The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve the Good, the True, the Beautiful in Commercial Law.

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The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*

INGRID MICHELSN HILLINGER**

It is well for our younger men to know our law. It is well for our older men and our younger men to agree about our law. It is not good to wait until trouble comes up before our law becomes clear to all. This is our law . . . .

—Llewellyn, Draft Preamble for a Code for the Pueblo of Zia

In 1949, Karl Llewellyn and his all-star drafting crew publicly unveiled the Uniform Commercial Code. Article 2 of the Code, the sales article, did something that prior sales law had not: it sometimes stated two rules regarding a legal issue, one for merchants, another for nonmerchants. Section 2-509(2), for


2. ** Associate Professor of Law, Marshall-Wythe School of Law, College of William and Mary. I dedicate this article to my husband, Mike, who shared every peak, valley and treeless plain along the way. I thank Professor Timothy J. Sullivan, whose patience and steadfast support were matched only by the number of revisions he read and commented upon. I also thank Professors Glenn E. Coven, Jr., Charles H. Koch, Jr., Margit Livingston and Frederick F. Schauer, whose gentle critiques twenty drafts ago vastly improved the final one. Finally, special thanks to my research assistants, Alison Bradner, Colin Buckley and Hugo Blankenship, for service above and beyond the call of duty, and my typist, Helen Adkins, who along with me, lived through innumerable drafts, but who, unlike me, did so with a smile on her face.

1. W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 547 app. (1973). According to Twining, Llewellyn was invited to draft codes for three Pueblos: Zia, Santa Domingo, and Santana. Apparently, only Santana accepted his draft. *Id. at 546.

2. According to William Schnader “[t]here was no difficulty in finding a chief reporter. The outstanding man in the United States to undertake this task was Professor Karl N. Llewellyn of the Columbia University Law School.” Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U. MIAMI L. REV. 1, 4 (1967). Along with Llewellyn, the Code drafting luminaries included Soia Mentschikoff (Karl Llewellyn’s wife), Grant Gilmore, Allison Dunham, William Prosser, Fredrich Kessler, Fairfax Leary, Homer Kripke and Peter Coogan. Arthur Corbin served as Code advisor. UNIFORM COMMERCIAL CODE § 2-101 comment (Draft May 1949) [hereinafter cited as MAY 1949 DRAFT].

3. The May 1949 Draft was submitted at the 26th annual meeting of the American Law Institute, a joint session with the National Conference of Commissioners on Uniform State Laws, on May 18-21, 1949. In this article, unless otherwise indicated, all references to the Uniform Commercial Code are to the 1978 Official Text and Comments.

4. See Rabel, The Sales Law in the Proposed Commercial Code, 17 U. CHI. L.R. 427, 433 (1950) (“only in the doctrine of warranty for merchantability does the text of the present Uniform Sales Act contain special provisions for ‘a seller who deals in goods of that description’”); Waite, The Proposed New Uniform Sales Act, 48 MICH. L.R. 603, 607 (1950) (merchant/nonmerchant distinction a “definite change”); Williston, The Law of Sales in the Proposed Uniform Commercial Code, 65 HARV. L.R. 561, 572 (1950) (merchant concept “introduces a novel provision in the common law”). Llewellyn, however, would have taken issue with the statement that the sales article had done something that prior law had not. Section 15(2) of the Uniform Sales Act, the predecessor to the Code, had limited the implied warranty of merchantability to a “seller who deals in goods of that description (whether he be the grower or the manufacturer or not).” UNIF. SALES ACT § 15(2) (1906). Llewellyn argued that “in regard to “dealers,” the special treatment of the merchant could hardly be more explicit than in the present Uniform Sales Act.
instance, provided that a merchant-seller bore the risk of loss until the buyer actually received the goods, while a nonmerchant seller assumed the risk only until he tendered delivery. Article 2 defined the term "merchant" to establish who was subject to the special merchant rules.

The Article 2 merchant definition and special merchant rules were not greeted with open arms. During the protracted period of Code debate, critics voiced two major objections: there was no need to distinguish merchants from nonmerchants, and even if there were such a need, the merchant definition was not something new in the law. What this is, instead, is a bringing into clarity and explicit focus of a thing which is really there and which has been in the law of sales for something more than a hundred years. The merchant appears in the present law without raising his head and letting it be known that he is there.

Act, Section 15(2) and 'usage of trade' . . . (which is so important throughout the existing Act) is simply unthinkable except as a . . . rule applying specially and separately to 'merchants.'" Llewellyn, Memorandum Replying to the Report and Memorandum of Task Group 1 of the Special Committee of the Commerce and Industry Association of New York, Inc. on the Uniform Commercial Code (August 16, 1954), reprinted in 1 STATE OF NEW YORK LAW REVISION COMMITTEE REPORT, HEARINGS ON THE UNIFORM COMMERCIAL CODE 108 (1954) [hereinafter cited as N.Y. LAW REVISION REPORT 1954]. Llewellyn maintained that the Article 2 merchant concept was not something new in the law. What this is, instead, is a bringing into clarity and explicit focus of a thing which is really there and which has been in the law of sales for something more than a hundred years. . . . The merchant appears in the present law without raising his head and letting it be known that he is there.

Id. at 165. Even if the concept had been there, its manner of expression in the Code was new. The Uniform Sales Act had never used the term "merchant" and only contained one rule predicated on status, § 15(2). UNIF. SALES ACT § 15(2).

Although prior American sales law had not drawn its legal rules along lines of merchant status, other legal systems had. For example, Germany had a separate commercial code for merchants, the Handelsgesetzbuch, which was approved as uniform legislation in 1861. J. DAWSON, GIFTS AND PROMISES 130 (1980). This code defined "merchant" as "a person who carries on a commercial enterprise." S. GOREN & I. FORRESTER, THE GERMAN COMMERCIAL CODE § 1 (1979) [hereinafter cited as GERMAN COMMERCIAL CODE]. The German Commercial Code governs "all transactions of a merchant which pertain to the carrying on of his trade." Id. § 343. A merchant's private life is exempt. N. HORN, H. KOTZ & H. LESER, GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 215 (1982). For a general discussion of the scope of the German Commercial Code, see id. at 211-18. France had a separate commercial code, but business transactions rather than merchant status determined its applicability. Id. at 212. The Swiss did not have a separate commercial code, but one part of the Swiss Code of Obligations regulated "commercial law including company law, law of negotiable instruments, and commercial registration." I. WILLIAMS, THE SOURCES OF LAW IN THE SWISS CIVIL CODE 16 (1976). When the Uniform Commercial Code was proposed, Professor Rabel remarked that Article 2 followed the Swiss and Italian approach which "establish[ed] a unified law of obligations with exceptions for transactions between merchants or for merchants." Rabel, supra, at 431.

5. MAY 1949 DRAFT, supra note 2, § 2-509(2).
6. The 1949 Draft defined the term "merchant" as a person who by his occupation holds himself out as having knowledge or skill peculiar to the practices of [sic] goods involved in the transaction or in any particular phase of it, or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary having such knowledge or skill. With respect to transactions of financing, payment collection, and the like, a financing agency is a "merchant."

MAY 1949 DRAFT, supra note 2, § 2-104(1).
7. The Code was officially introduced in 1949. Pennsylvania adopted it in 1954, Massachusetts in 1958. The rest of the states did not adopt it until the 1960s. Gilmore argued that the legal establishment which controlled the bar associations (and had great influence with the bankers' associations) opposed the Code and was successful in preventing its enactment. In the 1960's the same people who had fought the Code ten years earlier had reversed their field and were counted among its most vigorous supporters. A plausible reason for this reversal is that during the 1950's the courts, in a surge of activism, had themselves been rewriting much of the law. The Code, which in the 1940's had seemed much too "liberal" to its conservative critics, had by the 1960's become an almost nostalgic throwback to an earlier period.

8. In his report on the activities of the American Bar Association Section on Corporations, Banking
difficult to understand, and promised confusion, uncertainty, and litigation.9 Despite the inhospitable welcome, however, the merchant concept and special merchant rules managed to survive.10 When enacted, Article 2 contained fourteen special merchant provisions11 and a merchant definition very similar to the one proposed by Llewellyn in 1949.12

For those who questioned the need to distinguish between merchants and nonmerchants, Article 2 provided little in the way of an answer. Beyond maintaining that “transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or

and Business Law, Malcolm recorded the decision by the Editorial Board in its executive session to ask the Reporters to reconsider the entire merchant concept, and in particular, when it would be applicable and when the special rule was really necessary. Malcolm, The Proposed Commercial Code, 6 BUS. LAW. 113, 183 (1951). In a written memorandum to the New York Law Revision Commission, the Commerce and Industry Association of New York questioned “whether there should be any variation in legal rules dependent on the business or character of the parties involved.” Memorandum of Task Group of the Special Committee of the Commerce and Industry Association of New York, Inc. on the Uniform Commercial Code on Article 2, Sales and Article 6, Bulk Transfers, reprinted in N.Y. LAW REVISION REPORT 1954, supra note 4, at 94. Among scholars, Professor Samuel Williston led the antimerchant charge, arguing that a bifurcation of sales rules would cause difficulties and that rules and duties should not depend upon a party's status. Williston, supra note 4, at 572-73. See also Hall, Article 2—Sales—“From Status to Contract”?, 1952 Wis. L. Rev. 209, 212 (arguing against merchant/nonmerchant distinction); Rabel, supra note 4, at 431-32 (criticizing distinction as “scarcely a workable formula”); Waite, supra note 4, at 618-19 (forecasting troublesome litigation over term “merchant”).

9. Professor Beutel included the merchant definition in his criticism of the Code’s “wonderland of exotic words which may be a delight to the lovers of intricate semantics, but which will rise to plague any lawyer, businessman or judge who attempts to apply such a statute to the regulation of everyday transactions.” Beutel, The Proposed Uniform Commercial Code as a Problem in Codification, 16 LAW & CONTEMP. PROBS. 141, 148 (1951). He particularly criticized the merchant definition because it changed the ordinary meaning of the word “merchant.” Id. at 145-46. Professor Rabel talked about “the elasticity of this phraseology,” and noted that too many questions would be left to the imagination. Rabel, supra note 4, at 431-32. Professor Waite found the definition “odd.” Waite, supra note 4, at 618. Professor Williston believed that many troublesome factual questions would have to be litigated in order to determine who is a merchant in a given transaction. Williston, supra note 4, at 571. The New York Law Revision Commission hearings frequently returned to the issue of the meaning of the merchant definition. See N.Y. LAW REVISION REPORT 1954, supra note 4, at 108, 116.

10. The text of the merchant definition was modified to include someone “who deals in goods of the kind,” U.C.C. § 2-104(1) (Final Text Edition November 1951), probably because Professor Waite did not believe that the definition encompassed retailers. Waite, supra note 4, at 619. For a more complete discussion of the historical evolution of the merchant definition, see Hillinger, The Merchant of Section 2-314: Who Needs Him?, 34 HASTINGS L.J. 747, 782-87 (1983). The drafters modified the comments to the merchant definition to clarify the apparent ambiguity as to who would qualify as a merchant under each individual code provision. N.Y. LAW REVISION REPORT 1954, supra note 4, at 168 (remarks by K. Llewellyn). Professor Kripke's observations appear to have prompted this clarification. Malcolm, supra note 8, at 183 (remarks by Professor Kripke before the Enlarged Editorial Board January 27-29, 1951). See also Hillinger, supra, at 779 n.148 (attributing the clarification concerning status to Professor Kripke).

11. Article 2 of the U.C.C. contains the following merchant provisions: § 2-103(1)(b) (good faith); § 2-201(2) (statute of frauds—“between merchants”); § 2-205 (firm offer); § 2-207(2) (additional terms in acceptance—“between merchants”); § 2-209(2) (modification, rescission and waiver—“between merchants”); § 2-312(3) (warranty of title and against infringement); § 2-314(1) (implied warranty of merchantability); § 2-327(1)(c) (sale on approval); § 2-402(2) (rights of seller's creditors); § 2-403(2) (entrusting); § 2-509(3) (risk of loss); § 2-603(1) (rightful rejection); § 2-605(1)(b) (waiver of buyer's objections by failure to particularize); and § 2-609(2) (adequate assurance of performance).

12. The definition of the term "merchant" provides:

""Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-104(1).
buyer,

Article 2 never explained why special rules for merchants were necessary.

Given the ensuing struggle to understand and identify the Article 2 merchant,

those who criticized the obscurity of the merchant definition might be justified in saying "I told you so." Left to their own devices, many courts and scholars have assumed that the merchant rules of Article 2 merely codified actual business practices, usages, and customs. Believing the merchant rules to be faithful reflections of business practices, courts have concluded that the Article 2 merchant rules apply only to those familiar with business practices or to those who have previously engaged in similar transactions because only they would know the relevant trade customs and business practices codified by the merchant rules. As a consequence, courts have never entertained the possibil-

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15. See infra notes 16 to 18 and accompanying text (discussing merchant cases).


17. In Cudahy Foods Co. v. Holloway, for instance, the court stated that the "mere fact that one is in business does not, without more, give rise to the conclusive presumption that . . . the businessman holds himself out as having knowledge peculiar to the practices involved in the transaction." 55 N.C. App. 626, 629, 286 S.E.2d 606, 607-08, 32 U.C.C. Rep. Serv. (Callaghan) 1352, 1354-55 (1982). See also Fear Ranches, Inc. v. Berry, 470 F.2d 905, 907, 12 U.C.C. Rep. Serv. (Callaghan) 27, 31 (10th Cir. 1972) (defendant not merchant in first sale of cattle to nonpacker), aff'd on rehearing, 503 F.2d 953 (1974); Sebasty v. Perschke, 404 N.E.2d 1200, 1203, 29 U.C.C. Rep. Serv. 39, 42 (Ind. App. 1980) (four previous
ity of applying the Article 2 merchant rules to nonmerchants.\textsuperscript{18}

Because they believe the merchant rules apply only to merchants, courts must determine an individual's status before the appropriate Article 2 rule can be applied.\textsuperscript{19} Resolution of a party's merchant status forces courts to confront the merchant definition head-on,\textsuperscript{20} rarely a pleasant encounter.\textsuperscript{21} In effect, the con-

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\textsuperscript{19} If the court concludes that the individual is not a merchant, it typically applies the nonmerchant rule without further ado. See, e.g., Pierson v. Arnst, 534 F. Supp. 360, 33 U.C.C. Rep. Serv. (Callaghan) 457 (D. Mont. 1982) (seller of sunflower seeds found not to be merchant and thus confirmation letter exception to statute of frauds does not apply); Playboy Clubs Int'l, Inc. v. Loomskill, Inc., 13 U.C.C. Rep. Serv. (Callaghan) 780 (N.Y. Sup. Ct. 1974) (purveyor of lodging, meals and entertainment is consumer, not merchant, of textiles to be manufactured into costumes, so statute of frauds written confirmation provision does not apply); Cudahy Foods v. Holloway, 55 N.C. App. 626, 286 S.E.2d 606, 32 U.C.C. Rep. Serv. (Callaghan) 1352 (1982) (real estate broker not cheese broker so statute of frauds merchant rules inapplicable); Samson v. Riesing, 62 Wis. 2d 698, 215 N.W.2d 662, 14 U.C.C. Rep. Serv. (Callaghan) 618 (1974) (band members' mothers not merchants, so no implied warranty of merchantability attaches to tainted sandwiches they sell at fund-raiser). Occasionally, a court will resort to the doctrine of estoppel to overcome a nonmerchant's statute of frauds defense. See Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 177-80, 547 P.2d 333, 329-30, 18 U.C.C. Rep. Serv. (Callaghan) 1160, 1168-70 (1976) (promissory estoppel invoked but only after evidence demonstrates that valid contract entered into by parties). One court refused to invoke estoppel to remove the defense of the statute of frauds because "it would be an unconscionable discrimination to allow the principle of estoppel to impose upon a non-merchant a standard far beyond that imposed upon a merchant." Farmers Coop. Ass'n v. Cole, 239 N.W.2d 808, 814, 18 U.C.C. Rep. Serv. (Callaghan) 1151, 1158 (N.D. 1976). One scholar has urged courts to define the class of Article 2 merchants liberally to best serve good sense and Code policy. Dolan, supra, note 13, at 2. No one appears to have argued that the merchant rules can apply to nonmerchants.


\textsuperscript{21} The definition establishes that an individual is an Article 2 merchant if he (1) deals in goods of the kind, (2) by his occupation holds himself out as having knowledge or skill peculiar to the goods involved in the transaction, (3) by his occupation holds himself out as having knowledge or skill peculiar to the practices involved in the transaction, or (4) employs an intermediary who by his occupation holds himself out as having such knowledge or skill. For the full text of the definition, see supra note 12. Although the statute suggests an individual is subject to all Article 2 merchant rules if he meets any one of the definition's subdefinitions, the comments note that merchant status under Article 2 is based upon specialized knowledge either as to the goods involved or as to business practices generally. Which kind of knowledge is required to establish merchant status depends upon the particular Article 2 provision involved. U.C.C. § 2-104 comment 2. Comment 2 lists the Article merchant provisions according to the professional knowledge ("goods" or "practices") required. Id. The comments classify the 14 merchant provisions into three categories. According to comment 2, §§ 2-201(2), 2-205, 2-207 and 2-209 dealing with the statute of frauds, firm offers, confirmatory memoranda, and modification, respectively, require professional knowledge as to business practices, or a "practices" merchant. Id. Section 2-314, concerning the implied warranty of merchantability, §§ 2-402(2) discussing a merchant-seller's retention of sold goods, and § 2-403(2), the so-called "entrusting provision," require professional knowledge as to goods, or a "goods" merchant. Id. The merchant obligation of good faith (§ 2-103(1)(b)), responsibilities with respect to rejection and
fusing merchant definition hangs like a little black cloud over judicial determination of the relevant Article 2 rule.\footnote{22} The merchant provisions themselves offer little help in defining the class of individuals subject to them\footnote{23} and provide no rationale for limiting their application to merchants.\footnote{24}

We are experiencing a merchant muddle that stems from a fundamental misunderstanding about the nature and purpose of the Article 2 merchant rules. They are not what we thought they were. Their intended purpose and function suggest a different approach both to the merchant rules themselves and to their application to nonmerchants.

This article demonstrates that the Article 2 merchant rules were never intended to codify merchant custom and trade usage. Llewellyn, the principal draftsman of Article 2,\footnote{25} invented the merchant rules. The necessity that

\footnote{21} One court noted that “[s]tatutory definitions are supposed to give the reader a sense of confidence by supplying apparently precise meaning. However, nowhere are the difficulties of definition more apparent than in (1) and (3) of § 2-104 of the U.C.C.” Pecker Iron Works, Inc. v. Sturdy Concrete Co., 96 Misc. 2d 998, 1002, 410 N.Y.S.2d 251, 254, 26 U.C.C. Rep. Serv. (Callaghan) 1066, 1069 (Civ. Ct. 1978).


23. Although the drafters provided extensive comments to the special merchant provisions, they did not explain why they limited these provisions to merchants. Article 2’s risk of loss provision is a good example. Section 2-509(3) provides that “risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.” U.C.C. § 2-509(3). According to the comments, the underlying theory is “that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.” Id. comment 3. Perhaps this explains the reasoning behind the merchant rule, but it does not explain why the rule is limited to merchants. If a buyer is unlikely to insure goods he does not possess, why should he assume the risk of loss for goods before he has received them from his nonmerchant seller? The merchant provisions and their accompanying comments generally fail to explain why the merchant provisions are limited to merchants. See, e.g., U.C.C. § 2-201(2) (without explanation); § 2-205 (same); § 2-207 (same).

24. See Newell, supra note 13, at 333 (“while general purpose of [merchant provisions] may be reasonably clear, the specific reason for limiting their application to merchants is often not nearly as clear”).

25. The May 1949 Draft noted that the drafters of Article 2 were “Professor Karl N. Llewellyn and Professor Soia Mentschikoff.” MAY 1949 DRAFT, supra note 2, § 2-101 comment. Article 2 began as a revision of the Uniform Sales Act. UNIFORM REVISED SALES ACT (Sales Chapter of Proposed Commercial Code) (Proposed Final Draft No. 1 1944) [hereinafter cited as REV. SALES ACT]. Karl Llewellyn was the Reporter and Soia Mentschikoff the Assistant Reporter of this revision. Id. at i. Ms. Mentschikoff once observed that “despite the numbers of persons involved in the drafting of the Code, the extent to
mothered his invention was his passionate desire to make "commercial law and practice clear, sane, and safe."26 The merchant rules are statutory expressions of Llewellyn's drafting creed that "[s]impler, clearer, and better adjusted rules, built to make sense and to protect good faith, make for more foreseeable and more satisfactory results both in court and out."27 Llewellyn sculpted the merchant rules to bring "the beautiful" to commercial law and commercial practice.28 To Llewellyn's eye, legal beauty lay in functional rules29—rules that could guide businessmen in conducting their business affairs,30 rules that could assist them in their "trouble shooting, trouble evasion and forward planning."31 Llewellyn drafted the merchant rules to apprise businessmen, attorneys, and courts of the peculiar obligations of businessmen.32 Their clarity, rationality and certainty in application would protect decent businessmen and promote sound, reasonable, and decent business practices.33

The idea of separate merchant rules for businessmen sprang from Llewellyn's pragmatism. Llewellyn believed businessmen needed rules on which they could rely, rules that would produce predictable results. The existence of predictable rules would make commercial activity more rational and would thereby encourage its expansion. Moreover, Llewellyn believed the policies and considerations involved in a mercantile situation differed from those in a nonmercantile situation, and that a unitary approach to sales rules would inevitably muddle policies and rationales. This result would jeopardize the predictability he so
wanted to create for businessmen. Under a single rule, governing both businessmen and nonbusinessmen, a court trying to protect Aunt Tilly might manipulate, distort, or misconstrue the rule, making uncertain its later interpretation or application to Tilly, Inc. Rules fashioned specifically for a commercial setting, and insulated from nonmercantile considerations, would thus protect the rules' predictability for businessmen. One set of sales rules for businessmen and another for Aunt Tilly would eliminate the possibility of undermining the commercial rule to do justice to Aunt Tilly.

Yet Llewellyn did not intend to preclude judicial application of the merchant rules to nonmerchants in every instance. If application to a nonmerchant would not jeopardize the rule's certainty and predictability, Llewellyn wanted the courts to apply the merchant rule to nonmerchants. Indeed, a provision in the 1949 draft expressly so provided.34

Llewellyn himself did not adequately explain the purpose of his merchant rules. As a result, deciphering his merchant theory requires detective work, and this article proceeds much like a sleuth novel. It discovers and follows hidden clues in an effort to figure out “Who done it?” or better yet “What was done and why?” To make this search easier, the article develops Llewellyn's merchant theory primarily in the context of three Article 2 provisions containing a special merchant rule: section 2-201,35 dealing with the statute of frauds; section 2-205,36 discussing merchant firm offers; and section 2-603,37 detailing a merchant buyer's responsibilities when rightfully rejecting goods. Section I of the article describes and then refutes the perception that the merchant rules codify actual business practices. It goes on to discuss some of the actual considerations that prompted the substantive content of the merchant rules. Section II explains how the merchant/nonmerchant bifurcation naturally resulted from Llewellyn's jurisprudence. Section III explores the problem of deciding who is a merchant and why it should matter, using as an example the question of whether a farmer is a merchant under the statute of frauds. Finally, section IV discusses the legacy of Llewellyn's Article 2 merchant theory and concludes that a thorough reevaluation of the merchant rules is now in order.

I. THE ARTICLE 2 MERCHANT RULES: MYTH, REALITY, AND MYSTERY

A. THE MYTH

Many scholars have assumed the Article 2 merchant rules merely codified preexisting commercial practices.38 In recommending the Code's enactment, no

34. Section 1-102(3) provided that a “provision of this Act which is stated to be applicable 'between merchants' or otherwise to be of limited application need not be so limited when the circumstances and underlying reasons justify extending its application." MAY 1949 DRAFT, supra note 2, § 1-102(3).
35. U.C.C. § 2-201(2).
36. U.C.C. § 2-205.
37. U.C.C. § 2-603(1).
38. Other commentators have proposed alternative theories. Professor Dolan, for instance, saw the merchant rules as an attempt to acknowledge and protect reasonable commercial expectations. Dolan, supra note 13, at 3. After an extensive analysis of the merchant definition and special merchant rules, Professor Newell concluded the drafters "hoped in the merchant sections to codify commercial practices, to correct specific abuses, to reform areas of the law and to establish higher standards of conduct for professionals." Newell, supra note 13, at 344. Anderson interpreted the merchant rules as an attempt to hold professionals to different and higher standards. 1 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-
less a stalwart than Professor Arthur Corbin, a Code advisor,\(^39\) wrote that "[t]he Commercial Code has taken notice of the developing law merchant and in a comparatively small number of sections has constructed rules based on merchant custom, applicable to those who regularly deal within its coverage and to others who know or have reason to know it."\(^40\) In 1954, Professor Lattin maintained:

The strongest argument in favor of the adoption of the Sales Article (and the remainder of the Uniform Commercial Code for that matter) is that this is merchants', and not lawyers' law. If merchants favor the unusual terminology that occasionally turns up in the draft on Sales, if merchants proceed on concepts different from that of lump-title, if merchants distinguish between dealing between merchants and merchants, and merchants and nonmerchants, if merchants consider some transactions involving agreements seriously entered into as being binding without the consideration which the law—i.e., lawyers' law—has insisted upon, then a new uniform statute is justified.\(^41\)

Even Grant Gilmore, a Llewellyn disciple who helped draft the Code,\(^42\) noted that Article 2 reflected Llewellyn's attempt to draft "a statute which would reflect (as the Sales Act did not) the actual practices of businesses in the twentieth century."\(^43\)

The Code helps create the impression that the merchant rules embody trade custom. In its first substantive provision, it announces that one underlying purpose of the Act is "to permit the continued expansion of commercial practices,

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\(^39\) May 1949 Draft, supra note 2, § 2-101 comment.


\(^42\) Professors Grant Gilmore and Alison Dunham drafted most of the secured transaction article. May 1949 Draft, supra note 2, § 9-101 comment. Gilmore recalled that after the Dean of the Yale Law School told him he would be teaching commercial law,

[j]n a despairing attempt to find out something about what I was supposed to be teaching, I turned to the work of Karl Llewellyn. Somewhat later, Professor Llewellyn, who had become the Chief Reporter for the Uniform Commercial Code, invited me to join the drafting staff and for half a dozen years, work on the Code became my principal preoccupation. Thus I came under Llewellyn's influence both through his writings and through the impact of his dramatic personality.

Gilmore, supra note 25, at 605.

\(^43\) G. Gilmore, supra note 7, at 83. Professor Twining believed that the merchant rules deferred to particular trade practices and usages:

The courts are given clear and articulate guidelines, but are left discretion in respect of application to particular situations, and flexibility is provided by incorporating criteria which will have different content in different types of situations, for example the standards of a particular trade and "knowledge or skill peculiar to the practices or goods involved in the transaction."

W. Twining, supra note 1, at 326. Professor Newell believed "the drafters sought the certainty of a central definition and . . . hoped to codify commercial practices . . . and to establish higher standards of conduct for professionals." Newell, supra note 13, at 343-44.
through custom, usage and agreement of the parties." If the Code intends to foster commercial practices, the special merchant provisions logically might embody the business customs and usages which the Code seeks to promote. Indeed, the overall tone of Article 2 suggests a clear respect for, if not deference to, commercial practices. Its rules speak in terms of commercial reasonableness, trade customs, and commercial understanding, all of which require courts to refer to actual commercial practice and understanding to resolve legal disputes. It seems reasonable to conclude that the merchant rules similarly respect commercial realities.

The official comment to the merchant definition itself states that "[t]he term 'merchant' . . . roots in the 'law merchant' concept of a professional in business." What characterized the "law merchant" was "its cosmopolitan character, based on a common origin and a faithful reflection of the customs of merchants. . . . [T]he English Statute of Staple expressly provided that justice was to be done according to the law merchant and not according to the common law or the special customs of any town." The comment's reference to the "law

44. U.C.C. § 1-102(2)(b).
46. U.C.C. §§ 2-609(2), 2-306 comment 2, 2-204 comment, 2-309 comment 1.
47. U.C.C. §§ 2-202(a), 2-301 comment.
49. Llewellyn insisted that courts interpret contract language based upon the commercial context in which it is used. U.C.C. § 2-202 comment 1(b). In 1946, he observed that "[i]f we care to make deals in a commercial field without relying to some extent on trade usage." Llewellyn, supra note 27, at 172. He went on to note that a merger clause might "knock out some features of usage which we want in. . . . The easiest way to handle this is to incorporate explicitly the rules or definitions of any relevant trade association, if there are any, and if we like them." Id. However, § 2-202(a) seems to adopt a different approach. Evidence of trade usage is always admissible to explain or supplement the terms of the parties' agreement, suggesting that if parties want to exclude trade usage, they must do so explicitly. U.C.C. § 2-202(a). Professor Danzig criticized Article 2 as "a renunciation of legislative responsibility and power." Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 STAN. L. REV. 621, 622 (1975). By stating "rules" in terms of commercial standards and commercial reasonableness, "[i]t does not tell judges the law; it tells them how to find the law. The law is found not in doctrine, not in policy, but in directed exploration of the fact-pattern of common life." Id. at 626.
50. U.C.C. § 2-104 comment 2. The Code incorporates the law merchant by reference, stating that "unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant . . . shall supplement its provisions." U.C.C. § 1-103. Professor Winship has noted that specific incorporation of the law merchant into uniform commercial law legislation "might seem to contradict the text." Winship, Contemporary Commercial Law Literature in the United States, 43 OHIO ST. L.J. 643, 645 n.8 (1982). He stated that "this reference has become increasingly cryptic, is relied on infrequently, and is usually only a minor factor in a decision when it is referred to." Id. Professor Nickles interprets section 1-103 as establishing generally "that the common law continues as a primary source of law in the field of commercial transactions except to the extent that 'particular' provisions of the U.C.C. are applicable." Nickles, Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part I: The Methodological Problem and the Civil Law Approach, 31 ARK. L. REV. 1, 48 (1977). Thus under Nickles' theory the law merchant remains a primary source of law under the Code. That, of course, assumes there ever was such a thing as the "law merchant." One commentator thought it had never existed: "Find the Law of Nature, the Law of God, the Law of Nations, the Law of Reason, the Law Univeral, the Common Law, Equity—find Common Sense, and I shall have much pleasure in accepting at your hands an introduction to the Law Merchant." Ewart, What Is The Law Merchant?, 3 COLUM. L. REV. 135, 149 (1903). He argued that before the time of Lord Mansfield, "there was nothing but a heterogeneous lot of loose undigested customs, which it is impossible to dignify with the name of a body of law." Id. at 138.
merchant” evokes the image of a special body of law and suggests that the merchant rules of Article 2 faithfully reflect and give effect to merchant customs.52

Llewellyn’s testimony to the New York Law Revision Commission appears to confirm the spiritual link between the old “law merchant” and the new Article 2 merchant rules. In defending the Code generally, Llewellyn stated that the Code sought “to remake the sales law of New York . . . in order that the law may be made to conform to commercial practice and may be read and make sense.”53 Rallying specifically to the cause of his merchant concept, he argued that the House of Lords, by thinking a single rule was needed for everyone, “slowed and delayed for a century the development of the admirable and needed law of letters of credit.”54 Article 2’s statement of one rule for merchants and another for nonmerchants would presumably avoid the English error and, like the “law merchant,” facilitate the development of the law regarding commercial practices generally. For Llewellyn, “this line of spotting and fulfilling mercantile need, without confusing it by including people and factors which would blur or distract, was a major achievement of Article 2.”55

As evidence is piled upon evidence, one is inescapably drawn to the conclusion that those in commerce required special rules that conformed to their way of conducting business and that the Article 2 merchant rules satisfied that need. If true, the merchant rules would prove to be as great a boon to modern commerce as the “law merchant” had been to medieval trade.

B. THE REALITY

The Article 2 merchant rules represented Llewellyn’s attempt to create simpler, clearer, and better adjusted rules for commercial transactions.56 The rules incorporated actual business practice, however, only to the extent that such practice conformed with Llewellyn’s view of sound and reasonable commercial conduct. This finds its clearest expression in section 2-205.

Section 2-205, dealing with firm offers, provides:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months.57

52. Commercial law casebooks tend to describe the “law merchant” in such terms. Professors Farnsworth and Honnold, for example, noted that Malynes, a seventeenth century merchant and author of Lex Mercatoria, believed that the law merchant “was a comprehensive body of authority which had been created not by kings or judges but by the customs of merchants, which was international rather than national in character, and . . . distinct from the common law of England.” E. FARNSWORTH & J. HONNOLD supra note 22, at 3.

53. N.Y. LAW REVISION REPORT 1954, supra note 4, at 113.

54. Id. at 107.

55. Id. at 108 (emphasis in original). Llewellyn was paraphrasing Hiram Thomas, who chaired the Commerce and Industry Association and whose work “gave the whole impetus to the production of the Uniform Commercial Code . . . which in special particular rested on the pressing commercial need for a complete revision of our present law of Sales of Goods.” Id. at 106.

56. Llewellyn, Modern Approach, supra note 27, at 178.

57. U.C.C. § 2-205.
Comment 1 explained that the section was intended to modify the former rule which required that ‘firm offers’ be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed writings. Comment 2 noted that section 2-205 was designed “to give effect to the deliberate intention of a merchant to make a current firm offer binding.” Thus, section 2-205 has the smell and feel of “merchants’ law,” or at least law which was not “lawyers’ law.” In rejecting the common law requirement of consideration as the earmark of irrevocability, the section removed a legal obstacle to judicial protection of the offeree’s reasonable expectations arising from the merchant’s firm offer.

Heady from section 2-205’s gracious accommodation to merchant mores, one comes upon the last sentence of comment 2: “However, despite settled courses of dealing or usages of trade whereby firm offers are made by oral communication and relied upon without more evidence, such offers remain revocable under this Article since authentication by a writing is the essence of this section.”

Quite clearly, section 2-205 was not going to accommodate any trade custom or mercantile understanding regarding firm offers that departed from the section 2-205 manner of expressing them. Section 2-205 did not state merchant custom; it stated Llewellyn’s law of irrevocable offers with respect to merchants.

The Article 2 merchant firm offer rule reflects Llewellyn’s statutory response to a concern he discussed as early as 1931. Generally, Llewellyn approved of the common law doctrine of consideration, and was convinced that it “comfortably cared for the great bulk of business promises.” Consideration was a helpful tool to identify the enforceable promise because “the existence of bargain equivalency does indeed commonly evidence positively that the promise was deliberate—considered—meant.” Furthermore, bargain equivalency afforded a reasonable basis “for believing that some promise was in fact made.” Still, although it answered problems more often than not, the doctrine of consideration troubled Llewellyn in four cases, the first of which was “business promises such as ‘firm offers,’ understood to be good for a fixed time, but revoked before. They are frequent; they are and should be relied on. As to them our consideration doctrine is badly out of joint.” Llewellyn drafted section 2-205 to “realign” the law of business offers and give effect to those firm offers that Llewellyn thought should be enforced.

Llewellyn’s discussion of the problems of enforcing business offers explains the thinking that prompted him to draft section 2-205. It also reveals something about Llewellyn’s basic attitude with respect to writings, a requirement shared by three provisions containing a special merchant rule. Llewellyn felt “the
handing over of a signed promise in writing [i.e., the firm offer] would go far to assure the values and functions which the doctrine of consideration had previously served.67 A writing would suggest the promise was “deliberate—considered—meant.”68 It would also provide objective evidence that an offer was actually made, thereby reducing the possibility of perjury.69 Finally, it would be “an excellent objective indication not only of the creation of expectation in the promisee, but of the reasonableness of there being expectation and of its being related to the promise.”70

For Llewellyn, a signed writing would advance all the policies served by consideration. He believed nothing more was required to recognize an irrevocable offer, and if the law required more, for example, consideration, the law would deny effect to some firm offers that he thought should be effective. By making a signed writing “the essence” of an irrevocable offer, Llewellyn simply recast the legal requirements to state what he considered a more rational rule. Section 2-205 represented a “better adjusted rule, built to make sense”71 because it would produce what Llewellyn thought to be more reasonable commercial results.72

Along with making commercial law more rational, Llewellyn also sought to make it clearer.73 Businessmen, knowing the rule of section 2-205, could quickly determine when their own offers would be binding and, more importantly, when they could safely rely on the ‘firm offer’ of another. If the firm offer were oral, industry-wide reliance notwithstanding, section 2-205 would not recognize it as binding.

The story of the Article 2 statute of frauds provision74 is the story of section 2-205 retold. Throughout the drafting process, the basic ingredients of the statute

frauds provision if the contract as modified falls within Article 2's scope. U.C.C. § 2-209(3). Section 2-209(3) is not limited to merchants, although it indirectly states merchant and nonmerchant rules because it incorporates § 2-201, which does provide merchant and nonmerchant rules. Section 2-209(2) contains the following merchant provision: “A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.” U.C.C. § 2-209(2). Comment 3 notes that the provision protects consumers because it only binds a consumer if he has separately signed the form. U.C.C. § 2-209 comment 3.

67. Llewellyn, supra note 61, at 743.
68. Id.
69. Id.
70. Id.
71. Llewellyn, supra note 27, at 178.

In sum: The Code makes business and financing sense. The existing law makes neither . . .

How can any honest critic, seriously, and for the supposed reading of intelligent persons, attack even a small portion of the Code without making clear the unbelievably awful condition of the existing commercial law which the Code so greatly improves?

Id, at 534. Professor Dawson described the requirement of consideration to make an offer irrevocable as a “piece of debris [which] is a needless hindrance to the processes by which agreement is reached and, being artificial as well as needless, was soon made to look silly, so that a dollar, a hairpin or a false recital would do.” Dawson, supra note 4, at 4.

73. See Llewellyn, Information Given in Reply to Questions Prepared by Consultants of the Law Revision Commission, N.Y. LAW REVISION REPORT 1954, supra note 4, at 160, 162 (stating that merchant definition clarified and focused concept fundamental to commercial law).
74. U.C.C. § 2-201.
of frauds never changed. For contracts exceeding $500, section 2-201(1) required "some writing sufficient to indicate that a contract for sale has been made between the parties . . . signed by the party against whom enforcement is sought." For oral contracts between merchants, 2-201 provided a limited exception. According to section 2-201(2), if merchant A, within a reasonable time after concluding an oral contract, sent a letter of confirmation to merchant B, which legally bound merchant A, the letter of confirmation, signed only by merchant A, would also satisfy the signed writing requirement with respect to merchant B "had reason to know its contents" and did not object in writing within 10 days of its receipt. Section 2-201 waived the requirement of a writing for contract enforceability in only three limited situations: (1) certain contracts involving specially manufactured goods; (2) admissions in court of the existence of a contract; and (3) partially performed contracts to the extent of their performance. Outside these three narrowly defined situations, section 2-201 left contracts over $500 unenforceable if not supported by some form of writing. Thus the message of both sections was clear—Article 2 would not countenance wholly oral deals.

Llewellyn knew that businessmen occasionally indulge in informal, oral deals. He also knew that a legal system could survive without a statute of

75. Compare Rev. Sales ACT, supra note 25, § 14 with MAY 1949 DRAFT, supra note 3, § 2-201 and U.C.C. § 2-201 (all substantially the same).
76. U.C.C. § 2-201(1).
77. Section 2-201(2) provides:
   Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given with 10 days after it is received.
U.C.C. § 2-201(2).
78. Section 2-201(3)(a) provides:
   A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer has made either a substantial beginning of their manufacture or commitments for their procurement.
U.C.C. § 2-201(3)(a).
79. The statute is satisfied under section 2-201(3)(b) "if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted." U.C.C. § 2-201(3)(b).
Professor Corbin noted that some courts had already adopted the approach provided by this subsection, believing "that such an admission in court is a sufficient protection against fraud." Corbin, supra note 40, at 831.
80. According to section 2-201(3)(c), the statute of frauds is satisfied "with respect to goods for which payment has been made and accepted or which have been received and accepted." U.C.C. § 2-201(3)(c).
Comment 2 notes that "'partial performance' as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted." U.C.C. § 2-201 comment 2. Llewellyn wanted to preclude the possibility of fraudulent contract claims based on some performance; for instance, a businessman gives a $1000 check and the recipient alleges it was partial payment for a $50,000 contract. N.Y. LAW REVISION REPORT 1954, supra note 4, at 109. Llewellyn maintained that the exception and its limitation were harsh, but safe. Id.
81. A 1957 article analyzed empirical research regarding prevailing business practices. Note, The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices, 66 YALE L.J. 1038 (1957). The responses indicated that "the promises of businessmen usually satisfy the requirements of the statute of frauds." Id. at 1042. It noted, however, that "oral promises are more prevalent in the transactions of small manufacturers than in the dealings of large ones." Id. at 1051. The writer surmised
frauds because he himself had observed that ten or more states had “found it unnecessary to have any Statute of Frauds in regard to the sales of goods,”82 and “the entire continent of Europe had also handled mercantile dealings for a few hundred years without that necessity.”83 Yet section 2-201 left businessmen operating in this manner to their own extrajudicial devices. Measured against the reality of business practice, the requirement of a writing seems far from accommodating.

Llewellyn’s insistence on formality as a prerequisite to the enforcement of contracts is also confusing in light of Professor Corbin’s attitude toward the statute of frauds. Corbin was Llewellyn’s mentor,84 his “father-in-the-law,” as Llewellyn once described him.85 Yet, in his 1950 article urging adoption of the Code, Professor Corbin had criticized the basic concept of a statute of frauds as inconsistent with what people actually do:

In the present writer’s forthcoming treatise on the law of Contracts, one entire volume is devoted to the statute of frauds and its extremely variable application by the courts. This work involved the comparative study of some thousands of cases in all jurisdictions . . . . [F]rom the very first, the requirement of a signed writing has been at odds with the established habits of men, a habit of reliance upon the spoken word in increasing millions of cases.86

Surely, Llewellyn’s inspiration for the merchant provision of the statute of frauds did not come from business reality. In fact, as Corbin intimated, a requirement of formality would thwart many a businessman’s contractual expectations.87 Rather than paying homage to actual mercantile practice, section 2-201, like section 2-205, codified what Llewellyn thought should be the law regarding commercial transactions. At most, section 2-201(2) codified the best practice of some businessmen,88 but at its core section 2-201 represented Llewellyn’s considered policy judgment reflecting his view of the statute of frauds and his vision of the proper role of law in commercial transactions.

In the same 1931 article in which he discussed the problem of “business offers,” Llewellyn spoke approvingly of the statute of frauds.89 He described it as “an amazing product” in which “de Leon might have found his secret of perpet-

that the prevalence of oral promises among small manufacturers was probably due to the greater opportunity to gain personal knowledge of those with whom deals were made. Id. at 1065. By admitting that his exception for partially performed contracts was harsh, Llewellyn was acknowledging that some contracts would not be enforced. 82. N.Y. LAW REVISION REpORT 1954, supra note 4, at 109.
83. Id.
84. Llewellyn had studied under Corbin and had been closely associated with him. G. GILMORE, supra note 7, at 79. Gilmore also described Llewellyn as Corbin’s disciple. Id. at 81.
86. Corbin, supra note 40, at 829.
87. Corbin claimed that he had read 14,000 cases on the subject. In fact, as Soia Mentschikoff had observed, “Corbin was the repository of all the case law that there ever was in contracts.” Mentschikoff, Reflections of a Drafter: Soia Mentschikoff, 43 OHIO ST. L.J. 537, 544 (1982).
88. In justifying his liberal requirement of just some writing, Llewellyn maintained that the risks associated with such a requirement were minimal because “the whole practice of all intelligent business is to confirm in detail or make careful written contracts so that the number of cases in which defective memos will actually come into operation not only is already almost nugatory, but is decreasing by the minute.” N.Y. LAW REVISION REpORT 1954, supra note 4, at 164.
89. Llewellyn, supra note 61.
ual youth" because two and a half centuries after its enactment, it stood "in essence better adapted to our needs than when it first was passed." Without doubt, Llewellyn believed in writings. No system could "ignore the value of forms as records"; forms provided "permanent and reckonable evidence of what was agreed upon." Llewellyn declared that "contracts are transactions, not mere events; and, as deliberate transactions, are capable of prophylactic regulation." Section 2-201, subsections (1) and (2), illustrate Llewellyn's prophylactic regulation in action.

Section 2-201's simple requirement of "some kind of writing" was a product of Llewellyn's dual concerns about misuse of the former rigid rule to deny the existence of contracts and the businessman's need for a reliable means to establish contract enforceability. Llewellyn maintained that the pre-Code formulation and judicial approach to the statute of frauds had turned what was a very good idea into a statute "for the perpetuation of fraud' rather than for the prevention of fraud." In effect, this rule of law had allowed a party to "throw open any memorandum, even when complete in appearance and signed by both, by alleging some error in some term, or by alleging even some omission of some term never in fact even discussed." Llewellyn drafted section 2-201 to set things right. By requiring only some writing, the main purpose of the statute, to "document the presence of a deal," would be served while its use as a device of unscrupulous businessman to void valid contracts would be minimized. Thus, the statute would create reliability for writings and enable businessmen to know they had an enforceable contract: "the Code adds both the desire and a reasonable machinery for a businessman to be able to rely on what both parties sign and on the fact that he has procured a memorandum signed by the other party." Llewelyn's version of the statute of frauds would cut down on the successes of conscienceless men and provide safety and reliability for decent businessmen.

Llewellyn knew that businessmen frequently concluded deals over the phone. He also knew they needed the assurance that these contracts would be enforceable. With this in mind, Llewellyn drafted the merchant exception to accomplish several objectives simultaneously. First, section 2-201(2) continued to require some writing but, as between merchants, a confirmation letter would suffice. The confirmation letter would provide some objective proof of a con-
tract. By permitting a confirmation letter to satisfy the writing requirement, the statute would enable businessmen to conclude business over the phone. If the confirmation letter only satisfied the statute of frauds with respect to the sender, however, it would leave the receiver free to speculate at the sender's expense. Allowing such speculation would either discourage businessmen from sending confirmation letters, an undesirable result, or encourage the sleazy businessman to exploit the decent, conscientious businessman. Llewellyn explained the rationale behind the merchant exception to the New York Law Revision Commission:

These days we are making contracts over the long-distance telephone as an increasingly standard practice. Decent businessmen having made a contract over the long-distance telephone confirm before five o'clock or close of business that day. As the statute now stands, any crook who wishes to play it both ways against the middle has only to fail to communicate and then the other guy is stuck. He can hold him or get out according to the market. This happy opportunity for fraud is unfortunately being indulged in to a considerable extent. We think the machinery provided in the section, not by any means wholly satisfactory, at least is a safeguard against this particular abuse and fits the practice of constantly closing deals at a distance, and orally.

Because decent business practice involved sending out a confirmation letter, any “decent” businessman would be protected by this rule. Llewellyn was seeking to balance the scales: section 2-201(2) was a “much needed provision which makes it possible for the good faith party who confirms to acquire rights against the bad faith party who just sits tight.” Section 2-201(2) significantly improved the pre-Code law by providing “a clean, safe and business-like machinery of protection to any man who does what even his own records and the co-ordination of his own business really require.” Those following good business practice were protected. Those who did not would learn about sound business practice the hard way: in court, upon the discovery that their contract was unenforceable.

Llewellyn never hid the fact that he was creating business duties—here, a duty to send out a confirmation letter after the conclusion of an oral deal and a duty to read a confirmation letter received. Moreover, Llewellyn maintained that his proclamation of business duties only followed venerable legal tradition: “The fact is, and the cases show, that different responsibilities have been imposed both by explicit law and by the cases upon persons who have professional respon-

Corbin, supra note 40, at 831.

103. Llewellyn once described the sending out of a confirmation letter as a “business duty.” N.Y. LAW REVISION REPORT 1954, supra note 4, at 118. As a general matter, he argued that his statute of frauds “not only fits with business practice, so that its cases of trouble are relatively few, but also provides a clean, safe and business-like machinery of protection to any man who does what even his own records and the coordination of his own business really require.” Id. at 117-18.

104. Id. at 179.

105. Id. at 118.

106. Id.

107. If the recipient does not read the letter, he obviously cannot object to it within 10 days of receiving it. His failure to object causes him to lose his statute of frauds defense. See infra note 249 (discussing cases in which defense was lost for failure to object within 10 days).
sibilities as contrasted with other persons. To bring this to explicit attention is to clarify the law, not change it.\(^{108}\)

Section 2-201(2) states law that embraced Llewellyn’s view of what constituted decent and sound business practice. Admittedly, it was law sensitive to the needs and realities of business life, but very clearly it was law and not business custom. Llewellyn acknowledged that “neither the existing law nor the Code has managed a wholly satisfactory solution . . . . [T]he difference is that the existing law is utterly unsafe and unsatisfactory.”\(^{109}\) As far as Llewellyn was concerned, his modifications of sales law were at least correctly aimed because they made the situation safer and more rational for businessmen.\(^{110}\)

With section 2-603, Llewellyn strengthened his architectural design for a sound commercial law that would induce reasonable commercial behavior. Section 2-603 details a merchant buyer’s duties when he rightfully rejects goods and the seller has neither an agent nor “place of business at the market of rejection.”\(^{111}\) Section 2-603(1) requires a merchant buyer to follow his seller’s reasonable instructions regarding the goods.\(^{112}\) For Llewellyn, this duty arose from simple business decency:

> Now consider the situation . . . of a man . . . buying a carload of produce and [he] goes down and inspects his carload—we will call it potatoes—and decides they are not up to contract and rejects them. He is a dealer in the trade. He knows the game. He properly, if he is a decent guy, and indeed necessarily if he wants to save himself from acceptance, notifies his seller he won’t take them. The seller says, “Ship them to Baltimore.” Why shouldn’t he ship to Baltimore? There is a certain decency between businessmen, and there ought to be, and it costs the man nothing in particular to ship them to Baltimore.\(^{113}\)

Comment 1 to section 2-603 suggests a common law genesis of the rule: “This section recognizes the duty imposed upon the merchant buyer by good faith and commercial practice to follow any reasonable instructions of the seller as to re-shipping, storing, delivery to a third party, reselling or the like.”\(^{114}\) But in fact section 2-603 had no basis in the common law. The comment’s reference to “commercial practice” did not refer to actual commercial practice, but the com-

\(^{108}\) N.Y. LAW REVISION REPORT 1954, supra note 4, at 116.

\(^{109}\) Id. at 117.

\(^{110}\) “If all the Code did had been to clear up confusion and pick the wiser rule and cure obsolete and unfair rules which lay traps, in regard to the hundreds of points on which it does one or all of these things, that would alone, in the present condition of commercial law, make the Code worth adoption.” Llewellyn, Why We Need the Uniform Commercial Code, 10 U. FLA. L. REV. 367, 381 (1957).

\(^{111}\) Section 2-603(1) provides:

> Subject to any security interest in the buyer . . . when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller’s account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

U.C.C. § 2-603(1).

\(^{112}\) Id.

\(^{113}\) N.Y. LAW REVISION REPORT 1954, supra note 4, at 166.

\(^{114}\) U.C.C. § 2-603 comment 1.
mmercial practice *Llewellyn wanted to institute*. Llewellyn thought it both reasonable and decent to require a merchant buyer to follow his seller's reasonable instructions when a distant seller had no available means to retrieve and redirect the goods. In essence, these two thoughts—"why shouldn't he ship them to Baltimore?" and "it's the decent thing to do"—gave birth to the Article 2 merchant buyer's duty to follow his seller's reasonable instructions.

The rule's rationality was demonstrated by the qualified nature of the duty imposed. The buyer need only follow a seller's *reasonable* instructions. For example, Llewellyn suggested, assume the situation of a farmer who receives a defective threshing machine. The farmer notifies the farm machinery company of his rejection and the company instructs him to resell it. Clearly, it would be unreasonable to require the farmer to resell the thresher because he would not know where to begin.

Section 2-603(1) also requires merchant-buyers (if the seller has no local agent) to make reasonable efforts to resell perishable goods or goods whose value threatens to decline rapidly. Once again, the duty made sense to Llewellyn. Imposing an affirmative duty on the buyer to resell and establishing that the buyer's efforts would not constitute an acceptance of the goods would help to curtail unnecessary seller losses. Before the Code, a buyer might refuse to touch rejected goods for fear of being held to have accepted them. As a result, goods perished, even though, with little effort, the buyer might have minimized the seller's losses by selling them. Section 2-603(1) created a more reasonable, so-

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115. The last sentence of section 2-603(1) makes it clear that a seller's failure to indemnify the buyer renders the seller's instructions unreasonable. U.C.C. § 2-603(1) ("[i]nstructions are not reasonable if on demand indemnity for expenses is not forthcoming").

116. N.Y. LAW REVISION REPORT 1954, supra note 4, at 166.

117. Id.

118. As Llewellyn stated, "There is a situation in which the man who is the seller has the job of following the goods up and that distinction should be made." Id.

119. U.C.C. § 2-603(1).

120. Article 2's definition of acceptance includes "any act inconsistent with the seller's ownership." U.C.C. § 2-606(1)(c). Comment 4 provides:

However, the provisions of paragraph (c) are subject to the sections dealing with rejection by the buyer which permit the buyer to take certain actions with respect to the goods pursuant to his options and duties imposed by those sections, without effecting an acceptance of the goods.

U.C.C. § 2-606 comment 4.

121. Section 48 of the Uniform Sales Act provided that one form of acceptance was the exercise of "any act of ownership, or act . . . inconsistent with the ownership of the seller." Unif. SALES ACT, supra note 4, § 48. According to Williston, "the commonest case is where he resells the goods . . . . The result is the same if the buyer merely attempts to resell the goods." 2 S. WILLISTON, WILLISTON ON SALES 1253 (2d ed. 1924). Williston noted that the case law approved a rejecter's later sale of perishable goods on the seller's account when the seller was notified of the rejection and did not act to reclaim the goods. Id. at 1297. A provision in a 1940 draft of the Revised Uniform Sales Act authorized the buyer in contracts between merchants to request instructions or consent to dispose of goods for the seller's account. Unif. SALES ACT § 67(2)(a) (Draft 1940). It went on to provide that absent instructions within a reasonable time, "the buyer's disposition of the goods or part thereof in mercantilely reasonable fashion for account of the seller is not an acceptance." Id. Comment 2 stated: "This states the better case law. But there have been unjust decisions under the original act where, for example, a rejecting buyer whose merchant's conscience was irked at seeing goods simply lie and rot was driven by the seller's pure silence into what was ruled an 'acceptance with knowledge.'" Id. comment 2. The comment characterized the new procedure set up by the provision as "reasonably safe for the buyer, keeping him from trouble." Id. See also Llewellyn, The Needed Federal Sales Act, 26 VA. L. REV. 558, 567-68 (1940) (impassioned critique of Uniform Sales Act approach).
cially productive approach.\textsuperscript{122}

Through the Article 2 merchant rules regarding firm offers, satisfaction of the statute of frauds, and a buyer's duties upon rightful rejection, Llewellyn sought to make commercial law rational, or to use his own term, "sane."\textsuperscript{123} Sane rules would promote sane commercial law and conduct. As Llewellyn insisted:

These are rules which lay upon a person professionally involved in the field those obligations which should properly be laid upon such persons. The practice along this line is ancient, not new. . . . Lord Mansfield incorporated into the common law, if one cares to really examine the cases, not "The Law Merchant," but "The Law of Merchants’ Peculiar Obligations."\textsuperscript{124}

Following Lord Mansfield’s lead,\textsuperscript{125} Llewellyn used the merchant rules to articulate Llewellyn’s law of merchants’ peculiar obligations. The merchant rules did not codify merchant reality, but rather Llewellyn’s view of what that reality should be. They were one part of Llewellyn’s overall goal to make “commercial law and practice clear, sane and safe.”\textsuperscript{126}

C. THE MYSTERY

There is something extremely peculiar about Llewellyn’s law of merchants’ peculiar obligations. Since the merchant rules are so sensible and reasonable, one feels compelled to ask, why limit these rules to merchants? Certainly the reasons behind the merchant rules provide no clue as to their limitation to merchants. If a signed writing is an acceptable substitute for consideration, why are only merchant firm offers binding without consideration?\textsuperscript{127} If a confirm-

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\textsuperscript{122} Traynor v. Walters, 342 F. Supp. 445, 10 U.C.C. Rep. Serv. (Callaghan) 965 (M.D. Pa. 1972) illustrates the application of § 2-603. The buyer had received 440 Christmas trees which were dry, poorly colored, unshaped and poorly shaped. The buyer notified the seller of the nonconformities. The seller delivered more trees, which the buyer also rejected. The seller had no local agent and the trees' value threatened to decline rapidly. The buyer rented a construction site, hired a night watchman and sold the trees. The court allowed him to recover his expenses in disposing of the trees.

\textsuperscript{123} N.Y. LAW REVISION REPORT 1954, supra note 4, at 112.

\textsuperscript{124} Id. at 107.

\textsuperscript{125} Llewellyn studied judges as well as cases. He seems to have been most taken by Thomas Edward Scrutton, to whom he dedicated an article. Llewellyn, On Warranty of Quality, and Society, 36 COLUM. L. REV. 699 (1936) [hereinafter cited as Llewellyn, On Warranty of Quality—I]. Of Mansfield, Llewellyn said: “Mansfield is superb, when he clamps down surely on what he knows to be the then commercial practice—or on what he feels to be wise commercial practice, for the decades just to come. But I see in him neither the higher prophecy nor the longer range of statesmanship.” Llewellyn, On Warranty of Quality, and Society II, 37 COLUM. L. REV. 341, 379 (1937) (footnote omitted) [hereinafter cited as Llewellyn, On Warranty of Quality—II].

\textsuperscript{126} NEW YORK LAW REVISION REPORT 1954, supra note 4, at 112.

\textsuperscript{127} Section 2-205 was narrower in scope than the existing New York law on irrevocable offers. Id. at 96. Section 2-205, unlike New York law, limited its application to merchants and limited the duration of the offer to three months. Id. The Ontario Law Reform Commission, in discussing the two different approaches, noted that “[t]he English Law Commission favoured the Code approach on the ground that it is consistent with the higher duties imposed in the Sale of Goods Act on a merchant seller.” ONTARIO LAW REFORM COMMISSION, REPORT ON SALE OF GOODS 92 (1979) (footnote omitted) [hereinafter cited as ONTARIO LAW REFORM REPORT]. The Ontario Commission remarked, however, that the English reasoning did “not explain why a firm offer should not also bind a non-merchant seller or buyer, assuming it was made freely and without unfair advantage taken of the offeror.” Id. at 93. The Commission stated it had “not been presented with any evidence that firm offers, not supported by consideration, are a significant feature in non-merchant sale transactions. We can see the merit of the argument that firm offers should be enforceable without restrictions as to the character of the offeror.” Id.
tion letter is acceptable objective proof of the existence of a contract, and the sending of one is a sound business practice, why does the nonmerchant who sends one to a merchant or other nonmerchant not have the benefit of section 2-201(2)?

If decency and common sense require a buyer to follow his seller's reasonable instructions regarding rejected goods, why do the dictates of reasonableness and common decency suddenly disappear when the buyer is a nonmerchant?

When pressed on this last question, Llewellyn answered:

The majority of the Task Group take the position that any buyer should be under a duty to follow a seller's reasonable instructions with regard to rejected goods. It may be that the word reasonable saves the criticism from absurdity and that telling a householder to send back three tons of properly rejected coal from his cellar would be unreasonable and therefore is not what is meant. In any event, however, the proponents of the Code stand upon their position. They do not believe that householders or farmers or lawyers have, as such, the responsibilities of businessmen in regard to properly rejected goods, and they do believe that sellers who sell to such persons should carry the burden of picking up non-conforming and rejected goods.

Llewellyn's response is singularly unresponsive. Section 2-603 only imposes a duty to follow a seller's reasonable instructions and to require a householder to reship three tons of coal would be unreasonable. The question posed was why not require all buyers to follow their seller's reasonable instructions? Llewellyn's answer suggests that he felt it was inappropriate to impose such a duty on nonbusinessmen.

Llewellyn's reply also suggests that the nonmerchant rules may simply have been the product of a vision limited by an all-consuming passion for business law and issues. Llewellyn rarely strayed far from business and mercantile considerations in his writings on sales. He confined one article's discussion to the "mercantile phases of sales" and another "to the initiation of business deals." In the preface to his 1930 casebook on sales, Llewellyn acknowledged his commercial focus:

128. Corbin was uncomfortable with the merchant limitation in the exception to the statute of frauds. He urged that "[i]t should not be easy for one to escape the application of this rule by showing that he is not a merchant, if it can also be shown that he in fact knew either the rule of the Code or the merchant custom." Corbin, supra note 40, at 831. Professor Nordstrom was also uneasy about § 2-201(2)'s "between merchants" limitation: "It is hard to believe that the drafters intended to allow the merchant, at the expense of the non-merchant, to speculate on the market and to use the statute of frauds as a shield to liability if it turned out to be economically desirable for the merchant to renege on the oral agreement. This type of case must have been overlooked by the drafters, probably because it is so rare." Nordstrom, supra note 22, § 26 n.31. For another explanation of why the drafters overlooked the situation, see infra text accompanying notes 217 to 250.

129. The Task Group of the Special Committee of Commerce and Industry Association questioned "whether there should be any variation in legal rules dependent on the business or character of the parties involved," NEW YORK LAW REVISION REPORT 1954, supra note 4, at 94, and specifically argued that "any buyer who rejects goods should be under an obligation to follow reasonable instructions received from the seller with respect to the goods and to sell them if perishable and this obligation should not be limited to a merchant buyer as in this section." Id. at 102.

130. Id. at 125.


132. Llewellyn, supra note 65, at 783. Llewellyn explained that he concentrated on business deals because they "provide the overwhelming percentage of instances in life." Id. at 785.
cial orientation: “The book errs, I think, in too happily assuming the needs of buyers and sellers to be the needs of the community, and in rarely reaching beyond business practice in evaluation of legal rules.”

He apologized that “time for building a wider foundation for judgment has been lacking.”

Lacking expertise in noncommercial matters, Llewellyn may have chosen to leave essentially unaltered the prior Uniform Sales Act’s treatment of such matters. Alternatively, Llewellyn’s business orientation may have caused him to confuse good business sense with just plain good sense.

Although these theories may explain Article 2’s merchant distinction, they are unsatisfying, both intellectually and emotionally, with respect to Llewellyn. By 1941, one would assume Llewellyn would have corrected this deficiency, especially when he was crafting a law rather than writing an article or casebook. In fact, Llewellyn’s writings and statements before the New York Law Revision Commission suggest another theory, far more appealing to “Llewellyn-watchers,” as an explanation of Article 2’s merchant and nonmerchant rules. Along with explaining what Llewellyn was doing, and why, they lead to the conclusion that Llewellyn never intended to limit the Article 2 merchant rules to merchants.

II. THE MERCHANT RULES, LEGAL REALIST’S LAW; OR, HOW TO BUILD BEAUTIFUL COMMERCIAL LAW

Professor Danzig once observed that Article 2 presented a rare opportunity to

133. K. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES xv n.3 (1930).
134. Id.
135. Id.

In defending his statute of frauds, Llewellyn said that “once there is given enough of a memorandum to document the presence of a deal, the Code proceeds then to let in oral testimony of any particular terms: which is business sense.” N.Y. LAW REVISION REPORT 1954, supra note 4, at 111-12. Why it is just “business sense,” as opposed to common sense, only Llewellyn would know. The nonmerchant rules may also possibly owe their existence to Llewellyn’s inability to come up with anything better. As a general matter, Llewellyn rejected the concept of title as a meaningful tool to resolve sales disputes. See, e.g., Llewellyn, supra note 131, at 160 (concept of title overbroad for intelligent use). Llewellyn maintained, however, that he did not mean to suggest the elimination of the Title concept. It has its use. But it should be made to serve merely as the general residuary clause. It should not give forth the norm for decision in each case when no cogent reason is shown to the contrary. Rather should it serve as a better-than-nothing, when inquiry has failed to reveal any other line of solution adapted to the problem in hand.

Id. at 170. Perhaps Article 2’s nonmerchant law represented “better than nothing” law.

136. According to Professor Carroll, “Karl Llewellyn watching is . . . becoming an increasingly popular method of U.C.C. interpretation.” Carroll, Harpooning Whales, Of Which Karl N. Llewellyn Is the Hero of The Piece; Or Searching For More Expansion Joints In Karl’s Crumbling Cathedral, 12 B.C. INDUS. & COM. L. REV. 139, 142 (1970) (footnote omitted). The present article admittedly represents an extreme form of “Llewellyn watching,” but, in defense of this activity, understanding Llewellyn’s objectives provides a better basis not only to understand Code provisions, but to evaluate their wisdom. Professor Carroll did not mince words in his criticism of the Code. He argued that

the business and financial interests . . . succeeded in completely out-negotiating the professors. These ‘hard-headed’ business types proceeded in subsequent drafts to eliminate all general provisions imbuing the Code with principles of justice and business morality, and to delete most of the specific sections providing protection or relief to the consumer . . . . The result was a relatively rigid, legalistic, pro-business commercial code.

Id. at 143.
study a statute "drafted by a self-conscious jurisprude." 137 Preoccupied with the more immediate struggle of figuring out what an Article 2 provision means or was intended to accomplish, we forget to consider that Llewellyn was "at least as reflective about the role of law in society and the relation of lawmaking institutions to each other as he was about the particular law-making task at hand." 138 It is Karl Llewellyn's jurisprudence that explains why he limited rules of seeming universal application to merchants.

Llewellyn planned to create beautiful law for businessmen. Such law would be beautiful because it was functional. For Llewellyn, legal esthetics were in essence functional esthetics. 139 Article 2 would create law businessmen could use, law which would guide them in their affairs: 140 "A structure of legal rules, however fair of face, must function well or be an active Evil to the men and work it houses." 141 Legal rules could be functional only if they were clear, certain and predictable. 142 Predictability, in turn, would be insured only if the rules protected good faith and did not require misconstruction to produce good results. 143 In drafting Article 2, Llewellyn sought to create "a body of sales law which is clear, guidesome, which it is almost impossible to misconstrue." 1144 Llewellyn wanted his rules to protect good faith and provide predictable and satisfactory results, both in court and out. 145 That aim, determined by Llewellyn's theory of what legal rules should accomplish, explains why he stated separate merchant rules in Article 2.

Gilmore observed that regardless of whether in fact there was such a thing as a "Realist School" or a "Realist Movement," "the academic theorists who emerged after World War I agreed . . . that the traditional or Langdellian way of achieving doctrinal unity on the level of case law or Restatement was absurd." 146 The merchant rules reveal Llewellyn's approach to the creation of doctrinal unity in commercial law:

137. Danzig, supra note 49, at 621.
138. Id.
139. Llewellyn, supra note 29, at 229.
140. Llewellyn repeatedly emphasized that rules should guide. See, e.g., Llewellyn, supra note 85, at 11 ("rules in the proper sense always have as their office to guide action") (emphasis in original); Llewellyn, supra note 29, at 241 ("[U]nder the early style, with right Reason plainly dominant, the outcome of a particular case at law can be moderately certain in the bulk of instances, and can and will at the same time give guidance in words, for the future, which is moderately clear"); N.Y. LAW REVISION REPORT 1954, supra note 4, at 229-30 ("[H]olmes' opinions . . . drive to a point; they drive to a policy; they drive to technical accuracy, to justice in the case at hand, to right guidance for the future").
141. Llewellyn, supra note 29, at 230. For Llewellyn, the challenge of drawing good rules involved more than artistic merit: "Sales offers backgrounds which lie at hand and can be grasped . . . and, indeed, a sufficiency of maladjusted rules and concepts to make drafting and the working out of protective devices appeal not only to sense of art but to sense of decency." Llewellyn, Across Sales on Horseback, 52 HARV. L. REV. 725, 727 (1939).
142. Llewellyn wanted rules that would produce "certainty in action." N.Y. LAW REVISION REPORT 1954, supra note 6, at 162. See also, Llewellyn, supra note 27, at 178 ("until the rules of law themselves are effectively and reductively adjusted to what commerce needs immediately, and to what All-Of-Us need indirectly, we are doomed to an unfortunate measure of waste in legal work, of unsatisfactory uncertainty and too frequent nonsense in result"); N.Y. LAW REVISION REPORT 1954, supra note 4, at 161-62, 178 (discussing certainty produced by U.C.C. sections).
143. See infra notes 185 to 197 and accompanying text (decrying "covert" tools used by courts which denied predictability to businessmen).
144. N.Y. LAW REVISION REPORT 1954, supra note 4, at 160.
145. Llewellyn, supra note 27, at 178.
146. G. GILMORE, supra note 7, at 79.
The main drive finds its fuel in the concentration and channeling of a body of mercantile cases under circumstances which permit them to be perceived as mercantile cases, which permit them to remain unconfused in their impact because they are not thrown into a single intellectual bin with cases of other and different pattern.147

Llewellyn believed proper results required “suitable explicit intellectual equipment.”148 He felt “the getting of such stock equipment is a struggle [and until] the case-results get themselves a prophet and a suitable doctrine, there is unpredictability, high, wide and handsome.”149 Llewellyn’s merchant was the prophet, his merchant rules the suitable doctrine. In statements before the New York Law Revision Commission, Llewellyn argued the Code would “produce intelligent and workable commercial law,”150 “make commercial law and practice clear, sane and safe,”151 and “hugely increase not only speed and flexibility, but safety and certainty in this area.”152 It was, he modestly remarked, “a rather amazing piece of legal engineering.”153

Llewellyn’s repeated emphasis on the Code’s safety, certainty and clarity might lead one to conclude that pre-Code law was unsafe, uncertain and unclear. No doubt Llewellyn perceived it that way, but others believed differently. In fact, some opposed the Code because it would disturb the existing law they thought clear and settled.154 Llewellyn responded to this particular anti-Code attitude in Tennessee, in a speech he made on the hustings of the Code campaign:

The question that faces a lawyer first of all, as he thinks about the Code is: Do I have to learn all over again everything that I have already learned and upon which I have relied now for these many years? Is the law which I have practiced to be upset by a new body of material? Must I start afresh? As to this, let me say three things. I wish you would let me say them very slowly, very loudly and with all the cogency at my command. The first is that you don’t know the present law, and if you are practicing on the assumption that you do, all I can

148. Id. at 876. Llewellyn believed that “if the stock intellectual equipment is apt, it takes extra art or intuition to get proper results with it. Whereas if the stock intellectual equipment is apt, it takes extra ineptitude to get sad results with it.” Id. (emphasis in original).
149. Id.
150. N.Y. LAW REVISION REPORT 1954, supra note 4, at 113.
151. Id. at 112.
152. Id. at 118.
153. Id. According to his wife, Llewellyn was “never . . . particularly humble about these things.” MENTSCHEKOFF, supra note 2, at 537.
154. Professor George Bacon’s remarks illustrate this attitude:

I have taught Sales for 28 years . . . . I have asked myself ever since the Code has been in the process of drafting, “Why is it needed?” . . . Now, just because we have more speed in the transaction of business and the delivery of goods does not seem to me to lead to the idea that we should change all the principles of the law that we now have and which are pretty well settled.

N.Y. LAW REVISION REPORT 1954, supra note 4, at 144. Professor Williston wrote that “the Code’s departure from the long-established tests for determining title and the consequences of title or the lack of it . . . presents the most striking and, as it seems to me, the most objectionable and irreparable feature of the part of the Code relating to sales.” Williston, supra note 4, at 570-71.
say to you is “God pity your clients!” The amount of abysmal, unbelievable, utterly ununderstandable, base ignorance on the part of the bar giving commercial advice which I have found in the highest quarters of the land, is a thing which has turned my hair—not white—but taken it out—during the process of discussion of the problems of this Commercial Code. Shall I say it over again, or did I make it moderately clear?

This frequently reoccurring repartee of “we know the law, so don’t change it”—“no you don’t know the law” seems odd. If those who did not know the law said they did, why did they think they knew it? And how could Llewellyn presume to know what they did or did not know? Although there are a variety of explanations, the most probable lies in the debaters’ differing perceptions of “the law.” Those occupying the “law-is-well-settled” camp viewed “the law” as doctrinal statements. Llewellyn conceived of “the law” as what courts do. In saying the law was uncertain and unsettled, Llewellyn meant that under the pre-Code rules no one could safely predict what a court would do in any given instance. If you could not predict a court’s behavior, you could not adjust your own. Since unpredictable rules could not guide action, Llewellyn considered the situation intolerable for businessmen who needed to plan and act rationally. The pre-Code and Code treatment of risk of loss illustrates both the underlying significance of this debate and Llewellyn's overall Article 2 jurisprudence.

Those who “knew the law” knew risk of loss fell on the person holding title to the goods. They also knew Llewellyn had jettisoned title as a legal doctrine to allocate risk of loss. In fact, Article 2's rejection of title as a means to resolve sales controversies was welcomed by some as a significant contribution. See Corbin, supra note 40, at 824-27 (Article 2 adopted “cheerful alternative” by emphasizing operative facts instead of undefined concepts such as “title”); Latty, Sales and Title and the Proposed Code, 16 LAW & CONTEMP. PROBS. 3 (1951) (rejection of title concepts will mean quicker resolution of controversies).

155. Llewellyn, supra note 136, at 781.
156. Professor Williston thought Article 2 was "iconoclastic." Williston, supra note 4, at 561. See also id. at 565 ("I did not then imagine a project to restate or to reform the law so radically as the proposed Code seeks to do. My original objection to a new Code seems to me still sound, but the novelty of the phraseology and the iconoclastic provisions in the present draft add force to this objection.").
157. In criticizing the existing law, Llewellyn would say things such as “no man knows where he is at,” N.Y LAW REVISION REPORT 1954, supra note 4, at 120; “under the present law nobody knows and nobody can tell where title is or how it comes to be transferred,” id. at 112 (emphasis in original); and “[this may make business for lawyers, but it does not make for either certainty, peace or decency in commercial life.” Id. at 162.
158. See infra note 177 and accompanying text (pre-Code sales law baffling and obscure).
159. The Uniform Sales Act had provided: “Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer.” UNIF. SALES ACT, supra note 4, § 22. In his treatise, Professor Williston wrote that “the effect and purpose of this section may be gathered from the following statement of the common law: risk of loss generally attends title.” S. WILLISTON, supra note 121, at 692-93.
160. In fact, Article 2's rejection of title as a means to resolve sales controversies was welcomed by some as a significant contribution. See Corbin, supra note 40, at 824-27 (Article 2 adopted “cheerful alternative” by emphasizing operative facts instead of undefined concepts such as “title”); Latty, Sales and Title and the Proposed Code, 16 LAW & CONTEMP. PROBS. 3 (1951) (rejection of title concepts will mean quicker resolution of controversies).
161. See U.C.C. § 2-509 (different methods are: (a) delivery by carrier without requirement of delivery to a particular destination, (b) delivery by carrier required to be at particular destination, and (c) delivery without movement where goods are in hands of bailee).
162. N.Y. LAW REVISION REPORT 1954, supra note 4, at 112. According to Llewellyn, under the present law nobody knows and nobody can tell where title is or how it comes to be
title as a metaphysical, mystical concept: "Nobody ever saw a chattel’s title. Its location in Sales cases is not discovered, but created, often ad hoc."\textsuperscript{163} In addition, Llewellyn objected to a single concept, what he called “lump title,”\textsuperscript{164} as a way to “solve all or most of the problems between seller and buyer—and even in regard to third parties.”\textsuperscript{165} Llewellyn believed that reliance on a monolithic concept to resolve disputes involving different considerations “works out, no less, either to obfuscate statement of results of rather reasonable decisions, or to misguide decision.”\textsuperscript{166}

For Llewellyn, the title concept was “too blunt to fit particular issues as they arise.”\textsuperscript{167} Its blanket application to a host of differing situations inevitably invited legal disaster. Courts would either reach the wrong result by blindly applying “the rule” to a situation involving a different issue or achieve the right result by judicial sleight-of-hand.\textsuperscript{168} Llewellyn observed that these “two processes . . . in their combination, throw into confusion any lines of predictable presuming about Title.”\textsuperscript{169} “Lump title” could not simultaneously produce good results and good reasoning, i.e., doctrinal unity, because it failed “to lay bare the true problems for visualization and for inquiry.”\textsuperscript{170} Even though Llewellyn believed that many courts did have a “feel for the precise issue,” chaos still reigned because no one could ever know, in any specific situation, whether a court would blindly apply the rule or maneuver around it to reach a good result.\textsuperscript{171} In his magnum opus on the commercial doctrine of good faith purchase, Professor Gil-

\textsuperscript{163} Llewellyn, supra note 131, at 165.
\textsuperscript{164} Id. at 166, 167. “It remains, in the Sales field, an alien lump, undigested.” Id. at 169.
\textsuperscript{165} Id. at 166. Llewellyn once wrote:

Now when the location of “the property” in the wares . . . gets far enough away from homely fact to need a lawyer to decide about it, but is supposed to be determined by the intentions of parties who are not lawyers, that is not so good. And when the lawyers themselves have difficulty in doing the deciding, that is worse. It bothers predictability, even for lawyers . . . And when, in addition, “the property” bounces around from party to party according to the issue, it begins to look as if “the property in the goods” as an issue-determiner, were in the mercantile cases, a farmer far from the dell, and none too well adjusted to the new environment.

Llewellyn, supra note 141, at 733.
\textsuperscript{166} Llewellyn, supra note 131, at 171.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 171-72.
\textsuperscript{169} Id. at 173. After reading a prior draft of this article, Professor Frederick Schauer argued that Llewellyn’s perceived disaster was not really a disaster. All predictable rules, said Schauer, are occasionally overinclusive or underinclusive, and that is the price one pays for certainty. Llewellyn would probably have responded: “Why have a rule that either encourages judicial manipulation as courts strain to reach just results or that produces unjust results as the result of nonmanipulation, if another rule would not do so?” Before the Code, the title concept was employed to resolve a number of different sales issues including risk of loss, a buyer’s replevin rights, a seller’s right to the purchase price and ability to stop goods in transit and priority between a buyer and his seller’s creditors. R. BRAUCHER & R. REIGERT, supra note 22, at 280. See also, E. FARNSWORTH & J. HONNOLD, supra note 22, at 478 (Code modifies existing law in adopting risk, replevin rights, recovery of purchase price). Llewellyn believed separate rules, tailor-made to deal with specific problems, would be more likely to produce rational results and consistent reasoning than a single, all-embracing legal construct.
\textsuperscript{170} Llewellyn, supra note 131, at 169.
\textsuperscript{171} Id. at 172-73.
more articulated explicitly what Llewellyn expressed only obliquely.\textsuperscript{172} Gilmore noted that there had been relatively little litigation under the negotiable instruments law on the prerequisites of negotiability.\textsuperscript{173} He wrote:

\begin{quote}
As long as the law distinguishes between commercial and noncommercial property on the basis of form, there will have to be borderline or fringe litigation. On the whole a continuing trickle of such litigation is not obnoxious; it produces a clearer state of the law than does the law of sales where the doctrines say one thing and mean another, a situation not productive of certainty and predictability.\textsuperscript{174}
\end{quote}

The Article 2 risk of loss rules illustrate Llewellyn’s general drafting approach. For each risk-of-loss situation, Llewellyn stated a separate risk-of-loss rule. Separate rules, tailor-made for specific situations, would lead both to good results and good reasoning, and hence to doctrinal unity:

\begin{quote}
The building of rules of law is by its very nature based on classification. Sound and wise building of rules of law calls for sound and wise classification of the problem-situations. Such classification makes for justice-in-result.\textsuperscript{175}
\end{quote}

Because he classified some Article 2 rules by a party’s status, Llewellyn must have believed that a merchant/nonmerchant classification would contribute to the sound and wise building of sales law.\textsuperscript{176} He must have concluded that a unitary approach to sales rules, one which failed to appreciate the different problems of merchants and nonmerchants, would produce the same legal chaos, the same unpredictability, that existed in the title area.\textsuperscript{177} Llewellyn intimated this when he wrote that

\begin{quote}
until merchant-to-merchant sales of wares are seen as the focus of a particular body of law (which they already largely are, in fact and in the decisions) we go on lacking clear, neat doctrine to distinguish from them, where needed, sales by nonmerchants, or to distinguish, where needed, sales to nonmerchants (the ultimate consumer).\textsuperscript{178}
\end{quote}

To provide the predictable, functional commercial law he so dearly wanted,

\begin{thebibliography}{9}
\bibitem{172} Gilmore, supra note 45, at 1057.
\bibitem{173} Id. at 1071.
\bibitem{174} Id. at 1072.
\bibitem{175} N.Y. LAW REVISION REPORT 1954, supra note 4, at 108.
\bibitem{176} Article 2’s merchant/nonmerchant distinction is arguably broader than one might initially suspect. In the 1949 draft, a comment to the merchant definition stated:
\begin{quote}
For the kind of transaction to which a merchant is almost always a party, this Article adopts as a general rule the established practice between merchants. In other instances this Article establishes the special obligations of the merchant, a professional, when he deals with another professional and when he deals with a non-professional.
\end{quote}
\bibitem{177} Llewellyn once said “the present condition of sales law is from the standpoint of prediction and counselling not only bafflingly obscure but, when light once gets achieved, alarming.” Llewellyn, supra note 110, at 373. He promoted the cause of the Code because “to the degree that the law has become not only more certain in fact but easier to find and also to see (or feel) in advance as certain, that result makes for easy and for fair settlements.” Id. at 369 (emphasis in original).
\bibitem{178} Llewellyn, supra note 147, at 879.
\end{thebibliography}
Llewellyn believed there was a "vital need for distinguishing merchants from housewives and from farmers and from mere lawyers."\textsuperscript{179} Presumably, the issues and considerations inherent in a commercial context differed from those in a noncommercial context, requiring separate treatment for each.\textsuperscript{180} Predictable commercial law required rules specially crafted for a commercial context.\textsuperscript{181} A court would not need to distort a sensible legal rule fashioned for a commercial context in order to produce a good result in a commercial dispute. If honest application of a rule would produce satisfactory results, the rule would be reliable and it could guide action. Llewellyn stated separate commercial rules to preserve the integrity and reliability of his commercial rules. Such soundly classified, special commercial rules would achieve doctrinal unity in commercial law. A comment to the 1944 merchant definition articulated his blueprint for good commercial law:

Well-built commercial law has since Mansfield centered on the transactions of "professionals" in the field. Practice and law have long recognized the need between such men of speed and common decency in contracting, of speedy remedy, and of reading their language and action in a commercially reasonable way. Practice and law have on the other hand also recognized that such men have skills and knowledge whose use is properly to be relied on. The courts have rightly laid down rules and rationale in these terms.\textsuperscript{182}

Article 2 also laid down rules and rationale in those terms. In fending off yet another attack on his merchant rules, Llewellyn said:

[M]aking merchants for some purposes a specially dealt with group has been dealt with at considerable length both orally before your Honorable Commission and elsewhere in this memorandum. . . . The fact is, and the cases show, that different responsibilities have been imposed both by explicit law and by the cases upon persons who have professional responsibilities as contrasted with other persons.\textsuperscript{183}

Llewellyn was "clarifying" the law by stating rules that would require all courts to adopt a mercantile approach to the legal issues addressed by the merchant rules. Llewellyn's claim of "clarification" is somewhat misleading. In fact, he was codifying a mercantile approach to commercial disputes, an approach that he believed distinguished the good commercial judges and good

\textsuperscript{179} N.Y. LAW REVISION REPORT 1954, supra note 4, at 108. Llewellyn believed that Lord Mansfield's "indirect legacy was crushing." Llewellyn, supra note 170, at 745. According to Llewellyn, by incorporating the law merchant into the common law, Mansfield "turned over to the common-law courts, thinking common-law thoughts in common-law ways, the development of the law of commerce. . . . No branch of mercantile law is after Mansfield to be seen as a thing distinct and differentiate." Id. at 745-46.

\textsuperscript{180} Llewellyn believed mercantile issues needed to be "cut free of the farmer's static concept." Llewellyn, Across Sales, supra note 141, at 735. Commerce required special commercial rules different from those that had evolved in pastoral society.

\textsuperscript{181} In discussing the problems associated with the title concept, Llewellyn remarked that "'property in the goods' remains at the heart of the theory and doctrine of the Law of Sales. . . . The mercantile rules of law—and they are solid . . . make their way through this like ivy through a wall, live, growing, spreading, finding cranny after cranny. But the wall is still there, it is still in the way." Id. at 736.

\textsuperscript{182} REV. SALES ACT, supra note 25, § 57 comment.

\textsuperscript{183} N.Y. LAW REVISION REPORT 1954, supra note 4, at 116.
commercial decisions from the bad.\textsuperscript{184} He was mandating all courts to follow the approach he believed to be proper and necessary with respect to commercial sales issues.

Llewellyn's spirited defense of Article 2's unconscionability provision\textsuperscript{185} provides further insight into his Article 2 merchant approach. Llewellyn did not like the judicial torture, manipulation and misconstruction of contractual language or intent to which courts resorted to achieve their desired result. He referred to these exercises in judicial gymnastics as "covert tools"\textsuperscript{186} of intentional and creative misconstruction, which were unacceptable to businessmen for three different reasons. First, businessmen, relying on what a court had said, would "recur to the attack"\textsuperscript{187} by attempting to draft contract language that better expressed their contractual intent:

We have all of us seen this kind of series of cases, haven't we? Case No. 1 comes up. The clause is perfectly clear and the court said, "Had it been desired to provide such an unbelievable thing, surely language could have been made clearer." Then counsel redrafts, and they not only say it twice as well, but they wind up saying, "And we mean it," and the court looks at it a second time and says, "Had this been the kind of thing really intended to go into an agreement, surely language could have been found" and so on down the line.\textsuperscript{188}

Judicial reliance on covert tools led businessmen down the primrose path: the problem was not one of better drafting, but of objectionable commercial intent. Second, judicial subterfuge failed to tell businessmen what was and was not permissible.\textsuperscript{190} Third, judicial use of covert tools would "seriously embarrass

\textsuperscript{184} For instance, Llewellyn admiringly wrote that Chief Judge Best was "a man who could look at horses, horse-hops and the timber in a bowsprit . . . and yet see a need, and distinguish the lot of them as 'articles of natural growth' from manufactured articles; and who could reach for a 'broad ground' of decision to fit the long-range needs of commerce." Llewellyn, supra note 141, at 739-40. Llewellyn praised Scrutton for "the keenness of his insight into mercantile law and practice." Llewellyn, On Warranty of Quality—\textit{I}, supra note 125, at 702.

\textsuperscript{185} U.C.C. § 2-302.

\textsuperscript{186} Llewellyn, Book Review, 52 HARV. L. REV. 700, 702-03 (1939) (reviewing O. Prausnitz, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)). See also K. LLEWELLYN, THE COMMON LAW TRADITION 364-65 (1960) (discussing the use of "covert tools" by the courts) [hereinafter cited as LLEWELLYN, COMMON LAW TRADITION].

\textsuperscript{187} LLEWELLYN, COMMON LAW TRADITION, supra note 186, at 364.

\textsuperscript{188} N.Y. LAW REVISION REPORT 1954, supra note 4, at 178.

\textsuperscript{189} Id. See also N.Y. LAW REVISION REPORT 1954, supra note 4, at 178 (since courts did not give words their clear meaning, parties were uncertain as to what words meant).
later efforts at true construction." In short, covert tools were unacceptable legal tools for business transactions:

This kind of thing does not make for good business, it does not make for good counseling, and it does not make for certainty. It means you never know where you are, and it does a very bad thing to the law indeed. The bad thing that it does to the law is to lead to precedent after precedent in which language is held not to mean what it says and indeed what its plain purpose was and that upsets everything for everybody in all future litigation.

Article 2 gave a devastatingly simple solution to the covert tool problem and its attendant unsettling effect on the planning and transacting of business. Section 2-302, the unconscionability provision, gave courts an overt tool that would eliminate any need for covert activity. Rather than misconstruing contractual language to mean what it clearly did not, a court could deny effect to a clause it disliked by holding it unconscionable. The unconscionability provision was good for businessmen. They could rely on courts to interpret contractual language as it was intended. They could also assume opinions meant what they appeared to mean. Most importantly, the accumulation of opinions over time would provide businessmen with explicit guidelines as to what was and was not beyond the pale. The unconscionability provision, amorphous as it was, would give concrete direction to businessmen in the future drafting of their contracts.

Of course, sound and reasonable legal rules, designed specifically for commer-

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195. At least one court has understood the unconscionability provision as Llewellyn intended it. See Kugler v. Romain, 58 N.J. 522, 279 A.2d 640, 9 U.C.C. Rep. Serv. (Callaghan) 559 (1971). The court, noting the absence of a definition for the term "unconscionability," characterized it as an amorphous concept obviously designed to establish a broad business ethic. In that way, a substantial measure of predictability will be achieved and professional sellers of consumer goods as well as draftsmen of contracts for their sale to ordinary consumers will become aware of the abuses the courts have declared unacceptable and will avoid them.

Id. at 543-44, 279 A.2d at 651-52, 9 U.C.C. Rep. Serv. at 565-66. Llewellyn intimated that the unconscionability provision would curb the business lawyer's tendency to "draft to the edge of the possible." N.Y. Law Revision Report 1954, supra note 4, at 177. He expressed amazement at the practice, noting that it was something that "no intelligent engineer would think of doing. . . . Any engineer makes his construction within a margin of safety, and a wide margin of safety, so that he knows for sure that he is getting what he is gunning for." Id. Llewellyn foresaw no problems with the unconscionability provision: "The only doubt that comes up in regard to unconscionability is, if you start drafting to the absolute limit of what the law can conceivably bear. At that point you run into what they run into now, and what you run into now is, the court kicks it over." Id. at 177-78.

196. According to Llewellyn,

if you take this and bring it out into the open, if you say, "when it gets too stiff to make sense, then the court may knock it out," you are going to get a body of principles of construction and the precedents are going to build up so that the language will be relied upon and will be construed to mean what it says. . . . We count this, therefore, by no means as a section which threatens certainty. We regard it instead as a section which greatly advances certainty in a now most baffling, most troubling, and almost unreckonable situation.

New York Law Revision Report, supra note 4, at 178. Llewellyn emphasized that the unconscionability provision "carefully safeguarded . . . principles of true construction [because it was] completely out
cial situations, would also do much to eliminate the covert tool problem in commercial cases. If the rules, without manipulation, would lead to good results, courts would not need to resort to covert activity to reach just results. And, of course, rules that courts could apply honestly to reach just results would be predictable, reliable rules.197

The merchant rules represent Llewellyn’s attempt to provide what he called “bedrock law”198 that would allow commercial practitioners to avoid trouble and plan ahead. These rules would effectively guide any businessman, lawyer, or financier.199 According to Llewellyn, an important aspect of the law of commercial transactions involved

the body of rules of law which one may call counsellor’s rules or rules seen from the angle of the counsellor. These have to do with the shaping of a transaction while it is still capable of being shaped and they run in terms of the degree of safety with which one can rely on the courts to act in particular predictable fashion if this particular transaction . . . should come to be presented to them. For the counsellor has found that there are some solid, settled clear rules on which he can build; they are safe, they are bedrock. But there are not as many of them as one might wish.200

Further on, he noted the realm of law beyond “bedrock law,”

that vast range of law which is not so clear and not so settled, of rules whose application is uneven, of “trends” in decision, of rules which courts commonly recite only to find a way around them if their direct application appears unfortunate . . . [represented] an area of risk . . . for the counsellor.201

On one level, Llewellyn was telling businessmen what was expected of them and what they could expect. On another, he was improving the substance of the

of the realm of the jury. Anything that is done under this section is going to make precedent, and the precedents can be recorded and the precedents can accumulate and guide.” Id.

197. In an article, Llewellyn discussed rules of law in terms of their safety:

(T)he form of an explicit written bargain is the one really safe form of consideration, and the agreed return for the promise should be substantial; nothing else is safe. No “rule” that “the adequacy of consideration will not be inquired into by the courts” is solid counsellor’s law, nor is a rule about “any bargained-for detriment” etc.; nor, for the promisee’s counsellor, is any “rule” of promissory estoppel a thing to be relied on (however strong the “trend” toward recognizing promissory estoppel may be) because until the reliance is clearly sufficient the outcome must remain uncertain, and a client has no business to be advised to change his position heavily to his prejudice before his legal rights have been made safe.

Llewellyn, supra note 27, at 168 (emphasis in original). Predictable rules would create the possibility of safe action. The individual who followed the rules would be safe in his approach.

198. Llewellyn, supra note 27, at 169. He defined “bedrock law” as “solid, settled, clear rules on which he (the legal counsellor) can build; they are safe, they are bedrock.” Id. at 168.

199. N.Y. LAW REVISION REPORT 1954, supra note 4, at 232; W. TWINING, supra note 1, at 541. Llewellyn described a lawyer’s professional crafts as “in essence, hugely resilient and versatile skills for sizing up situations wisely, and then getting things done, skills of trouble-shooting, trouble-evasion, and forward planning.” Llewellyn, supra note 27, at 167 n.*. He also talked about “counsellor’s rules . . . These have to do with the shaping of a transaction while it is still capable of being shaped, and they run in terms of the degree of safety with which one can rely on the courts to act in particular predictable fashion if this particular transaction in hand should come to be presented to them.” Id. at 167.

200. Llewellyn, supra note 27, at 167-68.
201. Id. at 169.
law regarding commercial transactions. Together, the commercial situation—law and practice—would be greatly improved:

Where the present law is blank or else confused or else in conflict, the Code moves in, with competence based on net experience, to provide one single and very reasonable answer, which is so much more clear than the existing law.\textsuperscript{202}

The Code would allow “legal advice at a reasonable rate,”\textsuperscript{203} which was “good for American business and finance: how else is competition to be fair and free? Such advice reduces risk, it reduces disputes, it makes for quick and fair adjustment.”\textsuperscript{204}

Clear and certain rules would produce predictable results that, in turn, would facilitate planning and trouble evasion. They would guide a businessman in entering a contract, seeking to protect his interests under it, and dealing with parties in troubled times.\textsuperscript{205} The merchant rules reflected Llewellyn’s attempt to create legal certainty:

Legal certainty in the ordinary sense, i.e., the deductive prophecy of the outcome of a lawsuit on the basis of the existing content of a major premise, called a rule of law, is possible only in those cases where no real legal controversy ought to exist.\textsuperscript{206}

Against this background, the first statement of the comment to the merchant definition, “[p]rofessionals . . . require special and clear rules,”\textsuperscript{207} takes on a different meaning and the merchant rules themselves assume a different pose. All businessmen (professionals), with a lawyer’s help, are expected to know the Code; it is readable, understandable, and establishes clear guidelines.\textsuperscript{208} For instance, businessmen can know, and should know, that risk of loss will rest on them until delivery of the goods to their buyer.\textsuperscript{209} Section 2-509(3) thereby

\textsuperscript{202} N.Y. LAW REVISION REPORT 1954, supra note 4, at 32; W. TWINING, supra note 1, at 540.

\textsuperscript{203} N.Y. LAW REVISION REPORT 1954, supra note 4, at 28. In a promotional article, Llewellyn argued that with “the bulk and especially the variety of pertinent rule-material . . . the need becomes overwhelming to find for quick use at need somebody of relatively compact, relatively accessible, relatively stable material which will not cost a week’s research time for each ten minute or ten dollar consultation.” Llewellyn, supra note 110, at 372-73 (emphasis in original).

\textsuperscript{204} N.Y. LAW REVISION REPORT 1954, supra note 4, at 28; W. TWINING, supra note 1, at 536.

\textsuperscript{205} In 1949, Llewellyn wrote: “So now, as I go through the nineteenth century—from about 1850 on—in regard to commercial law, I haven’t been able to really understand how any businessman could intelligently do anything but set up a reserve for legal contingencies.” Llewellyn, On Law and Our Commerce, 1949 Wis. L. Rev. 625, 631 (1949).

\textsuperscript{206} Llewellyn, 

\textsuperscript{207} U.C.C. § 2-104 comment.

\textsuperscript{208} Llewellyn, supra note 110, at 369.

\textsuperscript{209} Apparently, Llewellyn intended to guide only those merchants who would be likely to insure their goods. According to the comments to the 1949 draft: “Occasional sellers who are not commonly covered by insurance fall outside the reason of the rule applying to merchant sellers. Such a seller is required only to make a due tender in order to free himself from risk of loss.” \textit{MAY 1949 DRAFT, supra note 2}, § 2-509 comment. In responding to the expressed fear that a farmer would assume the risk of loss under Article 2, Llewellyn said that

occasional over-coverage, like occasional under-coverage, is a thing which the utmost care has never been able to avoid. I should have some hope that a court, seeing the reason for the rule announced in the comment, and knowing that farmers are not within that reason, might arrive at the conclusion that for this purpose the farmer, who is so worrying the majority of the Com-
“guides” a merchant-seller to insure his goods. If he insures, no harm can befall him. If he fails to insure, section 2-509(3)’s clear and certain rule will lead to out-of-court settlement because parties do not litigate disputes having a pre-ordained result. This same kind of thinking explains the merchant-seller’s implied warranty of merchantability. Section 2-314 informs “goods” merchants that, by law, they assume responsibility for the quality of goods they sell. This clear and certain rule facilitates intelligent conduct by encouraging “goods” merchants either to disclaim that responsibility or insure against liability.

The Article 2 merchant rules represent Llewellyn’s rules for the professional game. They would make the game easier to play as well as more rational:

[If] American enterprise is to develop as a free economy, then the rules of the game must be known, and they must therefore be made readily knowable. They must be made as simple (though adequate) and also as easy to know, as the best legal engineering can make them. That the Code does. That the present law does not do, in New York or any other of our states. Thus . . . the result is clear: with the Code, the law of commerce and commercial finance becomes relatively quick to find, to understand, and to use. This is a typical example of the point made . . . about the unplanned value of good tools.

The Article 2 merchant rules recognize that businessmen “have skills and
knowledge whose use is properly to be relied on." Llewellyn's rules expected the knowledge and guaranteed the reliability. Clarity, rationality, and predictability in the rules governing business transactions would create the legal certainty necessary to enable businessmen to prosper. The commercial rules would let businessmen know where they were, so they could know what to do. For Llewellyn, a major achievement of the Article 2 merchant rules was that they spotted and fulfilled mercantile need "without confusing it by including people and factors which would blur or distract." By stating separate commercial rules, noncommercial factors could not jeopardize the predictability or integrity of Llewellyn's rules for businessmen.

III. Who is a Merchant? A Question of Sound and Fury, Probably Signifying Little

In concluding that good commercial law and practice required special commercial rules, Llewellyn was not concluding that the commercial rules could have no application to a noncommercial context. Section 1-102(3) of the 1949 draft makes that clear: "A provision of this Act which is stated to be applicable 'between merchants' or otherwise to be of limited application need not be so limited when the circumstances and underlying reasons justify extending its application."

According to Article 2 as originally planned, the merchant rules would be invoked in a nonmercantile context if the purpose and reasoning behind a merchant rule applied. Llewellyn did not codify the special merchant rules to shut out nonmerchants. Rather, he sought to insulate his bedrock commercial rules from creeping, noncommercial considerations that might blur or distort the predictability of his commercial rules.

A comment to the 1949 firm offer provision illustrates Llewellyn's equivocal attitude regarding application of the merchant rule to nonmerchants:

Although the section is directed primarily toward[ ] the offers of merchants, a non-merchant's offer may in an appropriate case become irrevocable under this section by application of the rule of this Act on purpose and construction when it is shown that the offeror had full understanding of the nature and effect of the offer made.

Llewellyn had every good reason to apply section 2-205 to nonmerchants. Aside from the preprinted, unintelligible, firm offer form supplied by an offeree, what offeror (absent duress, fraud, mistake, etc.) would not fully understand the na-

214. REV. SALES ACT, supra note 25, § 7 comment.
215. The merchant rules reflected Llewellyn's response to existing law, under which businessmen did not know where they were and what to do when "tensions or doubts" arose. N.Y. LAW REVISION REPORT 1954, supra note 4, at 161, 178.
216. Id. at 108.
217. MAY 1949 DRAFT, supra note 2, § 1-102(3). The 1944 Uniform Revised Sales Act contained an identical provision. REV. SALES ACT, supra note 25, § 1(3).
218. This is what Llewellyn meant when he talked about "spotting and fulfilling mercantile need, without confusing it by including people and factors which would blur or distract." N.Y. LAW REVISION REPORT 1954, supra note 4, at 108 (emphasis in original).
219. MAY 1949 DRAFT, supra note 2, § 2-205 comment 2.
ture and effect of a writing that he composed and signed which expressed his offer as firm?

Yet, section 2-205's limitation of the firm offer rule to merchants reflected Llewellyn's drafting caution. Had section 2-205 not been limited to merchants, a court, confronting a nonbusinessman and wanting to find his offer revocable, might twist and distort the unitary rule to do so. Llewellyn feared that nonmercantile considerations might seep in and ultimately undermine the certainty of his commercial rules. At all costs, Llewellyn wanted to protect the clarity, meaning and predictability of his commercial rules. However, if the predictability of the rule would not be sacrificed through its application to a nonmerchant, there was no reason to limit its application to merchants. In fact, there was good reason not to, because an arbitrary limitation could result in individual injustice. Llewellyn's drafting solution was masterful. A rule for merchants, stated as an absolute, gave businessmen the predictability and certainty they needed. Liberal extension of the rule to nonmerchants when "the circumstances and underlying reasons" justified such an extension would avoid arbitrariness, but never at the expense of the predictability of the commercial rule.

Had the 1949 provision authorizing liberal application of the merchant rules to nonmerchants survived and been enacted, the question of merchant status would not have assumed its current importance. Courts could have sidestepped many status questions by concluding that merchant status was ultimately irrelevant, and the reasons underlying the merchant rule—reasonableness, soundness, and decency—would justify its application to the nonmerchant. Unfortunately, the drafters finally bowed to merchant critics and eliminated section 1-102(3), apparently as a political concession to save the embattled Article 2 merchant distinction itself.

Critics disapproved of Article 2's merchant definition, believing its obscurity would precipitate litigation over which Article 2 rule governed. They argued that section 1-102(3) would compound the problem by encouraging litigation over whether the merchant rule should apply to a nonmerchant.

220. Id. § 1-102(3).

221. Even with § 1-102(3), the question of merchant status would have continued to haunt courts under the implied warranty of merchantability provision. U.C.C. § 2-314(1). If its limitation to "goods" merchants reflects imposition of the loss on those likely to insure against such liability, its application arguably would not extend far beyond "goods" merchants. Needless to say, had Llewellyn ever been clear about the policy underlying § 2-314, courts would have had an easier time resolving the merchant issue. See, e.g., Blockhead, Inc. v. Plastic Forming Co., 402 F. Supp. 1017, 1025, 18 U.C.C. Rep. Serv. (Callaghan) 636, 645 (D. Conn. 1975) (term "practices" in merchant definition indicates one may be merchant of goods by virtue of involvement in production as well as sale of goods); Samson v. Rising, 62 Wis. 2d 698, 711, 215 N.W.2d 662, 669, 14 U.C.C. Rep. Serv. (Callaghan) 618, 622 (1974) (commercial restaurateurs are merchants, but Wauwatosa Band Mothers selling turkey sandwiches were not merchants as contemplated by statute).

222. The Editorial Board voted to delete the provision at its executive session. Malcolm, supra note 8, at 182.

223. For instance, Professor Rabel talked about "the elasticity of this phraseology" and concluded that "so many questions are left to the imagination that, as it is now, this is scarcely a workable formula." Rabel, supra note 4, at 431-32. See also Williston, supra note 4, at 571 ("[m]any troublesome questions of fact would have to be litigated to determine . . . who is a merchant within the definition"); Malcolm, supra note 4, at 182 (quoting Mr. Braucher's remarks in the Hearing before the Enlarged Editorial Board, January 28, 1951).

224. Professor Rabel noted: "The danger of litigation . . . especially lurks behind Section 1-102(3)." Rabel, supra note 4, at 432.
In the midst of this debate, several Harvard law professors suggested the merchant fury was a tempest in a teapot. They assumed the merchant rules would "apply to non-merchants except when there is some element of harshness or unfair surprise." To quell the controversy, they recommended "rephrasing Section 1-102(3) to establish a presumption of application to non-merchants and so reduce the area of uncertainty." Perhaps the recommendation was never considered. In any event, section 1-102(3) was not rephrased, but rather eliminated. As a result, Article 2 appears to isolate nonmerchants from merchant law, making the issue of status critical to the proper application of Article 2.

Section 1-102(3)'s demise has clearly created a problem. Llewellyn, were he alive, would find the present situation ironic. He would see his merchant definition become one of the covert tools he fought so hard against. He would see some courts misconstruing his intended merchant definition in order to achieve a just result through application of the merchant rule. He would see other courts reach an unreasonable, unjust result by correctly construing his merchant definition and blindly applying the nonmerchant rule. The celebrated "Is a farmer a merchant?" question involving Article 2's statute of frauds illustrates both the problem and its irony.

The farmer cases involving statute of frauds defenses all involve a similar plot. Farmer periodically calls Grain Elevator Company to check on current grain prices. During one call Farmer likes what he hears and the parties conclude a contract on the phone, the grain to be delivered some months later. Shortly after the oral deal, Grain Elevator Company prepares and sends a written confirmation of the phone deal to farmer. Farmer does not respond. Grain


226. Id. at 154.

227. Id.

228. Section 1-102(3) did not appear in the 1951 draft. Uniform Commercial Code (Spring 1951 Proposed Final Draft No. 2, text ed.).


230. See Loeb & Co. v. Schreiner, 294 Ala. 722, 321 So. 2d 199, 17 U.C.C. Rep. Serv. (Callaghan) 897 (1975) (cotton farmer found not to be merchant thus permitting statute of frauds defense in transaction with purchaser with whom farmer had dealt for previous four or five years); Sand Seed Serv., Inc. v. Poeces, 249 N.W.2d 663, 21 U.C.C. Rep. Serv. (Callaghan) 12 (Iowa 1977) (seed farmer found not to be merchant, thus permitting statute of frauds defense even though notice sent by buyer clearly states that failure to respond will be considered seller's acceptance of terms).

Elevator Company then contracts to sell Farmer's grain to a third party. At the
time scheduled for delivery, the price of grain has skyrocketed, and not surpris­
ingly, Farmer no longer likes the contract price. He sells his grain to someone
else at the higher market price. Farmer's breach forces Grain Elevator Company
to cover at the current market price to meet its contractual obligations. It ulti­
mately sues Farmer to recover its loss.

Farmer appears in court outfitted in bib overalls and cowboy boots that cast
off a faint perfume of manure. Farmer inevitably makes two responses to Grain
Elevator Company's contract action: (1) "We never made a contract" and, (2)
"Even if we did, I am a farmer, not a merchant, and therefore, the contract is
unenforceable because I never signed anything." Grain Elevator Company al­
ways responds that Farmer is a merchant and the statute is therefore satisfied
because Farmer never responded to its confirmation letter. As Article 2 is pre­
sently understood, the result of the litigation turns on the issue of the farmer's
status.

In treating this question, some courts have concluded that the terms "farmer"
and "merchant" are mutually exclusive: farmers are "tillers of the soil," while
merchants are "traders in goods." The evidence indicates Llewellyn did not
consider most farmers to be merchants for purposes of the statute of frauds. In a
comment to an early draft, Llewellyn discussed the apple farmer who marketed
three to six hundred bushels a year. Although such a farmer would give the
implied warranty of merchantability (because he would qualify as a "goods"
merchant), he would not be subject to section 2-207's rule that additional minor
terms stated in a confirmation became part of the parties' contract (a "prac­
tices" merchant provision), because invocation of section 2-207(2)

depends upon the established practice of regular merchants to attend
and reply promptly to correspondence. No such practice exists among
small farmers . . . his occupation does not hold him out as familiar
with any practice "of the kind involved" or as having the general
knowledge or skill in that aspect of a person in trade.

In defending the inapplicability of the statute of frauds to transactions under
five hundred dollars, Llewellyn discussed farmers and merchants separately, noting that

(Callaghan) 1141, 1143 (1965) (farmer defined as one devoted to tilage of soil); Lish v. Compton, 547
applicable to anyone who sells crops annually).

234. REV. SALES ACT, supra note 25, § 7 comment.

235. Section 20 of the Revised Sales Act provided:

Where either a definite and reasonable expression of acceptance of a written confirmation
which is sent within a reasonable time states terms additional to those offered or agreed upon
a. the additional terms are to be construed as proposals for modification; and
b. between merchants the additional terms become part of the contract if they do not alter the
essential terms and are not objected to within a reasonable time.

REV. SALES ACT, supra note 25, § 20.

236. U.C.C. § 2-104 comment 2.

237. The comment went on to note that a large-scale farmer "using standard business marketing meth­
ods" would be a merchant because he was "with respect to all aspects of the transaction concerned a
person in trade." Id.
in regard to such transactions, a merchant is protected by his normal procedure of reducing transactions to written sales slip or confirmation; a farmer is protected by his standing in the community.238

In some of his articles, Llewellyn distinguished the horse and haystack from "wares-in-commerce,"239 arguing the commercial sales rules that had evolved from horse and haystack deals were unsuited for the new world of modern commerce.240 One may surmise that Llewellyn intended to leave farmers with their haystack law and to give businessmen new "wares-in-commerce" law.241 This theory would explain why Llewellyn repeatedly distinguished merchants from farmers and housewives in his testimony before the New York Law Revision hearings.242

Although Llewellyn probably would have agreed that a farmer is not an Article 2 "practices" merchant, he would have been upset with the consequences that flow from this conclusion. Courts that have held the farmer not to be a merchant have applied section 2-201(1) (the nonmerchant rule) and refused to enforce the contract. Llewellyn would have wanted the courts to apply section 2-201(2)'s confirmation letter exception despite the farmer's nonmerchant status, because the purpose and policies behind the merchant exception would justify such application. Llewellyn designed section 2-201(2) to accommodate oral deals that the decent businessman confirmed promptly in accordance with sound business practice. He intended section 2-201(2) to serve as a bulwark against one party's indecent speculation at the expense of the other. Here, Farmer's questionable conduct as contrasted with Grain Elevator Company's sound and good business practice of sending out a confirmation letter would justify the application of section 2-201(2). No harm could come to the merchant rule by invoking it in that situation and its application would produce a just and satisfactory result.

Other courts, confronted with the farmer situation, have concluded the farmer is a merchant;243 one court emphasized that the statutory definition, rather than

238. Id. comment 14.
239. Llewellyn, supra note 141, at 743-44; Llewellyn, supra note 147, at 903-04.
240. Llewellyn, supra note 147, at 904 ("The time is overdue to make one more attempt to unhorse the law of wares ... so that we see ... the very different types of situation [sic] with very different types of need.").
241. "I hope, too, my none too flattering use of such terms as haystack and farmer when I am dealing with a need for merchants' law in merchant-to-merchant trading may not mislead into a conception that I lack interest in farmers' law ... the very different types of situation [sic] with very different types of need.").
242. N.Y. LAW REVISION REPORT 1954, supra note 4, at 108, 125. Llewellyn's distinction between farmers and merchants may have come from his assumption that legal concepts, having evolved in preindustrial society, often were unsuited to businessmen in an industrial society. Llewellyn, supra note 147, at 886. In discussing judicial recognition of trade usage and warranty, he remarked that the courts "are creating merchants' law for merchants, where farmers' law has ceased visibly to cover merchants' needs." Id. at 903 (emphasis in original).
common sense, controlled. Although these courts have interpreted the merchant definition to include those whom Llewellyn probably did not intend to include, their "misconstruction" enabled them to achieve the result Llewellyn would have wanted, through application of the merchant rule. In short, had 1-102(3) been enacted, courts could have dismissed many "Who is a merchant?" questions with a glib "Who cares?" If the policy fits, the merchant rule should govern. Given the merchant rules' inherent reasonableness, the policy would fit more often than not.

The loss of section 1-102(3) and a basic misunderstanding about the underlying purpose of the Article 2 merchant rules have created a flaw in Article 2's bifurcated system. Courts assume the existence of an Article 2 barrier, which precludes application of the merchant rules to situations involving only one merchant or only nonmerchants. Courts either respect the barrier, often reaching poor results, or surmount it by various means to reach the proper results. Those who are unquestionably nonmerchants suffer most. They can never find refuge in the Article 2 merchant rules. This situation is especially ridiculous because there does not appear to be anything intrinsically commercial about most of the Article 2 merchant rules. The merchant rules for firm offers, the statute of frauds, risk of loss, and so on, are edicts issuing forth from the temple of reason, not the marketplace. The merchant rules embody good sense, not just good commercial sense.

Compared with the nonmerchant rules, the merchant rules seem enlightened. The merchant rules impose only the mildest, most modest of responsibilities, such as the duty to open one's mail and respond to it promptly. The
merchants' failure to abide by these duties often results in equally innocuous consequences. For example, the businessman who fails to reply to a confirmation letter simply loses his statute of frauds defense against contract enforcement. The businessman who fails to read or respond to the offeree's letter of acceptance is bound by minor additional contract terms contained in the acceptance. These are rules which, in most instances, could apply to the common man with little fear of judicial distortion or doctrinal confusion. In fact, it may be said that what's good for businessmen in Article 2 is good for the rest of us.

IV. EPILOGUE

Llewellyn once remarked that he was "ashamed of [the Code] in some ways; there are so many pieces that I could make a little better; there are so many beautiful ideas I tried to get in that would have been good for the law, but I was voted down." Undoubtedly, one source of shame must have been the defeat of duties imposed by the "practices" provisions are nonspecialized business practices. Thus, every businessman, whether widget jobber or jelly bean trader, opens or should open his mail. Every businessman responds or should respond to his mail. These are the business practices that the Article 2 "practices" merchant provisions require, and they apply to all businessmen. Comment 2 notes that the four "practices" merchant provisions "rest on normal business practices which are or ought to be typical of and familiar to any person in business." Thus the "practices" merchant provisions simply state special rules for businessmen, a businessmen's code of operation.

249. Comment 3 to the statute of frauds section emphasizes that failure to respond merely eliminates the defense of the statute of frauds. U.C.C. § 2-201 comment 3. The burden of establishing an oral agreement is unaffected. Some courts have confused §§ 2-201(2) and 2-207(2), holding that a failure to respond to a confirmation memo renders additional terms in it binding. See, e.g., Trafalgar Square, Ltd. v. Reeves Bros., 35 A.D.2d 194, 315 N.Y.S.2d 239, 8 U.C.C. Rep. Serv. (Callaghan) 343 (1970) (arbitration term is binding because party failed to object to it within 10 days after receipt); In re Phillips-Van Heusen Corp., 15 U.C.C. Rep. Serv. (Callaghan) 33 (N.Y. Sup. Ct. 1974) (same); In re Dalil Fashions, Inc., 12 U.C.C. Rep. Serv. (Callaghan) 478 (N.Y. Sup. Ct. 1973) (same). Professor Duesenberg criticized the lower courts of New York for this mistake. Duesenberg, General Provisions, Sales, Bulk Transfers and Documents of Title, 29 Bus. Law. 1243, 1249 (1974). He pointed out that § 2-201(2) imposes a duty to object only for purposes of preserving the statute of frauds defense: "It does not ordain that silence itself results in a binding obligation." The New York Court of Appeals held that the lower courts had erred on this issue. Marlene Indus. Corp. v. Carnac Textiles, Inc., 408 N.Y.2d 410, 380 N.E.2d 239, 24 U.C.C. Rep. Serv. (Callaghan) 257 (1975). One court explained that the judicial blurring of §§ 2-201(2) and 2-207(2) enunciated a sound policy of promoting arbitration of commercial disputes. Wolfkill Feed & Fertilizer Corp., 16 U.C.C. Rep. Serv. (Callaghan) 1188, 1192 (N.Y. Sup. Ct. 1975). If the receiving merchant had reason to expect that an arbitration provision would be included in the confirmation of an oral agreement, the court felt that provision should be binding; proof of expectation might be established from prior sales between the parties or from trade practices. Id.

250. Between merchants, additional terms contained in an acceptance or confirmation letter become binding terms "unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given within a reasonable time after notice of them is received." U.C.C. § 2-207(2). In discussing § 2-207(2), Llewellyn noted that the provision deals with the now hopelessly confused situation... when deals are made by phone or by shorthand message and "confirmations" are sent on forms which reach beyond the dickered terms... The "orthodox" law of offer, counter-offer, and the like gives no satisfactory answer to this problem... In a word, the existing law is confused and uncertain. Some improvement is to be hoped from the provision of sec. 2-207(2) which allows minor additional terms to enter into the contract without that express consent which (more frequently than not) never occurs. What terms will be construed as "materially" altering the contract is indeed a question for the courts' determination, but at least the Code focuses the question. Today the question is not focused and... no man knows where he is at.

N.Y. LAW REVISION REPORT 1954, supra note 4, at 119-20.
251. Llewelyn, supra note 136, at 784.
section 1-102(3). Llewellyn had to sacrifice nonmerchants to protect his Article 2 law for businessmen. We might remedy the nonmerchant plight by amending the Code to "reinstate" section 1-102(3). This would certainly go far toward defusing the merchant controversy under section 2-201. It would also encourage courts to extend other innocuous merchant rules to nonmerchants, vastly improving Article 2's provisions governing transactions between nonmerchants and those involving only one merchant. Without such an amendment, courts should rely on section 1-102(1)'s command to construe and apply the Code liberally in order to promote its underlying purposes and policies, and should ignore a provision's merchant limitation.

In fact, even though Section 1-102(3) met an untimely and unfortunate death, its spirit has lingered on. Comment 1 to the merchant definition provides: "This Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer." The comment's statement that the merchant rules may not apply to nonmerchants suggests with equal force that they can. This should persuade courts to apply the merchant rules to those nonmerchant situations that cry out for the reasonable and fair results that invocation of the merchant rule would produce.

This article has argued that the Article 2 merchant rules do not codify trade customs and usages. They codify Llewellyn's law of merchants' peculiar obligations. They articulate what Llewellyn believed to be sound, rational commercial rules. They do not reflect actual business conduct but rather adopt Llewellyn's ideal business conduct. At one level, this suggests a new judicial approach to the merchant rules. With respect to businessmen, courts seeking to uphold the legislative intent behind the merchant rules should strictly construe and enforce the merchant rules that impose business duties. For instance, Llewellyn wanted the merchant exception to the statute of frauds to promote the sound business practice of sending out a confirmation letter. Business professionals who fail to follow this sound business practice should not be allowed to enforce their oral agreements. That is the price they must pay for unacceptable business behavior. Courts should not liberally construe section 2-201 as an attempt simply to re-

252. The debate over § 1-102(3) involved more than a scuffle about a single provision. It assumed the dimensions of a primordial battle regarding fundamental approach. The drafters maintained that the provision "favored a principle of statutory construction that looked to the reason, purpose and substance of a statute rather than its form." Malcolm, supra note 8, at 181. They argued "it had the effect of narrowing the range of judicial results on particular questions as compared to the converse principle of close adherence to the specific statutory language used." Id. Opponents believed that the provision gave the courts too free a hand in statutory construction and led to uncertainty and indefiniteness. Id. "If the basic concept of looking to substance rather than form was sound and the stronger courts were now doing this," the opponents added, "they would continue to do so without anything being said about it in a statute." Id. at 181-82. As could be predicted, some courts have and some have not. See supra notes 233, 242 to 244 and accompanying text (discussing cases).

253. U.C.C. § 1-102(1) provides: "This Act shall be liberally construed and applied to promote its underlying purposes and policies." A fundamental underlying purpose and policy of the Code is rationality. The present state of the law with respect to the firm offers of nonmerchants is irrational as is the law regarding risk of loss with respect to nonmerchant sellers.

254. U.C.C. § 2-104 comment 1 (emphasis added).

255. Merchant rules imposing business duties include all the "practices" merchant provisions and the third category of "either goods or practices" merchant provisions.

256. N.Y. LAW REVISION REPORT 1954, supra note 4, at 117-18.
quire some corroboration of the existence of a contract. A confirmation letter sent by the seller to the buyer ten weeks after conclusion of an oral contract should not satisfy the business behavior norm posited by section 2-201(2). Neither should courts limit section 2-201(2)'s defense of the statute of frauds to those cases where fraud is suspected. That kind of approach to the statute of frauds would undercut Llewellyn's objective of clear and certain application. So too, courts should not resort to estoppel theories to overcome the Article 2 statute of frauds or firm offer rule. Such judicial activity undermines the rule's predictability and certainty, which, in turn, diminishes its effectiveness both as a prod to acceptable, reasonable, decent business behavior and as a meaningful guide to businessmen.

Of course, hard-nosed enforcement of the commercial rules presupposes faith in the wisdom of those rules and the policies they seek to effect. As statements of commercial policy rather than commercial reality, the merchant rules lose their immunity from critical evaluation. We are free to assess them, to question both their underlying objectives and the means they have adopted to achieve those goals. Some scholars have frothed and foamed at the very idea of a statute of frauds. Other legal systems do not insist on written formalities for contract

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259. See Jamestown Terminal Elevator, Inc. v. Heib, 246 N.W.2d 736, 739, 20 U.C.C. Rep. Serv. (Callaghan) 617, 620 (N.D. 1976) (substantial evidence supports jury finding of contract, including testimony by the plaintiff's employees of conversation plaintiff had with defendant, plaintiff's notation of transaction in business records, plaintiff's resale of wheat of like amount, and testimony of retired farmer that defendant said he had sold wheat to plaintiff); Harry Rubin & Sons, Inc. v. Consolidated Pipe Co., 396 Pa. 506, 512, 153 A.2d 472, 476, 1 U.C.C. Rep. Serv. (Callaghan) 40, 44 (1959) (writing need only provide basis for believing oral evidence regarding the existence of contract).


But see C.R. Federick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 857, 21 U.C.C. Rep. Serv. (Callaghan) 26, 31 (9th Cir. 1977) (application of promissory estoppel would nullify §§ 2-201(1) and (2)); Sacred Heart Farmers Coop. Elevator v. Johnson, 305 Minn. 324, 327, 232 N.W.2d 921, 923, 17 U.C.C. Rep. Serv. (Callaghan) 901, 904 (1975) (buyer's resale in reliance cannot take contract out of statute of frauds because to do so would render statute of frauds meaningless, since grain elevators typically purchase grain solely for resale); Farmers Coop. Elevator Ass'n v. Cole, 239 N.W.2d 808, 814, 18 U.C.C. Rep. Serv. (Callaghan) 1151, 1159 (N.D. 1976) (exceptions to statute of frauds cannot be enlarged by trade usage, such as consistent failure of grain dealers to use written agreements when dealing with farmers).

261. Those in the academic ivory tower would think twice about evaluating or criticizing rules that businessmen have evolved to structure and facilitate commerce. But as statements of policy, the merchant rules are legitimate objects for scholarly reevaluation. Professor Twining noted some criticism "of Llewellyn's... 'unscientific,' 'impressionistic,' or 'anecdotal' approach." W. TWINING, supra note 1, at 319. At least some believed that the Code rules should be based on empirical evidence of what businessmen did and needed. Id. at 314-21.

262. Professor Rabel strenuously objected to the existence of a statute of frauds in Article 2: "The most striking example of ultra-conservatism in the Draft is the insertion and reinvigoration of the Statute of Frauds. ... Compulsory writing for the enforceability of transactions is a thoroughly antiquated legislative trick, which has so often misfired that the old law has been called the Statute for Frauds and 'the refuge of a welcher.'" Rabel, supra note 4, at 433. Rabel viewed the statute as "patriarchal protection of
enforcement. Some courts, uncomfortable with the statute of frauds as an instrument of social justice, have maneuvered around or within the statute to achieve their desired result. Moreover, other legal systems do not require formalities with respect to irrevocable offers or contract modification. In short, now that we know what Llewellyn was doing, we may decide we do not approve.

At a higher level of abstraction, we need to reexamine Llewellyn’s ideological presupposition that American sales law needs to discriminate in its rules on the basis of who is a “merchant” and who is not. Llewellyn was certainly not alone in his rejection of monolithic legal doctrine. For example, Professor Kessler rejected a unitary approach to the law of contracts for reasons theoretically akin to those that motivated Llewellyn in his drafting of the merchant rules:

The term ‘contract of adhesion’ . . . has not even found general recognition in our legal vocabulary. This will not do any harm if we remain fully aware that the use of the word ‘contract’ does not commit us to an indiscriminate extension of the ordinary contract rules to all contracts. . . . Courts have made great efforts to protect the weaker contracting party and still keep ‘the elementary rules’ of the law of contracts intact. As a result, our common law of standardized contracts is highly contradictory and confusing, and the potentialities inherent in the common law system for coping with contracts of adhesion have not been fully developed. . . . Society had thus to pay a high price in terms of uncertainty for the luxury of an apparent homogeneity in the law of contracts.

ignorant parties.” Id. He noted that no civil law country had such a statute, “not even the small farmers of Poland and Italy have been considered to need this guard. . . . Do we rate American businessmen as less intelligent, more naive? Considering all the well-known arguments, historical and practical, the draftsmen owe us some justification for their stand.” Id. See also Bruckel, The Weed and the Web: Section 2-201’s Corruption of the U.C.C.’s Substantive Provisions—the Quantity Problem, 1983 U. ILL. L.R. 811 (1983) (criticizing rigidity of statute of frauds); Burdick, A Statute For Promoting Fraud, 16 COLUM. L. REV. 273 (1916) (questioning the need for statute of frauds); Corbin, supra note 40, at 829-34; and Willis, The Statute of Frauds—A Legal Anachronism, 3 IND. L.J. 528 (1928) (same).

German law requires written formalities only in certain limited situations, such as a promise to guarantee a debt. I. FORRESTER, S. GOREN & H. ILGEN, THE GERMAN CIVIL CODE § 780, at 127 (1975) [hereinafter cited as GERMAN CIVIL CODE]. The German Commercial Code dispenses with this formality in commercial transactions. GERMAN COMMERCIAL CODE, supra note 4, § 350, at 58. Llewellyn himself acknowledged that a legal system could survive without a statute of frauds. N.Y. LAW REVISION REPORT 1954, supra note 4, at 109. The English have abolished their statute of frauds. Law Reform (Enforcement of Contracts) Act of 1954, 2 & 3 Eliz. 2, ch. 34. The Ontario Law Reform Commission recommended abolition of a statute of frauds requirement for sales contracts in general. ONTARIO LAW REFORM COMMISSION, supra note 127, at 94.


German law, for instance, presumes an offer is irrevocable unless the offeror expressly indicates otherwise. GERMAN CIVIL CODE, supra note 263, § 145, at 22 (“[w]hoever offers to another to enter a contract is bound by the offer, unless he has excluded being so bound”). The Ontario Law Reform Commission noted that “the English Law Commission’s Working Paper on Firm Offers had concluded that a writing should not be a condition of enforceability.” ONTARIO LAW REFORM COMMISSION, supra note 127, at 94. A majority of the Ontario Commission agreed with the English conclusion. Id.

See supra notes 177 to 183 and accompanying text (discussing Llewellyn’s concern for protecting integrity and reliability of commercial law).
Other scholars as well have noted the doctrinal confusion and poor results that flow from a unitary approach to situations involving different issues and policy concerns.\textsuperscript{268} The recent proliferation of consumer protection legislation suggests the perceived need to create different rules for different classes of people.\textsuperscript{269}

In the abstract, then, Llewellyn’s Article 2 principle of discrimination seems sound, but his actual discrimination along merchant/nonmerchant lines is at least open to question. Today, the relevant principle of discrimination may be consumer/nonconsumer,\textsuperscript{270} a distinction to which Article 2 has not shown an abundance of sensitivity, as several have pointed out.\textsuperscript{271}

In his last article, entitled “The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman,”\textsuperscript{272} Gilmore observed that the Code, dating from the 1940s, already qualified for senior citizen status.\textsuperscript{273} He concluded the piece:

Let us treat it [the Code] with respect—even with a nostalgic affection—but there is no need, and with each passing year there will be less need, for us to be overborne by its quaint, old-fashioned ways. There may yet be a way out of the nineteenth century.\textsuperscript{274}

Article 2’s merchant/nonmerchant approach may be a quaint, old-fashioned principle of discrimination that has little, if any, relevance to modern sales needs and problems.

In his article, Gilmore said that he did not want to appear to be “using Karl Llewellyn as a whipping boy. . . . I have now, as I had then, the highest admiration for Llewellyn. He was a man of extraordinary intelligence and of remarkable insights. He was always willing—indeed eager—to rethink his own earlier formulations.”\textsuperscript{275} Llewellyn, of course, cannot rethink the advisability of his Article 2 merchant/nonmerchant approach, but we can and should.


\textsuperscript{271} Childres and Garamella talked about the Code’s anticonsumer and promerchant bias. Childres & Garamella, supra note 268, at 442. See also Carroll, supra note 136, at 142-43 (separate treatment of consumers as a class rejected in battle between academic and business interests).

\textsuperscript{272} Gilmore, supra note 25, at 605-06.

\textsuperscript{273} Id. at 629.

\textsuperscript{274} Id.

\textsuperscript{275} Id.