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# ESSAYS

## WHY DO LAW STUDENTS INSIST THAT ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE APPLIES ONLY TO MERCHANTS AND WHAT CAN WE DO ABOUT IT?\*

*Scott J. Burnham*<sup>†</sup>

I (a law professor) agree to sell my pen to you (a student) for \$10. This agreement:

- (a) is a UCC transaction
- (b) is not a UCC transaction because the parties are not merchants
- (c) is not a UCC transaction because the sale is for less than \$500
- (d) both (b) and (c)

Every year I ask this question on my Contracts exam, and every year many students get it wrong. Why do law students insist that Article 2 of the Uniform Commercial Code applies only to merchants?<sup>1</sup> We tell them, again and again, that Article 2 applies to the sale of goods, but it doesn't register. Why? After teaching Contracts for a number of years, in a

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<sup>1</sup> In this essay, "the Code" or "Article 2" refers to the text of Article 2 of the Uniform Commercial Code 1997 Official Text. "Revised Article 1" refers to the text of the National Conference of Commissioners on Uniform State Laws ("NCCUSL") September 1997 draft of Revised Article 1. "Revised Article 2" refers to the text of the NCCUSL March 1, 1998 draft of Revised Article 2. These drafts are available at the NCCUSL official website, <<http://www.law.upenn.edu/library/ulc/ulc.hmt#ucc1>>.

number of localities, I have come to some tentative conclusions regarding this phenomenon and what can be done about it.

Perhaps the very name—Uniform Commercial Code—contributes to the confusion. The Code's first section, 1-101, states that "This Act shall be known and may be cited as Uniform Commercial Code."<sup>2</sup> I find this an odd provision, for although the National Conference of Commissioners on Uniform State Laws promulgates a uniform code, each state enacts a variation of it. It seems to me more reasonable to say that a state enacts not the *Uniform* Commercial Code, but the Louisiana Commercial Code or the North Dakota Commercial Code. Perhaps the section reflects the Commissioners' futile battle against local variation. In any event, my concern is not with the *Uniform* aspect of the Code but its *Commercial* aspect.<sup>3</sup>

What does it mean that the Code describes itself as Commercial? The Code never defines the term. In section 1-102,<sup>4</sup> we learn that one of its purposes is "to simplify, clarify and modernize the law governing commercial transactions." No help there. In fact, "commercial transactions" sounds like something the heavy hitters do, not what I do when I sell you a pen. Another purpose is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." No help either. "Commercial practices," "custom," and "usage" sound like terms that those involved in a business—i.e. merchants—deal with, not what you and I do. The section also says that a purpose is "to make uniform the law among the various jurisdictions." This purpose is of no concern to me if I am only an occasional buyer or seller, not in business, not venturing beyond my jurisdiction. The Code does not, as the philosophers like to put it, claim me. In finding the Code inhospitable to nonmerchants, the students appear to recapitulate history, for the "law merchant," grew out of the

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<sup>2</sup> Revised § 1-101 improves it with brevity: "This [Act] may be cited as the Uniform Commercial Code."

<sup>3</sup> As to whether it is even a *Code*, that is a subject for another day. See, e.g., Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1042-47 (1961).

<sup>4</sup> This section is largely unchanged in Revised § 1-102(a).

need for merchants to establish their own body of law, separate from the common law.<sup>5</sup> We ordinary folks have never quite fit into its confines.

Much of the confusion may also stem from the Code's use of the word *merchant*.<sup>6</sup> One would think that if the Code occasionally enumerates special rules for merchants, known in the literature as the "merchant rules,"<sup>7</sup> then the rest of the time the rules apply to everyone else. But who is everyone else? *Nonmerchants* of course. Curiously, the Code never refers to nonmerchants, leaving us to ponder when it states a rule for merchants, what the rule is for nonmerchants. Sometimes the rule is easy to determine. If a firm offer is made by a merchant, then presumably a nonmerchant cannot make a firm offer.<sup>8</sup> On the other hand, if additional terms are proposed and "between merchants such terms become part of the contract," then between nonmerchants or between a merchant and a nonmerchant do they not become part of the contract?<sup>9</sup> And, notoriously, if a nonmerchant receives a confirmation and does not object to it, does the writing satisfy the Statute of Frauds?<sup>10</sup>

If students find it difficult to make these negative inferences, they are in good company. Karl Llewellyn believed that if, under the circumstances, it is reasonable to apply a merchant rule to one who is not a merchant, then by all means apply it.<sup>11</sup> Yet the present Code commands exactly the opposite:

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<sup>5</sup> Arthur Linton Corbin, *The Uniform Commercial Code-Sales: Should It Be Enacted?*, 59 YALE L.J. 821, 822-24 (1950).

<sup>6</sup> This term is defined in U.C.C. § 2-104(1) (1997).

<sup>7</sup> See, e.g., Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987).

<sup>8</sup> U.C.C. § 2-205 (1997).

<sup>9</sup> U.C.C. § 2-207(2) (1997).

<sup>10</sup> U.C.C. § 2-201(2) (1997).

<sup>11</sup> Revised Uniform Sales Act (1941) Proposed Section 1-B, a section that did not survive the drafting process, provided:

*Mercantile Rules in Transactions Not Between Merchants.* A provision of this Act which is applicable "between merchants" may be applied by the court to a transaction not between merchants if the reason and convenience of the provision justify so doing. Such application is subject to review.

The fact that "merchant" is thus used in some sections does not mean that only those sections are applicable to merchants. "Seller" and "buyer" include all persons so engaging whether merchants or not. Accordingly *all sections are applicable to merchants and some sections are only applicable to them.*<sup>12</sup>

In expressing confusion about to whom the provisions apply, students may be on to something, perhaps perceiving the ghost of Llewellyn's flexible ideas behind the present Code's expression. There seems to be consensus now that the dual standard of the Code should yield to different rules for different relationships.

Ignoring that the labels represent a continuum rather than a dichotomous pair, we can construct a matrix of possible Article 2 transactions between a sophisticated party and an unsophisticated party.<sup>13</sup>

		BUYER	
		UNSOPHISTICATED	SOPHISTICATED
SELLER	UNSOPHISTICATED	<b>I</b> Unsophisticated Buyer and Unsophisticated Seller	<b>II</b> Sophisticated Buyer and Unsophisticated Seller
	SOPHISTICATED	<b>III</b> Unsophisticated Buyer and Sophisticated Seller	<b>IV</b> Sophisticated Buyer and Sophisticated Seller

<sup>12</sup> 1A Ronald A. Anderson, Uniform Commercial Code § 2-104:5 (3d ed. 1996) (emphasis added) (footnotes omitted).

<sup>13</sup> It is not an amazing coincidence that this chart resembles Marc Galanter's matrix of one-shot and repeat players in his wonderful piece, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 107 (1974).

Box IV, sophisticated buyer and sophisticated seller, represents what we generally think of as a commercial transaction: Hertz buys a fleet of cars from Ford. Box III, unsophisticated buyer and sophisticated seller, represents what we generally think of as a consumer transaction: I buy a car from a Ford dealer. Box II, unsophisticated seller and sophisticated buyer is a fairly rare sale of goods transaction, particularly among those that are litigated, for the buyer will rarely be wronged; and when it is, even though it has the greater resources, it may well choose the course of swallowing its losses: I sell my car to a Ford dealer.<sup>14</sup> Box I, unsophisticated buyer and unsophisticated seller, is the transaction at issue: I sell my car to you.

The consumer transaction embodied in Box III receives virtually no attention in Article 2.<sup>15</sup> The extent to which this omission should be remedied is the source of great debate, but there seems little doubt that Revised Article 2 will recognize this transaction and the special rules that it invokes.<sup>16</sup> Explicitly admitting consumers to the Code will not solve our problem, however, for it is Box I that represents the area where students instinctively find the Code inapplicable. It is the only transaction that does not involve a merchant, who is by defi-

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<sup>14</sup> An exception may be the cases arising under § 2-201(2) in which a farmer receives a confirmation of an oral contract, although the issue in those cases is whether the farmer is in fact an unsophisticated party. Revised § 2-201 does not resolve the problem, although Note 3 contains an echo of Llewellyn's lost Section 1-B.

Subsection (b) retains the confirmation principle in Section 2-201(2) with the following change. The text states that only the recipient of the confirmation must be a merchant. The text does not say that merchant may or may not be a farmer. The conclusion that farmers can never be a merchant, however, is rejected. See Section 2-201 (1995), Comment 2, paragraph 2, which states that the merchant concept under Section 2-201(2) rests "on normal business practices which are or ought to be typical of and familiar to any person in business."

Revised § 2-201(2).

<sup>15</sup> The term *consumer* is not defined, which makes sense because the term is not used except in the phrase *consumer goods*, which is defined by reference to Article 9 in § 2-103(3) and which makes one appearance, in § 2-719(3).

<sup>16</sup> See, e.g., *Symposium: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 1 (1997). Revised Article 2 § 2-102(a)(8) defines "consumer" as "an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household use." U.C.C. § 2-102(a)(8) (1997). The defined term is then used in a number of substantive provisions.

nition a sophisticated party.<sup>17</sup> The transaction is not a consumer transaction, for it involves two consumers, and thus lacks the theoretical purpose of the designation, to protect the unsophisticated from the sophisticated.<sup>18</sup>

In our teaching, we do little consciously to make clear that this transaction is part of Article 2, and perhaps much unconsciously to suggest that it is not. When we and our materials send contradictory messages to students, they quite properly pick up on what we do, rather than what we say.<sup>19</sup> For example, we make distinctions between "commercial" and "noncommercial" contracts, and between "commercial contracts" and "consumer contracts."<sup>20</sup> In many doctrinal areas, such as unconscionability, fraud, or the parol evidence rule, we explore disparate results that can be explained by such a characterization of the parties. We may say that in *commercial* cases, such and such is usually the result, but in *non commercial* cases it is so and so. We do not then say:

I have just used the term *commercial* in a different context than it is used in the Uniform Commercial Code. In fact, I might add, I have just used it in its more natural context, to describe parties that have experience in the business, which is to say merchants. But don't conclude from this that when the Code says commercial, it means merchants.

Absent this explanation, is it any wonder the students assume *commercial* in the context of the Code has the same connotation?<sup>21</sup>

<sup>17</sup> U.C.C. § 2-104(1) (1997).

<sup>18</sup> Revised § 2-102(a)(9) defines "consumer contract" as "a contract for sale between a seller regularly engaged in the business of selling and a consumer."

<sup>19</sup> The Reporter for the Revised Article 2, Professor Richard E. Speidel, was the co-author of an excellent casebook, *Commercial and Consumer Law*, the text of which emphasized the integration of the topics, but the title of which suggested dichotomy.

<sup>20</sup> The phrase *consumer goods* makes its sole Article 2 appearance in § 2-719(3):

Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

*Id.* This provision exemplifies the confusion, for it seems to divide the world into consumer parties and commercial parties, even as we strive to remember that both are governed by this *commercial* code.

<sup>21</sup> In early drafts, Karl Llewellyn used the word *mercantile*, a word that has

Students experience similar cognitive dissonance when they encounter the merchant rules. Only fourteen provisions of Article 2 make specific reference to merchants, but these fourteen somehow loom large in the eyes of students. One explanation for this phenomenon is that in a first-year course, the instructor usually approaches the Code piecemeal, contrasting certain Code sections with the common law rule. Because they often study offer and acceptance early in the course, students probably first encounter sections 2-205 and 2-207, with the term "merchant" leaping out at them. One would think that some elementary principles of statutory interpretation would begin to take root. If a given rule applies "between merchants" or to a "merchant seller," is there not an implication that another rule applies not between merchants or to a nonmerchant seller? And if every word in a statute counts, would the legislature in its wisdom have added a reference to *merchants* if the rule applied only to merchants anyway? These may be sophisticated thoughts for students just beginning the study of law. Faculty who lament that students think the Code applies only to merchants undoubtedly also lament that law study emphasizes case law at the expense of statutory law.<sup>22</sup>

In an attempt to redress the balance, one year I changed the pedagogy. Students would not plunge into particular Code sections without the larger context of the Code. Furthermore, following the theory that students will learn what they discover for themselves better than what a teacher tells them, I designed a simple problem to guide their discovery. I asked them to read all of Part 1 of Article 2, sections 2-101 through 2-107, dubbed "Short Title, General Construction and Subject Matter," and to use those provisions to answer this question: "If I sell my pen to you, is that a Code transaction?"

The first student I called on answered firmly, "No." I asked her what analytical steps she had taken to reach that conclusion. "I reached it," she responded, "because section 2-

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now disappeared entirely from the Code. It may have been a good choice, for a mercantile practice is clearly the practice of merchants, professional buyers and sellers. Use of that word would have kept *commercial* from doing double duty, now referring to generic buying and selling, now referring to activity by professionals.

<sup>22</sup> See, e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

104(1) defines merchant as 'a person who deals in goods of the kind' and under that definition you are not a merchant." I had to admit that what she said was absolutely correct. She did, nevertheless, concede under my patient questioning that that definition was not in fact used in any of the other sections, but she remained dubious about the relevance of that observation.

I tried one more pedagogical approach. Late in the year, as I was spinning out an Article 2 hypothetical in which an unsophisticated seller made a deal with an unsophisticated buyer, a student came to life with a flash of insight and exclaimed, "Wait a minute! Doesn't Article 2 only apply to merchants?" My response, an involuntary muscle reflex induced by this unintended assessment of my teaching abilities, was to clutch the area of my chest where my heart was located, utter a groan, and fall to the classroom floor, where I lay still until I could recover from the blow. In retrospect, I thought this was pretty good. Drawing an analogy to the pedagogical theory that students will remember the professor's jokes about a subject, I concluded that these students would never forget the rule because they would remember my response and hopefully connect that response to the statement that prompted it. I was therefore taken aback when I found this comment among the student evaluations that semester:

When Professor Burnham pretended to have a heart attack when a question was answered wrong, it was funny, but I was afraid to answer a question because I didn't want everyone to know how dumb I was. I think many questions went unasked for fear of giving Professor Burnham a heart attack.

Believe me, I swear I will save my heart attack for *this* question, but I guess the students do not know that. Sensitive to any act that would silence the class, I have refrained from further heart attacks to make the point.

The heart attack approach suggested to me the possible efficacy of the "dying words" approach. An interviewer once asked hotel owner Conrad Hilton whether he had any words of wisdom for the American people. "Yes," he responded. "Put the shower curtain *inside* the tub before you shower." Similarly, I wonder if some great person might die uttering the words, "Article 2 applies to *all* transactions in goods." As the story

was repeated to generations of law students, perhaps it would stick, just as we all remember the significance of "Rosebud." Any volunteers?

It seems to me there are three approaches to solving this problem: (1) we could change our teaching; (2) we could change the students; (3) or we could change the Code. The tenacity of adherence to a wrong rule, even in the face of systematic and enlightened pedagogy, leads me to give up hope that changing teaching will do the job. Can we change the students? As they refuse to change, I am sometimes convinced that the error is genetic, a case of nature over nurture. After all, students who have never before encountered the Code and have therefore not been taught one view or the other, cling to the wrong view. Students who have "learned" the rule in Contracts I get it wrong in Contracts II and years later in Commercial Law. Nature would also explain why many lawyers and judges make the same mistake, failing to mention the Code in their analysis of a transaction.<sup>23</sup> Perhaps the modern alchemy of gene splicing will eventually allow us to identify and remove the incorrect understanding.

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<sup>23</sup> The cases are legion in which a court neglects to apply the Code to a transaction involving the sale of goods or to a transaction involving unsophisticated parties. Even the Code commentators are not immune. Official Comment 3 to § 2-715 refers to "excuse under the section on merchant's excuse by failure of presupposed conditions," even though § 2-615 is titled "Excuse by Failure of Presupposed Conditions" and the section refers to "a seller," which § 2-103(1)(d) defines as "a person who sells or contracts to sell goods." Any person. See U.C.C. § 2-103(1)(d) (1997).

The opposite phenomenon is also common—cases where a court applies the Code to a service transaction. In *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), the Court held that a California court had personal jurisdiction over the defendant even though his contacts with the state were brief. Commenting on the services the defendant had received from the State of California, Justice Scalia stated:

Three days' worth of these benefits strike us as powerfully inadequate to establish, as an abstract matter, that it is "fair" for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the 10 years of his marriage, and the custody over his children. We daresay a contractual exchange swapping those benefits for that power would not survive the "unconscionability" provision of the Uniform Commercial Code.

*Id.* at 623. Not only would such an exchange not be a Code transaction, but to add insult to injury, California enacted a nonuniform version of the Code that does not include the unconscionability provision.

In the meantime, as we await more enlightened teaching methods or more precise gene splicing, perhaps it is time to change the Code. The best solution may be to state expressly that the Code applies to this transaction—not in law school, where my experience shows the fix does not take, but in the Code itself, where the reader is more likely to believe it. What better time than now, while Article 2 is undergoing revision? This suggestion raises an interesting question: for whose benefit are statutes written? If writers are encouraged to speak to an audience, to whom is the Code addressed? The drafting process seems to take on a life of its own, with the drafters regarding their audience as each other.<sup>24</sup> Once promulgated, the Code speaks to legislators, who ask if they wish this document to be the law of their jurisdiction. Once enacted, it speaks to lawyers, who may find it advantageous to redraft old forms, and to judges, who must grumpily adjust to a new scheme. Its greatest potential audience, the buyers and sellers whose transactions it regulates, probably pay the least attention to it,<sup>25</sup> throwing its readership back to lawyers and judges when things go wrong.

There is, however, a potential audience of some 40,000 readers a year entering the nation's law schools, more than enough to make a work a best seller. Unlike the instrumentalist readers who study it with a purpose in mind, these readers actually sit down and read the damned thing in an attempt to understand it as an intellectual exercise. And if they get it right, far less damage may be done down the road when those

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<sup>24</sup> See Richard Hyland, *Draft*, 97 COLUM. L. REV. 1343 (1997). Consider revised § 2-103(b), which provides:

(b) If a transaction involves both information and goods, this article applies to the aspects of the transaction which involve standards of performance of or rights in the goods other than the physical medium containing the information, its packaging, and its documentation. However, this article applies to a sale of a computer program that was not developed specifically for a particular transaction and that is embedded in goods other than a copy of the program or an information processing machine, if the program was not the subject of a separate license with the buyer.

*Id.* This provision seems to be written in, well, code. See David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185 (1967).

<sup>25</sup> See, e.g., Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465.

enlightened students become the lawyers and judges using the Code in planning, in dispute resolution, or even in the legislature when the inevitable amendment process begins.

A subtle approach might review all Code sections with a view to imparting the flexibility that would make them applicable to each box in our matrix unless expressly stated otherwise. An unsubtle approach—and who needs subtlety when our goal is to hit the reader over the head—would be to come right out and say it. What would such a provision look like? Revised section 2-103 begins with even greater clarity than the present section 2-102: “This article applies to transactions in goods.” A good start. The point that causes confusion might be brought home: “This article applies to transactions in goods. It applies to transactions in goods regardless of the status of the parties as merchants or nonmerchants.”

Another alternative would be to place the clarification in the Official Comments, where many good suggestions for revision of Code sections have found a resting place. An Official Comment to section 2-103 might explain that Article 2 covers *all* transactions in goods:

Article 2 covers *all* transactions in goods, regardless of the sophistication of the parties who enter the transaction. Article 2 covers transactions in which one party is a merchant (see § 2-102(23)), transactions between merchants (see § 2-102(2)), consumer transactions (see § 2-102(9)), and transactions between two nonmerchants.”

To illustrate:

(a) Auto Manufacturer Inc. sells a fleet of cars to Auto Rental Inc. Article 2 covers the transaction, which is between merchants. (b) Auto Dealer Inc. sells a new car to Mary Smith for her personal use. Article 2 covers the transaction, which is a consumer transaction. (c) Mary Smith sells a lemon peeler to her neighbor John Brown. Article 2 covers the transaction, which is between nonmerchants.

Contracts between unsophisticated parties do not fit snugly in the present structure of Article 2. To date, the revision process has not remedied this situation. The revisers have addressed consumer contracts, but that does not accomplish the same purpose.<sup>26</sup> Revised Article 2 should either exclude this transaction or expressly include it.

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<sup>26</sup> In fact, when the revisers create an exception for consumer contracts, they are by implication putting the unsophisticated parties on a par with the sophisticated parties. See, e.g., Revised § 2-209.

