a crucial datum in the expression of rule or doctrine, a professional concern for certainty and predictability inevitably causes disquiet. The historic purposes of restating the law<sup>50</sup>—to clarify and simplify—mirror the professional inclination to enlarge the objective content of legal rules and to confine judicial discretion, to the fullest extent possible, within fixed and cognizable boundaries. The increased use of justice-based grants of judicial discretion in the *Restatement Second* appears, therefore, to compromise both the long-accepted goals of the Restatements and the values of certainty and predictability.

There are, of course, contexts in which the legislator or the restater appropriately admits the impossibility of formulating a rule or doctrine without an unacceptable risk of imposing a norm either too broad or too narrow. In such circumstances, there is much to recommend what is in effect an explicit grant of lawmaking power to the courts, in the hope that the shape of a sound rule or doctrine will emerge more clearly as experience is gained in dealing with narrowly-defined problems. Such a view rationalizes the Uniform Commercial Code's treatment of unconscionability<sup>51</sup> and, to some extent, the resort to justice-based criteria in

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<sup>48</sup> D. DOBBS, *supra* note 24, at 815-17.

<sup>49</sup> RESTATEMENT (SECOND) OF CONTRACTS § 351, Comment f (1979).

<sup>50</sup> See Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140 (1981).

<sup>51</sup> Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1042-44 (1976):

the Restatement (Second) of Contracts. Criticism of the latter, suggested by this Essay on section 351(3), seems justified on four grounds:

(a) the scope of the interests whose protection may, in the discretion of the court, be denied is left somewhat ambiguous—that is, is the excludable interest only certain claims to consequential damages, such as profits, or the expectation interest more broadly?;

(b) the section does not make clear, when reliance recovery is substituted for expectancy, whether discretionary discrimination between essential and incidental reliance is appropriate;

(c) the transferability of a justice-based criterion from section to section is assumed without analysis of the diversity of needs and purposes involved in different contexts; and

(d) the factors that should guide the courts in defining the requirements of justice are not articulated to the extent that might have been possible.

Of course, to determine now the influence that section 351(3) will exert on the damage remedy is impossible. Its arguable breadth and essential indeterminacy, however, portend the impairment of much of the law of contract damages that has been patiently developed over the past century or so.

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All will agree that by any test section 2-302 is a general clause. Instead of "good morals" or "good faith," . . . the standard proposed—again the only standard—is "conscience"; courts are authorized to refuse enforcement to any contract or clause that offends it. If the draftsmen of the U.C.C. had any particular limitations or targets in mind, no clues can be found in the Official Comment. . . . It is idle to parse this [language] or to seek guidance from the illustrations [given]. . . . It is clear that the notion of unconscionability extends far beyond setting limits to self-exculpation. If the draftsmen of the U.C.C. had in mind other objectives or limitations on the scope of section 2-302, they did not express them in the one way that counts, in the language of the Code. So it is only a slight exaggeration to say that section 2-302, as it appeared in the Code at the outset had no meaning, and most of the meanings it is to have will be discovered in the course of its application. This is a characteristic feature of general clauses . . . . Nevertheless, to insert such a clause deliberately in a comprehensive scheme of legislation is in effect to concede that the norms expressed in the legislation are incomplete in ways that have not been identified, so that some means are needed for discovering and incorporating additional elements not yet formulated or foreseen. . . . [T]he initial leadership is clearly cast on judges, not only because the need for new departures will ordinarily be disclosed through litigation but because judges have the first opportunity, through the reasons they give, to provide a good start in perceiving and defining the new elements. . . . The aims of this common enterprise are obviously to scale down the apparently unlimited mandate of the general clause, to restructure it into distinct subordinate norms that become intelligible and manageable through their narrowed scope and function.