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ARTICLE 2 OF THE UCC: SOME THOUGHTS ON SUCCESS OR FAILURE IN THE TWENTY-FIRST CENTURY

*Robert A. Hillman**

I am pleased to contribute to this symposium in honor of Bob Summers and Jim White, whose treatise on the Uniform Commercial Code (UCC or Code) has educated countless lawyers and law students for almost fifty years on the intricacies of commercial law.¹ A good portion of the treatise focuses on Article 2, Sales, which is fitting because Article 2 continues in the twenty-first century to generate a large amount of the litigation that the treatise so ably covers. The volume of litigation on Article 2, along with the rise of e-commerce, raises the question of whether Article 2 can succeed in the twenty-first century. That is the subject of this essay.

There are, of course, many ways to measure success or failure of legislation. One strategy, applied here, is to evaluate Article 2 against the UCC's ambitious "purposes and policies" of simplifying, clarifying, and modernizing commercial law, supporting commercial practices, and promoting uniformity of the law among the states.² In doing so, I will adapt three questions, from criteria that I previously identified for determining when particular sections of Article 2 impede these goals and are ripe for revision³:

1. Does Article 2 continue to generate litigation?
2. Does Article 2 keep up with twenty-first century technology?
3. Does Article 2 impede twenty-first century commercial practices?⁴

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1. I joined the four-volume practitioner's sixth edition of the treatise, see JAMES J. WHITE, ROBERT S. SUMMERS & ROBERT A. HILLMAN, UNIFORM COMMERCIAL CODE (Practitioner 6th ed. 2012) [hereinafter UCC TREATISE]. There is also a one volume student edition, see JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (Student 6th ed. 2010).

2. U.C.C. § 1-103(a)(1)–(3) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

3. See Robert A. Hillman, *Standards for Revising Article 2 of the U.C.C.: The NOM Clause Model*, 35 WM. & MARY L. REV. 1509 (1994). In 1994 the wheels were in motion to revise Article 2. The National Conference of Commissioners on Uniform State Laws (NCCUSL) appointed a study group charged with recommending whether to revise Article 2. NCCUSL and the American Law Institute (ALI) then appointed a drafting committee to revise the Article. Several years later, NCCUSL withdrew revised Article 2, and no state has enacted it. For one perspective on why revised Article 2 failed, written by the chair of the drafting committee, see Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 607–09 (2001).

4. Hillman, *supra* note 3, at 1514–18. I identified other criteria for revision as well, including whether an Article 2 section conflicts with other law such as Magnuson-Moss and the Convention on the International Sales of Goods (CISG), and whether states have enacted non-uniform amendments to a section.

These questions are obviously related, as we shall see. Based on the analysis of these issues, I will identify some problematic Article 2 sections, and some that need no tinkering. In the conclusion, I briefly consider next steps if the climate for revision of Article 2 is renewed.

I. DOES ARTICLE 2 CONTINUE TO GENERATE LITIGATION?

This question is obviously pertinent to the issue of whether Article 2 simplifies and clarifies sales law. If a section has spurred lots of litigation because of “inconsistent, vague, or ambiguous language,” it has not succeeded to simplify and clarify the law nor to promote uniformity.⁵ Here, I focus on provisions that generated litigation previously, where there is little reason to believe things will improve in the twenty-first century.

Previously, I singled out Section 2-207 as an obvious example of a section in need of revision and therefore a failure as written. I wrote:

Section 2-207, which deals with the “battle of the forms,” comes to mind as a likely candidate for revision The section contains famously unclear language and has produced mountains of litigation, which, unfortunately, has not led to a breakthrough in analysis. This is not surprising. The original drafters took on a colossal challenge when they sought to supply the terms of a contract for parties whose inconsistent forms cross in the mail.⁶

I have little reason to reassess my thinking about Section 2-207, at least if businesses continue to utilize paper purchase orders and acknowledgment forms.⁷ In fact, Section 2-207 cases still arise with some frequency.⁸ Of course, reasons that a section generates litigation could exist independent of any lack of artfulness of the language of the section. For example, judging from the cases, merchants still heavily rely on their purchase order and confirmation practices that generate “battle of the forms” issues when the forms do not match. This practice simply may not be susceptible to effective regulation when the parties begin to perform the contract without having agreed on material terms.⁹ In addition, the drafters of Article 2 purposefully applied broad standards, such as materiality in Section 2-207(2)(b), that

5. Hillman, *supra* note 3, at 1514–16.

6. Hillman, *supra* note 3, at 1514. “Unfortunately, [2-207] is like an amphibious tank that was originally designed to fight in the swamps but was sent to fight in the desert.” 1 UCC TREATISE, *supra* note 1, at 79. For a recent case characterizing the section, see *Frix v. Integrity Medical Systems, Inc.*, 2017 WL 4171987, at *8 (W.D. Tenn. July 21, 2017) (“No provision of the UCC, at least in Article 2, can match the battle of the forms provision for opportunities to ensnare parties and even the occasional court.”).

7. But see *infra* note 44 and accompanying text (technology may decrease the number of 2-207 cases in the future).

8. In the last five years or so, Jim White and I have prepared pocket parts for the UCC Treatise. We have included close to 65 cases that apply Section 2-207. Of course, this does not take into account the likely volume of disputes that arise, because of the section’s opaqueness, that do not reach the stage of a reported case.

9. 1 UCC TREATISE, *supra* note 1, at 77. (“It is a sad fact that many sales contracts are not fully bargained, not carefully drafted, and not understandingly signed or otherwise acknowledged by both parties.”).

might generate litigation, in part to accommodate the UCC goal in Section 1-103(a)(2) of allowing for the “continued expansion of commercial practices.”¹⁰

Clearly, however, Section 2-207’s language creates interpretation issues that modern commercial practices have not yet resolved and that promote litigation. A ton of secondary literature, including the UCC Treatise, covers its mishaps, and this is not the place to rehash the myriad problems of draftsmanship in detail.¹¹ A few examples should suffice. Why does subsection 1 introduce the issue of “additional” or “different” terms, when subsection 2, which explains whether terms are part of the contract or only “proposals,” refers only to “additional” terms? What happens to “different” terms? For that matter, if a purchase order is silent on an issue (for example, it fails to disclaim the implied warranties of Sections 2-314 and 2-315), but the confirmation expressly fills the gap (for example, it disclaims all implied warranties), is the term in the confirmation an additional or a different term? After all, the Article 2 default is to set forth implied warranties, so a disclaimer of them in a confirmation arguably is “different.” Further, when is an additional term a “material” alteration?¹² And why does Section 2-207 favor the first form over the second by providing that material terms in the second form drop out?¹³ Finally, when should the court rely on subsection 3, which applies when “the writings of the parties do not otherwise establish a contract”?¹⁴

The drafting committee for revised Article 2, tried its hands at various revisions to Section 2-207 and the final effort would have improved matters.¹⁵ The revised section read:

Subject to Section 2-202, if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed in a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, are:

- (a) terms that appear in the records of both parties;
- (b) terms, whether in a record or not, to which both parties agree; and

10. I made this point regarding another such standard: “The drafters intentionally left unconscionability open-ended, inviting parties to litigate and courts to engage in case-by-case contextual analysis of whether a contract or term should be struck down on fairness grounds. Litigation, therefore, does not [always] signal a problem of clarity or consistency. Instead, it demonstrates a choice made by the drafters in favor of a standard over a rule.” See Hillman, *supra* note 3, at 1514–15.

11. See, e.g., 1 UCC TREATISE, *supra* note 1, at 77–134.

12. See U.C.C. § 2-207, cmt.4 (AM. LAW INST. & UNIF. LAW COMM’N 2017).

13. See *id.* at § 2-207(2)(b).

14. All of these issues are treated in 1 UCC TREATISE, *supra* note 1, at 77–134.

15. See 1 UCC TREATISE, *supra* note 1, at 116–34. Revised Article 2, including the 2-207 revision, never became law. See *supra* note 3.

(c) terms supplied or incorporated under any provision of this Act.¹⁶

This approach would have been much less complicated. Among other things, it would have resolved the additional–different, materiality, and 2-207(3) mysteries by eliminating the offending language. Perhaps most important, sending the first form would not have created an advantage.¹⁷

Section 2-209 is another section that appears to raise issues relatively unchanged in today’s sales law environment and that keeps the cases coming.¹⁸ Issues unresolved include what constitutes a “good faith” modification under subsection 1.¹⁹ Another issue is the extent to which subsection 4’s reference to waiver subsumes subsection 3’s greater-than-\$500 writing requirement because “an attempt at modification or rescission . . . can operate as a waiver.”²⁰

The same “can operate as a waiver” language especially causes headaches in the treatment of no oral modification (NOM) clauses. Section 2-209(2) authorizes the parties to write their own private Statute of Frauds for modification agreements and rescissions.²¹ But subsection 4 clouds the analysis by allowing oral waivers when the parties’ “attempt at modification or rescission” “operate[s] as a waiver.”²² Questions raised by this language include precisely when does an oral modification in the face of a NOM clause waive the NOM clause—if always, there is nothing left of subsection 2. In addition, what exactly is an “attempt at modification”? Does it simply require an oral agreement to modify? Does it require reliance? Ultimately, Section 2-209 raises freedom of contract issues. However, does freedom mean that parties should have the power to make NOM clauses inviolate or does freedom mean that parties should be able to change their minds about requiring only written modifications?²³

The UCC issues singled out here are not new. As noted, judging from the reported cases, twenty-first century developments have not yet resolved or exacerbated these problems. But changes in technology may signal their obsolescence.²⁴ That is the subject of the next section of this essay.

16. Amended section 2-207 is set forth in 1 UCC TREATISE, *supra* note 1, at 117–18.

17. See 1 UCC TREATISE, *supra* note 1, at 117–19.

18. In the last five years, close to thirty pocket part cases have been added to the UCC Treatise that apply U.C.C. § 2-209.

19. See Robert A. Hillman, *A Study of Uniform Commercial Code Methodology: Contract Modification under Article Two*, 59 N.C. L. REV. 335, 353–56 (1981).

20. See Hillman, *supra* note 19, at 364–70.

21. U.C.C. § 2-209(2) (AM. LAW INST. & UNIF. LAW COMM’N 2017).

22. *Id.* at § 2-209(4).

23. On all of this, see Hillman, *supra* note 19, at 364–70. Another mystery of Article 2 is the meaning of “basis of the bargain” in section 2-313 (Express Warranties by Affirmation, Promise, Description, Sample). See 1 UCC TREATISE, *supra* note 1, at 869–82.

24. See *infra* note 42, and accompanying text.

II. DOES ARTICLE 2 KEEP UP WITH TWENTY-FIRST CENTURY TECHNOLOGY?

The second criterion concerns whether Article 2 has kept up with changes in technology. If not, Article 2 has failed another goal of the Code set forth in Section 1-103(a)(2), to support “the continued expansion of commercial practices.” As the conclusion to Part I intimates, we are at the point now where it is fair to speculate about whether Article 2 should survive in the age of the Internet, smart phones, smart contracts, algorithmic contracts, and digital standard forms.²⁵ In fact, today much commerce governed by Article 2 consists of sales of goods and intellectual property licenses formed electronically. These transactions create new issues, including some that have been resolved—whether Internet sales satisfy the writing requirement of Section 2-201—and some that are boiling up—what constitutes an enforceable digital agreement between a business and consumer, and what terms are substantively fair and enforceable in that context.

Of course, evaluating Article 2 in light of certain technological changes may be premature or unnecessary. Evaluation would be premature if technology is in flux and likely to create new issues down the road.²⁶ The “smart contract” revolution is a good example.²⁷ Articles are now popping up on this new digital transaction type, but explanations of what a smart contract is and does are technical and challenging, at least to tech amateurs (like me). For purposes of this discussion, the following explanation of a smart contract is helpful, although it only scratches the surface:

Smart contracts enable firms to transact without the need for law or courts. They can autonomously negotiate with other parties (or other parties’ smart contracts), and then attach directly to the parties’ information systems so that goods or payment promised by the contract are automatically delivered.²⁸

25. See, e.g., Lauren Scholz, *Algorithmic Contracts*, 20 STAN. TECH. L. REV. 128 (2017).

26. Hillman, *supra* note 3, at 1516–17 (“The experience of the drafters of Article 4 illustrates this point. They wisely elected not to draft rules to govern the electronic presentment of checks, an obvious wave of the future, because banks had not yet adopted the technology and the drafters could not foretell precisely how the system would operate.”).

27. See, e.g., Jeremy M. Sklaroff, *Smart Contracts and the Cost of Inflexibility*, 166 U. PA. L. REV. 263 (2017).

28. *Id.* at 266–67. Another helpful definition appears in Richard Holden & Anup Malani, *Can Blockchain Solve the Holdup Problem in Contracts?* 5 (Univ. Chicago Coase-Sandor Inst. for Law & Econ., Working Paper No. 846, 2018), <https://ssrn.com/abstract=3093879>: “Smart contracts are computer scripts that execute transactions, including transactions that constitute mutual promises between contracting parties When created on blockchain, the future transactions envisioned in the smart contract are automatically executed and, because of the inalterability of the blockchain, cannot practically be stopped.” *Id.* at 4–5.

“[A] transaction on a computer network with blockchain infrastructure . . . is witnessed by others on the network (distributed), is made public to everyone on the network (open), and cannot be changed without a tremendous amount of computer power or cost (unalterable).” *Id.* at 4.

Sklaroff offers an example in which a lessor of cars can activate or terminate operation of the cars remotely. Lessor and lessee “have pre-specified a bargaining logic based on their desired terms [Lessor] runs a blockchain program that monitors his accounts and inventory, analyzes [lessee’s] terms, and then autonomously negotiates terms acceptable to both.” Sklaroff, *supra* note 27, at 13–14. Lessee also runs a blockchain program that monitors the lessee’s funds. “Both applications are authorized to bargain and enter into a smart contract for their respective owners.” *Id.* at 14. If the lessee fails to make a payment, the smart contract can terminate operation of the cars. *Id.*

A debate roils about whether “smart contracts will revolutionize the way firms transact [business] and [whether they will] fundamentally transform our social and legal institutions.”²⁹ Advocates believe that smart contracts will create efficiencies such as increasing the speed and accuracy of exchanges, reducing drafting costs, and creating less expensive enforcement techniques.³⁰ Others disagree and worry that smart contracts eliminate the parties’ flexibility to draft broadly and to enforce terms selectively, both necessary to deal with uncertainty in “volatile or uncertain environments.”³¹ Legislation should await some resolution of whether these predictions one-way or the other have any merit. In short, as smart contracts demonstrate, revision is premature if lawmakers would have difficulty predicting technology’s effect on commercial parties’ methods of doing business.

Lawmakers also should not overreact to changes in technology if, on balance, existing law can handle particular new issues.³² As an example, fancy new gadgets, filled with software, are flooding markets and, inevitably, some will not live up to their marketing boasts. Warranty law will come into play. Article 2’s warranty scheme seems up to the task, with at least one caveat.³³ Section 2-316(1)’s direction to construe express warranties and disclaimers, consistently if possible, may not adequately reconcile vendors’ strong propensity to make assertions about their products that constitute express warranties, only to disclaim them in their digital standard forms.³⁴ For another more general example, technology facilitates planning and drafting contracts, sending notices, assembling documents, etc., but it is not clear that such modern advances render Article 2’s general approach to interpretation and gap filling obsolete.³⁵

Some legal adaptation to technology has already occurred. Article 1, for example, defines “signed” in part for the purposes of the Section 2-201 Statute of Frauds, as including “using any symbol executed or adopted with present intention to adopt or accept a *writing*.”³⁶ But the Code defines a “writing” as including “printing, typewriting, or any other intentional reduction to tangible form.”³⁷ Courts have found that “tangible” includes electronic contracts because they can be saved

29. Sklaroff, *supra* note 27, at 276.

30. See, e.g., Reggie O’Shields, *Smart Contracts: Legal Agreements for the Blockchain*, 21 N.C. BANKING INST. 177, 183 (2017).

31. Holden and Finkelstein, *supra* note 28; See also Holden & Malani, *supra* note 27, at 21 (“[S]mart contracts require the parties and/or a hired programmer to script [the] contract[.]”).

32. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 430 (2002).

33. See, e.g., Davidson v. Apple, Inc., 2017 WL 3149305 (N.D. Cal. 2017).

34. See Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 YALE J. OF LAW & TECH. 1, 2–3 (2009) (fifty-three of fifty-four software titles sampled made express warranties that were then disclaimed).

35. “For reasons that are partly historical and partly driven by the modern market for gasoline, sellers of oil and of oil derivatives such as gasoline have traditionally agreed to sell at a ‘posted price.’ In the earliest days of oil production, this was apparently a price on a note nailed to a post in an oil field. More recently, it is the price, disclosed on a Web site, which a gasoline wholesaler offers to retail gas stations. Of course, this is a price to be fixed by the seller under 2–305(2) and so must be fixed in ‘good faith.’” 1 UCC TREATISE, *supra* note 1, at § 4:15. See also George G. Triantis, *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*, 18 STAN. J. L. BUS. & FIN. 177 (2013).

36. U.C.C. § 1-201(b)(37) (AM. LAW INST. & UNIF. LAW COMM’N 2017) (emphasis added).

37. *Id.* at § 1-201(b)(43).

on a hard drive and printed.³⁸ The Uniform Electronic Transactions Act (UETA) also authorizes the use of electronic signatures and records.³⁹

But many Article 2 issues remain. For example, certainly the appearance of software licenses and hard goods loaded with software exacerbates the sale-of-goods versus services quagmire that determines whether Article 2 even applies.⁴⁰ Because the Internet facilitates rapid communication and collaboration, many formation and modification processes likely also will change in the future.⁴¹ In fact, old methods of forming business contracts that implicate the “battle of the forms,” modification agreements, and other offer and acceptance practices may eventually become only of historical interest.⁴² Changes in technology may mean the obsolescence of Sections 2-207 and 2-209.⁴³ In fact, despite the number of cases that still arise, we may have reached a tipping point with respect to Section 2-207, with commercial parties increasingly doing business online subject to posted terms on their website:

Commercial parties have increasingly stopped exchanging forms as their mode of contracting or as their method for confirming an agreement; they choose instead to place and receive orders through web applications. In this new environment, the battle of the forms may be irrelevant to commercial transactions.⁴⁴

On the other hand, “battle of the forms” type problems may continue to raise serious issues in the context of automated “smart” contracting, if “no means are provided for reconciling conflicting contractual terms.”⁴⁵

Perhaps the most important current issue influenced by modern technology that needs more study is whether Article 2 should be revised to regulate business to consumer standard-form Internet contracts. It is not surprising that many analysts believe the Internet has only exacerbated the problem of business opportunism by,

38. See, e.g., *Bazak Intern. Corp. v. Tarrant Apparel Group*, 378 F. Supp. 2d 377 (S.D.N.Y. 2005).

39. See 1 UCC TREATISE, *supra* note 1, at 68 (quoting UETA to the effect that “in the context of Articles 2 and 2A, the UETA provides the vehicle for assuring that [electronic] transactions may be accomplished and affected via an electronic medium.”).

40. U.C.C. § 2-102 (AM. LAW INST. & UNIF. LAW COMM’N 2017). See, e.g., *In re VTech Data Breach Litigation*, 2017 WL 2880102 (N.D. Ill. July 5, 2017).

41. Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 RUTGERS COMPUTER & TECH. L.J. 215, 217–18 (2000); Qizhi Dai & Robert J. Kauffman, *Business Models for Internet-Based B2B Electronic Markets*, 6 INT’L J. ELECTRONIC COM. 41, 60 (2002).

42. See Amelia Rawls, *Contract Formation in an Internet Age*, 10 COLUM. SCI. & TECH. L. REV. 200, 203 (2009) (“Nearly instantaneous electronic contracting is increasingly common and has taken on many forms, including even the use of electronic agents to reduce transaction costs by altogether eliminating human involvement.”).

43. See Francis J. Mootz, *After the Battle of the Forms: Commercial Contracting in the Electronic Age*, 4 I/S: J.L. & POL’y for INFO 271, 274, 279 (2008). See also *id.* at 279; Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 483 (2006).

44. Mootz, *supra* note 43, at 273.

45. Jose Angelo Estrella Faria, *e-Commerce and International Legal Harmonization: Time to Go Beyond Functional Equivalence*, 16 S. AFR. MERCANTILE L. J. 529, 555 (2004). Thus, “battle of the forms” issues can arise in digital transactions, absent a smart-contract approach that allows for “autonomous[] negotiat[ion].” Sklaroff, *supra* note 27, at 276.

among other things, facilitating merchants' presentation of obtuse and lengthy standard forms and merchants' creation of questionable methods of acceptance in an environment in which few consumers read their voluminous, overly technical forms.⁴⁶ Whether large legislative changes are in order is debatable, however. After all, Internet standard-form contracting generally affords consumers more time to consider their transaction and to search for better deals. Consumers are also free from the coerciveness of sales agents or the impatience of other customers waiting in line. In addition, it is easy in the digital world to spread the word about unsavory business practices. Negative publicity should incentivize businesses to draft reasonable terms. Such advantages may counterbalance those of businesses in the digital world.⁴⁷

If arguments for revision prevail, Article 2's current approach to the problem of merchant opportunism is not a helpful starting point. Sections 2-204 and 2-206 on formation relax some common law requirements such as definiteness and manners of acceptance, but understandably have nothing pertinent to say about the formation and content problems of Internet standard-form contracts.⁴⁸ Courts require a "manifestation of assent" by consumers to terms after they have received reasonable "inquiry notice."⁴⁹ Thus, courts enforce so-called clickwrap terms that require clicking "I agree" adjacent to the screen presentation of the standard form, which process resembles signing a paper contract.⁵⁰ Courts balk, however, at browsewrap terms that require arduous searching even to unearth them.⁵¹ The danger is that consumers with little patience and with good reason not to read the forms will click "I agree" or the like to substantively nasty terms regardless of the manner of their presentation.⁵²

46. Hillman & Rachlinski, *supra* note 32, at 432–33; *but see* Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 1011 (2008) ("[T]he contracts found on Internet retailers' websites contain the standard, pro-seller boilerplate provisions—arbitration, disclaimers of consequential damages, and the like—much less frequently than would be expected. No such clauses appear in the contracts for more than half of the retailers that we studied.")

47. *See* Hillman & Rachlinski, *supra* note 32, at 462–464; *but see* Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract & Shared Meaning Analysis*, 132 HARV. L. REV. (forthcoming 2019) (available at <https://ssrn.com/abstract=3124018>) (people may be starting to buy into the superficially simple picture of contract formation). In 2014 General Mills created a furor by including a mandatory arbitration provision when customers downloaded coupons. General Mills quickly eliminated the term. Stephanie Strom, *When 'Liking' a Brand Online Voids the Right to Sue*, N.Y. TIMES (Apr. 16, 2014) <https://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html>.

48. U.C.C. § 2-204(3) (AM. LAW INST. & UNIF. LAW COMM'N 2017) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); U.C.C. § 2-206(1)(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017) ("An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.")

49. *Specht v. Netscape Comm. Corp.*, 306 F.3d 17, 30–31 (2d Cir. 2002). *See* Brian Bix, *Consent and Contracts*, THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT 264–65 (Andreas Müller & Peter Schaber eds., forthcoming 2018) (available at <https://ssrn.com/abstract=3031183>).

50. *See, e.g.*, *Tres Jeane, Inc. v. Brolin Retail Sys. Midwest, Inc.*, No. 3:07-CV-139-H, 2007 WL 3118482 (W.D. Ky. Oct. 22, 2007).

51. *See, e.g.*, *Netscape Comm. Corp.*, 306 F.3d 17.

52. *See* NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 44–52 (2013). Nancy Kim labels as "crook" terms those that diminish rights unrelated to the present contract and "shield" terms as those that eliminate rights in the present contract, such as disclaimers and remedy limitations. In addition, "sword" terms require, for example, mandatory arbitration. *See* Danielle Kie Hart, *Form & Substance in Nancy Kim's Wrap*

Suggestions for legal intervention that go beyond the judicial clickwrap–browwrap distinction abound, but each presents problems. One solution would require consumers to click “I agree” next to each contestable term, but will consumers become cautious and slow down even in this environment or just rapidly click through each term? For that matter, it is not in the interest of either businesses or consumers to bog down contract formation by such procedures.⁵³ Another solution is to create a governmental agency to pre-approve terms. Such an approach would be costly and time consuming and would introduce all of the pitfalls of agencies, such as lack of resources to promulgate effective strategies and capture by the industry.⁵⁴

A third suggestion is to increase the punch of substantive unconscionability and other policing doctrines.⁵⁵ One writer even advocates dispensing with the requirement that businesses set forth boilerplate terms and satisfy inquiry notice on the theory that assent to standard forms is a useless fiction. Instead, courts should strike unfair terms that businesses reveal upon a dispute.⁵⁶ Such approaches require confidence that courts can sort out enforceable and unenforceable terms under the rubric of unconscionability or the like in a manner that guides contract drafters and reduces litigation. I am doubtful. For example, suppose the law dispensed with inquiry notice. A vendor wishes to license its software “as is.” The software doesn’t work and the licensee complains. The vendor responds: “Sorry, licensee, one of our terms that we didn’t have to reveal is that you were licensing the software ‘as is.’” Is the term unconscionable? “As is” clauses have a long history of enforcement, but faced with a product that does not work and the lack of notice, I doubt that a court would enforce the term. If not, this means that vendors can never enforce software “as is” terms if they followed law that does not require inquiry notice.

Still another proposed solution to the problem of Internet boilerplate is to encourage private sector rating services. This has some appeal, but requires easy access to standard forms. The American Law Institute’s Principles of the Law of Software Contracts (ALI Principles) calls for disclosure of forms on websites before a consumer enters a transaction and would facilitate the rating services in this regard.⁵⁷ Even without the aid of formal rating services, the ALI Principles take the position that advanced disclosure supports Internet watchdog groups that publicize potentially unfair terms, such as authorizing unilateral modification, unfair arbitration, or negative options.⁵⁸

Disclosure is itself a contentious subject, however. Naysayers assert that disclosure is useless and costly (in this context and even in other disclosure

Contracts, 44 SW. L. REV. 251, 252 (2014) (quoting Kim at n.4). Professor Hart argues that the Internet is a “coercive contracting environment” for consumers.

53. Robert A. Hillman & Maureen O’Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 108–09 (2011).

54. *Id.*

55. RESTATEMENT OF CONSUMER CONTRACTS (AM. LAW INST., Counsel Draft No. 3, at 4–5, 2017).

56. Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 Cornell L. Rev. 117, 168 (“Termlessness is not quite as disruptive a notion as it looks at first glance.”).

57. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02 (AM. LAW INST. 2009).

58. *Id.* at § 2.02 cmt. h.

regimes).⁵⁹ These skeptics fail to consider how digital communication increases the potential for Internet users to spread the word about unfair terms. Further, disclosure is relatively costless to consumers precisely because they do not read the terms. It is also inexpensive for vendors who can display their standard form on their homepage. Even if disclosure does not establish true assent to boilerplate, disclosure skeptics also fail to appreciate its importance for reasons of autonomy, corrective justice, and morality, issues I have treated elsewhere.⁶⁰ Finally, one disclosure skeptic argues that disclosure has the perverse effect of “inhibit[ing] substantive objections to . . . terms” because of consumers’ belief that they have a moral duty to honor their contracts.⁶¹ The evidence is thin, and one wonders if consumers really have any position on terms they have not read or would not understand even if revealed at the time of a dispute.

The problem of consumer assent to Internet standard-form transactions is far from resolved. Current Article 2 is no help. In Part III, however, I set forth an example of one approach of the UCC that contributes to the UCC’s adaptability to the new millennia.

III. DOES ARTICLE 2 IMPEDE TWENTY-FIRST CENTURY COMMERCIAL PRACTICES?

Part III’s question obviously relates to the previous technology discussion. To the extent that Article 2 does not provide answers to issues created by new commercial practices supported by technology, this lack of legal certainty creates costs. In this section, however, I want to focus on one successful approach of Articles 1 and 2. Potential reformers should hold on to Article 1’s treatment of trade custom, course of dealing, and course of performance to interpret Article 2 contracts in order to capture what Llewellyn called the “situation sense” of the transaction.⁶²

59. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 13 (2014) (“[M]andated disclosure persistently fails to achieve its purposes, cannot be fixed, and too often causes harm. Lawmakers should stop using it. . .”).

60. See Hillman & O’Rourke, *supra* note 53 at 106–07.

61. Wilkinson-Ryan, *supra* note 56, at 172.

62. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 121 (1960); U.C.C. § 1-303 (AM. LAW INST. & UNIF. LAW COMM’N 2017) (Course of Performance, Course of Dealing, and Usage of Trade):

(a) A “course of performance” is a sequence of conduct between the parties to a particular transaction that exists if:

(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and

(2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces to it without objection.

(b) A “course of dealing” is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) A “usage of trade” is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such usage must be proved as facts

Id. at (a)–(c).

Scholars debate the merits of this approach with fervor.⁶³ For example, skeptics (sometimes called textualists) believe that admitting extrinsic evidence impedes commercial practices because judges and juries are ill equipped to apply these sources and make mistakes when they do so.⁶⁴ Supporters of the Code approach, however (sometimes called contextualists), believe that the meaning of contract language cannot be realized without evidence of context.⁶⁵ Further, supporters have more faith in judges and juries to get it right.⁶⁶ In addition, as I have written in support of Article 2's approach, "parties often expect cooperation and flexibility from their contracting partner, not rigid adherence to the technical meaning of the written terms. Only the full picture can reveal the parties' reasonable expectations."⁶⁷

In short, I am persuaded by what Justice Traynor said on this subject in another context years ago (despite Judge Kozinski's admonition that Traynor's approach "chips away at the foundation of our legal system"⁶⁸):

If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents The meaning of particular words or group of words varies with the . . . verbal context and surrounding circumstances⁶⁹

Viewed in isolation, Traynor's argument for the importance of context seemed to pave the way for contracting parties to prove that "black" means "white" or that 500 means 300 in the context of their transaction. But Traynor cabined his argument by noting that evidence must be "reasonabl[y] susceptible" to a particular meaning and "credible" to shed meaning on contract language.⁷⁰ By relying on practices in a trade or sequences of conduct in the present or a previous contract, trade custom, course of dealing, and course of performance certainly meet Traynor's test. Each

63. An excellent summary of the arguments and of additional related issues appears in Joshua M. Silverstein, *Using the West Key Number System as a Data Collection and Coding Device for Empirical Legal Scholarship: Demonstrating the Method via a Study of Contract Interpretation*, 34 J.L. & COM. 203, 253–84 (2016).

64. *Id.* at 265; see also Lisa Bernstein, *Custom in the Courts*, 110 Nw. U.L. Rev. 63 (2015) (discussing the absence of statistical evidence).

65. Silverstein, *supra* note 63, at 265.

66. Silverstein, *supra* note 63, at 267; see also Shahar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519, 562–63 (2017) ("There is no reason to assume that [courts] are unable to identify the intentions of the parties even if these intentions are not embedded in the text of the contract [I]f discovering the consent of the parties outside of the agreement is a difficult task, it does not become easier when the courts are forced to work without access to all the relevant information.").

67. ROBERT A. HILLMAN, *PRINCIPLES OF CONTRACT LAW* (4th ed. forthcoming 2019); Lifshitz & Finkelstein, *supra* note 66, at 554 ("Relational contract theory preferred . . . interpretive techniques that allow the interpreter to consider sources external to the contractual text in order to interpret the contract according to the relationship between the parties.").

68. *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988).

69. *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968).

70. *Id.*

source of evidence supports a reasonable interpretation of contract terms, not claims of subjective intent.⁷¹

Those opposed to Article 2's dependence on the use of extrinsic evidence also contend that the law should incentivize the drafting of relatively complete contracts, not allow drafters to rely on context to fill in the meaning of terms.⁷² These analysts contend that complete contracts reduce lawsuits because issues over meaning will be limited.⁷³ Article 2's supporters argue, however, that the Article's reliance on context reduces the costs of planning, bargaining, and drafting contracts precisely because parties do not have to cover all the bases in the contract, many of which are unanticipated or unforeseen.⁷⁴ One commentator with a persuasive argument on this aspect of the debate has pointed out that the costs of planning "are incurred with certainty and in the present while enforcement costs are incurred rarely and well into the future."⁷⁵

Case law suggests that the division between textual and contextual orientations is often not so stark.⁷⁶ However, the UCC's invitation to courts to supplement the written contract with objective outside evidence in the interpretation process is crucial if the law's goal is to enforce a reasonable interpretation of the contract.⁷⁷ This strategy also helps position Article 2 to support new methods of doing business in the age of the Internet that may involve more communication and informality. I concede, of course, that the use of extrinsic evidence likely will have little role in contracts that rely on algorithms and other non-human interactions.⁷⁸

71. See, e.g., *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F.Supp. 987 (S.D.N.Y. 1968). Of course, trade custom, course of dealing, and course of performance sources of evidence can prove a meaning that contradicts the dictionary definition of the language. See, e.g., *Pac. Gas & Elec. Co.*, 442 P.2d at 644 n.6:

Extrinsic evidence of trade usage or custom has been admitted to show that the term "United Kingdom" in a motion picture distribution contract included Ireland (*Ermolieff v. R.K.O. Radio Pictures*, 122 P.2d 3, 5–8 (Cal.1942)); that the word "ton" in a lease meant a long ton or 2,240 pounds and not the statutory ton of 2,000 pounds (*Higgins v. California Petroleum, etc., Co.*, 52 P. 180 (Cal. 1898)); that the word "stubble" in a lease included not only stumps left in the ground but everything "left on the ground after the harvest time" (*Callahan v. Stanley*, 57 Cal. 476, 477–79 (1881)); that the term "north" in a contract dividing mining claims indicated a boundary line running along the "magnetic and not the true meridian" (*Jenny Lind Co. v. Bower & Co.*, 11 Cal. 194, 197–99 (1858)) and that a form contract for purchase and sale was actually an agency contract (*Body-Steffner Co. v. Flotill Prods. Inc.*, 147 P. 2d 84, 85–89 (1944)).

But see Lisa Bernstein, *The Myth of Trade Usages: A Talk for Kcon*, BARRY L. REV. (forthcoming 2018) (arguing trade usages do not exist and cannot be proven accurately if they did exist); Robert Scott, *Is Article 2 the Best We Can Do*, 52 HASTINGS L. J. 677, 686–688 (2001) ("incorporation of context . . . simply has not occurred in a meaningful way").

72. Silverstein, *supra* note 63, at 277.

73. Silverstein, *supra* note 63, at 272.

74. Silverstein, *supra* note 63, at 268–69.

75. Silverstein, *supra* note 63, at 281; see also Lifshitz & Finkelstein, *supra* note 66, at 557–558.

76. Lifshitz & Finkelstein, *supra* note 66, at 520–521 ("The textualist approach focuses primarily on the plain meaning of the language contained within the four corners of the contract. In contrast, the contextualist approach allows courts to consider a wider array of information outside the text of the agreement in order to comply with the parties' intended purpose However, a closer look at legal opinions from courts throughout the United States reveals a great deal of inconsistency regarding how to approach contract interpretation, even within states that putatively fit into either the textualist or contextualist camp.").

77. See *supra* note 67, and accompanying text.

78. See *supra* notes 26–31 and accompanying text.

CONCLUSION

This paper certainly does not resolve the question of Article 2's prospects for the future, nor is it a complete treatment of the issues currently at play. But the analysis does suggest that some sections have worked better than others and some are better suited for the future than others. A logical way forward would be to look carefully at the entire Article and to revise only problematic sections based on the criteria applied here and any additional objective criteria helpful in identifying problems.⁷⁹

One mistake of the drafters of the unsuccessful revised Article 2 was that they failed to spare any section from revision regardless of need.⁸⁰ There are costs to such an approach, including introducing new ambiguities, replacing rules already clarified by case law, and reeducating business and consumer communities.⁸¹ Instead of a blunderbuss approach, there should have been a presumption in favor of the existing law, with the need for revisions guided by criteria in part identified here.

79. Hillman, *supra* note 3.

80. A comparison of the January 24, 1997 revised draft and the 1995 Official Text of Article 2 prepared March 19, 1997 by General Electric was 72 pages long (on file with author). *See also supra* note 3.

81. Hillman, *supra* note 3, at 1509–10.