Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule

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INEVITABLE DISCOVERY: THE HYPOTHETICAL INDEPENDENT SOURCE EXCEPTION TO THE EXCLUSIONARY RULE

The exclusionary rule insures that the methods employed to obtain evidence for a criminal prosecution comply with the mandates of the fourth and fifth amendments. The use of reliable and probative evidence is suppressed as a judicial sanction to enforce constitutional standards governing the conduct of law enforcement agencies in the investigation and prosecution of criminal activities. If leads that develop from unlawful police conduct are pursued, any derivative evidence that is obtained will be deemed tainted by the primary illegality and barred from the courts.

Depriving the government of the fruits of an investigation is a harsh remedy when there has been good faith action by the police to comply with an individual’s rights. The lack of empirical data demonstrating that suppression actually deters future violations of constitutional guarantees by law enforcement agents has generated much criticism about the utility of the rule. Exclusion of relevant evidence often harms society by permitting “[t]he criminal . . . to go free because the constable has blundered.”

1. U.S. CONST. amend. IV. The fourth amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.


4. The expression “fruit of the poisonous tree” was first used by Justice Frankfurter in Nardone v. United States, 308 U.S. 338, 341 (1939).


In many cases offenders are immunized from prosecution.\(^7\)

In response to these criticisms, courts have limited the application of the exclusionary rule and will admit derivative evidence if there is no significant causal relationship between the unlawful police conduct and the discovery.\(^4\) If an actual independent source for the fruit of an investigation does not exist, there is a split of authority whether such evidence is admissible.\(^9\) Some courts hold that the evidence is not tainted if normal police procedures would have produced the same results without the illegally acquired leads.\(^10\) This exception to the exclusionary rule is the "inevitable discovery" doctrine.\(^11\) Although the Supreme Court has not ruled on the validity of this limitation, two justices have charged that "it is a significant constitutional question, whether the 'independent source' exception to inadmissibility of fruits . . . encompasses a hypothetical as well as an actual independent source."\(^12\) An exception to the exclusionary rule that allows the prosecution to remove the taint from "poisoned" evidence by showing that the unlawful police activity was not the "but for" cause of the discovery should be measured against the deterrence rationale of the suppression doctrine.\(^14\)

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14. See Pitler, supra note 11. The author states that:
   The logic of the "inevitable discovery" has a certain appeal, but it collides with the fundamental purpose of the exclusionary rule. If the Supreme Court adopts the inevitable discovery exception, it will mark a sharp break with Silverthorne,
I. THE EXCLUSIONARY RULE—HARVESTING THE FRUITS

Suppression of evidence has become virtually the only sanction employed against infringement of constitutional rights by law enforcement officers. A determination of the relevant factors that should be weighed in a decision to exclude evidence obtained through illegal police conduct requires analysis of the constitutional underpinnings of the suppression doctrine.

Where there has been an unreasonable search and seizure, the rule is applied as a judicial sanction against intrusions by the police into an individual's fourth amendment right to privacy. Case law reflects two underlying policy considerations. First, persistent suppression of evidence obtained from an unreasonable search and seizure is "calculated . . . to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Second, exclusion of unlawfully acquired evidence serves to bolster judicial integrity. Courts will not permit themselves to become part of a process where an individual could be convicted solely on unconstitutionally obtained evidence. The deterrence rationale has proven to be the dominant theme of fourth amendment suppression cases.

In *Silverthorne Lumber Co. v. United States* the Supreme Court rejected the Government's argument that the exclusionary rule applied only to suppress the use of physical evidence seized by law enforcement agents. Deterrence could not be successfully

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*Nardone* and *Wong Sun*. The preservation of the exclusionary rule as a viable deterrent to illicit police activities requires the spotlight to focus "on actualities not probabilities."

Id. at 630.

20. 251 U.S. 385 (1920).
achieved if leads that were the product of illegal police conduct could be used to develop further evidence against a suspect. Justice Holmes, writing for the Court, stated:

The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired may not be used before the court, but that it shall not be used at all.

This came to be known as the “fruit of the poisonous tree” doctrine, and it applies to both physical evidence and confessions that are tainted by a prior illegal seizure. Recently, the Supreme Court held that a confession obtained after Miranda warnings are given may still be a tainted product of an arrest made without probable cause. The Court stated that “Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.”

Exclusion of a “coerced” confession was historically based on its lack of probative force. Numerous factors such as physical force and psychological pressures were held to be indicia of unreliability. Under this analysis it seemed that the “fruit of the poisonous tree” doctrine would not apply to confession cases. Physical evidence discovered through a suspect’s involuntary statements was admissible. “The rationale was that the confession was excluded because of its untrustworthiness, but if the other evidence was itself of sufficient probative value the reason for excluding the confession did not extend to its fruits.”

21. Id. at 392.
22. But see United States v. Calandra, 414 U.S. 338 (1974) (unlawfully seized evidence may be used in grand jury proceedings); United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y.), aff’d, 435 F.2d 25 (2d Cir. 1970) (evidence obtained from illegal wiretap may be used in sentencing).
where the evidence corroborated the confession, courts would admit the statements themselves.\textsuperscript{33}

The Supreme Court has indicated that considerations other than unreliability justify exclusion of confessions: "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true."\textsuperscript{34} Courts, in general, have become primarily concerned with deterring improper police methods used to obtain inculpatory statements.\textsuperscript{35} In view of this expanded basis for exclusion of confessions, the distinction between excluding the confessions but admitting the fruits of the statements has disappeared. "[I]t appears that the policies underlying the rules requiring the exclusion of confessions under certain circumstances are sufficiently analogous to the policies underlying the rules requiring the exclusion of unconstitutionally obtained evidence to justify applying the same tests of exclusion to the 'fruits' of both."\textsuperscript{36}

When an in-custodial confession is obtained from a suspect without prior \textit{Miranda} warnings, it is the fifth amendment privilege against self-incrimination that requires suppression of the statements and not considerations of reliability. \textit{Miranda} did not specifically deal with the problem whether evidence derived from an illegal confession should be suppressed. State and lower federal courts, however, have held that the fruits of a failure to give \textit{Miranda} warnings are inadmissible.\textsuperscript{37} Although there is some question as to what activities are covered by the fifth amendment privilege against "communicative" disclosures by a suspect in a criminal investigation,\textsuperscript{38} the argument that suppression of deriva-

\textsuperscript{33} See 2 F. WHARTON, CRIM. EVIDENCE §§ 357-58 (12th ed. 1955).
\textsuperscript{34} Rochin v. California, 343 U.S. 165, 173 (1952).
\textsuperscript{35} In Blackburn v. Alabama, 361 U.S. 199 (1960), the Supreme Court listed "a complex of values [that] underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary." \textit{Id.} at 207. See also Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959).
\textsuperscript{36} C. MCCORMICK, EVIDENCE § 157, at 344 (2d ed. 1972).
\textsuperscript{38} See C. MCCORMICK, EVIDENCE § 124 (2d ed. 1972). In Schmerber v. California, 384 U.S. 767 (1969), the Supreme Court stated that the fifth amendment privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." \textit{Id.} at 761. The Court held that blood samples extracted from a nonconsenting suspect did not constitute a testimonial act. The Court did, however, reject the view that the privilege was limited to words
tive evidence will actually deter future police misconduct is often more compelling in confession cases than in cases where fourth amendment infringements are alleged. Many violations of an individual’s right to privacy by law enforcement agents never come before the court through an exclusionary rule challenge because the tactics were not aimed at producing evidence. Police procedures such as “stop and frisk” may not be employed with the intent to bring the individual to trial. Tactics used to obtain confessions, however, are “more likely to be aimed at procuring evidence to be used in an eventual prosecution.” Thus, the exclusionary rule when applied to the fruits of unlawful in-custodial questioning should prove to be an effective deterrent device.

Courts and commentators have expressed disenchantment with the mechanical exclusion of the fruits of an investigation where the police have acted in good faith and the intrusion into a defendant’s rights is relatively minor. Chief Justice Burger criticized the application of a rule that suppresses evidence without any inquiry into the degree of deterrence that will be achieved:

[T]he Exclusionary Rule has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under

spoken by the suspect. Id. at 765. Subsequent Supreme Court cases examine the activity (for example, participation in a line-up) to determine if it was a form of communication. See, e.g., Gilbert v. California, 388 U.S. 263, 265-67 (1967); United States v. Wade, 388 U.S. 218, 222-23 (1967).


40. ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 150.3, Commentary (1975). Failure to give a suspect Miranda warnings often has evidentiary consequences. Suppression of the fruits of an unlawful confession should encourage the police to comply with constitutional guidelines in future cases.

41. Over the years, many Justices of the Supreme Court have expressed concern that the exclusionary rule has little or no deterrent effect. See, e.g., United States v. Calandra, 414 U.S. 333, 348 n.5 (1974); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (Harlan & Black, JJ., concurring); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting).

42. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970); Wright, Must the Criminal Go Free if the Constable Blunders? 50 Texas L. Rev. 736 (1972).

the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant ... violations of the Fourth Amendment.

Recent Supreme Court cases indicate that the degree of deterrence is a relevant consideration when ruling on a motion to suppress. In United States v. Calandra\textsuperscript{44} the Supreme Court held that a grand jury witness may be asked questions on the basis of illegally seized evidence because exclusion of the tainted evidence "would achieve a speculative and undoubtably minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury."\textsuperscript{45} Subsequently, in Michigan v. Tucker\textsuperscript{46} the Court announced that the state of mind of the officers who committed the infringement on a suspect's constitutional rights should also be weighed in determining whether to suppress fruits of an unlawful confession. The Court pointed out that:\textsuperscript{47}

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

The Supreme Court has recognized the high social cost of excluding probative evidence from criminal prosecutions. Judges should, therefore, determine whether the purposes underlying the rule require suppression in a given case by considering the nature of the constitutional right violated, the state of mind of the law enforcement agents when the infringement occurred, the flagrancy of the violation and even the stage of the criminal proceedings.

II. AN ANTIDOTE FOR POISONOUS FRUITS

The early decisions on the application of the exclusionary rule to the fruits of unlawful police conduct demonstrated that an

\textsuperscript{44} 414 U.S. 338 (1974).
\textsuperscript{45} Id. at 351-52.
\textsuperscript{46} 417 U.S. 433 (1974).
\textsuperscript{47} Id. at 447.
entire investigation would not be "poisoned" so as to immunize an individual from prosecution. In *Silverthorne Lumber Co. v. United States* the Supreme Court indicated that when evidence is acquired by illegal police conduct, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others.

When police arrest a suspect in his home and exceed the permissible scope of an incidental search to uncover stolen property or act on an invalid search warrant to investigate a suspect's illegal activities, the use of the unlawfully acquired evidence must be suppressed as part of the fourth amendment exclusionary rule. Similarly, if a defendant confesses to committing a crime without adequate warnings of his constitutional rights, his statements may not be admitted in evidence against him. *Silverthorne*, however, demonstrates that an individual whose rights have been violated is not immunized from proof of the fact that he has committed an offense. If the government can prove guilt on the basis of lawfully acquired evidence, the suspect can be convicted of the crime.

Although the Court did not indicate what would constitute an independent source, subsequent cases on the attenuation exception shed light on the policy considerations that underlie this determination. Often the causal relationship between unlawful police action and discovery of fruits becomes so remote that it is unlikely that the police consciously used the illegal leads to obtain the derivative evidence.

Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the government's proof. As a matter of good sense, however, such

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48. 251 U.S. 385 (1920).
49. *Id.* at 392.
connections may have become so attenuated as to dissipate the taint.

The attenuation limitation was first applied by the Supreme Court in *Wong Sun v. United States.* Federal agents arrested Toy in his home without probable cause. After Toy told the agents that Yee had been selling narcotics, Yee was arrested and surrendered a quantity of heroin. Subsequent questioning of Toy and Yee led the agents to Wong Sun who was arrested, arraigned and released in his own recognizance. Several days later Wong Sun voluntarily returned to the police station and made an unsigned confession.

Toy's statements and the narcotics taken from Yee were both held to be fruits of the illegal arrest of Toy. The verbal evidence was excluded because the admission was not "sufficiently an act of free will to purge the primary taint of the unlawful invasion." The Court also held that Wong Sun's arrest was without probable cause. His confession, however, was held to be admissible. The fact that he returned voluntarily after being arraigned and released for several days made the connection between his unlawful arrest and the confession "so attenuated as to dissipate the taint."

Recently, the Supreme Court clarified what was meant in *Wong Sun* by an "act of free will." In-custodial statements made after an arrest without probable cause are not per se admissible solely because *Miranda* warnings were given before the statements were made. The nature of the primary right that was violated is a relevant consideration to determine the scope of the exclusionary rule. *Miranda* warnings protect fifth amendment rights by assuring that the defendant will make a voluntary choice to waive his rights if a confession is made. The warnings, however, are only one factor to consider when statements have been made after an unlawful arrest:

If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. . . .

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57. Id. at 486.
58. Id. at 491, quoting Nardone v. United States, 308 U.S. 338, 341 (1939).
60. Id. at 602-03.
rests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom hopefully could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

Two problems are left unresolved by *Silverthorne* and its progeny. First, if the government uncovers evidence through a combination of legally and illegally acquired information, the question arises whether the presence of the legal lead alone is sufficient for a court to determine that there was no exploitation of the illegality. A literal reading of *Silverthorne* would suggest that the prosecution could never use any evidence derived from leads obtained through illegal police conduct.61 The policies enunciated by *Wong Sun* indicate that the evidence is also not "sacred and inaccessible."62 The Court in *Wong Sun* stated:63

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Consider the following hypothetical: United States customs agents are examining a suspect's business records pursuant to a search warrant to determine the prices that the individual paid to overseas exporters for certain merchandise. The customs agents have reason to believe that the owner of the corporation filed falsified documents with the government to pay lower importation duties. At the same time, FBI agents are conducting an unrelated investigation into the suspect's organized crime activities and learn through an illegal wiretap that certain documents reflecting altered prices have been filed with customs. This infor-

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61. See Pitler, *supra* note 11, at 589.
62. See text accompanying note 49 *supra*.
Information is then relayed to the customs agents investigating the illegal importation scheme. The problem arises whether the information from the FBI wiretaps taints the documents in the customs investigation even though the agents can show that they continued the saturation investigation and that only the legal leads were used to discover the evidence.

The second problem left open by Silverthorne is more difficult. Assume there are no legal leads, but it can be shown that the normal course of police investigation would inevitably produce the same evidence. It is unresolved whether a court can constitutionally hold that taint does not attach to evidence that would be discovered by a "hypothetical" independent source. In the preceding example once the customs agents receive the illegally acquired information from the FBI, it is questionable whether they would be able to discontinue the expensive and time-consuming saturation procedures without inquiry into the manner in which the evidence was acquired.

One commentator urges that a "sine qua non test, if properly administered, serves well the raison d'être of the exclusionary rule." This permits a court to find that there is no significant causal relationship between unlawful police conduct and the discovery of evidence if the prosecution can demonstrate that subsequent investigative procedures would inevitably produce the same findings. It is submitted that while causation is a relevant factor to a determination whether evidence has come about by "exploitation" of the primary illegality, it by no means conclusively answers the question whether the exclusionary rule should be applied. In deciding to suppress or admit derivative evidence courts must also balance the nature of the right infringed and the "purpose and flagrancy of the official misconduct."

A. Fruits of a Tree "Nourished by Both Pure and Polluted Waters"

When an investigation is initiated or evidence uncovered as a result of a combination of legal and illegal leads, there is conflicting authority whether the exclusionary rule should apply.

64. The term "saturation investigation" refers to procedures involving examination of a suspect's personal or business records to uncover evidence of a crime. See note 74 infra.

65. Maguire, supra note 13, at 317. Contra, Pitler, supra note 11, at 630.


Some courts focus on the evidentiary value of the untainted lead alone to determine if it is sufficient as an independent source. The theory is that if the government does not need the illegal leads to uncover the fruits then the challenged evidence is not causally related to the illegality.

Examination of a series of cases in the Second Circuit reveals a number of possible approaches to these problems. In *Parts Manufacturing Corp. v. Lynch* FBI agents unlawfully seized what were believed to be stolen automobile parts from the defendant's warehouse. The goods were subsequently ordered returned to the defendant but the FBI gave Ford Motor Company a list of the seized items. Ford Motor Company then replevied the parts from the defendant. The FBI agents examined the stolen parts while they were in the sheriff's warehouse, and new search warrants were issued before Parts Manufacturing Corporation could retrieve the goods under a posted bond. The defendant claimed that the warrants were invalid because they were issued as a result of an inventory made from the first seizure. The court found that the warrants were in fact issued from an examination of the Ford Motor Company books made before the unlawful seizure, and the illegally acquired information "simply confirmed what [the] affiants already had reasonable cause to believe would be found."

In *United States v. Schipani* the Court of Appeals for the Second Circuit, in affirming the district court, seemed to reverse the approach taken in *Parts Manufacturing Corp. v. Lynch*. The district court held that evidence acquired as a result of both legal and illegal leads is inadmissible, even if "the legal lead would

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In contrast, the District of Columbia Circuit goes even beyond the Reisman rule: "the validity of a warrant and search depends on whether the untainted information, considered by itself, establishes probable cause for the warrant to issue." By focusing on the probative value of the untainted evidence to the exclusion of consideration of the effect of the illicit evidence on the decision to obtain a warrant, the court relieves the prosecution of the burden of showing that the same investigation would have been carried out merely on the basis of the legally obtained evidence.

71. Id. at 843.

69. Durham v. United States, 403 F.2d 190 (9th Cir. 1968).
70. 129 F.2d 841 (2d Cir.), cert. denied, 317 U.S. 674 (1942).
71. Id. at 843.
itself probably have sufficed to uncover the evidence.\textsuperscript{73} The defendant was the subject of a tax evasion prosecution.\textsuperscript{74} In an unrelated investigation, the FBI recorded defendant's conversations with a major organized crime figure whose telephone was illegally wiretapped. The information from the taps revealed leads to the existence of substantial amounts of income from criminal activities that the defendant had not reported. The court had to determine whether any of the evidence introduced at trial was obtained from the wiretap and whether the entire investigation was tainted by the presence of the illegal leads.

The district court suppressed the use of the information from the illegal wiretap to prove the existence of a "likely source" of unreported income.\textsuperscript{75} The Schipani approach, that the mere presence of illegal leads taints the derivative evidence, always operates to protect a defendant from the possible use of unconstitutionally obtained evidence against him.\textsuperscript{76} Unfortunately, mechanical operation of this standard, without inquiry as to whether the information was used, does not take into account the deterrent purposes of the exclusionary rule. When the police have uncovered the evidence without the illegally acquired information, the mere presence of the unconstitutional conduct should not operate to immunize a suspect from prosecution: \textsuperscript{77}

Assuming that the exclusionary rule is nevertheless reasonably effective in controlling certain police practices, it is argued that this control is achieved at too great a cost. Exclusion of


\textsuperscript{74} In tax evasion cases the government often employs complex methods of circumstantial proof to show a suspect's failure to declare taxable income. One of these methods allows the prosecution to select a time period in which it can determine changes in a defendant's net worth. The government can show that the accretion in wealth was unreported taxable income either by proof of a "likely source" of unreported income or by negating leads furnished by the defendant as to the existence of nontaxable sources of income. An explanation of the method of proof in tax evasion cases can be found in United States v. Massei, 355 U.S. 595 (1958) and Holland v. United States, 348 U.S. 121 (1954).

\textsuperscript{75} United States v. Schipani, 289 F. Supp. 43 (E.D.N.Y. 1968), aff'd, 414 F.2d 1262 (2d Cir. 1969), cert. denied, 397 U.S. 922 (1970). The Government, however, was able to convict the defendant through an alternative method of proof—the negation of leads as to nontaxable sources of income. See note 74 supra. This did not require the use of any information obtained from the illegal FBI wiretaps. It is significant that the mere presence of tainted information as to a possible "likely source" of unreported income prevented the prosecution from using this method of proving tax evasion.

\textsuperscript{76} See Comment, The Inevitable Discovery Exception to the Constitutional Exclusionary Rules, 74 Colum. L. Rev. 88, 101-02 (1974).

\textsuperscript{77} C. McCormick, Evidence § 166, at 367 (2d ed. 1972).
evidence that is often highly probative may result in the release of defendants known to constitute a threat to society. Moreover, this result can be required by the misconduct of a single officer, thus giving each officer involved in an investigation the power to confer immunity upon the subject by acting improperly. Such a "fox hunting" approach to the establishment of criminal guilt—in which the emphasis is not upon the result but rather on compliance with rules of the game during the chase—is inconsistent with the social interest in the conviction of those posing a danger to the public.

The more difficult question remaining in Schipani was whether the entire net worth investigation was tainted by the intervening illegality. The district court applied a very strict test: "If illegally secured information leads the government to substantially intensify an investigation, all evidence subsequently uncovered has automatically 'been come about by exploitation of that illegality.'" The court concluded that there was no taint because the decision to investigate the defendant's taxes and the determination as to the scope of the inquiry had been made prior to the receipt of the information from the illegal wiretaps.

The problem with the analysis used by the district court in Schipani is demonstrated by a slight variation on the facts. In United States v. Cole, where the circumstances almost mirrored those in Schipani, the FBI discovered defendant's tax evasion scheme through illegal wiretaps in an unrelated investigation. Unlike Schipani, where the FBI learned of a possible "likely source" of undeclared income, here the illegal taps revealed that the defendant had been crediting a number of his personal expenses to his business to obtain deductions. At the same time the IRS had been gathering information about the defendant's activities and learned through a legal source that Cole had a substantial secret interest in a number of Las Vegas hotels. Before the decision to undertake an investigation was made, the FBI gave the IRS the information about the tax evasion scheme. The IRS then ordered a saturation investigation of Cole and prosecuted him for

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tax evasion. Under the test in Schipani the entire investigation would be tainted because the decision to initiate the saturation procedures was based in part on the presence of unlawful information. All of the evidence uncovered by the lawful procedures would be an exploitation of the illegality even if the government could show that the legal leads alone were sufficient to trigger the decision to investigate. The intervening illegality of the FBI wiretaps would then immunize the defendant from prosecution on the entire net worth investigation including the failure to report the income from the hotel interests.

The Second Circuit subsequently backtracked on the Schipani approach, namely, that the presence of the illegal lead in the decision to initiate the saturation procedures would void the entire investigation. The court of appeals observed that the district court in Schipani had erroneously interpreted Wong Sun v. United States to mean that the presence of any causal relationship between the commencement or intensification of an investigation and the primary illegality requires automatic exclusion of the derivative evidence. The language in Wong Sun that only evidence "come at by exploitation" of the unlawful police conduct should be suppressed was an application of the attenuation exception "as limiting the scope of the exclusionary rule rather than as carrying it into new ground." The court indicated that its affirmance of Schipani was based solely on the fact that the prosecution had met its burden that the saturation investigation would have been commenced even if no information had been received from the illegal surveillance. The court stated that "[i]t was with respect to this — not to everything said in the course of a 22-page opinion by the district judge — that Judge Jameson writing for the court, 'approve[d] the legal principles applied.'" The rejection of the implications of Schipani — that taint automatically attaches to an investigation initiated in part by illegal leads — allows the prosecution to show that the probe would have commenced even in the absence of the primary illegal

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82. Id. at 487-88 (1963).
83. United States v. Friedland, 441 F.2d 855, 860 (2d Cir. 1971) (emphasis added).
police conduct. In *United States v. Falley* the Second Circuit announced a new test to determine if an entire investigation is tainted:

> [A]n inquiry must first be made as to the cause of the investigation. If the investigation was in fact instigated by information that was discovered independently of the illegal intrusion and if the illegally obtained information would not have been, in and of itself, sufficient in the normal case to trigger this type of investigation, then the investigation has not been tainted and no indirect, derivative taint attaches to any of the evidence produced by the investigation.

This approach is more consistent with the policies underlying the exclusionary rule. If actual independent sources are used to make a decision to investigate an individual, then there is no exploitation of the primary illegality. There is, however, no reason to add the additional requirement that the illegal lead was insufficient to initiate the investigation. In *Cole*, the court found that the FBI's discovery of the defendant's plan to attribute the personal expense deductions to his business was not sufficient to trigger a saturation investigation. Information of minor tax evasion schemes is treated by ordinary audit procedures. Because the illegal leads were insufficient to prompt the government to employ the expensive saturation procedures, the court was able to conclude that the decision was made solely on the basis of the legal leads.

A determination of whether an investigation has been commenced on the basis of legal or illegal leads should not turn on a "but for" test. The inquiry must consider a number of factors. The court should first determine what information the government had about the suspect's activities prior to the receipt of the unlawfully acquired leads. If the investigating agency had already commenced the probe, then the intervening illegality should not retroactively taint the entire process. If the individual had not been selected as the target of a criminal investigation when the illegal data was received, then the court must determine whether the legal or illegal leads, when considered alone, would

85. 489 F.2d 33, 41 (2d Cir. 1973) (emphasis added).
86. 463 F.2d 163 (2d Cir.), cert. denied, 409 U.S. 942 (1972).
87. The relevance of this factor is suggested by *United States v. Cole*, 463 F.2d 163 (2d Cir.), cert. denied, 409 U.S. 942 (1972); *Smith v. United States*, 402 F.2d 771 (9th Cir. 1968); *Parts Mfg. Co. v. Lynch*, 129 F.2d 841 (2d Cir.), cert. denied, 317 U.S. 674 (1942).
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be sufficient to initiate the probe.⁸⁸

A finding that the unconstitutional conduct would cause the commencement of an investigation should not mechanically preclude further inquiry. An important consideration is whether the agency participated in the illegal conduct or had received the evidence from an independent agency in an unrelated investigation.⁸⁹ In Cole, for example, if the IRS had wiretapped defendant’s telephone, then the participation in the unlawful activities would severely damage the agency’s credibility that the decision to investigate was based solely on lawfully acquired information.

The court must then balance the degree of deterrence that will be achieved against the danger of immunizing a suspect from prosecution. This approach results in “rationally graded responses from judges in place of the universal ‘capital punishment’ we inflict on all evidence when police error is shown in its acquisition.”⁹⁰ As long as the prosecution has met its burden of proof that the legal leads were the source of the determination that a suspect’s activities should be investigated, a court should find that there is no exploitation of the primary illegal police conduct.

The Second Circuit also modified its approach for determining whether taint attaches to investigative findings.⁹¹ Under Schipani, evidence uncovered through the use of a combination of lawful and unlawful sources must be suppressed.⁹² This prevents the government from showing that it actually followed the legal leads to uncover specific items of evidence of criminal activity. In United States v. Falley⁹³ the court adopted a new standard for determining whether the ultimate findings are tainted: “If the evidence produced by the investigation was simply the normal output of that investigation, then the investigative findings have not been tainted directly.”⁹⁴

Under this approach, the inevitable discovery doctrine is

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⁹³ 489 F.2d 33, 41 (2d Cir. 1973).
⁹⁴ Id. at 41.
used to prove that the investigating agency disregarded the prior unlawfully acquired information because it was unnecessary for the discovery of certain evidence. When the investigating agency has not been the passive recipient of information from another department, but has actually participated in the unlawful conduct, the court should not be precluded from finding that there was no exploitation of the primary illegality. The mere fact that the government was using routine investigatory procedures should not be applied as a per se approach to determine that taint did not attach to the ultimate evidentiary findings.

B. "Inevitable Discovery" as an Exception to the Exclusionary Rule

Inevitable discovery has been applied to situations where there is no actual independent source for the discovery of the fruits of an investigation. In these cases the doctrine is not used as a means to prove that the government acted solely on lawfully acquired information; rather, it takes on the character of a separate exception to the exclusionary rule. The prosecution can remove the taint from derivative evidence by showing that the ordinary course of an investigation would have produced the same findings. The government must satisfy the court, as a fact, that the proffered evidence would have been acquired through lawful sources of information even if the illegal act had never taken place. Since such act did in fact occur and further, did in fact produce the evidence, this is not a simple task.

Thus, under the facts of United States v. Cole, once the Internal Revenue Service received information about the defendant's personal expense deductions from the unrelated FBI wiretaps, the inevitable discovery doctrine would permit the government to immediately focus on the tax evasion scheme.


96. Maguire, supra note 13, at 317.

97. 463 F.2d 163 (2d Cir.), cert. denied, 409 U.S. 942 (1972). In Cole, the court concluded that the lawful saturation procedures were completed. "Inevitable discovery" was used to prove that the illegal leads were not used to uncover the defendant's improper deductions. See text accompanying notes 80-93 supra.

98. The deterrence goal of the exclusionary rule is satisfied under this analysis by
A sine qua non test is appealing when applied to the facts of *Cole*. The court noted that "once the saturation investigation was ordered, discovery of the improper deductions was inevitable." Expense and inconvenience would militate against continuing the probe. The information about the improper deductions was not procured by any illegal conduct by the Internal Revenue Service. Receipt of the information merely accelerated what would have been found through the legal leads. There is a serious drawback to an analysis that allows taint to be removed solely by showing that the illegal conduct was not the "but for" cause of the discovery of the challenged evidence. Investigating agencies would have an incentive to use illegal procedures if it could be argued at the suppression hearing that the effect of such conduct was merely to accelerate what could have been found by the saturation procedures. Courts should be careful to prevent application of the inevitable discovery exception from subverting the safeguards of the exclusionary rule.

A more serious concern is that it is very difficult to hypothesize what the police response would be to a given situation because "it is extremely rare to find a normal, lawful police procedure which is regularly followed and inevitably would have produced the same exact information." Just as there is a danger that sophisticated legal argument will be used to show a causal connection between the initial illegal conduct and the discovery of derivative evidence, the same "sophisticated argument" aided by hindsight can be used to show what the police would have done in a given situation. The problem with this speculative method of analysis is best demonstrated by examining the way in which courts have applied the doctrine.

100. United States v. Cole, 463 F.2d 163, 173-74 (2d Cir.), cert. denied, 409 U.S. 942 (1972). In Cole, the court did not apply inevitable discovery as an independent exception to the exclusionary rule.
102. Pitler, supra note 11, at 629.
1. The Hypothetical Police Search

In People v. Fitzpatrick the defendant was arrested in his home in connection with the shooting deaths of two policemen. The arresting officers discovered him hiding in a closet. Fitzpatrick was moved from the closet to the hall area, a few feet away, where he was handcuffed. The officers failed to adequately warn him of his Miranda rights and then proceeded to question him about the location of the murder weapon. The defendant revealed that the gun was on a shelf in the closet where he had been found.

Although Fitzpatrick's statements were suppressed, the court held that the discovery of the gun was not a fruit of the illegal confession. Chief Judge Fuld writing for the New York Court of Appeals reasoned that the police would inevitably have searched the closet and found the gun. “[I]t was entirely fortuitous that the police delayed the search of the immediate area where the defendant was discovered until they had begun questioning him and, as a result, they quickly learned where the gun was located.” Chief Judge Fuld concluded that because the gun was a prime object of the investigation, the police would have searched the defendant's person and “[i]f not found upon him, the next most reasonable place to look for it was where he had been just before he was seized.”

A close analysis of the majority opinion indicates that the purposes underlying the exclusionary rule were not adequately considered. The “tree” in this case was an unlawful confession. As noted earlier, in-custodial questioning will often have evidentiary consequences. The court then has an opportunity to review the police conduct and suppression of the evidence could be an effective deterrent against similar improprieties.

A more serious problem with the approach used by Chief Judge Fuld lies in hypothesizing that the warrantless search of the premises was justified and “would have been conducted in a constitutional manner.” One commentator demonstrates the problem with speculating about future police conduct:

105. Id. at 507, 300 N.E.2d at 142, 346 N.Y.S.2d at 797.
106. Id.
107. See text accompanying notes 38-40 supra.
109. Pitler, supra note 11, at 630.
The ability of police scientists, laboratory technicians, and investigators to discover, analyze, and develop substantial leads from minute materials appears to make even the most implausible discovery virtually inevitable. The exclusionary rule is designed to encourage the development of such methods, not use their theoretical availability as a reason for admitting illegally-seized evidence.

*Fitzpatrick* illustrates the tenuous assumptions that must be made when a hypothetical search is used to show that an illegal confession is not the sine qua non of the discovery of incriminating evidence. Chief Judge Fuld's analysis leaves an important question unanswered.\(^\text{110}\)

If “the normal course of police investigation” would have turned up the gun, why not also assume that the hypothetical search was conducted pursuant to a hypothetical search warrant? It is certainly the “normal course of police investigation” to obtain a warrant where one is required.

In *Fitzpatrick*, Chief Judge Fuld had to stretch the boundaries of a lawful search incident to arrest to demonstrate that the police did not have to get a warrant.\(^\text{111}\) If a search of the closet was not permissible after the defendant was handcuffed, a more difficult problem is whether “the ‘inevitable discovery’ doctrine would expunge the taint from an unconstitutional and warrantless search if the people could convince a Judge that regular police procedures would have produced a warrant independent of the


\(^{111}\) Id. at 509, 300 N.E.2d at 143, 346 N.Y.S.2d at 798. Chief Judge Fuld justifies the search of the closet under *Chimel v. California*, 395 U.S. 752 (1969). He reads the Supreme Court decision as granting the police an automatic right to search the area where they locate a suspect. *Fitzpatrick* was handcuffed and unable to reach into the closet to obtain a weapon or destroy evidence. Indeed, Judge Wachtler is severely critical of Judge Fuld’s analysis of *Chimel*. He argues:

> The grabbing area delineation only makes sense if it is supported by a rationale resting on danger to the police or evidence destruction. If a search could be conducted after the apprehended person can no longer reach any evidence or weapon, the definition of the allowable search area as, in effect, the “grabbing area” becomes completely arbitrary and without any underlying justification.

> If the *Chimel* case is to be overruled or limited, it is the place of the Supreme Court and not our court to do so.

illegal search."  

The argument would form the following syllogism: There was probable cause for the issuance of a search warrant based on the information available to the police at the time that the unlawful questioning occurred. The officers would have secured the warrant after the suspect was taken into custody. The subsequent search would then "inevitably" produce the evidence. This "house that Jack built" analysis would subvert the foundations of the suppression doctrine. Courts, therefore, should not use this argument to conclude that the illegal police conduct was not the sine qua non of the discovery of the challenged evidence.

In *United States v. Griffin* federal narcotics agents, through continuous surveillance, developed probable cause to believe that there was a quantity of narcotics in the defendant's apartment. On the day the seizure was made, one agent went to obtain a search warrant while other officers were dispatched to secure the apartment. When the agents arrived at the defendant's premises they broke in without waiting for the warrant and seized a quantity of drugs and narcotics paraphernalia. Four hours later the other agent arrived with the warrant and a thorough search was made of the apartment. The government argued that the exclusionary rule should not be applied because the discovery of the evidence was inevitable without reference to the illegal entry. The Sixth Circuit held that the narcotics should be suppressed and distinguished *Fitzpatrick* on the grounds that the New York police had a "clear legal right" to search and the present intention to execute the search. Perhaps the real basis of the decision is revealed in the following comment by the court:

> The assertion by police (after an illegal entry and after finding evidence of crime) that the discovery was "inevitable" because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond judicial review.

If the argument was accepted that the search was valid because a warrant would subsequently be issued, the protections of the fourth amendment would be reduced to a nullity. The police

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114. *Id.* at 961.
115. *Id.*
would have nothing to lose by conducting warrantless searches if there could be an after-the-fact determination of probable cause. The fourth amendment requires, whenever possible, that a neutral and detached magistrate issue a warrant before there is a substantial invasion of individual privacy.116 Thus, at least one court that accepts the principle of inevitable discovery would not extend the doctrine to assume that a search was conducted pursuant to a hypothetical search warrant.

Chief Judge Fuld’s analysis of the scope of the search incident to arrest neatly avoids the problem of the hypothetical search warrant but yields little in determining the boundaries of the doctrine. The application of an inevitable discovery limitation to the exclusionary rule in most search and seizure cases results in “speculative theory with no discernable limits.”117 While principles of causation are relevant in determining whether evidence is the fruit of the poisonous tree, they are not controlling. There are too many variables to apply a simple “but for” analysis.

The court should first consider whether the police could constitutionally search the area in question and whether they had the present capability to do so. If the investigative procedures were routine with reasonably predictable results,118 the court must then determine whether the police intentionally violated the suspect’s rights to accelerate the discovery.119 An argument that no taint attaches to evidence where available constitutional procedures would have produced the same results is often self-defeating. The question then arises why the lawful investigatory techniques were not used initially. The purpose of the exclusionary rule is “to prevent not repair.”120 There is too much danger that a mechanical application of the inevitable discovery doctrine will encourage unconstitutional shortcuts:121

[A] showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual, the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities, not possibilities.

The same considerations\(^\text{122}\) that are used in the determination to apply the exclusionary rule to primary evidence must be made before a "but for" analysis is applied to the fruits of an investigation. The nature of the right that was violated and the state of mind of the police officers when the constitutional infringement occurred are relevant factors in determining whether taint should attach to derivative evidence. An inquiry should be made to determine whether the acceleration of the discovery resulted from bad faith conduct of law enforcement agents. For example, in *Fitzpatrick* it is questionable whether Judge Fuld would have reached the same conclusion if the officers had used physical force on the defendant to learn the location of the murder weapon.\(^\text{123}\) In addition, the doctrine should be limited to those situations where it is certain that defined investigatory procedures would be followed. All of these factors must be weighed in determining whether the derivative evidence has been uncovered through exploitation of the illegality. Whether exclusion of derivative evidence is proper must be determined on a case-by-case basis, examining the circumstances presented to the court and not by mechanical application of a "but for" test.\(^\text{124}\)

There are only a few situations where the courts can apply the inevitable discovery limitation consistently with the deterrence goals of the exclusionary rule. When evidence would have been revealed to the police by operation of law\(^\text{125}\) or by clearly defined police procedures\(^\text{126}\) which are regularly followed, and the police officers have not acted in bad faith to accelerate the discovery, the doctrine can be applied satisfactorily.

\(^{122}\) See text accompanying notes 16-47 supra.


\(^{125}\) See text accompanying notes 127-35 infra.

\(^{126}\) See text accompanying notes 136-44 infra.
2. **Evidence That Would be Obtained by Operation of Law**

Where it can be shown that a law enforcement agency would have acquired information through required statutory procedures, some courts apply the inevitable discovery doctrine to hold that no taint attaches to the unlawfully acquired information. The danger of speculating that a hypothetical police search would have produced the same information is minimized in these situations.127 Thus, where a suspect confessed to a fatal stabbing after inadequate *Miranda* warnings and admitted that he had placed the knife in a mailbox near the scene of the crime, it was held that the murder weapon could be introduced against him at trial.128 Under postal regulations a foreign object must be turned over to the police when found in a mailbox.129 The court was satisfied that the only effect of defendant’s statements was to accelerate the discovery of the evidence.

Although there was little doubt that the police would ultimately have learned of the existence of the knife without the unlawful confession, the court never questioned whether the deterrence goals of the fifth amendment exclusionary rule would be satisfied solely by exclusion of the defendant’s inculpatory statements connecting him with the murder weapon. Unfortunately, the reported decision does not contain a well-reasoned analysis of the nature of the infringement on the defendant’s rights and the state of mind of the police officers when the confession was obtained.

This problem is amplified using a slight variation of the facts. Assume that the police learned of the location of the knife through the use of physical force upon the suspect. Under a “but for” analysis, the mere fact that the police would have received the evidence through a required statutory procedure will automatically operate to remove the taint from the murder weapon. If the purpose of the exclusionary rule is deterrence, then there should not be any constitutional significance to the fact that the knife was hidden in a mailbox; however, mechanical operation of the inevitable discovery exception will render the evidence admissible. The prosecution clearly could not have applied inevita-

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129. *Id.* at 220, 285 N.Y.S.2d at 168.
ble discovery if the evidence was hidden in a safe deposit box, because it would stretch the imagination to assume that the police would have inevitably searched it. In both situations the police "exploited" the unconstitutional shortcut and the deterrent value of suppressing the evidence would be the same. A difference in results is irrational.

Two cases in the District of Columbia Circuit are useful to illustrate how inevitable discovery could be successfully applied as an exception to the exclusionary rule. Each case involved a coroner's testimony about an examination of a corpse which was located through an infringement on the defendant's rights. In *Wayne v. United States*\(^3\) the defendant was charged with attempted abortion terminating in the mother's death. The police received information from the decedent's sister who had witnessed the defendant perform the unsuccessful illegal abortion. The police officers who were called to the scene had been informed only that an unconscious woman was in an apartment at a certain address. The evidence showed that the police did not go to the apartment to arrest the defendant. The police entered the locked apartment and discovered the dead woman along with other evidence of the abortion. At trial the surgical tools found in the apartment were suppressed. The defendant claimed that the discovery of the body was the product of the illegal entry and that the coroner's testimony as to foreign substances in the body should also be excluded as "fruit of the poisonous tree." The court admitted the coroner's testimony because\(^4\)

\[\text{[it was inevitable that, even had the police not entered appellant's apartment at the time and in the manner they did, the coroner would sooner or later have been advised by the police of the information reported by the sister, would have obtained the body, and would have conducted the post mortem examination prescribed by law. ... Thus, the necessary causal relation between the illegal activity and the evidence sought to be excluded is lacking in this case.}\]

The result in *Wayne* is consistent with the policies underlying the exclusionary rule. The infringement on the defendant's rights was protected by suppression of both the surgical tools found near the body and the testimony of the policemen as to the circumstances

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\(^3\) 318 F.2d 205 (1963).

\(^4\) Id. at 209. The coroner was required to obtain the body after the information was given to him by the police.
under which the decedent was found. The coroner, by law, had to examine the body. The only effect of the police conduct was to accelerate the time that the examination was made. There was no bad faith action by the police in the entry into the apartment that would lead to the conclusion that an unconstitutional shortcut had initially been taken.

The problem with application of the sine qua non test in *Wayne*, rather than a reasoned policy analysis as to whether the coroner's testimony came about by exploitation of the unlawful entry, is demonstrated by the District of Columbia Circuit's second "body" case. In *Killough v. United States* the defendant's in-custodial statements, made in violation of his due process rights, led the police to the discovery of his deceased wife's body. The corpse was left in an open field near a heavily populated area. On a motion to suppress the coroner's testimony, the court relied on *Wayne* and stated that it "could not conclude . . . the body would not have been discovered 'but for' Killough's confession." 133

The court did not consider that *Wayne* was a significantly different factual setting. In *Wayne*, the police knew the location of the body at the time the illegal entry had been made. In *Killough*, however, the authorities did not even know where the corpse was hidden. The defendant's statements were the source of discovery of the corpse. The taint from the coroner's testimony was removed by hypothesizing that someone would eventually find the body and notify the police.

The amount of speculation in *Killough* exceeds even that of the hypothetical search in *Fitzpatrick*. 134 Assume that the defendant also told the authorities that he used a gun to murder his wife and that he abandoned it in another open field near a heavily populated area. It is doubtful that the police could have successfully made the same argument that someone would inevitably turn the gun in to the authorities. While it is more likely that the police would have been notified of the location of a body than a gun, the probability of discovery is not the standard to be applied. The discovery must be inevitable. 135 In the limited circumstances where statutory procedures would disclose the same infor-

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133. Id. at 934 (citations omitted).
135. United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962). "The test must be of actualities not possibilities." Id. at 489.
The inevitable discovery doctrine can be applied only where there is a reasoned determination that the policies underlying the exclusionary rule will not be undermined.

3. Evidence that Would be Produced Through Routine Investigatory Procedures

Courts have applied the inevitable discovery doctrine when the only effect of the intervening illegality is to accelerate the discovery of evidence in an investigation where the results are easily predictable. Thus, where an illegally obtained confession accelerated the discovery of information that would be forthcoming from FBI records, or the discovery of the owner of a gun whose identity could be readily disclosed from its serial number, the courts have held that no taint attached to the derivative evidence.

In United States v. Falley it seems that the Second Circuit may have applied "inevitable discovery," sub silentio, as an independent exception to the exclusionary rule. Federal agents were conducting a saturation investigation of customs brokers to determine which of them had prepared entry documents for shipments imported by the defendants. The agents prepared a list of 98 brokers to question. After contacting less than 10, the agents made an illegal search of the defendant's home where one of the items taken was an address book containing the name of the customs broker who possessed the documents. The court concluded that the agents had actually completed the legal saturation procedures and that the address book had not been used to discover the sought-after customs broker. The majority noted, however, that "[e]ven if the address book had shortened or facilitated the investigation it did not supply fruit sufficiently poisonous to be fatal." Judge Oaks, in dissent, indicated that it was highly unlikely that the government had used actual independent sources and that the approach taken by the court is tantamount to permitting the government to "prevail in a taint hearing on the

139. 489 F.2d 33 (2d Cir. 1973).
140. Id. at 40 (emphasis added).
mere showing of a hypothetical independent source . . . .”\textsuperscript{141} If, however, the majority had applied the inevitable discovery exception to the investigative findings in \textit{Falley}, then it would have been condoning unconstitutional police shortcuts because the investigating agency had participated in the illegal conduct that accelerated the discovery of the name of the custom's broker and the documents.

A recent Second Circuit case illustrates how the inevitable discovery doctrine can be used as a limitation on the exclusionary rule where “the intrusion on protected rights . . . was as minimal as possible given the fact that it was improper [and] [t]here is no evidence of any conscious purpose on the part of the People's agents to evade the constitutional restraints upon their activities.”\textsuperscript{142} The defendant had devised a scheme whereby false mechanics liens were filed against homeowners' properties after they refused to pay for fencing that was never delivered. The district attorney's office had received over 200 complaints from consumers about the defendant's activities and, therefore, commenced an investigation. In the interim between the commencement of the investigation and the issuance of a subpoena for the business records of the fencing company, the defendant sold his business and sublet the building to the new owners. The subpoena was issued to the new owners of the business, who produced copies of the mechanics liens from the defendant's old files. At a suppression hearing the court held that the copies of the liens should be suppressed because the files were not the property of the new owners. At trial the district attorney introduced certified copies of these same liens from the county clerk's office over the defendant's objections that the original information about the liens was from the prior illegal subpoena. The court appropriately applied the inevitable discovery doctrine to the challenged evidence, because the investigation would have led the district attorney to check the county clerk's office for the liens. The government had erroneously served the new owner of the business with the subpoena, believing that the files were his. Even if the subpoena had properly been served on the defendant, the records of the corporation were not subject to the fifth amendment privilege against self-incrimination.\textsuperscript{143} There was no reason to hold

\textsuperscript{141} Id. at 43 (Oaks, J., dissenting).
\textsuperscript{142} Roberts v. Ternullo, [1976] 18 CRIM. L. REP. (BNA) 2415, 2416 (2d Cir.).
that the original liens in the government’s files were immunized from use at trial. The court held that “it is impossible to find here that publicly recorded liens might have remained hidden from disclosure but for the wrongful seizure of the copies found in petitioner’s files or that any right of privacy was invaded by their use.”

III. CONCLUSION

The exclusionary rule should not automatically bar evidence solely upon a determination that it was discovered by the use of an illegal lead. In deciding whether evidence is “fruit of the poisonous tree,” the Supreme Court recently stated:

[W]e . . . decline to adopt any . . . per se or “but for” rule. . . . No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse . . . to turn on such a talismanic test. . . . [T]he presence of intervening circumstances . . . and particularly, the purpose and flagrancy of the official misconduct are all relevant.

Care should be taken not to apply a “but for” test in determining whether evidence is the fruit of the poisonous tree without also analyzing whether the policies underlying the exclusionary rule are satisfied. Causation is merely one factor to be considered in deciding if the police have exploited the illegality. It should not be determinative. In the limited situations where the agency has acted in good faith and the dangers of a “hypothetical search” are minimized, the inevitable discovery doctrine can be applied successfully as an exception to the exclusionary rule.

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144. Roberts v. Ternullo, [1976] 18 CRIM. L. REP. (BNA) 2415 (2d Cir.).
* J.D., 1976, Hofstra University. The author was the Book Review Editor for Volume 4 of the Hofstra Law Review.
SECTIONS 2-615 AND 2-616 OF THE UNIFORM COMMERCIAL CODE: PARTIAL SOLUTIONS TO THE PROBLEM OF EXCUSE

The purposes of the Uniform Commercial Code (hereinafter the Code) are to simplify, clarify and modernize the law governing commercial transactions and to make uniform the law of the various jurisdictions. This article will examine whether or not these goals have been met with respect to sections 2-615 and 2-616 of the Code. Section 2-615 determines the circumstances in which a seller will be excused from a contractual obligation. Sec-

1. Uniform Commercial Code § 1-102 [hereinafter cited as U.C.C.]. All references to the U.C.C. will be to the 1972 Official Text with Comments.
2. U.C.C. § 2-615 provides:
   Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
   (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
   (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
   (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.
3. U.C.C. § 2-616 provides:
   (1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2-612), then also as to the whole,
      (a) terminate and thereby discharge any unexecuted portion of the contract; or
      (b) modify the contract by agreeing to take his available quota in substitution.
   (2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.
   (3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.
tion 2-616 specifies the rights and obligations of a buyer who has been notified of a seller's claim of excuse.

The volume of cases which will be decided on the basis of sections 2-615 and 2-616 is increasing dramatically. The proper construction and application of these sections, however, are not readily apparent from the language of the Code itself. In addition, the sections have been subject to only limited scholarly attention. The fact that 49 states and the District of Columbia have adopted the Code and that it is "a source for the 'federal' law of sales" contributes to the critical need for contracting parties and attorneys to understand the scope and effect of sections 2-615 and 2-616.

This article will examine the defense of excuse as governed by section 2-615 and the procedures a buyer should follow on notice of excuse under section 2-616 in the context of four hypothetical fact situations.

**HISTORICAL BACKGROUND**

In order to understand and apply the section 2-615 test for excuse and the suggested procedures under section 2-616, it is necessary to examine the common law view of excuse due to impossibility and recognize the conflicting policies which must

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6. Louisiana is the only state which has not adopted the U.C.C. For an interesting discussion of the state of the law with regard to impossibility in Louisiana see Comment, *The Energy Crisis and Economic Impossibility in Louisiana Fuel Requirements Contracts: A Gameplan for Reform*, 49 *Tul. L. Rev.* 605 (1975).


8. The common law doctrine excuses a party from performance of a contract when an event beyond his control makes such performance either physically impossible or
be balanced before adopting any statutory solution to this problem. The English courts, in *Paradine v. Jane*,⁹ initially encountered the problem of whether the occurrence of an unforeseen contingency discharges either party from further contractual liability. The case involved an invasion by a hostile army and a lessee’s consequent inability to retain possession of his premises. While the defendant argued that this occurrence excused him from rent due, the court adopted what is called the rule of absolute contracts and found the defendant liable for rent, stating that:¹⁰

[W]here the law creates a duty or charge, and the party is disabled to perform it without any default on him and hath no remedy over, there the law will excuse him . . . but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

The rule of absolute contracts often produces harsh results which courts justify on the ground that a party can always guard against unforeseen contingencies by express contractual language in a force majeure clause.¹¹ Should a party choose to undertake an unduly burdensome. For the many variations of this doctrine see 6 A. CORBIN, CONTRACTS §§ 1320-72 (1962); 3 S. WILLISTON, CONTRACTS §§ 1931-79 (3d ed. 1962); 3 R. MCELROY, IMPOSSIBILITY OF PERFORMANCE (1941). See also Note, The Fetish of Impossibility in the Law of Contracts, 33 COLUM. L. REV. 94 (1933); Page, The Development of the Doctrine of Impossibility of Performance, 18 MICH. L. REV. 599, 591-610 (1920); Patterson, Constructive Conditions in Contracts, 42 COLUM. L. REV. 903, 943-54 (1942).


¹¹. The following typifies a modern force majeure clause:
The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather and defaults of subcontractors due to any of such causes . . . .

Austin Co. v. United States, 314 F.2d 518 (Ct. Cl.), cert. denied, 375 U.S. 830 (1963). See also Miss. CODE ANN. § 75-2-617 (1972) which provides:

Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent. If, because of any such circumstance,
absolute and unconditional obligation to perform, he will not later be excused from literal performance regardless of subsequent events which make the contract either unduly burdensome or impossible.\textsuperscript{12} The policies of basic contract law — that "the promisor accepts the risks of the promise"\textsuperscript{13} and that contracts should be performed whenever feasible — support this outlook.

Despite these historically sound policies, American courts eventually recognized instances when parties should be excused from performance. At the same time, they also recognized that strict, literal performance of all contractual obligations could at times prove to be unduly burdensome and oppressive.\textsuperscript{14} Courts acknowledged that at the time of contracting, parties could not always successfully negotiate and specify who would bear the loss of all potential contingencies. In 1918, the court in \textit{Mineral Park Land Co. v. Howard}\textsuperscript{15} set forth the then most modern and liberal standard of excuse: "[a] thing is impossible in legal contemplation when it is not practicable."\textsuperscript{16} The court eliminated the criterion of objective impossibility of performance to merit excuse from contractual liability.
LIMITED APPLICATION OF SECTION 2-615 EXCUSE

An initial problem encountered in section 2-615 stems from the introductory language "[e]xcept so far as a seller may have assumed a greater obligation." The difficulty presented by this phrase and the language in Comment 8 of this section has been adroitly analyzed by Professor Hawkland. His article, which explains the history behind the drafting of this section, also expresses a fear that its language could be read as granting excuse in the face of a force majeure clause specifying the disabling event. He notes that the Code could be misconstrued to mean that variation of the effect of these sections by contract is not possible. The ramifications of this introductory phrase can be understood only by examining the history of both section 2-615 and Comment 8.

Section 87 of the Uniform Sales Act preceded U.C.C. section 2-615, and the language of the two is strikingly similar. Professor Karl Llewellyn, one of the drafters of both sections, indicated in his notes a belief that parties should bargain for exemptions from contractual liability. Llewellyn also, however, wished to broaden the areas of excuse not covered by explicit contractual clauses.

17. U.C.C. § 2-615, Comment 8 provides:

The provisions of this section are made subject to assumption of greater liability by agreement and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like. Thus the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances. (See Madeirense Do Brasil, S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399 (2d Cir. 1945)). The exemption otherwise present through usage of trade under the present section may also be expressly negated by the language of the agreement. Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go.

Agreement can also be made in regard to the consequences of exemption as laid down in paragraphs (b) and (c) and the next section on procedure on notice claiming excuse.

18. Hawkland, supra note 5.
19. Id. at 77.
20. Id.
21. Id. at 75; Peters, supra note 5; Spies, supra note 5.
22. See Spies, supra note 5, where it is stated that Karl Llewellyn, one of the primary drafters of the Code, "was seeking the widest possible application of this section." Id. at 255.
Clearly the drafters of section 2-615 did not intend it to negate the effect of a valid force majeure clause. Rather, they sought to change the standard from one of impossibility to the more liberal and flexible standard of "impracticability," covering only those situations where the parties had not taken the possibility of the event into account at the time of contracting.

The introductory language of section 2-615 initially read "unless merchants otherwise agreed," but the drafters deleted the word "merchants" in order to emphasize that section 2-615 excuses encompass any sale of goods. The present language — "[e]xcept so far as a seller may have assumed a greater obligation" — harmonizes the statute with the result reached in Madeirense Do Brasil, S/A v. Stulman-Emrick Lumber Co. The shipping contract in Madeirense lacked a force majeure clause, but the seller defended his inability to deliver the goods on the ground of a lack of available ships. The court held the seller liable, claiming he had assumed the risk of not finding ships. In order to reconcile the holding in Madeirense with section 2-615, the drafters substituted the present language of "[e]xcept so far as a seller may have assumed a greater obligation," for the origi-
nal “unless otherwise agreed” language. The drafters wanted to make it clear that a party could lose his claim of section 2-615 excuse by express contractual agreement or by assuming a greater obligation by means of a circumstance known to the parties at the time of contracting.

It should be clear from the preceding discussion that parties may incorporate a force majeure clause into their contract to preclude any application of sections 2-615 and 2-616. Whether a court will find a force majeure clause to cover a certain contingency is another matter. If the court finds a clause to be inapplicable under the circumstances of a given case, a party might be able to claim excuse under section 2-615. It is unclear when a party will be denied excuse on the grounds that he assumed the risk of the contingency by circumstances surrounding the parties at the time of contracting.

The effect of this introductory phrase and the role that assumption of risks plays in the area of excuse are illustrated by recent judicial applications of section 2-615. In Transatlantic Financing Corp. v. United States, the closing of the Suez Canal thwarted a seller’s delivery. The court denied excuse because “the circumstances surrounding this contract indicate that the risk of the Canal’s closure may be deemed to have been allocated to Transatlantic.” Security Sewage Equipment Co. v. McFerren provides another example of an unsuccessful section 2-615 defense. In that case, where a contractor was held liable for non-performance, the court found the seller had assumed the risk that its plans for a sewage system would not be approved by the Department of Health. These cases illustrate that foreseeability is important in determining whether a seller has assumed the risk

28. See, e.g., Austin Co. v. United States, 314 F.2d 518 (Ct. Cl.), cert. denied, 375 U.S. 830 (1963) (the court refused to excuse the performance of a contract rendered impracticable by engineering difficulties, despite a force majeure clause which read “[t]he Contractor shall not be liable . . . [due to] causes beyond [his] control”); Thaddeus Davids Co. v. Hoffman-LaRoche Chemical Works, 178 App. Div. 855, 166 N.Y.S. 179 (1st Dep’t 1917) (the court refused to excuse the seller from an impracticable contract caused by an embargo despite a force majeure clause which read “change in tariff will allow [seller] to cancel this contract”). See also Consolidated Coal Co. v. Jones & Adams Co., 232 Ill. 326, 83 N.E. 851 (1908) (the court limited applicability of a force majeure clause to strikes at seller’s mine only). But see Davis v. Columbia Coal Mining Co., 170 Mass. 391, 49 N.E. 629 (1898).
29. 363 F.2d 312 (D.C. Cir. 1966).
30. Id. at 318.
32. Id., 237 N.E.2d at 899.
of a certain contingency. Neither case law nor the Code, however, clearly states whether tort standards of assumption of the risk\textsuperscript{33} or the Code test used in remoteness problems\textsuperscript{34} determines the foreseeability of the event. This may result from the Code's reliance on commercial custom and usage rather than abstract rules of law.\textsuperscript{35} Moreover, the concepts of foreseeability and assumption of the risk encourage parties to bargain over a particular contingency if it is sufficiently foreshadowed at the time of contracting. On the other hand, some feel that these concepts obfuscate the issue of whether a party should be granted contractual excuse.\textsuperscript{36} Based on the Code's present language, before a party can successfully establish a section 2-615 defense he must overcome the threshold qualification: "[e]xcept so far as a seller may have assumed a greater obligation."

Section 2-615: Hypothetical A

A buyer B contracts with a seller S to purchase 1,000 widgets. One day noxious fumes spread throughout S's plant making it unsafe for S's employees to continue working inside the plant. The Board of Health inspector orders S to close the plant until he finds the cause of the noxious fumes and alleviates the dangerous condition. S knows it will take at least ten weeks to trace his underground heating system. S realizes he will be unable to deliver the widgets to B as scheduled next week. S wants to

\textsuperscript{33} For definitions and analyses of the tort standard of assumption of the risk see Restatement (Second) of Torts §§ 496(A)-(D) (1965). The Restatement refers to assumption of the risk as a subjective test. Id. § 496(A).

\textsuperscript{34} The U.C.C. test for remoteness hinges on whether there was "reason to know." U.C.C. § 2-715(2), Comments 2 and 3; U.C.C. § 1-201(25). See also 5 A. COBIN, CONTRACTS § 1000 (1964). In a recent article, one commentator defined the Code test as "should have known." Note, Doctrine of Impossibility of Performance and the Foreseeability Test, 6 LOYOLA U. L.J. (Chicago) 575 (1975).

\textsuperscript{35} See U.C.C. § 1-201, Comment.

\textsuperscript{36} See Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia), [1964] 2 Q.B. 226 (C.A. 1963), where Lord Denning noted:

It has frequently been said that the doctrine of frustration only applies when the new situation is "unforeseen" or "unexpected" or "uncontemplated", as if that were an essential feature. But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract. . . . [W]hereas if they did foresee it, you would expect them to make provision for it.

Id. at 239. See also Comment, Quasi-Contract—Impossibility of Performance—Restitution of Money Paid or Benefits Conferred Where Further Performance Has Been Excused, 46 Mich. L. Rev. 401 (1948):

When a court allocates the loss with a statement that there was an implied assumption of risk, it hides from itself the responsibility and difficulty of its task if in fact it is clear that the intervening event was not covered by the contract. Id. at 406 (footnote omitted).
know if he will be held liable for nonperformance due to the plant closing. S owns another plant presently in full operation, and S also wants to know if he will be required to allocate delivery among all of his customers.

If S had no reason to know that noxious fumes would force the closing of his plant, and if the S-B contract contained no force majeure clause covering fumes, S would have to meet the Code's "three-step test" for excuse under section 2-615(a). Initially, in the three-step test, a contingency must occur; secondly, performance must be rendered impracticable; and thirdly, the parties must have contracted with the basic assumption that the contingency would not occur.

The Code "deliberately refrains from any effort at an exhaustive expression of contingencies" which qualify for excuse under section 2-615(a). Comment 2 states that whether a contingency satisfies the section's requirements shall be determined with regard to the underlying purpose and reason of the section. Generally, a contingency refers to an unusual change in circumstances which has a marked effect on the seller's ability to perform. The language used in and the policy underlying section 2-615 demonstrate that the appearance of the noxious fumes in S's plant should be considered a contingency warranting excuse so long as the other components of the section's test are met.

The second aspect of the test involves defining the parameters of the term commercial impracticability. Impracticability is often nothing more than the American common law definition of impossibility stated in Mineral Park Land Co. v. Howard. Commercial impracticability has also been termed a "commer-


38. U.C.C. § 2-615, Comment 2.


40. U.C.C. § 2-615, Comment 3 provides:

    The first test for excuse under this Article in terms of basic assumption is a familiar one. The additional test of commercial impracticability (as contrasted with "impossibility," "frustration of performance" or "frustration of the venture") has been adopted in order to call attention to the commercial character of the criterion chosen by this Article.

41. 172 Cal. 289, 156 P. 458 (1916). See text accompanying note 20 supra.
cially senseless" situation.\textsuperscript{42} The Code standard of commercial impracticability excuses performance not only when a contract has become strictly impossible\textsuperscript{43} but also when it has become unduly burdensome. Thus, the Code does not require that a seller meet the earlier, stricter tests of impossibility or frustration.\textsuperscript{44} Rather, the Code resolves questions of excuse based on the particular facts of the commercial setting in which the contingency occurred.\textsuperscript{45} With regard to hypothetical A, to excuse the contract the noxious fumes must make performance extremely difficult. Under the Code a seller will not be excused every time he encounters some unanticipated difficulties or increased expenses. To excuse sellers without proof that performance has become senseless would destroy the viability of contracts under the Code. If S proves the fumes' presence prevented work at his plant, he meets his burden of proving that performance had become impracticable.

The final aspect of the Code test requires "the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made." This language resembles language used by courts when applying the doctrine of implied condition.\textsuperscript{46} The doctrine initially granted excuse where a contract depended upon the continued existence of a person or thing and such person or thing was destroyed. The concept eventually excused parties when subsequent events altered the essential nature of performance.\textsuperscript{47} As one writer has commented, "essentially the same factors are involved in determining 'basic assumptions' as in finding 'impracticability.'"\textsuperscript{48} This test also incorporates the

\begin{itemize}
\item \textsuperscript{42} Natus Corp. v. United States, 371 F.2d 450, 457 (Ct. Cl. 1967).
\item \textsuperscript{43} See note 14 supra.
\item \textsuperscript{44} See Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc., 174 So. 2d 614 ( Fla. Dist. Ct. App. 1965). "Impossibility of performance" and "frustration of purpose" are distinct grounds for rescission of a contract. The first theory refers to those factual situations in which the contractual purposes have become impossible for one party to perform. The second theory refers to that situation in which one party to the contract finds that the purposes for which he bargained, of which the other party knew, have been frustrated by failure of consideration or impossibility of performance by the other party. \textit{Id.} at 617. \textit{But see} Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966), where Judge Skelly Wright pointed out that "the English regard 'frustration' as substantially identical with 'impossibility.'" \textit{Id.} at 320 n.16 (citation omitted).
\item \textsuperscript{45} U.C.C. \textsection 2-615, Comment 3. For recent cases construing the degree to which increased costs have rendered performance impracticable, see notes 86 and 87 infra.
\item \textsuperscript{46} For a discussion of implied condition see Farnsworth, \textit{Disputes Over Omission in Contracts}, 68 \textit{COLUM. L. REV.} 860 (1968); Comment, \textit{Apportioning Loss Ater Discharge of a Burdensome Contract: A Statutory Solution}, 69 \textit{YALE L.J.} 1054 (1960).
\item \textsuperscript{47} See, e.g., Wood v. Bartolino, 48 N.M. 175, 146 P.2d 883 (1944).
\item \textsuperscript{48} Symposium, \textit{supra} note 5, at 889.
\end{itemize}
concept of foreseeability used in the introductory language of section 2-615. In United States v. Wegematic Corp. Judge Friendly interpreted the third step of this test as “a somewhat complicated way of putting Professor Corbin’s question of how much risk the promisor assumed.” Thus, in hypothetical A, if S could contemplate the contingency of noxious fumes at the time of contracting, the courts would find that the third step of the section 2-615 test had not been met and would likely declare that S had assumed a greater obligation.

Even if a seller has a valid excuse under section 2-615(a), if the seller’s ability to perform has been only partially affected, he must allocate production and deliveries in accordance with section 2-615(b). The Code mandates that the seller allocate in a

49. 360 F.2d 674 (2d Cir. 1966).
50. Id. at 676. See 6 A. Corbin, Contracts § 1333 (1962); Corbin, Recent Developments in the Law of Contracts, 50 Harv. L. Rev. 449, 465-66 (1937).
51. See Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 70 Cal. 2d 666, 451 P.2d 721, 75 Cal. Rptr. 889 (1969), where the court refused to apply the doctrine of frustration because the party had assumed the risk of a cesspool failure and the consequent government-ordered termination of trailer park operations; Glens Falls Indem. Co. v. Persallo, 96 Cal. App. 2d 799, 216 P.2d 567 (2d Dist. 1970), where the court found that a contract entered into on Dec. 13, 1941 precluded any defense of commercial frustration because “[i]f the possibility of governmental regulation is reasonably foreseeable there can be no commercial frustration of a contract because of such regulation.” Id. at 802, 216 P.2d at 569. The court stated that “any American citizen should have been able to foresee the imminence of war with the axis powers.” Id., 216 P.2d at 570; Aristocrat Highway Displays, Inc. v. Stricklin, 68 Cal. App. 2d 778, 157 P.2d 880 (4th Dist. 1945) in which the court held that in October 1941 the United States involvement in World War II was foreseeable and therefore the parties should have known of the possibility of neon signs being prohibited. These cases rely on the rationale of Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944):

It is settled that if parties have contracted with reference . . . [to the frustrating event] or have contemplated the risk arising from it, they may not invoke the doctrine of frustration to escape their obligations.

Id. at 55, 153 P.2d at 51 (citations omitted). See also Symposium, supra note 5, at 880; Note, 53 Colum. L. Rev., supra note 8. “[F]oreseeability [is] properly utilized, i.e., as a factor probative of assumption of the risk of impossibility.” Id. at 99 n.23, citing Carlson v. Sheehan, 157 Cal. 692, 109 P. 29 (1910).

52. U.C.C. § 2-615, Comment 11 provides:

An excused seller must fulfill his contract to the extent which the supervening contingency permits, and if the situation is such that his customers are generally affected he must take account of all in supplying one. Subsections (a) and (b), therefore, explicitly permit in any proration a fair and reasonable attention to the needs of regular customers who are probably relying on spot orders for supplies. Customers at different stages of the manufacturing process may be fairly treated by including the seller’s manufacturing requirements. A fortiori, the seller may also take account of contracts later in date than the one in question. The fact that such spot orders may be closed at an advanced price causes no difficulty, since any allocation which exceeds normal past require-
fair and reasonable manner and allows for judicial flexibility in determining the appropriateness of allocation where performance has not been completely thwarted.

Two recent cases dealing with the problem of allocation illustrate the construction of section 2-615(b). In *Mansfield Propane Gas Co. v. Folger Gas Co.*, the court held that the reasonableness of allocation due to excuse should be determined by the circumstances of each case. The seller permissibly allocated among all of his customers even though some had written contracts and others had oral contracts. In *Chemtron Corp. v. McLouth Steel Corp.*, the court found the allocation unreasonable under section 2-615(b) where a seller for three years fulfilled 100 percent of its own needs and only 33 percent of the buyer's needs.

In hypothetical A, therefore, S would be required to allocate his production among his customers from his operating plant in order to meet the proportional needs of B.

Section 2-615(c) requires a seller who raises the defense of excuse to give seasonable notice to the buyer of delay, nondelivery or allocation. In *Bunge Corp. v. Miller* the buyer sued the seller for failure to deliver 80 percent of the soybeans ordered under contracts entered into in August 1972. Although shipment was due in November, the seller could not deliver until February 1973 because of a flood. The court rejected the seller's claim of excuse on the grounds that a particular tract of land was not specified. As an alternative rationale for denying relief, the court noted that even if section 2-615 had applied, the seller could not successfully advance the defense of excuse because he had not properly notified the buyer. Notice of nondelivery in February for goods due in November did not qualify as seasonable notice under section 2-615(c). Thus in hypothetical A, S would lose any potential

http://scholarlycommons.law.hofstra.edu/hlr/vol5/iss1/8
section 2-615 excuse if he failed to give \( B \) seasonable notice. Furthermore, \( S \)'s required notice to \( B \) extends to nondelivery of the widgets as well as to seasonable notice of allocation and the estimated quota available.

**Failure of a Seller's Source of Supply**

Comment 5 of section 2-615\(^{60}\) examines the problem which exists when a seller contemplates a particular source of supply to fulfill a contract, and the source fails due to an unforeseen contingency. If in hypothetical \( A \), \( S \)'s anticipated source of supply, rather than his plant, had been forced to shut down due to noxious fumes, the question arises whether \( S \) would be bound to fulfill the \( S-B \) contract. To be granted excuse a seller must show that both parties to the contract were relying on a particular source of supply. This can be shown by written agreement, custom or circumstances known by the parties at the time of contracting. Therefore, even if the \( S-B \) contract did not mention a particular source of supply, \( S \) could prove a particular source was contemplated by circumstance or custom.

Comment 5 cites two cases in support of the proposition that a party can prove the contemplation of a particular source by using only evidence of circumstances or custom at the time of contracting. *International Paper Co. v. Rockefeller*\(^{41}\) involved a

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60. U.C.C. § 2-615, Comment 5 provides:

Where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. The same holds true where a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting. (See Davis [sic] Co. v. Hoffmann-LaRoche [sic] Chemical Works, 178 App. Div. 855, 166 N.Y.S. 179 (1917) and International Paper Co. v. Rockefeller, 161 App. Div. 180, 146 N.Y.S. 371 (1914)). There is no excuse under this section, however, unless the seller has employed all due measures to assure himself that his source will not fail. (See Canadian Industrial Alcohol Co., Ltd. v. Dunbar Molasses Co., 258 N.Y. 194, 179 N.E. 383, 80 A.L.R. 1173 (1932) and Washington Mfg. Co. v. Midland Lumber Co., 113 Wash. 593, 194 P. 777 (1921)).

In the case of failure of production by an agreed source for causes beyond the seller's control, the seller should, if possible, be excused since production by an agreed source is without more a basic assumption of the contract. Such excuse should not result in relieving the defaulting supplier from liability, nor in dropping into the seller's lap an unearned bonus of damages over. The flexible adjustment machinery of this Article provides the solution under the provision on the obligation of good faith. A condition to his making good the claim of excuse is the turning over to the buyer of his rights against the defaulting source of supply to the extent of the buyer's contract in relation to which excuse is being claimed.

contract to deliver lumber. The court considered whether the parties intended the delivery of lumber to come from a particular source. The written contract conditioned the agreement on the seller obtaining a certain tract of land. Yet, the court expressed some doubt as to whether the parties bargained for the wood to be cut from a particular tract. The case supports the Code's policy favoring excuse when a particular source has been contemplated. It is inconsistent, however, with the proposition that circumstances alone can show that a particular source of supply was intended.

*Thaddeus Davids Co. v. Hoffman-LaRoche Chemical Works* is also cited in Comment 5 to support the proposition that a particular source need not be in writing to justify excuse. The seller failed to deliver carbolic crystals because of a European embargo. The court held the seller liable, finding that the term “tariff” in the force majeure clause did not encompass embargoes. With no discussion of whether the parties contemplated a particular source of supply, it is difficult to see why the case was cited at this point. In order to avoid confusion in situations falling under the penumbra of Comment 5, the practitioner should avoid any reference to *Thaddeus Davids Co.*

A recent case has clarified the notion that circumstances alone can show the contemplation of a particular source of supply. In *A. Leo Nash Steel Corp. v. C. D. Perry & Sons, Inc.* the court excused the seller for delay in delivery of steel resulting from its subcontractor's unexpected bankruptcy, noting that: “Nash had subcontracted the order, as Perry [had] known it would do, to Connecticut Steel Structures, Inc.” Excuse was granted even though the contract did not specifically refer to Connecticut Steel. According to this case, if the source of supply in the hypothetical S-B contract had failed, S would be excused if he could prove by circumstance that a particular source of supply was contemplated by both parties.

Comment 5 also deals with a seller's good faith effort to insure that his source of supply will not fail. Naturally, courts hesitate to grant excuse to a party who either causes his source

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62. Id. at 183, 146 N.Y.S. at 374.
63. 178 App. Div. 855, 166 N.Y.S. 179 (1st Dep't 1917) (the Code incorrectly cites this case as Davis Co. v. Hoffmann-LaRoche Chemical Works).
64. Id. at 857, 166 N.Y.S. at 181.
65. 491 F.2d 948 (2d Cir. 1974).
66. Id. at 949.
of supply to fail or does not protect it. Section 2-615 excuse will be denied when a seller has not "employed all due measures to assure himself that his source of supply will not fail." This requirement of good faith complements the good faith aim of section 1-203. Comment 5 reflects the generally accepted view that a party cannot profit from a self-created impracticability, but rather, must make all reasonable efforts to avoid impossibility.

Comment 5 concludes by noting the potential inequity of permitting a seller to claim excuse under section 2-615 where a particular source fails, yet enabling him to sue a third-party supplier for default. To avoid this result, the Code requires a seller claiming section 2-615 excuse to assign his rights against the defaulting supplier to the buyer. This policy prevents unjust enrichment of the seller with a bonus of damages from the supplier after the seller has been excused from his nondelivery liability. If $S$ claimed section 2-615 excuse due to failure of a contemplated source of supply, he would have to assign any of his rights against the supplier to $B$.

67. U.C.C. § 1-203 provides:

Every contract within this Act imposes an obligation of good faith in its performance or enforcement.

U.C.C. § 1-203, Comment, provides:

This section sets forth a basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. Particular applications of this general principle appear in specific provisions of the Act such as the option to accelerate at will (Section 1-208), the right to cure a defective delivery of goods (Section 2-614), and failure of pre-supposed conditions (Section 2-615). The concept, however, is broader than any of these illustrations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty within this Act. It is further implemented by Section 1-205 on course of dealing and usage of trade.

It is to be noted that under the Sales Article definition of good faith (Section 2-103), contracts made by a merchant have incorporated in them the explicit standard not only of honesty in fact (Section 1-201), but also of observance by the merchant of reasonable commercial standards of fair dealing in the trade.

See also Symposium, supra note 5, which states that courts should refuse to recognize an impracticability defense when a seller's laxity in getting a supply breaches good faith. Id. at 895; Squillante & Congalton, supra note 5: A seller cannot commit "acts which are detrimental to his good faith obligation to perform." Id. at 4.


Section 2-615: Hypothetical B

Seller S contracts to sell and deliver to buyer B a minimum of 5,000 shipping crates per month under a three-year requirements contract. Halfway through the S-B contract, B's employees strike. B's plant shuts down and is picketed by his employees. Since B does not desire or need any crates from S and is unable to take delivery from S, he wishes to know if he will be excused from the contract for the duration of the strike.

Although section 2-615 was drafted primarily to excuse a seller, Comment 98 mentions the possibility of buyers' exemptions in certain cases of frustration. The comment states that in cases of requirements contracts section 2-306 applies to both assumption and allocation of the relevant risks. Comment 9 goes on, however, to state that in requirements contracts containing explicit reference to a particular venture or in a case in which reference can be drawn from the circumstances, "the reason of the present section may well apply and entitle the buyer to an exemption." In a requirements contract if a buyer meets the section 2-306 test for allocation of the risk, he may be entitled to the same rights of excuse as a seller under section 2-615. In hypothetical B, considering Comment 9 of section 2-615 and section 2-306 together, it appears that B should be excused from failure to accept delivery of the crates as long as his plant remains shut down by the strike. Although no court has resolved this precise issue,71 the hypothetical fact pattern fits into the limited number

70. U.C.C. § 2-615, Comment 9 provides in part:
Exemption of the buyer in the case of a "requirements" contract is covered by the "Output and Requirements" section both as to assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raw material makes no specific reference to a particular venture and no such reference may be drawn from the circumstances, commercial understanding views it as a general deal in the general market and not conditioned on any assumption of the continuing operation of the buyer's plant. Even when notice is given by the buyer that supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see such a supply contract as conditioned on the continuance of the buyer's further contract for outlet. On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

71. In Prescon Corp. v. Savoy Constr. Co., 259 Md. 52, 267 A.2d 222 (1970), the court denied a buyer's attempted U.C.C. § 2-615 excuse for failure to accept delivery under the contract because it found that there was not a requirements contract, and therefore there was no need to review the contract in relation to the Code. Id. at 64, 267 A.2d at 223.
of cases in which the drafters intended to grant the buyer excuse.

Section 2-615 should be expanded to allow buyers the defense of excuse in contracts other than requirements contracts. One writer questioned whether section 2-615 is only one-way frustration or a partial codification of frustration. Mississippi has added the following subsection to section 2-615 to allow buyers the same rights as sellers in excuse situations:

(d) The buyer must notify the seller seasonably that there will be a delay or total inability to take delivery, and where practicable, state the contingency which has occurred causing such delay or inability.

Buyers and sellers should have the opportunity to claim section 2-615 excuse when faced with an unduly burdensome or commercially senseless contract. Equity and mutuality of remedies support this rationale.

Although no recent case law supports this proposition, Mishara Construction Co. v. Transit-Mixed Concrete Corp. illustrates the sound policy of extending the defense of excuse to buyers in other than requirements contracts. Mishara involved a situation similar to hypothetical B; however, the buyer in Mishara demanded delivery and the seller claimed the picket line around the buyer’s plant as the excuse for nondelivery. The court admitted evidence that the seller may have encountered difficulties attempting to cross the picket lines and found that picket lines can be grounds for excuse. No logical reason exists for distinguishing Mishara from hypothetical B. A strike at a buyer’s plant, which meets the section 2-615 three-step test should excuse a buyer from accepting delivery in the same way that it would excuse a seller from delivering, regardless of whether the S-B agreement was a requirements contract.

In response to Mississippi’s addition of a subsection, the Code’s Permanent Editorial Board stated that such a provision

74. For a case which rejects this proposition see Prescon Corp. v. Savoy Constr. Co., 259 Md. 52, 267 A.2d 222 (1970).
76. 310 N.E.2d at 368. For a case which holds that a strike does not render performance impractical see Fritz-Rumer Cooke Co. v. United States, 279 F.2d 200 (6th Cir. 1960).
might permit excuse in inappropriate cases. This fear is not persuasive in light of the fact that a buyer would be required to meet the three-step test when seeking section 2-615 excuse. Mississippi has made a sound policy decision in this area which the Code and other state legislatures should follow, especially because the grant of excuse under section 2-615 determines who bears the loss when applying section 2-616.

Section 2-614: Hypothetical C
Seller S in New York contracts to sell and deliver 1,000 widgets to buyer B in Europe. S has the goods ready for delivery, but an unforeseen longshoremen’s strike results in S’s inability to ship the goods from New York as planned. S wants to know if he is liable for nondelivery.

The introductory clause of section 2-615 states that the section is “subject to the preceding section [2-614] on substituted performance.” Comment 1 of section 2-615 reemphasizes that “the problem of the use of substituted performance on points other than delay or quantity . . . must be distinguished from the matter covered by this section.” In section 2-614 the drafters intended to solve problems of commercial impracticability which call for substituted performance. The section states that substituted performance must be tendered and accepted when “the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available.” It is generally agreed that the seller has the burden of

77. Bender’s U.C.C. Service, Willier & Hart, Permanent Editorial Board Comment (Report No. 3), at 1-168 (1975). The amendments seek to provide for excuse of a buyer, as suggested in Comment 9. The comment indicates that the need for such a provision is not clear, and the amendment may be read to permit the excuse in inappropriate cases.

78. U.C.C. § 2-614 provides:
(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.

79. But see U.C.C. § 2-614(2) which deals with situations in which the agreed manner of payment fails because of a governmental regulation. In such an event, the seller may withhold delivery unless the buyer provides a substantially equivalent manner of payment.
showing the unavailability of a commercially reasonable substitute. If there is no commercially reasonable substitute, a seller who meets the section 2-615 criteria would be excused. This interplay between sections 2-614 and 2-615 has led one commentator to remark that many times in deciding which section applies “the reader is left to his own ingenuity.”

The comments clarify whether section 2-614 will apply to a specific fact pattern. Comment 1 distinguishes between sections 2-614 and 2-615 by indicating that the former of these applies only when the “impossibility of performance arises in connection with an incidental matter.” The comment also states that sections 2-613 and 2-615 deal only with situations “going to the very heart of the agreement” and involving total excuse. Section 2-614 represents the Code’s policy that the manner of delivery or manner of payment are incidental matters. As a result, it requires that the seller tender and the buyer accept substitute performance when either of these two elements is affected. This policy of requiring substitute performance resembles the allocation requirement of section 2-615(b), and demonstrates the Code’s view that parties should perform contracts whenever possible.

One case closely parallels the facts of hypothetical C. In Caruso-Rinella-Battaglia Co. v. Delano Corp. of America, a seller claimed excuse for nondelivery of a foreign shipment of onions because a shipping strike made January delivery at the designated pier “impracticable.” The seller sued the buyer for refusing to accept delivery in February. The court dismissed the complaint because the seller did not specify substitute delivery in January and therefore did not protect his rights under section 2-614. It should be noted that the court admitted that the strike made delivery impracticable.

Applying Caruso to hypothetical C, the longshoremen’s strike would justify S’s excuse since it caused the agreed manner of delivery to become impracticable. Caruso leaves open those criteria which may determine a commercially reasonable substi-

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80. 2 ANDERSON: UNIFORM COMMERCIAL CODE § 2-614:8, at 295 (1971). See, e.g., Ocean Air Tradeways, Inc. v. Arkay Realty Corp., 480 F.2d 1112 (9th Cir. 1973), where the court determined that the burden of proving each element of commercial impracticability is on the party claiming excuse. Id. at 1117.
81. Spies, supra note 5, at 253.
82. U.C.C. § 2-614, Comment 1.
84. Id. at 1031, 3 U.C.C. Rep. at 867.
85. Id., 3 U.C.C. Rep. at 867.
tute manner of delivery. Although section 2-614 does not deal directly with this question, presumably the cost of the substitute delivery may determine its commercial reasonableness.

It is apparent that the seller in hypothetical C would have to offer a substitute manner of delivery if there were an available nearby port. On the other hand, S would not be required to use air freight if such extreme additional expense would change the essential nature of the contract. Between these two extremes the Code has left the courts to determine on a case-by-case basis the commercial reasonableness of a more expensive substitute manner of delivery.

There are several cases which specify the percentage of increased cost sufficient to excuse a seller under section 2-615 or to require substituted delivery under section 2-614. The more foreseeable the increased cost, the more extreme the increase a seller must show to warrant excuse. Whether a court will find excuse

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86. See, e.g., American Trading & Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939 (2d Cir. 1972) (30 percent increase in cost not sufficient for excuse); Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (added expense of $43,972 in contract price of $305,842.92 not sufficient for excuse); United States v. Wagematic Corp., 360 F.2d 674 (2d Cir. 1966) (1 to 2½ million dollars extra for redesign in 10 million dollar contract not sufficient for excuse); Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. Chemung County 1974) (23 percent increase in cost not sufficient for excuse). British cases which have dealt with increased cost include: Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia), [1964] (C.A. 1963) 2 Q.B. 226 (45 percent increase in cost not enough for frustration); Tsakiroglou & Co. v. Noble Thorl G.M.b.H. [1960] 2 Q.B. 318 aff'd, [1962] A.C. 93 (1961) (doubled costs not sufficient for excuse). Two recent cases have applied such a stringent test for impracticability that one must question whether the drafters' intention to broaden the area of excuse will ever be attained. In Publicker Industries, Inc. v. Union Carbide Corp., 17 U.C.C. Rep. 989 (E.D. Pa. 1975), the court refused a seller's defense of impracticability even though there had been a 100 percent increase in costs. The court said: "[W]e are not aware of any cases where something less than a 100% cost increase has been held to make a seller's performance 'impracticable.'" Id. at 992. In Eastern Air Lines v. Gulf Oil Corp., ___ F. Supp. ___ (S.D. Fla. 1975), Case No. 74-335-Civ-JLK (Oct. 20, 1975), the court again denied a seller's claim of impracticability even though there had been a cost increase of 400 percent for foreign oil due to the Arab oil embargo.

87. In Maple Farms v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. Chemung County 1974), the court found that a 23 percent increase in cost of raw milk did not justify excuse, where there had been a 10 percent increase in the cost of raw milk one year before the contract was written. Similarly, in American Trading & Prod. Corp. v. Shell Int'l Marine, Ltd., 453 F.2d 939 (2d Cir. 1972), the court held a 30 percent increase in cost not impracticable where the contract price was 75 percent above the normal rate. Id. at 942. The opinion in Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966), specifically stated:

[T]here must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the
often depends on "the ever shifting line, drawn by courts...at which the community’s interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance."^8

Under the facts of the hypothetical C longshoremen’s strike, S must offer a commercially reasonable substitute manner of delivery, if available, or be held liable for breach of contract. There can be no fixed percentage increase in delivery cost which will warrant excuse; courts must decide each case on the basis of the commercial setting involved. Recent case law illustrates that the total contract price and foreseeability are factors to consider when a seller decides whether to offer substitute delivery. If the seller decides to offer substitute delivery, section 2-614 requires that the buyer must accept such delivery.

Section 2-616: Hypothetical D
S seller S enters into a one-year installment contract with buyer B. S is to deliver 1,000 widgets on the 15th of each month. B is to make a down payment on the 10th of January. B fails to do so before delivery of the first installment in January. On January 11, S notifies B that he cannot fulfill two installments because of a raw material shortage, but that he expects to resume monthly deliveries in March. B wants to know his rights upon notice of S’s claimed excuse.

Section 2-616 determines a buyer’s rights upon receiving a seller’s notice claiming excuse. This section seeks to establish simple and workable machinery for deciding when a contingency "excuses delay...discharges the contract...or results in a waiver of delay by the buyer."^9

promisor can legitimately be presumed to have accepted some degree of abnormal risk.
Id. at 319.
89. U.C.C. § 2-616, Comment provides:
This section seeks to establish simple and workable machinery for providing certainty as to when a supervening and excusing contingency "excuses" the delay, "discharges" the contract, or may result in a waiver of the delay by the buyer. When the seller notifies, in accordance with the preceding section, claiming excuse, the buyer may acquiesce, in which case the contract is so modified. No consideration is necessary in a case of this kind to support such a modification. If the buyer does not elect so to modify the contract, he may terminate it and under subsection (2) his silence after receiving the seller's claim of excuse operates as such a termination. Subsection (3) denies effect to any contract clause made in advance of trouble which would require the buyer to stand ready to take delivery whenever the seller is excused from delivery by unforeseen circumstances.
To date, only one American court has even tangentially discussed the scope and effect of section 2-616. In *Goddard v. Ishikawajima-Harima Heavy Industries Co.*, the court excused a boat manufacturer-seller for nondelivery when his factory was destroyed by fire. The dealer-buyer claimed that the seller should have been required to manufacture and deliver the boats if he rebuilt his factory. The court found that "[t]here [was] no proper evidentiary showing . . . that this particular order was effectively continued or reinstated so as to obligate the defendant to manufacture and deliver the particular boats following the rebuilding of its factory." Without comment the court parenthetically cited section 2-616 to support its holding. Due to the lack of judicial analysis of section 2-616, practitioners must pay careful attention to the section's language when advising buyers how to respond properly to a notification of delay or allocation which the seller claims under section 2-615. This need for attention increases in importance when one recognizes the significant substantive results which may flow from this section.

Section 2-616 applies where a buyer has been informed of a material or indefinite delay within a reasonable time. If the seller fails to meet the section 2-615(c) notice requirement, the seller loses both the defense of excuse due to impracticability and coverage by section 2-616. Other language in section 2-616(1) limits its application to situations "where the prospective deficiency substantially impairs the value of the whole contract under provisions relating to breach of installment contracts (section 2-612) . . . ." This language lends itself to two interpretations.

At first glance this phrase appears to give the buyer the same options under an installment contract breach that he would have under a section 2-615 excuse. The buyer could opt to terminate under section 2-616(1)(a) or to modify under section 2-616(1)(b). However, the procedure following the breach of an installment contract does not belong in a section entitled Procedure On Notice Claiming Excuse. Furthermore, section 2-612 offers no indication to a buyer, either by direct mention of section 2-616 or by cross reference to it, that the procedures of section 2-616 are available.

A more rational interpretation of this phrase exists. The language further explains the preceding phrase in section 2-616 (1).

91. Id., 287 N.Y.S.2d at 902.
92. For a discussion of seasonable notice see text accompanying notes 57-59 supra.
This construction shows that when commercial impracticability warrants excusing a seller from nondelivery of one segment of an installment contract, the buyer may terminate or modify the whole contract only if the one delivery substantially impairs the value of the whole contract.

In hypothetical D the shortage affected only two deliveries and did not substantially impair the value of the whole contract, therefore B must accept the March delivery of the widgets. Termination or modification of the agreement would be available solely with respect to the January and February deliveries affected by the shortage. That the shortage might extend past February does not give the buyer the right to terminate the whole contract under section 2-616.93

The proper view of the phrase — "Where the prospective deficiency substantially impairs the value of the whole contract under provisions relating to breach of installment contracts (section 2-612) . . ." — refers only to excuse situations. However, the present draft of section 2-616 creates two problems. First, the allowance of excuse for only one delivery of the installment contract contradicts the idea that section 2-615 involves a complete avoidance of the contract. The avoidance of one part of a contract obligation also contradicts section 2-616(1)(a), which states that if a buyer terminates he discharges any unexecuted portions of the contract. Simple redrafting would clarify the section and prevent misapplication of the aforementioned phrase.

If a buyer may only terminate or modify each undelivered installment in hypothetical D, B would be required to stand ready to accept delivery each month, even though S had been excused the previous month. B's requirement would result even if it appeared that the shortage would last a long time. B would be forced to enter into contracts with other sellers each month for the undelivered 1,000 widgets. This arrangement must preclude B from entering into any long-term or more favorable contracts with other sellers for widgets.

Adopting a standard of foreseeability to determine that the whole contract is substantially impaired in lieu of the section 2-612 Code test would resolve B's dilemma. Foreseeability plays

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93. According to U.C.C. § 2-612, Comment 6, the fact that future performance may be affected does not justify cancellation of an installment contract. For text of Comment 6 see note 94 infra.

94. U.C.C. § 2-612, Comment 6 provides:

Subsection (3) is designed to further the continuance of the contract in the
an important role in determining a seller’s grant of excuse under section 2-615. By a parity of reasoning, foreseeability should in part determine a buyer’s right to terminate the whole installment contract after the excuse of one delivery. Buyers’ facile avoidance of installment contracts would not necessarily ensue: they would have to prove that a shortage would continue for a major portion of the contract. Although a difficult burden of proof, this would at least provide for a more equitable result when B’s current lack of options.

The words of section 2-616(1) — “justified under the preceding section” — present yet another problem. One would naturally assume that the procedures outlined in section 2-616 would apply only after a court has determined the validity of the seller’s excuse under section 2-615. Unfortunately, the buyer does not have the luxury of knowing, upon receiving notice of excuse, whether a court will later uphold the seller’s excuse. In fact, if the buyer fails to respond to such notice within thirty days, the Code treats the contract as terminated under section 2-616(2). No court has examined whether termination or modification under section 2-616 precludes a later suit for breach of contract. At a minimum, the buyer must emphasize when terminating or modifying that he reserves right to sue for breach of performance.

Section 2-616(3) reads: “[t]he provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.” As the comment indicates, “[s]ubsection (3) denies effect to any contract clause made in advance of trouble which would require the buyer to stand ready to take delivery whenever the seller is excused from delivery by unforeseen circumstances.” Some states

absence of an overt cancellation. The question arising when an action is brought as to a single installment only is resolved by making such action waive the right of cancellation. This involves merely a defect in one or more installments, as contrasted with the situation where there is a true repudiation within the section on anticipatory repudiation. Whether the non-conformity in any given installment justifies cancellation as to the future depends, not on whether such non-conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract. If only the seller’s security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance but has not an immediate right to cancel the entire contract. It is clear under this Article, however, that defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect “waived.” Prior policy is continued, putting the rule as to buyer’s default on the same footing as that in regard to seller’s default.
have deleted this section claiming that it constitutes a limitation on the freedom of contract. The Permanent Editorial Board of the Code, recognizing the confusion over this subsection, has noted that "[t]his is an old controversy." The language of Comment 8 to section 2-615 further obscures the meaning of section 2-616(3). That comment states: "[a]greement can also be made in regard to the consequences of exemption as laid down in paragraphs (b) and (c) and the next section on procedure on notice claiming excuse." A recent article by Professor Hawkland resolves any apparent conflict, explaining that section 2-615 comes into play only when the parties did not bargain for the excuse claimed.

Parties may bargain for exemptions and their results to avoid the application of section 2-615. Since section 2-616 applies only where there has been use of section 2-615 excuse, parties may bargain for exemptions and their results despite the language of section 2-616(3). Hawkland's explanation gives effect to the procedures of section 2-616 but also encourages parties to enumerate in the contract exemptions and consequences. In hypothetical D the parties could have bargained beforehand over the shortage and the consequences which would flow from it.

Section 2-616 is entitled Procedure on Notice Claiming Excuse. The procedural rules outlined create important substantive results. To comprehend the substantive ramifications of these procedural guidelines, however, the various judicial techniques which have been employed to allocate the burden of loss after a seller has been excused from performance must be examined.

The histories of impossibility and frustration have been ably summarized. In this discussion, the historical synopsis is relevant in adducing the Code's apportionment of the burden of loss. Some commentators have suggested that apportionment of the loss between seller and buyer most equitably resolves the issue.

96. Id. at n.9, citing Report No. 2 of the Permanent Editorial Board for the Uniform Commercial Code 48 (1965).
97. Hawkland, supra note 5.
98. See notes 8 and 51 supra.
The Code has not adopted this view either because of a policy that this outlook is infeasible or because adoption of it might hinder parties in allocating losses between themselves. By avoiding any allocation of loss and adopting a view of total excuse or no excuse, the Code allows only quantum meruit and places the entire reliance loss of an unfulfilled contract on the seller or the buyer. Read literally, the Code seems to revert to an early, often criticized view that the loss lies where it falls at the point of impossibility. The Code’s resolution of this problem does not comport with the standards of fairness and reasonableness espoused throughout the Article.

In 1904 the first truly critical judicial attempt to deal with the burden of loss occurred in Chandler v. Webster. That case involved a plaintiff who contracted to rent a room to see a coronation procession. The lessee made a downpayment of £100 and owed a balance of £41.5. When the procession did not take place, the lessee sued for return of his £100 and the lessor demanded payment of the balance due. Justice Collins wrote:

The fulfillment of the contract having become impossible through no fault of either party, the law leaves the parties where they were, and relieves them both from further performance of the contract.

The court found the lessor entitled to keep the original £100 and to collect the balance due because the obligation to pay accrued before the procession was cancelled. The court maintained that obligations up to the point of frustration were enforceable; subsequent obligations were not enforceable. This case has been interpreted to stand for the proposition that “the loss lies where it falls.” The plaintiff had argued that he could disregard the contract and recover the £100 paid under a theory of burdensome contracts see Drachsler, Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality, 3 N.Y.L.F. 50 (1957); Rodhe, Adjustment of Contracts on Account of Changed Conditions, in 3 SCANDINAVIAN STUDIES IN LAW 153 (1959); Smit, Frustration of Contract: A Comparative Attempt at Consolidation, 58 COLUM. L. REV. 287 (1958).

101. Id.
102. Id. at 498.
103. Id.
104. Id. at 500.
of quasi-contract, on the ground of total failure of consideration. However, the court wrote:

If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine [of frustration]; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply.

In hypothetical D, Chandler would require B to pay the down-payment even though he had received nothing.

Although often criticized, the decision rendered in Chandler remained in effect until the 1944 case of Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd. The defendant, an English company, agreed in July 1939 to sell and deliver certain machinery to a Polish buyer within three or four months of the contract. The contract price was £4,800 of which £1,600 was payable in advance. The buyer paid only £1,000 of the down-payment. The outbreak of war in Europe frustrated the contract and the English company could not deliver the machinery. The Polish buyer asked for return of the £1,000 paid before the war. The English company, however, refused to return the down-payment because a considerable amount of work had already gone into making the machinery. The English court permitted the Polish buyer to recover the £1,000 downpayment, overruling Chandler. The decision permitted the buyer, though, to recover because he had received no benefit. The seller received no money even though he had incurred substantial essential reliance damages in attempting to build the machine in order to fulfill the contract prior to the point of frustration. Although Fibrosa diminished the harshness of Chandler, it only resolved situations where total failure of consideration occurred. If the consideration had only partly failed, the buyer would not have been able to recover any of his downpayment. Delivery of any insignificant item would cause the buyer to lose his rights to recover his downpayment on the theory of failure of consideration. If in hypothetical D, B had made a downpayment and received no delivery, he could recover his downpayment regardless of S’s reliance expenses. If, however, B had received one installment

108. Id. at 129.
delivery and then the shortage occurred, he could not recover the downpayment under *Fibrosa*.

The next attempt to clarify the law of frustration and impossibility occurred in 1943 with the Law Reform (Frustrated Contracts) Act. The statute, which applies only when the contract is discharged due to frustration or impossibility, brought about two crucial changes. It increased the scope of *Fibrosa* by allowing recovery of prepaid money less seller's essential reliance losses even when there has not been a total failure of consideration. If one party has conferred a benefit on another party before frustration, it permits the conferring party to recover the value of the benefit. If the statute were applied to the facts of *Fibrosa*,

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109. The Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 GEO 6, c. 40, §§ 1(1)-(3) stated:

(1) Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have effect in relation thereto.

(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as “the time of discharge”) shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular,—

(a) the amount of any expenses incurred before the time of discharge by the benefitted party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

110. In *Fibrosa*, the contract price was £4,800 and the downpayment required was £1,600, only £1,000 of which was actually paid in advance:

(a) if the seller had expended £600 attempting to complete the contract prior to the point of frustration, he would keep £600 and return £400 of the downpayment to the buyer;

(b) if the seller had spent £1,300 prior to the point of frustration, the buyer would be required to pay an additional £300 to the seller;
the seller could not recover his essential reliance expenses absent a downpayment requirement. His recovery would be limited to quantum merit. In hypothetical D a downpayment was required. Therefore, S would be able to recover his essential reliance expenses up to the amount of the downpayment.

The Restatement of Contracts § 468 codified the American rule prior to the Uniform Commercial Code. Under the Restatement, the buyer recovers from the seller what he paid prior to impossibility less the value of any benefit received. This differs from the Chandler rule in which the buyer lost any payments made prior to the supervening event. Under the Restatement a seller could only recover for part performance related to the benefit conferred. The Frustrated Contracts Act provided for the seller's retention of any prepayments that related to essential reliance expenses the court deemed just. The English rule recognizes essential reliance losses while the Restatement concerns solely the value of the benefit conferred. Thus under the Restatement a seller who incurs expenses in order to fulfill a contract receives no money from the buyer when the contract becomes impractical if the buyer has received no goods. Applying the Restatement to hypothetical D, S would receive no money at all: there had been no delivery to B and S's essential reliance expenses would not be recognized.

If a buyer does not have a feasible section 2-616(1)(b) modification remedy, he can exercise his rights under sections 2-616(1)(a) and 2-616(2) and terminate the contract. If the contract

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(c) if the seller had spent £1,700, he would be able to keep the £1,000 of the downpayment already paid and demand the additional £600 due under the downpayment. However, the seller would be unable to recover the £100 spent on the reliance cost since that sum exceeded the downpayment.

111. RESTATEMENT OF CONTRACTS § 468 (1932) provides:

(1) Except where a contract clearly provides otherwise, a party thereto who has rendered part performance for which there is no defined return performance fixed by the contract, and who is discharged from the duty of further performance by impossibility of rendering it, can get judgment for the value of the part performance rendered, unless it can be and is returned to him in specie within a reasonable time.

(2) Except where a contract clearly provides otherwise, a party thereto who has rendered performance for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he has rendered can be and is returned to him in specie within a reasonable time.

(3) The value of performance within the meaning of Subsections (1, 2) is the benefit derived from the performance in advancing the object of the contract, not exceeding, however, a ratable portion of the contract price.
called for a downpayment before the point of commercial impracticability and the buyer failed to make that payment, the buyer might be held liable for that downpayment. This outcome results from the Code definition of termination: "all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives." Failure to pay money payable before the excuse could be viewed as a prior breach of the contract, despite the fact the seller has been excused from further performance and has suffered no essential reliance losses. A literal reading of the Code may return the parties to the rule of Chandler v. Webster in cases of justified excuse. Therefore, in hypothetical D, B might be required under the Code to pay S the scheduled downpayment even though no delivery had occurred.

The present language of the Code could be interpreted as resurrecting and reestablishing a rule of law known as "a maxim which 'works well enough among tricksters, gamblers and thieves.'" Certainly, the drafters could not have intended this inequitable result in light of the fact that:

The decision reached in Chandler's case [has been] criticized by WILLISTON, CONTRACTS, sect. 1954, p. 5477 (see, too, sect. 1974, p. 5544), and has not been followed in most of the States of America. Nor [was] it adopted in the Restatement of The Law of Contract by the American Law Institute, sect. 468, pp. 884 et seq.

112. U.C.C. § 2-106 provides in part:

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

113. Interview with Dean Monroe H. Freedman, Hofstra University School of Law, in Hempstead, New York, Feb. 10, 1976. Dean Freedman further stated that adoption of this reading of the Code might put a defaulting party in a better position than a buyer who had had his contract excused due to impracticability under U.C.C. § 2-615. Under U.C.C. § 2-718(2)(b), if the buyer breaches and the seller withholds delivery, the buyer must pay $500 or 20 percent of the value of total performance, whichever is lower. If the seller's performance has been excused, however, the buyer loses the entire downpayment.


115. Id. at 141 (L. Wright).
This complex, yet crucial substantive issue should be confronted in order to provide the courts with the needed flexibility to fashion equitable solutions in this area, and to resolve any lingering doubts that the Code might have adopted the view that “the loss lies where it falls.”

CONCLUSION

This article has examined sections 2-615 and 2-616 within the context of four hypothetical commercial situations. After analyzing the historical background, the drafting and the limited judicial constructions of section 2-615, it is apparent that the drafters’ goals of simplification, clarification and modernization of the doctrine of excuse have not been attained. The language contained in the present draft of section 2-615 is partially responsible for the section’s failures. The roles that foreseeability, assumption of risks and increased cost should play in commercial impracticability must be clarified to insure that courts utilize the appropriate standards when applying the three-step test. The action taken by the Mississippi legislature which grants buyers the same rights of excuse as sellers should be adopted by the Code and other state legislatures. The ambiguous language of section 2-616 should be eliminated so that both contracting parties and practitioners will know their rights and obligations when involved in an excuse situation. Finally, the decision to limit loss apportionment to quantum meruit in section 2-616 must be reevaluated. Section 2-616 should consider reliance losses in order to attain the equitable results sought under section 2-615.

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