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

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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


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1. W. TWI~ING, 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. Ed. at 546.


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 Comercial Code, 63 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
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.

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. Gorein & 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. Honn, H. Kotz & H. Leiser, 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." J. 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 "established" 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.\footnote{Professor Beutel included the merchant definition in \textit{U.C.C.} \S 2-104(1) (Final Text Edition, November 1951), probably because Professor Waite did not believe that the definition encompassed retailers. \textit{Waite, supra note 4, at 619.} For a more complete discussion of the historical evolution of the merchant definition, see \textit{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. \textit{N.Y. LAW REVISION REPORT 1954, supra note 4, at 168 (remarks by K. Llewelyn). Professor Kripke's observations appear to have prompted this clarification. \textit{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).}} Despite the inhospitable welcome, however, the merchant concept and special merchant rules managed to survive. When enacted, Article 2 contained fourteen special merchant provisions\footnote{Article 2 of the \textit{U.C.C.} contains the following merchant provisions: \S 2-103(1)(b) (good faith); \S 2-201(2) (statute of frauds—"between merchants"); \S 2-205 (firm offer); \S 2-207(2) (additional terms in acceptance—"between merchants"); \S 2-209(2) (modification, rescission and waiver—"between merchants"); \S 2-312(3) (warranty of title and against infringement); \S 2-314(1) (implied warranty of merchantability); \S 2-327(1)(c) (sale on approval); \S 2-402(2) (rights of seller's creditors); \S 2-403(2) (enforcement); \S 2-509(3) (risk of loss); \S 2-603(1)(b) (waiver of buyer's objections by failure to particularize); and \S 2-609(2) (adequate assurance of performance).} and a merchant definition very similar to the one proposed by Llewellyn in 1949.\footnote{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, broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. \textit{U.C.C.} \S 2-104(1).}

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...}
buyer.\textsuperscript{13} Article 2 never explained why special rules for merchants were necessary.

Given the ensuing struggle to understand and identify the Article 2 merchant,\textsuperscript{14} 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.\textsuperscript{15} 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\textsuperscript{16} 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.\textsuperscript{17} As a consequence, courts have never entertained the possibil-

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\textsuperscript{14} U.C.C. § 2-104 comment 1.

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


\textsuperscript{17} In Cadaby 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. 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. 19 Resolution of a party's merchant status forces courts to confront the merchant definition head-on. 20 rarely a pleasant encounter. 21 In effect, the con-


§ 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 determina-
tion of the relevant Article 2 rule.22 The merchant provisions themselves offer
little help in defining the class of individuals subject to them23 and provide no
rationale for limiting their application to merchants.24

We are experiencing a merchant muddle that stems from a fundamental mis-
understanding 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 inten-
ted to codify merchant custom and trade usage. Llewellyn, the principal
draftsmen of Article 2,25 invented the merchant rules. The necessity that

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 appar-
ent than in (1) and (3) of § 2-104 of the U.C.C." Pecker Iron Works, Inc. v. Sturdy Concrete Co., 96
1976).

22. The goods merchant/practices merchant distinction has been a particular source of confusion for the
courts. See, e.g., Cement Asbestos Prods. Co. v. Hartford Accident & Indemnity Co., 592 F.2d 1144,
1148, 1149, 1150, 25 U.C.C. Rep. Serv. (Callaghan) 1236, 1239-40 (10th Cir. 1977) ("goods" merchant test applied to
§2-207); In re Barney Schlogel, Inc., 12 Bankr. 697, 703-04 n.6, 34 U.C.C. Rep. Serv. (Callaghan) 29, 36
n.6 (Bankr. S.D.N.Y. 1981) (same); Miller v. Kaye, 545 P.2d 199, 199-200, 18 U.C.C. Rep. Serv. (Calla-
ghan) 832, 852-54 (Utah 1975) ("goods"/merchant test for statute of frauds).

Many commentators have pondered the merchant definition. See, e.g., R. Braucher & R. Reedert,
INTRODUCTION TO COMMERCIAL TRANSACTIONS 206 (1977) (sometimes difficult to determine whether
person is merchant within meaning of Article 2); R. Nordstrom, HANDBOOK OF THE LAW OF SALES
§ 26:34 (scope of merchant definition difficult to determine); J. White & R. Summers, HANDBOOK ON
THE UNIFORM COMMERCIAL CODE § 9-6 at 345 (2d ed. 1980) (merchant definition considerably broader
than one might think); Dolan, supra note 13, at 3 (knowledge or skill peculiar to practices or goods are
primary factors determining status, but must also be mercantile or businesslike rather than recreational or
personal); Newell, supra note 13, at 308 (merchant definitions needlessly imprecise). Professor Newell
devoted this entire article to pinning down the elusive meaning of the merchant definition. Id. In their
casebook, Professors Farnsworth and Honnold note that "[t]he elastic nature of the 'merchant' definition
is illustrated, if not clarified, by comments 1 and 2 to U.C.C. §2-104." E. Farnsworth & J. Honnold,
COMMENTS AND MATERIALS ON LAW CASES AND MATERIALS 487 (3d ed. 1976).

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 ex-

ample. Section 2-509(3) provides that "risk of loss passes to the buyer on his receipt of the goods if the
seller delivers to the buyer a receivables account on the risk of loss 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 making 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 reason-
ably 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 L. 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 Commer-
cial Code) (Proposed Final Draft No. 1 1944) [hereinafter cited as RV. SALES ACT]. Karl Llewellyn was the
Reporter and Soia Mentschikoff the Assistant Reporter of this revision. Id. at 1. 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.”

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.” Llewellyn sculpted the merchant rules to bring “the beautiful” to commercial law and commercial practice. To Llewellyn's eye, legal beauty lay in functional rules — rules that could assist them in their “trouble shooting, trouble evasion and forward planning.”

Llewellyn drafted the merchant rules to apprise businessmen, attorneys, and courts of the peculiar obligations of businessmen. Their clarity, rationality and certainty in application would protect decent businessmen and promote sound, reasonable, and decent business practices.

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 which it reflects Llewellyn's philosophy of law and sense of commercial wisdom and need is startling.” S. MENTSCHEKOFF, COMMERCIAL TRANSACTIONS CASES AND MATERIALS 4 n.3 (1970). Professor Franklin went so far as to dub the Code “lex Llewellyn.” Franklin, On the Legal Method of the Uniform Commercial Code, 16 LAW & CONTEMP. PROBS. 330, 333 (1951). In describing an article he had written, Professor Gilmore noted that it had “summarized quite accurately, what we all then believed to be the truth of the matter as we had learned the truth from Karl Llewellyn.” Gilmore, The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman, 15 GA. L.R. 605, 606 (1981). Professor Twining estimated that “rather more than half of the initial drafting was done by Llewellyn and Mentschikoff, Llewellyn being primarily responsible for the general sections in Article 1 (excluding definitions), Article 2 and Article 5.” TWINING supra note 1, at 300.

26. N.Y. LAW REVISION REPORT 1954, supra note 4, at 112 (emphasis in original).


28. See infra note 139 and accompanying text (Llewellyn considers the most functional commercial law to be the most beautiful).

29. According to Llewellyn, “the prime test . . . of legal beauty remains the functional test. Structural harmony, structural grandeur, are good to have; they add, they enrich; but they are subsidiary. So is ornament. Legal esthetics are in first essence functional esthetics.” Llewellyn, On the Good, the True, The Beautiful, in Law, 9 U. CHI. L. REV. 224, 229 (1942). Jerome Frank wrote an article analogizing statutory interpretation to “the interpretation of musical compositions by musical performers.” Frank, Words and Music Some Remarks on Statutory Interpretation, 47 COLUM. L. REV. 1259, 1260 (1947). He noted that Llewellyn had “rejected the musical analogy and . . . insisted that the ‘esthetic phase of a legal system is cognate to architecture.’” Id. Llewellyn maintained that

the rules, and the concepts which build into and are built out of them . . . are to stand together; they are to merge into majestic harmony; they are to be a structure. Structured beauty becomes thus the esthetic goal—an intellectual architecture, clean, rigorous; above all, carried through in sharp chiseling to body out the predetermined plan, in every vault, in each line, into each angle.

Llewellyn, supra, at 228.

30. See infra notes 198 to 202 and accompanying text (discussing Llewellyn's goal of “bedrock,” or truly dependable, commercial law).

31. Llewellyn, supra note 27, at 167 n.*.

32. See infra notes 176 to 216 and accompanying text (discussing the goal of predictability in law).

33. Id.
wanted to create for businessmen. Under a single rule, governing both business­
men 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 DRAF, 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,

104:4 (3d ed. 1981). Duesenberg and King argued that the merchant definition is "a principle of transcending importance designed to distinguish between professionals in a given field and casual or inexperienced buyers and sellers." R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS, 3 U.C.C. Serv. (MB) § 1.02, 2.04(3)(b) (1984). A student note suggested that "the merchant sections as a group are intended to implement the policy announced in section 2-103(1)(b) of charging persons with reasonable commercial standards of fair dealing in their trades." Note, Merchant Sections, supra note 13, at 191.

39. Corbin, supra note 2, § 2-101 comment.
40. Lattin, supra note 2, § 2-101 comment. Lattin recalled that after the Dean of the Yale Law School told him he would be teaching commercial law,

[in 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." 44 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, 45 commercial standards, 46 trade customs, 47 and commercial understanding, 48 all of which require courts to refer to actual commercial practice and understanding to resolve legal disputes. 49 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." 50 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." 51 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 "[t]he law of us 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).
50. 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 "[t]he law of us 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).
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 Relying 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 comported 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

58. Id. comment 1.
59. Id. comment 2.
60. Id.
62. Id. at 742.
63. Id. at 743.
64. Id.
65. Id. at 742. See also Llewellyn, Our Case-Law of Contract: Offer and Acceptance, II, 48 YALE L.J. 779, 780, 804 (1939) (certain "orthodox" rules of consideration are "either defective or false or unwise").
66. The statute of frauds requires a writing of some kind. U.C.C. § 2-201(1)-(2). A merchant's firm offer requires a writing. U.C.C. § 2-205. Any contract modification must satisfy the Article 2 statute of
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

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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, as long as 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

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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 46, 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," and "the entire continent of Europe ha[d] also handled mercantile dealings for a few hundred years without that necessity." 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, as Llewellyn once described him. 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.

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. 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, 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. 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. 297, 344 (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”90 because two and a half centuries after its enactment, it stood “in essence better adapted to our needs than when it first was passed.”91 Without doubt, Llewellyn believed in writings. No system could “ignore the value of forms as records”;92 forms provided “permanent and reckonable evidence of what was agreed upon.”93 Llewellyn declared that “contracts are transactions, not mere events; and, as deliberate transactions, are capable of prophylactic regulation.”94 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.95 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.”96 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.”97 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,”98 would be served while its use as a device of unscrupulous businessman to void valid contracts would be minimized.99 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.”100 Llewellyn’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.101 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.102 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 coordination 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-

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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."

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." 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.

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." Section 2-603(1) requires a merchant buyer to follow his seller's reasonable instructions regarding the goods. 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.

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 reshipping, storing, delivery to a third party, reselling or the like." 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-

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.
commercial 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 threshing machine 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-

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).
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 1255 (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 confirma-

\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 reasona-
bleness 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, how-
ever, 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 considera-
tions in his writings on sales. He confined one article's discussion to the
"merc­
tantile phases of sales" and another "to the initiation of business deals." In
the preface to his 1930 casebook on sales, Llewellyn acknowledged his commer-

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 "be-
tween 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 230.

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."133 He apologized that "time for building a wider foundation for judgment has been lacking."134 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.135

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,"136 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. 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. & COMM. 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.” 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.” 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. Article 2 would create law businessmen could use, law which would guide them in their affairs: “A structure of legal rules, however fair of face, must function well or be an active Evil to the men and work it houses.” Legal rules could be functional only if they were clear, certain and predictable. Predictability, in turn, would be insured only if the rules protected good faith and did not require misconstruction to produce good results. In drafting Article 2, Llewellyn sought to create “a body of sales law which is clear, guidesome, which it is almost impossible to misconstrue.” Llewellyn wanted his rules to protect good faith and provide predictable and satisfactory results, both in court and out. 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.” 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 (“under 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 (“Holmes' 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 realistically 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 confused 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 112.
151. Id. at 112.
152. Id. at 118.
153. Id. According to his wife, Llewellyn was "never . . . particularly humble about these things." MENTSCHIKOFF, 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, unbel-
lievable, utterly understandable, 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 moder-
ately clear?155

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 expla-
nations, 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.156 Llewellyn conceived of "the law" as what courts do.157 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.158 The pre-
Code and Code treatment of risk of loss illustrates both the underlying signifi-
cance 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.159 They also knew Llewellyn had jettisoned title as a legal doctrine to
allocate risk of loss.160 In its stead Llewellyn had stated several rules based on
different methods of delivery.161 Llewellyn believed the pre-Code law regarding
risk of loss had created uncertainty because everyone knew the person who held
the title assumed the risk but no one knew who had title.162 Llewellyn viewed

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
"[t]his 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.” 163 In addition, Llewellyn objected to a single concept, what he called “lump title,” 164 as a way to “solve all or most of the problems between seller and buyer—and even in regard to third parties.” 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.” 166

For Llewellyn, the title concept was “too blunt to fit particular issues as they arise.” 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. 168 Llewellyn observed that these “two processes . . . in their combination, throw into confusion any lines of predictable presuming about Title.” 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.” 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. 171

If, Professor Gil-
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:

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}

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:

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}

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

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}

To provide the predictable, functional commercial law he so dearly wanted,
Llewellyn believed there was a "vital need for distinguishing merchants from housewives and from farmers and from mere lawyers." Presumably, the issues and considerations inherent in a commercial context differed from those in a noncommercial context, requiring separate treatment for each. Predictable commercial law required rules specially crafted for a commercial context. 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.

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.

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.

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

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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.
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.
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.
182. REV. SALES ACT, supra note 25, § 57 comment.
183. N.Y. LAW REVISION REPORT 1954, supra note 4, at 116.
commercial decisions from the bad.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 provision185 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”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”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.188

Judicial reliance on covert tools led businessmen down the primrose path:189 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.190 Third, judicial use of covert tools would “seriously embarrass

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—I, supra note 125, at 702.

On Llewellyn’s use of words, Gilmore’s observations are revealing. In discussing § 2-403(1), dealing with the distinction between void and voidable title, which contained four subsections, Gilmore asked:

What are we to make of this a-b-c-d list? The official comment observes that . . . “subsection (1) provides specifically for the protection of the good faith purchaser for value in a number of specific situations which have been troublesome under prior law.” For “situations which have been troublesome” read “situations in which the courts have been protecting the original transferer by refusing to expand the ‘voidable title’ concept.” All the courts that had failed to appreciate the “mercantile approach” were being put in their places. At least as a matter of drafting, “troublesome” was a stroke of genius.

G. GILMORE, supra note 7, at 618. In short, Llewellyn was doing more than just “clarifying the law.” He was creating law establishing a mercantile approach to mercantile issues.

187. LLEWELLYN, COMMON LAW TRADITION, supra note 186, at 364.
188. N.Y. LAW REVISION REPORT 1954, supra note 4, at 178.
189. LLEWELLYN, COMMON LAW TRADITION, supra note 186, at 364.
190. 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."\textsuperscript{191} 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.\textsuperscript{192}

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,\textsuperscript{193} 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.\textsuperscript{194} 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.\textsuperscript{195} The unconscionability provision, amorphous as it was, would give concrete direction to businessmen in the future drafting of their contracts.\textsuperscript{196}

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

\textsuperscript{191} LLEWELLYN, COMMON LAW TRADITION, supra note 186, at 365.
\textsuperscript{192} N.Y. LAW REVISION REPORT 1954, supra note 4, at 178.
\textsuperscript{193} U.C.C. § 2-302.
\textsuperscript{194} N.Y. LAW REVISION REPORT 1954, supra note 4, at 178.
\textsuperscript{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.

\textsuperscript{196} According to Llewelyn, 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.”1d.

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

"The 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 1934, 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.\footnote{202}

The Code would allow "legal advice at a reasonable rate,"\footnote{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."\footnote{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.\footnote{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.\footnote{206}

Against this background, the first statement of the comment to the merchant definition, "[p]rofessionals . . . require special and clear rules,"\footnote{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.\footnote{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.\footnote{209} Section 2-509(3) thereby

\begin{itemize}
    \item \footnote{202} N.Y. LAW REVISION REPORT 1954, supra note 4, at 32; W. TWINING, supra note 1, at 540.
    \item \footnote{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).
    \item \footnote{204} N.Y. LAW REVISION REPORT 1954, supra note 4, at 28; W. TWINING, supra note 1, at 536.
    \item \footnote{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, \textit{On Law and Our Commerce}, 1949 WIS. L. REV. 625, 631 (1949).
    \item \footnote{206} Llewellyn, \textit{Prljudizienrecht und Rechtsprechung in Amerika} (1933), translated in mimeograph in J. Dawton, \textit{Comparative Law} 187-200 (1951) (available in University of Michigan Law School Library).
    \item \footnote{207} U.C.C. § 2-104 comment.
    \item \footnote{208} Llewellyn, supra note 110, at 369.
    \item \footnote{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 \textit{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."214 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.215 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."216 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."217

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.218

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.219

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-

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.
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).
nature 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 nonmer­
cantile 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. Riesing, 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

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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.).

229. See Musil v. Hendrich, 6 Kan. App. 2d 196, 627 P.2d 367, 373, 31 U.C.C. Rep. Serv. (Callaghan) 432, 435 (1981) (court finds hog farmer a merchant in order to impose implied warranty of merchantability on feeder pigs sold to another hog farmer); Currutch Grain Inc. v. Powell, 38 N.C. App. 10, 10, 246 S.E.2d 853, 855, 24 U.C.C. Rep. Serv. (Callaghan) 1099, 1101 (1978) (court upholds jury finding that inexperienced, small-scale farmer is merchant in order to preclude statute of frauds defense). 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. Pooches, 249 N.W.2d 665, 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).


231. The celebrated "Is a farmer a merchant?" question involving Article 2's statute of frauds illustrates both the problem and its irony.
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 surprisingly, 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 ultimately 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 always responds that Farmer is a merchant and the statute is therefore satisfied because Farmer never responded to its confirmation letter. As Article 2 is presently 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 "practices" 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

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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 methods" 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 for farmers." Id. at 903 (emphasis in original).
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 another point, he stated:

Once any judge, writer or lawyer gets thoroughly into the orbit of 'law of trade among traders' . . . the whole stock of implicit orientations to solution which are the life of active work with law—these all proceed to derive overwhelmingly from trade, from trade seen and felt as trade, as trade for a living, as trade quite dissociated from houses, farms or haystacks.

Id. at 874 (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


See also Kimball County Grain Cooperative v. Yung, 200 Neb. 233, 242, 263 N.W.2d 818, 822, 23 U.C.C. Rep. Serv. (Callaghan) 875, 882 (1978) (Brodkey, J., concurring) (farmer is agribusinessman and should be considered merchant under language of U.C.C.)

245. Only two merchant rules have a commercial or marketplace rationale: § 2-403(2), the entrusting provision, and § 2-402(2), dealing with a seller's retention of sold goods. Both of these provisions protect buyers who buy from merchants, i.e., those who buy in the marketplace. Thus both rules try to protect normal commercial activity in the marketplace. The warranty rules (U.C.C. §§ 2-312(3) and 2-314(1)) try to place commercial loss on those who can best absorb and spread it. Other merchant rules, such as the firm offer rule, the confirmation letter exception, and the risk of loss rule, merely articulate reasonable approaches to legal issues.

246. Gilmore attributed the nature of the enacted merchant rules to the political concessions made during the Code adoption process:

On the whole and in the long run the conservatives or traditionalists had their way. Llewellyn's proposals for a radical restructuring of the law—as, for example, in distinguishing between the standards applicable to "merchants" and those applicable to nonmerchants—survived the early drafts only in an attenuated, watered down, almost meaningless form.

G. GILMORE, supra note 7, at 85.

247. Why does a nonmerchant's firm offer require consideration to be irrevocable? Why must a buyer bear the risk of loss for goods tendered, but not delivered by a nonmerchant seller? Both situations are nonsense. The inherent, universal rationality of the merchant rules has prompted some commentators to urge an expansive reading of the merchant definition. See Dolan, supra note 13, at 2; Corbin, supra note 40, at 828.

248. Opening one's mail and responding to inaccuracies or alterations are the core "business" duties of §§ 2-201(2) and 2-207(2). In discussing the business practices involved in the "practitioners" merchant provisions, comment 2 to § 2-104 states: "For purposes of these sections, almost every person in business would, therefore, be deemed to be a 'merchant' under the language 'who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices involved in the transaction'" because the
merchant's 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 agreement. The businessman who fails to reply to a confirmation memo renders additional terms in it binding. The businessman who fails to respond to a confirmation renders additional terms in it binding. The businessman who fails to reply to a confirmation renders additional terms in it binding. The businessman who fails to respond to a confirmation renders additional terms in it binding. The businessman who fails to reply to a confirmation renders additional terms in it binding.

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 businessman'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. Id. 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 Fishlons, 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." Id. 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 (1978). 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 bindings 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 dictated 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. Llewellyn, supra note 136, at 784.
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.
require some corroboration of the existence of a contract.\(^\text{257}\) 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).\(^\text{258}\) Neither should courts
limit section 2-201(2)'s defense of the statute of frauds to those cases where fraud is suspected.\(^\text{259}\) 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.\(^\text{260}\) 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.\(^\text{261}\) 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.\(^\text{262}\) Other legal systems do not insist on written formalities for contract


\(^{259}\) 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).


\(^{261}\) 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).

\(^{262}\) 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." \textit{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. \textit{Id.} at 314-21.

\(^{263}\) 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, \textit{supra} note 4, at 433. Rabel viewed the statute as "patriarchal protection of
enforcement.263 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.264 Moreover, other legal systems do not require formalities with respect to irrevocable offers or contract modification.265 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.266 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:

"[T]he 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. . . . [C]ourts 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 system 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."267
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.268 The recent proliferation of consumer protection legislation suggests the perceived need to create different rules for different classes of people.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,270 a distinction to which Article 2 has not shown an abundance of sensitivity, as several have pointed out.271

In his last article, entitled “The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman,”272 Gilmore observed that the Code, dating from the 1940s, already qualified for senior citizen status.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.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.”275 Llewellyn, of course, cannot rethink the advisability of his Article 2 merchant/nonmerchant approach, but we can and should.


271. Children 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).

272. Gilmore, supra note 25, at 605-06.