

CLEAR RULES STILL PRODUCE FUZZY RESULTS: IMPOSSIBILITY IN INDIAN CONTRACT LAW

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Robert Scott and others have forcefully argued that the justification for commercial statute-drafting is efficiency.¹ Because commercial parties can draft their own contracts, legislatures should draft default rules, he argues, only when it will save commercial parties time and money.² This can be called the efficiency goal.³ Greater efficiency is achieved when the costs of the gains produced by commercial transactions are reduced. Thus, with few exceptions, the rules of commercial law should be clear, precise, and what most parties would want most

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1. See Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT'L REV. L. & ECON. 446 (2005); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994). But see Shawn J. Bayern, *Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law*, 97 CAL. L. REV. 943, 946 (2009) (arguing that the conclusion of Schwartz and Scott "seriously misstates the costs and benefits of formalism"); Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism* (June 14, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1419683> (contrasting certainty with predictability and arguing that failure of the former does not equate to lack of the latter).

2. See, e.g., Paul B. Stephan, *Does the CISG Fill a Much-Needed Gap?*, 101 AM. SOC'Y INT'L L. PROC. 414, 414 (2007) ("Codification of contract law, whether through a domestic statute or an international convention, should be seen as an effort to reduce the costs of contracting by providing parties terms that operate by default.").

3. This should be so regardless of whether efficiency is understood in terms of performance or reliance. See generally Richard Craswell, *Two Economic Theories of Enforcing Promises*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 19 (Peter Benson ed., 2001).

of the time.⁴ This is the precision corollary to the efficiency goal. Statutory precision emulates a well-drafted agreement and reduces the risk of moral hazard.⁵

The excuse of contractual impossibility may be in tension with the goal of efficiency. This conflict becomes more pronounced as impossibility is relaxed to include impracticability and frustration of purpose. On the one hand, parties' evaluation of the welfare-enhancing nature of contractual obligations should not be undercut by subsequent regret. On the other hand, contract parties obviously believe that the occurrences of some post-contract states of affairs warrant discharge of unperformed contractual obligations; after all, they regularly incorporate *force majeure* clauses into their contracts. Moreover, it seems plausible that the same parties would prefer not to expend the resources necessary to describe these risks in a contract and instead would wish to leave this issue to standard form legislation.⁶ Or at least they would if the American versions of impracticability were not pitched at such a high level of abstraction that they transgress the precision corollary.⁷ Finally, the fact that people are generally risk averse suggests that the possibility of a judicial "out" would encourage the practice of contracting generally; the systemic cost of the excuse of impracticability is a form of insurance.⁸ In other words, for most people, the value of avoiding a possible catastrophic loss exceeds the cost of eliminating a potential windfall gain.⁹

Two responses to the uncertainty created by American versions of impracticability seem plausible. First, the law could provide a more precise impracticability rule—one that complies with the precision corollary. Alternatively, the impracticability project can be abandoned, letting risks fall

4. Stephan, *supra* note 2, at 414 ("If the terms in the CISG were to conform to party desires, that law would reduce the costs of contracting, both saving parties some expense and making contracting more attractive.").

5. Gillette & Scott, *supra* note 1, at 458 ("Standards, however, risk undermining the predictability that commercial parties prefer and can create problems of moral hazard.").

6. See STEPHEN A. SMITH, CONTRACT THEORY 293 (2004) ("[I]f potential contracting parties know that courts will allocate low probability risks in the same way that they would have done themselves, they can confidently enter contracts without specifying how those risks should actually be allocated.").

7. See U.C.C. § 2-615(a) (2003); RESTATEMENT (SECOND) OF CONTRACTS § 266 (1981); see also Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369 (2004).

8. See FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 233–63 (1921) (analyzing distinction between risk and uncertainty and relationship of insurance to the former); see also NASSIM TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (2007) (popularizing the distinction between "known unknowns" and "unknown unknowns" and their impact on decision-making).

9. See generally Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227 (2004).

where they may and leaving any excuses to the drafting efforts of the contracting parties.¹⁰

This article will address the feasibility of the first possible response, that a better impracticability mousetrap can be built. Instead of speculating about what forms a more precise version of impracticability might take, this article will examine a currently subsisting example, Section 56 of the Indian Contract Act, 1872. Part I of this article will examine the text of Section 56, its history and meaning, and its leading Indian judicial applications. Part II will summarize the American experience with impracticability, while Part III will briefly address the long-standing challenges impracticability and its cognates have presented in the history of Western legal thought. Part IV will take account of a competing normative perspective justifying impracticability and conclude with the author's view of the virtue of applying Section 56 as originally understood.

I. THE INDIAN CONTRACT ACT

A. The Scope of the Field

Section 56 of the Indian Contract Act¹¹ is straightforward. Its three sections lay out two rules regarding impossibility and what amounts to a limitation on the first rule. The first directive is brief and to the point:

56. Agreement to do impossible act. – An agreement to do an act impossible in itself is void.¹²

The third section is consistent with the well-recognized common law limitation on the excuse recognized in the first section:

Compensation for loss through non-performance of act known to be impossible or unlawful. – Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.¹³

10. See Scott, *supra* note 7, at 370 (arguing that public contract law is dying because of a move “from bright line rules to vague standards”).

11. Indian Contract Act § 56, No. 9 of 1872; INDIA A.I.R. MANUAL (5th ed. 1989), v. 14, available at <http://indiacode.nic.in/fullact1.asp?tfnm=187209>.

12. Indian Contract Act § 56.

13. *Id.*

These paragraphs restate contract rules going back to Roman law¹⁴ and represent the law of England in 1872.¹⁵ No reported cases in India, and relatively few in America, have fallen within their scope.¹⁶ However, the Indian limitation of relief to the aggrieved party for “losses sustained” (thus excluding recovery for gains prevented) when the obligor knew or should have known what had been promised was impossible contrasts with the Restatement’s view that would permit recovery of both losses sustained and gains prevented.¹⁷

The second paragraph of Section 56 addresses the core of impracticability:

Contract to do act afterwards becoming impossible or unlawful. – A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the Promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.¹⁸

Subsequent illegality provokes a host of practical issues, but it is impossibility (or impracticability) that has drawn substantial analytic attention over the years.¹⁹ The term “impossible” in Section 56 raises several concerns. How would a law-minded audience in 1872 have understood “impossible”? And, assuming we can answer that question with reasonable clarity, how do Indian courts apply Section 56 today?

B. History and Context of Section 56

The process of drafting the Indian Contract Act began in 1861 in England with the creation of the third Indian Law Commission.²⁰ Upon receiving the

14. DIG. 50.17.185 (Celsus, Digestum 8) (“Impossibilium nulla obligatio est.”).

15. See *infra* text accompanying notes 26–43; see also 1 FREDERICK POLLOCK & DINSHA FARDUNJI MULLA, INDIAN CONTRACT & SPECIFIC RELIEF ACTS 1123 (R.G. Padia & Nilima Bhadbhade eds., Lexis 2006) (1905) (“The first paragraph represents the same law as in England.”). Indeed, the same is true in America. See RESTATEMENT (SECOND) OF CONTRACTS § 266 (1981).

16. As of October 2009, no Indian cases under this paragraph of Section 56 have been reported. For general discussions of American law on existing impossibility, see E. ALLAN FARNSWORTH, CONTRACTS 658–60 (3d ed. 1999); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 515 (4th ed. 1998). See also U.C.C. § 2-613 cmt. 2 (2004).

17. RESTATEMENT (SECOND) OF CONTRACTS §§ 272(2), 377.

18. Indian Contract Act § 56.

19. See *infra* text accompanying notes 67–117.

20. See Atul Chandra Patra, *Historical Background of the Indian Contract Act, 1872*, 4 J. INDIAN L. INST. 373, 393 (1962) (“The Indian Contract Bill was drafted originally by the (Third) Indian Law Commission constituted in December, [sic] 1861, and functioning

Commission's proposed bill in 1867, the bill was referred to a select committee of the Council of the Governor-General in India²¹ where Fitzjames Stephen took the lead in making limited revisions, none of which pertained to Section 56.²² The drafters' goal had been to create a simplified version of English common law with modifications necessary for the Indian context.²³ Both the Governor-General and the Lieutenant-Governor of India expressed concern that parts of the bill were too hard-edged for many persons in India. However, the Council demurred, and the bill became the Indian Contract Act, effective September 1, 1872.²⁴ Interestingly, the responses of several Council members to the meliorating suggestions of the Governor-General and Lieutenant-Governor anticipated the efficiency arguments described above:

In reference to His Honour's general complaint that the Bill was a hard one the Hon'ble Mr. Bullen Smith said that a Contract Law must, from its very nature, be cast in a somewhat hard mould, and that any attempt to eliminate this element of hardness from it, would certainly tend to mar its usefulness and render it a weak, ineffective measure.²⁵

What was the state of English law on the subject of impossibility during the drafting of the Indian Contract Act? The leading treatise on English contract law in 1861 would probably have been Joseph Chitty's *Law of Contracts*.²⁶ Chitty's work exemplifies the "hard mould" later advocated by the Council in its deliberations. Thus, according to Chitty, where a contract may have become extremely difficult to perform, it continues to bind a promisor "notwithstanding it is beyond the power of the party to perform it—it being deemed to be his own fault and folly, that he did not thereby *expressly* provide against

in England."); see also M.P. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY* 466–68 (1952) (discussing history of Third Indian Law Commission and its tense relationship with the Government of India).

21. See 1 WHITLEY STOKES, *ANGLO-INDIAN CODES* 534 (1887).

22. See Patra, *supra* note 20, at 394–95; see also JAIN, *supra* note 20, at 648.

23. 1 POLLOCK & MULLA, *supra* note 15, at 7. See also Patra, *supra* note 20, at 395 ("The scope of the Bill was to bring the Indian Law of Contract, as far as might be, into harmony with the English law on the same subject, as established by recognized practice, by Statute, and by the latest and best judicial decisions of the time.").

24. Indian Contract Act § 1, No. 9 of 1872; INDIA A.I.R. MANUAL (5th ed. 1989), v. 14 ("[I]t shall come into force on the first day of September, 1872.").

25. Patra, *supra* note 20, at 397. Another councilor "thought that the policy of the law should be certain and unequivocal and the provisions for its enforcement impartially stringent." *Id.* The goal of efficiency and its precision corollary were in the forefront of the legislators' minds.

26. JOSEPH CHITTY, *A TREATISE ON THE LAW OF CONTRACTS* (6th ed. London, Sweet 1857).

contingencies”²⁷ According to Chitty, even contractual terms purporting to reduce a party’s absolute liability were of limited value because courts would construe them very narrowly.²⁸

Bookending Chitty’s work, which pre-dated the early drafting of the Indian Contract Act, was Frederick Pollock’s 1876 *Principles of Contract*.²⁹ Pollock’s work is particularly salient because he and Fitzjames Stephen were close associates,³⁰ and because, as this article will show, Pollock was an early commentator on the Indian Contract Act.³¹ While there is little evidence of the “hard mould” of contract law softening in Pollock’s treatise, it represents a substantial development in the substantive analysis of relief for impossibility from Chitty’s earlier exposition. Pollock’s statement of the basic rule of the effect of subsequent events is blunt:

An agreement is not void merely by reason of the performance being impossible in fact, nor does it become void by the performance becoming impossible in fact without the default of either party, unless according to the true intention of the parties the agreement was conditional on the performance of it being or continuing possible in fact.³²

Pollock’s analysis of the parties’ “true intention” extended over many pages and fell into two standard categories of excuse: where performance of the contract depends on a continuing existence of some object and where it depends on the life or health of a particular person.³³ Pollock observed that other examples of impossibility could be found in English cases, but, in each, he believed such a

27. *Id.* at 640 (emphasis in original).

28. *Id.* at 641.

And where the lessee in a coal lease, covenanted to pay a certain proportion of the value of the coals to be raised, unless prevented by *unavoidable accident* from working the pit: it was held, that if the accident were of such a nature, that to work the pit was not physically impossible, but such working might have been effected, although at an expense greater than the value of the coals to be raised, the defendant was liable.

Id. (emphasis in original).

29. FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY (London, Stevens & Sons 1876).

30. See NEIL DUXBURY, FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION 15 (2004) (describing Pollock and Stephen’s membership in the *Conversazione Society* beginning in 1865).

31. See *infra* text accompanying notes 41–53.

32. POLLOCK, *supra* note 29, at 323.

33. *Id.* at 336–45.

result was justified by the contract's construction, one that discovered an implied condition under the particular facts of that case.³⁴ In any event, Pollock did not believe that excessive difficulty or unreasonable cost warranted an excuse for a contractual obligation.³⁵

Two other parts of the Indian Contract Act are also important. Sections 32 through 36 address the topic of "contingent contracts." A contingent contract is a "contract to do or not to do something, if some event, collateral to such contract, does or does not happen,"³⁶ what would be understood in American contract law as a condition.³⁷ Section 32 specifically provides that a contract becomes void if the occurrence of a contingency becomes impossible.³⁸ Section 9 authorizes recognition of implied terms.³⁹ Indian courts, thus, have statutory warrant to imply conditions which, when unsatisfied, authorize discharge of unperformed obligations.⁴⁰

Did the separation of Sections 9 and 32 in the Indian Contract Act (the law for implied conditions) from Section 56 impossibility signify a change in the substantive understanding of excuse for changed circumstances? Pollock is not entirely clear in *Principles of Contract*. He observed, generally, that the Indian Contract Act simplified English law on the subject, but "perhaps," he opined, "at

34. *Id.* at 335 (describing the "modern tendency" as seeking "to reduce all the rules on this subject to rules of construction."). Pollock appears eventually to have retreated from the principle that excuse for impossibility could be justified by the doctrine of implied conditions. See DUXBURY, *supra* note 30, at 199.

35. POLLOCK, *supra* note 29, at 326 ("If a man may bind himself to do something which is only not known to be impossible, much more can he bind himself to do something which is known to be possible, however expensive and troublesome."); *id.* at 330 ("[I]mpossibility of this kind [by reason of particular circumstances] is no excuse for the failure to perform an unconditional contract, whether it exists at the date of the contract, or arises from events which happen afterwards."); *id.* ("Still less will unexpected difficulty or inconvenience short of impossibility serve as an excuse.").

36. Indian Contract Act § 31, No. 9 of 1872; INDIA A.I.R. MANUAL (5th ed. 1989), v. 14.

37. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981).

38. Indian Contract Act § 32 ("Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.").

39. *Id.* § 9 ("In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."). For the deployment of Section 9 outside the context of offer and acceptance, see generally 1 POLLOCK & MULLA, *supra* note 15, at 252–53.

40. See 1 POLLOCK & MULLA, *supra* note 15, at 1138 ("According to [§] 9 of the Contract Act, the terms of contract may be expressed or implied. Therefore, where as a matter of construction, the contract itself contains, impliedly or expressly, a term according to which it would stand discharged on the happening of a certain event, the dissolution of the contract would take place under the terms of the contract itself and that would be outside the scope of [§] 56.").

the expense of definiteness on some points.”⁴¹ His only specific conclusion, however, was limited to the observation that the Indian Contract Act made continued possibility an implied condition in all contracts.⁴² It can be inferred that Pollock thought that “impossible” in Section 56 still meant impossible as understood in the English common law by his observation that Illustration *e* to Section 56 was drawn from *Robinson v. Davison*. Pollock had earlier classified *Robinson* as an example of the second standard category of implied conditions—one depending on the continued life or health of a person.⁴³

Pollock’s opinion of the Indian Contract Act did not improve with the passage of time. In 1905, the first edition of his treatise co-authored with Dinshah Mulla was published.⁴⁴ Pollock wrote in the preface that “not only [is the Indian Contract Act] the work of different hands, but work done from quite different points of view, has been pieced together with an incongruous effect.”⁴⁵ Pollock especially disliked Section 56 because it attempted to resolve a problem with a positive rule of law—a problem that he believed had been handled well by English and American courts as a matter of construction.⁴⁶ He was especially

41. POLLOCK, *supra* note 29, at 353.

42. *Id.* (citing Indian Contract Act §§ 53 (failure of constructive condition of performance), 56, and 67 (implied duty of cooperation)). Pollock also queried whether Section 65 (allowing restitution to the discharged party for benefits conferred on other party) represented a change from English common law. *Id.* at 354. While Pollock’s point—that continued possibility is an implied term of all contracts subject to the Indian Contract Act—is clear, he does not explain the Act’s continued separation of preexisting impossibility from subsequent impossibility.

43. *Id.* at 341. *See also supra* text accompanying note 33.

44. FREDERICK POLLOCK & DINSHAH FARDJUNI MULLA, *THE INDIAN CONTRACT ACT* (1905).

45. *Id.* at iv–v. Immediately thereafter Pollock excoriates the use of the Field Code by certain of the drafters in India.

Another source of unequal workmanship, and sometimes of positive error, is that the framers of the Indian Codes, and of the Contract Act in particular, were tempted to borrow a section here and a section there from the draft Civil Code of New York, an infliction which the sounder lawyers of that State have been happily successful so far in averting from its citizens. This code is in our opinion . . . about the worst piece of codification ever produced.

Id. at v. However, Pollock’s antipathy to legislation generally might have been as significant a reason for his shrill comments as were his concerns about particular aspects of the Indian Contract Act. *See DUXBURY, supra* note 30, at 169–74 (describing Pollock’s hostility toward legislation generally in terms of its frustration of common sense, stifling of principles, and failure to take account of costs of new statutory duties).

46. POLLOCK & MULLA, *supra* note 44, at 210 (“[Section 56] varies the Common Law to a large extent, and moreover the Act lays down positive rules of law on questions

concerned that the second paragraph of Section 56 might be understood to reverse the presumption of common law that an unconditional promise bound the promisor in all circumstances.⁴⁷ Without a condition, a promise was virtually absolute; although, Pollock was quick to point out that conditions could be express or “implied from the nature of the transaction.”⁴⁸ Pollock also expanded his restatement of the common law’s standard set of categories of excuses from the two he had described in 1876 to three in 1905 because of the decision in *Krell v. Henry*.⁴⁹ It is not clear why Pollock added this dictum since, as he had earlier noted in his analysis of Section 56, “English authorities . . . can be of very little use as guides to the application of this section.”⁵⁰ As its subsequent judgments reveal, the Indian Supreme Court has followed Pollock’s example rather than his precept.⁵¹ Nettled as he may have been by the text of Section 56, Pollock concluded it had caused no “inconvenience”⁵² and observed that Indian courts could handle the recent doctrine of frustration by implying a condition under Section 32.⁵³

which English and American Courts have more and more tended, during the last quarter of a century or longer, to regard as matters of construction . . .”).

47. *Id.* (“The second paragraph has the effect of turning limited exceptions into a general rule. By the Common Law a man who promises without qualification is bound by the terms of his promise if he is bound at all. If the parties do not mean their agreement to be unconditional, it is for them to qualify it by such conditions as they think fit.”).

48. *Id.* at 210–11.

49. *Id.* at 211.

[A] promise is discharged if, without the promisor’s fault, (1) performance is rendered impossible by law; (2) a specific subject-matter assumed by the parties to exist or continue in existence is accidentally destroyed or fails to be produced, or an event or state of things assumed as the foundation of the contract does not happen or fails to exist, although performance of the contract according to its terms may be literally possible; (3) the promise was to perform something in person, and the promisor dies or is disabled by sickness or misadventure.

Id. (citations omitted).

50. *Id.* at 210.

51. *See infra* text accompanying notes 67–117.

52. POLLOCK & MULLA, *supra* note 44, at 211 (“There is no reason to believe that a broad simplification of the English rules was not intended, nor does it appear that any inconvenience has ensued or is to be expected.”).

53. *See id.* at 212. Here Pollock was utilizing *Taylor v. Caldwell*, (1863) 122 Eng. Rep. 309 (Q.B.), to its fullest. It seems clear that Pollock grounded his organizing principle for English cases excusing performance based on an implied condition of continuing possibility on *Taylor*, which postdated Chitty’s treatise but preceded the Indian Contract Act. *See* POLLOCK, *supra* note 29, at 336, 341, 344, 351, 353. *See also infra* text accompanying notes 144–145.

Reviewing the text and history of Section 56, as well as selected English treatise writers, suggests that the best way of understanding the second paragraph of Section 56 is that it incorporated the two long-standing presumptive excuses—continuing existence of a particular object and continuing life or health of a particular person.⁵⁴ Sections 9 and 32, in turn, were designed to afford relief based on implications that could be drawn from the relationship of the parties, their prior dealings, and the purpose of the contract at issue.⁵⁵ Given the 1871 enactment of the Indian Contract Act, it is extraordinarily unlikely that excuse on account of later developments like subjective impracticability or frustration were within the intendment or original understanding of Section 56.

C. Application of Section 56

During the years before India's independence, the Privy Council rendered a few judgments on cases connected with Section 56. *Pradgas Mathuradas v. Jeewanlal*⁵⁶ is instructive. An Indian seller and buyer entered into a contract for the sale of "Penang quality" tin⁵⁷ on December 8, 1941, notwithstanding the widespread awareness that World War II had just reached the Far East.⁵⁸ The price rose throughout the day and, by December 22nd, the seller asserted that it would not be able to acquire the tin due to "unforeseen trouble in Penang."⁵⁹ The buyer sued for damages in February of the next year, but the trial court dismissed the case on the ground of impossibility.⁶⁰ The High Court of West Bengal reversed, holding that there was neither a basis to imply a contingency excusing performance nor was it impossible for the seller to have performed.⁶¹ The Privy Council affirmed.⁶² With respect to the implication of a contingency, presumably under Section 32, it concluded that

54. *See supra* text accompanying note 32.

55. *See* 1 POLLOCK & MULLA, *supra* note 15, at 254 ("The terms implied [under Section 9 of the Indian Contract Act] may be of three types: (i) terms implied by custom; (ii) terms implied by law; and (iii) other terms implied by courts.").

56. *Pradgas Mathuradas v. Jeewanlal, Ltd.*, A.I.R. 1948 P.C. 217.

57. *See* PAUL W. THRUSH, *DICTIONARY OF MINING, MINERAL, AND RELATED TERMS* 803 (1st ed. 1968) (defining Penang tin as "tin of about 99.95 percent purity, obtained from the Penang mines" in modern day Malaysia.).

58. *Pradgas Mathuradas*, A.I.R. 1948 P.C. at 218.

59. *Id.* at 218–19.

60. *Id.* ("The contract became impossible of performance owing to the non-arrival of tin from Penang." (citation omitted)).

61. *Id.* (relying upon Chief Justice Sir Harold Derbyshire's opinion that the fulfillment of this contract was not contingent upon the arrival of the Penang Tin, and "the contract was broken by the defendants").

62. *Id.* at 220 ("[I]n their Lordships' view the learned Chief Justice and his colleagues arrived at the right conclusion . . .").

The Court . . . ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted.⁶³

The seller's defense of impossibility under Section 56 fared no better because, while Penang had been occupied by the Japanese since December 16th, tin of equal quality was available in Calcutta—albeit at a cost of 40% more than the contract sale price.⁶⁴ The Privy Council did not consider Section 56 expansively; there was no suggestion that the meaning of “impossible” was broader than what had been understood in 1872.⁶⁵

Since India's independence in 1947, the Indian Supreme Court has addressed Section 56 a number of times. However, those judgments have expressed fundamentally contradictory understandings of the foundation and purpose of Section 56.⁶⁶ In the first post-independence case, a three-judge panel issued a judgment in 1954 in *Satyabrata Ghose v. Mugneeram Bangur & Co.*,⁶⁷ reversing a judgment by the Calcutta High Court.⁶⁸ The facts of *Satyabrata Ghose* were straightforward. In August 1940, the plaintiff-purchaser and defendant-developer executed a contract for the sale of a plot of land in the then undeveloped Lake Colony in Calcutta.⁶⁹ The purchaser deposited 101 rupees (Rs.) as earnest money and agreed to pay the balance of approximately Rs. 4,900 “within one month from the date of completion of the roads.”⁷⁰ Nothing in the contract specified any time within which the roads were to be completed.⁷¹

63. *Id.* (quoting *Comptoir Commercial Anverpois v. Power Son & Co.*, (1920) 1 K.B. 868, 899–900).

64. *Id.* at 218, 220.

65. *See id.* at 220. Prior to *Pragdas Mathuradas*, the Privy Council considered Section 56 in *Govindram Sesaria v. Radbone*, and held that the declaration of war between the United Kingdom and Germany rendered void a contract between a German and an Indian firm. A.I.R. 1948 P.C. 46.

66. *See infra* text accompanying notes 67–117.

67. *Satyabrata Ghose v. Mugneeram Bangur & Co.*, A.I.R. 1954 S.C. 44.

68. *Id.* at 50.

69. *Id.* at 45.

70. *Id.* The agreement further provided that time was of the essence. *Id.* Presumably this applied to the parties' duties to pay and convey because there were no references to time for other obligations.

71. *Id.* at 49 (“[T]here [was] absolutely no time limit within which the roads and drains [were] to be made.”).

In November of the following year, before construction of the roads had begun, the government issued a series of orders requisitioning the lots of Lake Colony for the war effort.⁷² Two more years passed and, in November of 1943, the developer presented the buyer with an ultimatum: agree either to cancel the contract and get back his earnest money or to pay the balance due, receive a deed, and accept the developer's promise to complete the roads after the war.⁷³ Accepting neither of its proffered alternatives, threatened the developer, would be deemed a cancellation of the contract with a forfeiture of the earnest money.⁷⁴ The buyer rejected both alternatives and replied that it was standing on the contract.⁷⁵ In January 1946, the buyer brought an action seeking a declaration that the contract had not been discharged and that it was entitled to a deed.⁷⁶ The developer pled the defense of impossibility, which failed at the trial court but succeeded before the High Court.⁷⁷

The lengthy reasoning of the Indian Supreme Court in *Satyabrata Ghose* nearly succeeds in obscuring its uncomplicated (if somewhat prolix) conclusion:

In our opinion, having regard to the nature and terms of the contracts, the actual existence of war conditions at the time when it was entered into, the extent of the work involved in the development scheme and last though not the least the total absence of any definite period of time agreed to by the parties within which the work was to be completed, it cannot be said the requisition order vitally affected the contract or made its performance impossible.⁷⁸

What could have been a very short judgment, one in which the Supreme Court concluded that a promisor could not avoid its duty to perform when it was the promisee whose interests were injured by the delay, became a far-ranging discussion of the meaning of "impossible" in Section 56.⁷⁹ Alternatively, the Court could have taken the word "impossible" in its classical sense and simply

72. *Id.*

73. *Id.* at 45–46.

74. *Id.* at 46.

75. *Id.* (“[T]he plaintiff refused to accept either of the two alternatives . . . and stated categorically that the latter was bound by the terms of the agreement . . .”).

76. *Id.* (“On 18th of January 1946 the suit . . . was commenced by the plaintiff against the defendant . . . for a two-fold declaration, namely, (1) that the contract . . . was still subsisting; and (2) that the plaintiff was entitled to get a conveyance executed and registered by the defendant on payment of the consideration . . .”).

77. *Id.* (“The only question canvassed before the High Court was whether the contract of sale was frustrated by reason of the requisition orders issued by the Government. The learned Judges answered this question in the affirmative . . . [and] dismissed the plaintiff's suit.”).

78. *Id.* at 50.

79. *See id.* at 47–48.

concluded that a delay (particularly a delay that worked to the detriment of the promisee, not the promisor seeking to avoid its obligations) did not make performance of a contract impossible. However, the Court did not take the simple path. Instead, it expanded the meaning of impossible to include frustration and impracticability and analyzed post-1872 English cases and explanations of excuses based on implied terms—only to abandon them.⁸⁰ The Court reasoned that Section 56 was a mandatory rule of positive law—yet remarked that parties could contract around it.⁸¹

Section 56 employs the single word “impossible.” Moreover, the statutory illustrations suggest that the Council did not contemplate extending the application of impossible beyond its meaning in the common law in 1872.⁸² In *Satyabrata Ghose*, the Supreme Court nonetheless held that

This much is clear, that the word “impossible” has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very

80. *Id.* at 48 (“In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 . . .”).

81. The Court further explained:

[I]f the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstances, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens.

Id. at 48.

82. Only two of the five illustrations pertain to the applicable second part of Section 56:

(b) *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void. . . . (e) *A* contracts to act at a theatre for six months in consideration of a sum, paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions becomes void.

Indian Contract Act § 56, No. 9 of 1872; INDIA A.I.R. MANUAL (5th ed. 1989), v. 14. Presumably, (a) illustrates the requirement of mental competence to marry. *See also* POLLOCK & MULLA, *supra* note 44, at 211 (“The illustrations do not, indeed, appear to go beyond English authority . . .”). Illustration (e) is drawn from *Robinson v. Davison*, (1987) 6 L.R. Exch. 269. *See supra* note 42

foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act he promised to do.⁸³

The Court left unsaid why it believed it was clear that “impossible” did not mean what English courts would have recognized in 1872.⁸⁴

In the course of its judgment the Court appears as though it was looking for an implied condition, which it never found.⁸⁵ Yet, the Court did not base its judgment on Section 32.⁸⁶ It made it clear that any application of Section 56 was a matter of law, not fact, and a matter of judicial imposition, not one of discovery of the parties’ tacit intentions. The Court observed that English judges had developed the doctrine of impossibility and expanded it to encompass impracticability and frustration through a combination of implying conditions⁸⁷ and aggressively constructing contractual terms.⁸⁸ However, Sections 9 and 32 of the Indian Contract Act address construction of implied conditions, thus leaving Section 56 to the courts as a matter of law:

In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.⁸⁹

83. *Satyabrata Ghose*, A.I.R. 1954 S.C. at 46. Later, the *Satyabrata Ghose* court reiterates this conclusion when it observes that “[i]t would be incorrect to say that Section 56 of the Contract Act applies only to case of physical impossibility” *Id.* at 47.

84. *See supra* text accompanying notes 32–35.

85. *Compare Satyabrata Ghose*, A.I.R. 1954 S.C. at 47–48 (discussing English cases grounding impossibility on doctrine of implied conditions) *with id.* at 48 (“To my mind the theory of the implied condition is not really consistent with the true theory of frustration.” (quoting *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co.*, [1944] A.C. 265, 275 (H.L.))).

86. *Id.* at 48 (explaining that “there is no question of finding out an implied term agreed to by parties . . . because the parties did not think about the matter . . .”).

87. *Id.* at 47 (“It seems necessary however to clear up some misconception which is likely to arise because of the complexities of the English law on the subject. The law of frustration in England developed, as is well known, under the guise of reading implied terms into contracts.”). Indian contract law uses the term “contingency” as the equivalent of the American “condition.” *Compare* Indian Contract Act, No. 9 of 1872 § 32; INDIA A.I.R. MANUAL (5th ed. 1989), v. 14 *with* RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981).

88. *Satyabrata Ghose*, A.I.R. 1954 S.C. at 48 (“In any view, it is a question of ‘construction.’”).

89. *Id.*

So, what is the rule if not impossibility as traditionally understood? How does the Court articulate the judicial task of absolution⁹⁰ without a precise rule? In its own words, “[w]hen such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end.”⁹¹ How is a court to apply such an imprecise standard? If the Court’s discussion in *Satyabrata Ghose* is an example, an Indian court will apply Section 56 by looking at the same facts and drawing the same sorts of inferences as any court construing a contract and implying conditions would examine.⁹² What is the end or purpose of this judicial absolution? Why should the law release a party from an obligation? Because the purpose of judicial absolution is neither efficiency nor autonomy but, rather, justice, it is to that principle courts must turn.⁹³

Six years later, in 1960, the Indian Supreme Court (without citing *Satyabrata Ghose*) reversed its course and held in *Alopi Parshad v. Union of India* that courts do not apply Section 56 because it is “just and reasonable” to excuse the promisor, but “because on its true construction it does not apply in that situation.”⁹⁴ Returning to the view that animated Sections 32 and 56 at the outset, “justice” was understood to be implementing what the Court found to be the common intention of the parties.⁹⁵ Then, in 1968, eight years after *Alopi Parshad*,

90. *Id.* at 47 (“The changed circumstances . . . make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility.”).

91. *Id.* at 48.

92. *See id.* at 49–50 (drawing inference from absence of time provision for road construction in contract, current combat activities in World War II that had led to other requisition orders and shortages of construction materials, and temporary nature of requisition orders in issue, that delay did not “affect the fundamental basis upon which the agreement rested or struck at the root of the adventure.”).

93. *Id.* at 47 (citing *Hirji Mulji v. Cheong Yue S.S. Co.*, [1926] A.C. 497, 510 (P.C.)). It is not clear that the Privy Council’s early adoption of a “realist” perspective on impracticability was an accurate summary of English law. *Id.* (“Frustration . . . is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.”). A decade earlier, the House of Lords had strongly reaffirmed the principle of construction of “implied conditions” as the foundation for this excuse. *See F.A. Tamplin S.S. Co. v. Anglo-Mexican Petroleum Prods. Co.*, [1916] A.C. 397 (H.L.). Even fifteen years later, a majority of the Law Lords expressed support for the classical justification for impracticability. *See Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp.*, [1942] A.C. 154 (H.L. 1941).

94. *Alopi Parshad & Sons, Ltd. v. Union of India*, A.I.R. 1960 S.C. 588, 594; *see also Mugneeram Bangur & Co. v. Gurbachan Singh*, A.I.R. 1965 S.C. 1523 (arising from same facts as *Satyabrata Ghose* and following that judgment without reference to “justice”).

95. *See Alopi Parshad*, A.I.R. 1960 S.C. at 594.

the Supreme Court in *Dhruv Dev v. Harmohinder Singh*⁹⁶ again affirmed a position consistent with an originalist understanding of Section 56:

[W]hen performance is rendered by intervention of law invalid, or the subject matter assumed by the parties to continue to exist is destroyed, or a state of things assumed to be the foundation of the contract fails, or does not happen, or where the performance is to be rendered personally and the person dies or is disabled, the contract stands discharged.⁹⁷

However, in the same year as *Dhruv Dev*, the Indian Supreme Court again heard an appeal from the Calcutta High Court, this time in the form of the High Court's refusal to set aside an arbitral award in *Naihati Jute Mills Ltd. v. Khyaliram Jagannath*.⁹⁸ *Naihati Jute* dealt with the sale of goods. Unlike *Satyabrata Ghose*, in this case the seller, not the buyer, asserted the defense of impossibility, and the agreement contained a *force majeure* clause.⁹⁹ The buyer had agreed to purchase Pakistani jute from the seller, which required the seller to get an import license from the Indian government's Jute Commission.¹⁰⁰ The parties agreed that the purchase price would increase for every month between November 1958 and January 1959 that the buyer could not get the license.¹⁰¹ The contract excused the buyer's obligations if it did not get the import license due to a variety of factors.¹⁰² The Jute Commission repeatedly denied the buyer's request

96. *Dhruv Dev v. Harmohinder Singh*, A.I.R. 1968 S.C. 1024.

97. *Id.* at 1025. Without a trace of irony the Court asserts that

No useful purpose will be served by referring to the judgments of the Supreme Court of the United States of America and the Court of Session in Scotland Section 56 of the Contract Act lays down a positive rule relating to frustration of contracts and the Courts cannot travel outside the terms of that section.

Id. at 1026. The Court went so far as to conclude that Section 56 was exhaustive with respect to frustration of contracts and that courts "cannot travel outside the terms of that section." *Id.*

98. *Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, A.I.R. 1968 S.C. 522.

99. *Id.* at 524 (quoting lengthy *force majeure* clause).

100. *Id.* ("[T]he import of Pakistan jute required an import license").

101. *Id.*

102.

Buyers shall not however be held responsible for delay in delivering letters of authority or opening letters of credit where such delay is directly or indirectly caused by or due to act of God, war, mobilisation, de-mobilisation, breaking off trade relations between Governments, requisition by or interference from Government or force majeure.

for an import license, and the seller ultimately asserted a claim for damages.¹⁰³ The buyer defended itself on the ground of impossibility, and the matter went to arbitration before the Bengal Chamber of Commerce, which held against the buyer.¹⁰⁴ The trial court upheld the award, and the High Court affirmed.¹⁰⁵

The Supreme Court again reviewed the evolution of English legal theory and, again, rejected its relevance because “Section 56 laid down a rule of positive law and did not leave the matter to be determined according to the intention of the parties.”¹⁰⁶ *Naihati Jute* followed *Satyabrata Ghose* when it came to specifying this rule of positive law: “[w]hen such an event or change of circumstances which is so fundamental as to be regarded by law a striking at the root of the contract as a whole occurs it is the court which can pronounce the contract to be frustrated and at an end.”¹⁰⁷ As in *Satyabrata Ghose*, the Court canvassed the facts to implicate the intention of the parties and held that “[w]hat is important in cases such as the one before us is to ascertain what the parties themselves contemplated at the time of entering the contract.”¹⁰⁸ However, unlike the Court in *Satyabrata Ghose*, the Court went on to conclude that the buyer had taken upon itself an absolute obligation to get the required license for which there could be no excuse—either by creative implication or judicial absolution.¹⁰⁹

Id.

103. *Id.* (“On December 11, 1958 the Jute Commissioner refused to issue the license and . . . [t]he respondents [seller] thereafter by their attorney’s letter claimed damages from the appellants [buyer] . . .”).

104. *Id.*

105. *Id.* at 525.

106. *Id.* at 526–27 (citing *Satyabrata Ghose v. Mugneeram Bangur & Co.*, A.I.R. 1954 S.C. 44).

107. *Id.* at 527.

108. *Id.*

109. *Id.* at 528.

In our view, the provision in the contract that whereas the delay to provide a license in November 1958 was to be excused but that the contract was to be settled at the market rate prevailing on January 2, 1959 if the appellants failed to deliver the license . . . clearly meant that the appellants had taken upon themselves absolutely the burden of furnishing the license . . . and had stipulated that in default they would pay damages

Id. Even though Section 56 is not cast as a default rule, in other words, it does not begin with a phrase like “unless otherwise provided,” the Supreme Court treats it as such. Were Section 56 treated as a mandatory rule, the parties would not be able to engage in renegotiating the deal. See generally Marta Cenini et al., *The Comparative Law and Economics of Frustration in Contracts* 19 (Minn. Legal Studies Res. Paper No. 09-20, 2009), available at <http://ssrn.com/abstract=1418035> (discussing losses that would ensue if were parties unable to deviate from rules of impracticability).

In 1969, the Supreme Court followed *Naihati Jute in Boothalinga Agencies v. V.T.C. Poriaswami Nadar*¹¹⁰ in which the Court again reversed course when it observed that Section 56 had nothing to do with implying conditions from what the parties “might or would” have agreed had they considered the contingency.¹¹¹ Instead, impossibility serves as a “device by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands.”¹¹² Unfortunately, the Court left its understanding of justice undefined. Most recently, the Supreme Court in 2002 again opened the door to understanding impossibility in terms of implied conditions in *Industrial Finance Corp. v. Cannanore Spinning & Weaving Mills, Ltd.*,¹¹³ although the Court made no use of this or any other theory of impracticability in reaching its judgment.¹¹⁴ Other Supreme Court cases add little to an accounting for impossibility; they serve only to illustrate it.¹¹⁵

Each of the leading Indian judgments dealing with impossibility concluded that no excuse existed on the facts of each case.¹¹⁶ Yet, the reasoning

110. *Boothalinga Agencies v. V.T.C. Poriaswami Nadar*, A.I.R. 1969 S.C. 110.

111. *Id.* at 116 (“The doctrine of frustration of contract is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality . . . and does not leave the matter to be determined according to the intention of the parties.”).

112. *Id.* (quoting *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.*, [1944] A.C. 265, 275 (H.L.)). *Boothalinga Agencies* may be the only Supreme Court judgment reversing a High Court and concluding that performance was impossible. Lord Wright was alone in his rejection of the construction of implied conditions in *Denny, Mott*, admitting his view was “somewhat heretical.” *Id.* at 276. Lords Thankerton and Porter both affirmed their support for the classical justification for impracticability. *Id.* at 271, 281, 283.

113. *Indus. Fin. Corp. v. Cannanore Spinning & Weaving Mills, Ltd.*, A.I.R. 2002 S.C. 1841. Of the Court’s numerous previous judgments in connection with Section 56, the *Industrial Finance* Court cited only *Naihati Jute*. *Id.* Its failure to take into account the 1969 judgment in *Boothalinga Agencies* may explain its laconic reference to the classical justification.

114. *Id.* (citing with approval language from *Naihati Jute* basing discharge on implied terms).

115. *See, e.g.*, *M.D. Army Welfare Housing Org. v. Sumangal Servs. Private Ltd.*, A.I.R. 2004 S.C. 1344 (holding that an obligor cannot avail itself of Section 56 if its negligence caused supervening event); *Anand v. Advent Corp.*, A.I.R. 2002 S.C. 2290 (holding that only final governmental rejection of application for conveyance renders contract to convey impossible); *Sushila Devi v. Hari Singh*, A.I.R. 1971 S.C. 1756 (holding that an agreement to lease land in Pakistan became impossible to perform due to communal violence); *Mohan Lal v. Grain Chambers Ltd.*, A.I.R. 1968 S.C. 772 (holding that the imposition of a restraint on the transport of a good, unless required by the government, does not amount to impossibility as contemplated by Section 56); *Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai*, A.I.R. 1977 S.C. 1019 (holding that a governmental agency’s rejection of initial application to convey property did not render contract to convey impossible).

116. *See, e.g.*, *Naihati Jute Mills Ltd., v. Jagannath*, A.I.R. 1968 S.C. 522; *Mugneeram Bangur & Co., v. Singh*, A.I.R. 1965 S.C. 1523; *Alopi Parshad & Sons, Ltd. v. Union of*

of the Supreme Court makes the work of lower courts more difficult. Had the Court restrained itself from canvassing English jurisprudence, had it limited impossibility to what would have been understood in 1872, had it refrained from analyzing even *its* broadened understanding of impossibility as if it were looking for an implied condition, and had it set forth a clear purpose and test for (in)justice under Section 56, the consequentialist hope might have been realized. In short, statutory realization of the precision corollary has failed to constrain judicial discretion, at least in India; judicial glosses, historical asides, and contradictory explanations have obscured the straightforward rule of Section 56.¹¹⁷

II. A BRIEF SUMMARY OF THE AMERICAN EXPERIENCE

American courts and legislatures have not advanced the goal of efficiency in their consideration of impracticability.¹¹⁸ The precision corollary has not been employed, if only because efficiency has not been the only (or even the principal) goal of lawmaking with regard to impracticability.¹¹⁹ Just what is the goal of impracticability law remains unclear. American law regarding excuse on account of impossibility immediately before the enactment of the Indian Contract Act was as narrow as any statement of English common law.¹²⁰ As the nineteenth

India, A.I.R. 1960 S.C. 588; Satyabrata Ghose v. Mugneeram Bangur & Co., A.I.R. 1954 S.C. 44.

117. *See generally* Aubrey L. Diamond, *Codification of the Law of Contract*, 31 MOD. L. REV. 361, 377–78 (1968) (discussing failure of courts to apply Indian Contract Act as written because “it is very difficult to prevent judges from applying the law they know, and have learnt to love, instead of the new and strange statute”).

118. *See infra* text accompanying notes 126–130.

119. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note (1981) (“Even where the obligor has not limited his obligation by agreement, a court may grant him relief. . . . In such a case the court must determine whether justice requires a departure from the general rule that the obligor bear the risk”). *See also* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 146 (5th ed. 2000) (“More commonly . . . the contingency will be one not foreseen by the parties and about which they had no expectations. . . . Here the court is not called upon to interpret the contract; its job is to direct a just and reasonable result.”).

120. *See, e.g.*, DAVID DUDLEY FIELD, THE CIVIL CODE OF THE STATE OF NEW YORK § 777 (1865) (“Everything is deemed possible, except that which is impossible in the nature of things.”); *id.* at § 727 (“The want of performance of an obligation . . . is excused . . . [w]hen it is prevented or delayed by an irresistible superhuman cause . . . unless the parties have expressly agreed to the contrary”); 1 WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS § 463 (4th ed. 1856) (“And even if a man contract to do something, which is at the time impossible in fact, but not impossible in its nature, he is liable in damages for a breach of contract for non-performance.”); *id.* at § 464 (“[H]ardship alone cannot be regarded as a sufficient ground of relief, unless it amount to so great a degree of

century progressed, some relaxation can be detected through increased use of implied conditions.¹²¹ By the end of the second decade of the twentieth century, Samuel Williston, the leading American treatise writer, acknowledged a much wider scope of excuse,¹²² labeled it impracticability,¹²³ and based its application on a reasonable allocation of risk.¹²⁴ The original Restatement of Contracts specified the rule without clarifying its basis: “In the Restatement of this Subject impossibility means not only strict impossibility but impracticality because of extreme and unreasonable difficulty, expense, injury or loss involved.”¹²⁵

The Restatement (Second) of Contracts squarely lays the foundation of impracticability on justice: “the court must determine whether justice requires a departure from the general rule that the obligor bear the risk that the contract may become more burdensome or less desirable.”¹²⁶ Yet, the contours of “justice” are largely unspecified. While finding implied conditions was explicitly rejected as the test of impracticability, the substitute of “basic assumptions”¹²⁷ is hardly

inconvenience and absurdity, as to afford judicial proof that such an agreement could not have been intended by the parties.”)

121. *See, e.g.*, C.C. LANGDELL, SUMMARY OF THE LAW OF CONTRACTS § 42 (2d ed. 1880)

[T]he law supposes that . . . the performance of a covenant or promise to render personal service will be made impossible by the death of the covenantor or promisor before performance, and may be made impossible or impracticable by his illness. . . . [T]he hardship of requiring a party to pay damages for non-performance is so great as to raise a presumption that the event would have been made a condition subsequent if it had been foreseen, and therefore the law will imply the condition.

Id.

122. 3 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 1963 (1920) (“[W]here a very great increase in expense is caused by a circumstance not only unanticipated but inconsistent with facts which the parties obviously assumed as likely to continue, the basic reason for excusing the promisor from liability seems present.”)

123. *Id.* (“‘[N]on-existence’ really means in most cases, not obtainable except by means and with an expense impracticable in a business sense and not contemplated by the parties.”)

124. *Id.* (“The important question is whether an unanticipated circumstance, the risk of which should not fairly be thrown upon the promisor, has made performance of the promise vitally different from what was reasonably to be expected.”). Williston does not further analyze fairness or what is reasonable.

125. RESTATEMENT OF CONTRACTS § 454 (1932). If the drafters of the first Restatement had the goal of efficiency in mind, they explicitly rejected the precision corollary. Official Comment *a* notes that as used in the Restatement “‘impossible’ must be given a practical rather than a scientifically exact meaning.” *Id.* § 454 cmt. a.

126. RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note (1981).

127. *See id.* § 261.

clearer or easier to apply.¹²⁸ The Introduction to Chapter 11 of the Restatement (Second) cites three factors for courts to consider when applying the “basic assumptions” test, but provides no formula for weighing them.¹²⁹ Regardless of what the drafters believed about justice, they deliberately cast the rules of impracticability at the level of principles.¹³⁰ Neither efficiency nor precision are served when the standard is a vague and contested principle.

Section 2-615 of the Uniform Commercial Code is no more precise, and neither it, nor the Official Comments, clearly account for providing an “excuse by failure of presupposed conditions.”¹³¹ Foreseeability seems to be the key to

Where, after a contract has been made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Id.

128. See, e.g., WHITE & SUMMERS, *supra* note 119, at 143:

The doctrines of Impossibility, Commercial Impracticability or as the Uniform Commercial Code knows it, Excuse by Failure of Presupposed Conditions, comprise unclimbed peaks of contract doctrine. . . . In spite of attempts by all of the contract scholars and even in the face of eloquent and persuasive general statements, it remains impossible to predict with accuracy how the law will apply to a variety of relatively common cases.

129. The first of the three factors—determining who assumed the risk—harkens back to finding implied conditions. The third—the ability of the market to spread the risk—sounds in efficiency. Only the second factor—the relative bargaining position of the parties—sounds in normative justice.

130. RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note (“This Chapter is concerned with the principles that guide [the court’s] determination.”).

132. See John D. Wladis, *Impracticability as Risk Allocation: The Effect of Changed Circumstances Upon Contract Obligations for the Sale of Goods*, 22 GA. L. REV. 503, 530 (1988). Discussing comments by Karl Llewellyn, the principal draftsman for the Revised Uniform Sales Act that became Article 2 of the Uniform Commercial Code, Wladis notes,

The contract for sale, as envisaged by merchants, puts on the seller the risk of rise in the market, and on the buyer the risk of fall in the market. But that contract presupposes that general conditions of operation will continue in such fashion as to make the contract performable by reasonable business effort.

Id. Llewellyn believed that excuse on account of impracticability could simply be implied as a matter of fact in every contract for the sale of goods. See *generally id.* at 568–69. Thus, even though Llewellyn was a Realist, his justification of the excuse of

applying UCC 2-615,¹³² which suggests that courts working with this section are not employing the efficiency paradigm—at least not directly. “Foreseeability” suggests a duty (presumably a moral one) that the courts believe an adversely affected promisor owes its promisee.¹³³ Richard Posner, however, has suggested that the duty encompassed within foreseeability is not fundamentally moral but is, rather, a shorthand expression identifying situations in which the cost of acquiring information about a particular risk is not so high as to have prevented the breaching party from dealing with that risk in the contract.¹³⁴ By requiring courts to calibrate the costs of identifying risks and the relative capacity to bear (or insure against) them, Posner’s version of the efficiency paradigm suggests a more robust place for judicial deployment of impracticability than does Robert Scott’s. In other words, Posner has more faith in the courts’ *ex post* ability to evaluate efficiency than Scott.¹³⁵

III. EFFICIENCY, PRECISION AND THEIR CONSEQUENCES

James Gordley has suggested that the Western legal tradition—common and civil law—has long suffered from a confusion of categories when it comes to

impracticability was very traditional in the classical late-nineteenth century sense; he appealed neither to efficiency nor justice but to the parties’ implicit understanding.

132. See WHITE & SUMMERS, *supra* note 119, at 146–47.

133. See Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEG. ANALYSIS 207, 224–25 (2009) (discussing role of fault in changed-circumstances cases).

134. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 203–04 (5th ed. 1998). In other words, the contractual silence of a party whose costs of discovery and allocation of risk are low signals a commitment to perform regardless of occurrence of the risk.

135. Of course, the issue of justifying efficiency as the source of extra-contractual norms remains for both Posner and Scott. See C. Scott Pryor, *Principled Pluralism and Contract Remedies*, 40 MCGEORGE L. REV. 723, 729–32 (2009). For a contrasting view of the capability of courts to recognize a sufficiently large change in the balance of incentives see Craswell, *supra* note 3. However, Craswell ultimately goes on to conclude,

Once it is seen that there is more to efficiency than the efficiency of the actual performance, however, the case for judicial second-guessing becomes weaker. . . . [T]hough it is possible for these combined effects [of choices of contract parties, not merely the choice to perform or breach,] still to be positive on balance, that judgment is obviously more complicated, and therefore harder for courts to get right. . . . [T]o the extent that the attraction of judicial second-guessing depends on there being clear or easy cases where enforcement would obviously be inefficient, that attraction can no longer be claimed once the full range of efficiency consequences is recognized.

Id. at 38–39.

dealing with impossibility, impracticability, and frustration.¹³⁶ An unfortunate combination of historically disparate legal doctrines has perplexed courts and scholars alike as they tried to develop a coherent rationale for these doctrines.¹³⁷ Beginning in the first millennium, Roman law recognized a very limited excuse for impossibility.¹³⁸ Roman law excused performance of certain types of contracts if performance was impossible when the contract was made; however, subsequent events excused performance only if they were of the sort no one could have prevented.¹³⁹ For the Romans, impossibility was objective (“it cannot be done”) and not subjective (“I cannot do it”). In the first half of the second millennium, Continental scholastic, late-scholastic, and natural lawyers already found it difficult to provide a theory justifying what Roman law taught because they analyzed the problem of excuse in terms of fault, a concept that Roman contract law did not use.¹⁴⁰ The civil law tradition continues in this vein.¹⁴¹ The source of confusion for lawyers in the common law tradition was different; they confounded impossibility with the idea of implied conditions.¹⁴² We see evidence of this growing “confounding” in a comparison of impossibility, as described in *Chitty*,¹⁴³ with that in *Pollock* only 23 years later.¹⁴⁴ The 11 excuses noted in *Chitty* may

136. See JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 339 (2006) (“In England, Roman law was borrowed [by nineteenth century jurists] in part but then confounded with another doctrine entirely, which concerned implied conditions.”).

137. *Id.* at 336–44.

138. *Id.* at 337 (“According to one text, if his performance was initially impossible, a party cannot escape liability if performance is merely beyond his own power. It must be beyond anyone’s power.”).

139. *Id.*

140. *Id.* at 339.

[T]here was a deeper reason why the natural law theory could not explain the Roman texts. The natural lawyers had a theory about when a person was at fault in the moral sense. As Zimmermann and Wollschläger have pointed out, such a theory could not explain Roman law because the Romans were really imposing liability absent fault for risks that, in their view, should fall on the promisor.

Id.

141. See *id.* at 339–42.

142. *Id.* at 339.

143. Compare *supra* text accompanying notes 26–28 with *supra* text accompanying note 53. *Chitty* lists 11 excuses of the duty to perform, *supra* note 26, at 640–47, but, even as late as 1853, there was no unifying concept such as implied conditions for discovering the “true intention” of the parties under which to group these disparate grounds of excuse. Not until after *Taylor v. Caldwell*, (1863) 122 ENG. REP. 309 (Q.B.), was there a judicial footing on which to build the “implied condition” structure for excuse on account of impossibility.

144. See *supra* text accompanying notes 32–53.

have been the result of judicial rules of construction, but only in Pollock do “rules of construction” become the principle around which excuse of contractual obligations by implication of conditions is organized.¹⁴⁵

Sections 32 and 56 of the Indian Contract Act presented an opportunity to separate what had grown together. Section 56 could have been restricted to impossibility as historically understood. The protean doctrine of changed circumstances could have found a home in Section 32. The Indian Contract Act provided a framework within which the confounding observed by Gordley could have been limited if not reversed. Had the Indian courts confined Section 56 to its 1872 perimeter, impossibility as originally understood would have stood on its own.¹⁴⁶ In turn, Section 32 would have provided the statutory basis to develop a doctrine of implied terms to deal with an increasing range of subsequent events that might be deemed to excuse performance. Not only has the failure of the Indian courts to follow the narrow way missed an opportunity to further the goal of efficiency, it has obscured the analysis of the grounds that should excuse performance.¹⁴⁷

The Indian Supreme Court asserted in *Boothalinga Agencies* that there is no basis in the parties’ understanding or the circumstances of the contract from which to derive an implied condition excusing performance:

Though it has been constantly said by high authority . . . that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might or would as hard bargainers

145. See POLLOCK, *supra* note 29, at 335.

By the modern understanding of the law we are not bound to seek for a general definition of ‘the act of God’ or *vis major*, but only to ascertain what kind of event were within the contemplation of the parties In other words, we are thrown back upon the nature and construction of the particular contract.

Id.

146. The Privy Council opened the door to interpretive freedom in constructing the Indian Contract Act slightly in *Ramdas v. Amerchand & Co.*, A.I.R. 1916 P.C. 7, where it rejected the appellant’s tendentious reading of the definition of documents of title. Even here, however, the Privy Council limited the Act’s meaning to its “reasonable interpretation.” *Id.* at 6.

147. See *supra* text accompanying notes 116–117.

have agreed. The doctrine is invented by the court in order to supplement the defects of the actual contract.¹⁴⁸

A conclusion of impossibility must thus be a purely judicial act—an implication to be sure but one from the court’s evaluation and not the parties’ tacit understanding.¹⁴⁹ However, a principled basis for that act has escaped detailed judicial explication in India. From the American side, the leading academic basis for concluding performance is impracticable has been efficiency—specifically, the allocation of the risk that the occurrence of an unspecified event that would substantially reallocate (or reduce) the expected contractual surplus.¹⁵⁰ Yet, other efficiency-oriented scholars like Robert Scott are deeply skeptical of the ability of the law to engage in such reallocation without increasing even greater inefficiencies.¹⁵¹ In any event, a review of the Indian judgments on Section 56 reveals no effort to frame impossibility in terms of efficiency.

If not efficiency, then what?

IV. CONTEMPORARY ACCOUNTS OF JUSTICE IN IMPRACTICABILITY

Law makers—legislative and judicial—routinely fail to implement the efficiency goal: why? America has experienced the progression from impossibility to impracticability in the U.C.C.¹⁵² The American common law of contracts has paralleled the law of sales.¹⁵³ A small list of excusing events has expanded, while the formerly precise rules governing excuse have morphed into abstract principles. With the increased number and increasing vagueness of the

148. *Boothalinga Agencies v. V.T.C. Poriaswami Nadar*, A.I.R. 1969 S.C. 110, 116 (quoting *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co.*, [1944] A.C. 265, 275 (H.L.)). A page later, however, the Court admits that Section 56 is a rule of positive law and that English decisions “cannot therefore be of direct assistance” although they may have “persuasive value.” *Id.* at 117. The Court does not further elaborate how decisions founded on a theory of implied conditions can be of persuasive value when applying a statute of another jurisdiction.

149. *See supra* text accompanying notes 85–89.

150. *See* *Cenini, et al.*, *supra* note 109, at 3 (“Efficiency requires allocating the risk to the parties who can bear it at least cost. In this way, the cost of remote risks would be minimized while the contractual surplus would be maximized”); *see also* Richard A. Posner & Andrew M. Rosenfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

151. *See supra* text accompanying note 1; *see also* Pietro Trimarchi, *Commercial Impracticability in Contract Law: An Economic Analysis*, 11 INT’L REV. L. & ECON. 63 (1991). For a criticism of structuring impracticability along risk allocation lines see GORDLEY, *supra* note 136, at 345.

152. *See supra* text accompanying notes 131–132.

153. *See supra* text accompanying notes 120–130.

grounds of excuse, the role and responsibility of the judiciary has increased.¹⁵⁴ International efforts to codify commercial law have proven to be equally inhospitable to the arid precision of efficiency.¹⁵⁵

A steadfast consequentialist might suggest rent-seeking motives for these changes: courts might be trying to expand the scope of their activity by moving from clarity to confusion, from precise to fuzzy rules. Legislatures dealing with private law may have been captured by a law-making caste of academics whose professional prestige would be undermined either by advocating adoption of hard-edged rules or by failing to come to consensus on rigid rules, leading to soft-edged standards as the price for consensus.¹⁵⁶ Judges and law professors gain because neither bears the increased costs of lack of precision; the externalities of imprecision are shifted to private contract parties.¹⁵⁷ Robert Scott argues that the move of sophisticated contract parties from public to private forums for dispute resolution is evidence for something like these conclusions.¹⁵⁸

154. See Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009) (citing superior adjudicative services and precise substantive law as reasons for commercial parties' choice of New York courts as a forum for business litigation); see also Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279 (1986).

155. See, e.g., United Nations Convention on Contracts for the International Sale of Goods art. 79, Apr. 11, 1980, 1489 U.N.T.S. 3; UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 7.1.7 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

156. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

157. See Gillette & Scott, *supra* note 1, at 461–62.

[T]he structural characteristics of the private legislative groups charged with formulation of sales law in the United States will result in the promulgation of many vague standards that vest considerable discretion in subsequent interpreters, such as judges, rather than specifying precise entitlements that follow from described circumstances. In the international context, the parallel argument suggests, treaties will use vague terms or ambiguous language that nations with different cultures and legal systems can interpret in an unobjectionable manner. Vague language, for instance, may minimize objections because it permits representatives from different legal systems to resolve uncertainties in a manner consistent with their domestic legal principles.

Id.

158. See Scott, *supra* note 7, at 378 (“Unsurprisingly, therefore, the dominance of standards over rules and context over text has coincided with a mass exodus from the public enforcement regime by important classes of contracting parties.”). While Scott does not explicitly assert a causal nexus between a decrease in the precision of public standards for private law and an increase in the use of arbitration, he clearly believes this is the case.

Yet, such an explanation suggests a deep-rooted duplicity on the part of law makers and undercuts claims to political legitimacy in a liberal polity.¹⁵⁹ Alternatively, something other than efficiency might be driving law makers to reallocate the effects of unforeseen risks. Perhaps a normative concern, inconsistent with efficiency, has led to recasting a strong and precise rule of impossibility, bordering on absolute liability, as the standard of impracticability. The occasional references of the Indian Supreme Court to justice in its analysis of Section 56¹⁶⁰ suggest that something other than efficiency might be at work. Reviews of other strands in the common law tradition suggest the same.¹⁶¹ Perhaps justice, understood normatively, but never articulated clearly, irresistibly pulls most judges and legislators toward understanding impracticability in terms other than efficiency.

Two American contracts scholars have attempted to bring a normative perspective to account for the doctrine of impracticability. Melvin Eisenberg suggests that notwithstanding the mantra of strict liability, morality—understood by him in the use of fault in a variety of ways—is fundamental to contract law¹⁶² and necessarily so.¹⁶³ Efficiency is an insufficient leg on which to base contract

However, he cites little evidence for such a contention. Others have suggested the speed and economy of arbitration as factors explaining its increased use. *See, e.g.*, Giles Cuniberti, *Beyond Contract—The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT’L L.J. 417 (2009) (arguing that arbitration of international commercial disputes should be favored because it is fair, saves public resources, and is flexible); POSNER, *supra* note 134, at 642 (framing choice of arbitration over adjudication in terms of expertise and impartiality); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979). *But see* Frank Partnoy, *Synthetic Common Law*, 53 U. KAN. L. REV. 281 (2005) (challenging conventional wisdom that arbitration is less costly than adjudication).

159. *See* Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 WM. & MARY L. REV. 1773, 1777 (2007) (“Any theory that falls short of identifying justifying reasons that determine the outcomes of private law adjudication fails to justify the private law.”).

160. *See* Satyabrata Ghose v. Mugneeram Bangur & Co., A.I.R. 1954 S.C. 44; Boothalinga Agencies v. V.T.C. Poriaswami Nadar, A.I.R. 1969 S.C. 110.

161. *See, e.g.*, Luke Nottage, *Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, U.S., Japanese, and International Sales Law and Practice*, 14 IND. J. GLOBAL LEGAL STUD. 385 (2007).

162. *See* Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413 (2009) (“It is often asserted that contract law is based on strict liability, not fault. This assertion is incorrect. Fault is a basic building block of contract law, and pervades the field.”) [hereinafter Eisenberg, *Fault in Contract Law*]; *see also* Melvin Aron Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207 (2009) (applying fault-based understanding to impracticability and remedies).

163. Eisenberg, *Fault in Contract Law*, *supra* note 163, at 1414 (“As a normative matter, fault should be a building block of contract law. One part of the human condition is

law and must be “appropriately constrained” by moral conditions.¹⁶⁴ Eisenberg does not elaborate on the nature or basis of moral considerations; he takes them as a necessarily human given.

James Gordley delves deeper and argues that fairness (understood as maintaining equality of exchange) was, historically, the excuse of impracticability’s normative foundation. As Gordley, drawing on Aristotle and others in that tradition, explains, it is evident that some manners of life are better than others.¹⁶⁵ *Eudaimonia* (happiness or flourishing) characterizes the good life.¹⁶⁶ While a person needs to know what morality requires and must also possess some material goods to flourish, neither following duty nor satisfying preferences is sufficient for the good life; an internal disposition toward the good is also required.¹⁶⁷ Instead, Gordley emphasizes the importance of the virtues of prudence, temperance, and courage.¹⁶⁸ In addition to these individual virtues, in the Aristotelian tradition there are social virtues—the greatest of which is justice.¹⁶⁹ The virtue of justice can be subdivided into distributive justice (that which concerns the distribution of goods in a society) and commutative justice (that which requires equivalence of exchange of resources).¹⁷⁰ For purposes of

that we hold many moral values concerning right and wrong. Contract law cannot escape this condition.”).

164. *Id.*

165. GORDLEY, *supra* note 137, at 7 (“Writers in the Aristotelian tradition believed there is a distinctively human life to which all one’s capacities and abilities contribute. Living such a life is the ultimate end to which all well-chosen actions are a means, either instrumentally or as constituent parts of such a life.”).

166. *See* ARISTOTLE, *NICOMACHEAN ETHICS* 11–12 (David Ross trans., Oxford World’s Classics 1998).

[W]e call final without qualification that which is always desirable in itself and never for the sake of something else. Now such a thing happiness, above all else, is held to be; for this we choose always for itself and never for the sake of something else, but honour, pleasure, reason, and every virtue we choose indeed for themselves . . . but we choose them also for the sake of happiness, judging that through them we shall be happy.

Id.; *see also* GORDLEY, *supra* note 136, at 9 (“True welfare or happiness, in the Aristotelian tradition, is not defined in terms of utility or preference satisfaction but in terms of leading a good life.”).

167. *See generally* NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* (2008).

168. GORDLEY, *supra* note 136, at 8; *see* ARISTOTLE, *supra* note 166, at 35–37 (defining moral virtues).

169. *See* James Gordley, *Contract Law in the Aristotelian Tradition*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 265, 266–67 (Peter Benson ed., 2001).

170. *See id.* at 267 (“In voluntary transactions, when people exchange, commutative justice requires that the resources exchanged be equivalent in value so that neither party’s

contracts, commutative justice requires that a contract party agree to give up goods or services, but only for a price that enriches neither of the parties.¹⁷¹ Equality of exchange is the hallmark of voluntary commutative justice.¹⁷² Thus, when an unexpected event occurs, it would be unfair to saddle the obligor with the increased cost of performance if the contract price did not reflect the cost of assuming that risk.¹⁷³

The Indian Supreme Court, however, has not accounted for the place that justice should occupy in the application of Section 56.¹⁷⁴ Without such an account, lower courts have no guidance except by example. The Court's example is clear: no normative understanding of justice is significant when applying Section 56. In the two cases in which the Court referred to "justice," the Court arrived at its judgments by construing the contract or by applying the excuse of illegality that Section 56 expressly provides.¹⁷⁵ In neither case was an appeal to principle, apart from the language of Section 56, necessary; straightforward statutory construction, without reference to theory, would have been sufficient.

V. CONCLUSION

The circle has been completed. This article began its analysis of Section 56 of the Indian Contract Act with the observation that its intendment limited the

share is diminished."); *see also* ARISTOTLE, *supra* note 166, at 111 (distinguishing two kinds of justice).

171. *See* GORDLEY, *supra* note 136, at 12.

172. *See* Gordley, *supra* note 169, at 267 ("In voluntary transactions, when people exchange, commutative justice requires that the resources exchanged be equivalent in value so that neither party's share [of wealth] is diminished.").

173. *See* GORDLEY, *supra* note 136, at 376.

[R]isks and burdens should be placed on the party who can bear them at least cost. The price should then be adjusted to compensate him for bearing them. . . . [T]he contract will be unfair if the party who can bear the risk at least cost succeeds in shifting it to the other party since the party shifting the risk would prefer to bear it himself if he had to compensate the other party fairly. . . . In contrast, from an Aristotelian standpoint, the rationale is fairness: to avoid, so far as feasible, changes in the share of purchasing power that belongs to each party.

Id.

174. Nor have the English courts that have recently ventured to opine that justice plays a role in impracticability explained what they mean by the term. *See, e.g.,* Lauritzen A.S. v. Wijsmuller B.V. (The Super Servant Two), [1990] 1 LLOYD'S REP. 1, 8 (C.A.); Nat'l Carriers, Ltd. v. Panalpina, Ltd., [1981] A.C. 675, 696 (H.L. 1980).

175. *See* Satyabrata Ghose v. Mugneeram Bangur & Co., A.I.R. 1954 S.C. 44; Boothalinga Agencies v. V.T.C. Poriaswami Nadar, A.I.R. 1969 S.C. 110.

excuse of impossibility to the narrow set of circumstances well-known in the English common law in 1872. Review of the Indian Contract Act disclosed that Sections 9 and 32 permit Indian courts to exercise the power of construction to supplement an express agreement with an implied term excusing an obligor's duty to perform. The Indian Supreme Court has moved beyond this statutory framework and has expanded Section 56 in unpredictable and even, one might say, unprincipled ways. Unprincipled, that is, because the Court has not disclosed an understanding of the principle of justice that parties or lower courts can use to predict or justify decisions. Unconstrained by statute, the American common law has come to largely the same pass. Section 2-615 of the Uniform Commercial Code simply codifies the identical result.

Reviewing advocates of the consequentialist paradigm reveals inconsistent approaches. Richard Posner advocates allocating the risk of unaddressed events in the most efficient way. Robert Scott argues that courts lack the capacity to do so effectively. Advocates of a normative approach, such as Melvin Eisenberg, give morality or justice priority over efficiency, but leave the underpinnings of their approaches without foundation. James Gordley has articulated a specific understanding of the normative value of fairness (equality in exchange), but application of Aristotelian ethics to legal theory has not found many followers.

One need not be committed to efficiency as the only goal of contract law to believe that courts and contract parties generally would be better served by applying the classical understanding of impracticability. Absent the efficiency goal, the precision corollary retains value. For all their faults, Sections 9, 32, and 56 of the Indian Contract Act, as originally understood, were fully sufficient for courts to deal with the problems created by unexpected subsequent events. Limiting Section 56 to the types of impossibility known in the English common law in 1872 and utilizing a nuanced Section 32 would have served the purposes of the law. One can hardly doubt that the inefficiencies created by deploying and then ignoring an undefined standard of justice exceed the vanishingly small value that such a standard might provide in the extraordinary case where the classical tools would not suffice.

