

Oklahoma City University School of Law

From the Selected Works of Michael T. Gibson

1988

Promissory Estoppel Article 2 of the U.C.C., and the Restatement (Third) of Contracts

Michael T. Gibson, *Oklahoma City University School of Law*



Available at: https://works.bepress.com/michael_gibson/4/

Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts

Michael Gibson*

In 1974, Grant Gilmore declared that contract was dead.¹ Gilmore said that orthodox contract law, the doctrine of bargained-for consideration created by Langdell and Holmes, had failed. Its demise was due to the degeneration of its discipline and well-ordered rules into formalities and technical requirements that prevented agreements from being enforced.² According to Gilmore, the theory of promissory estoppel³—a theory founded largely in tort⁴—had been developed to enforce those agreements that consideration's technical rules would not enforce,⁵ and its success had caused its use to increase dramatically between 1930 and 1970.⁶ Gilmore predicted that the scope of promissory estoppel would continue to expand, pulling contract closer and closer into the realm of tort.⁷ He wondered, however, whether one day contract might not pull away from tort and whether someone was not "already waiting in the wings to summon us back

*Associate Professor of Law, Oklahoma City University. B.A. 1979, University of Nebraska-Lincoln; J.D. 1982, Yale University; Law Clerk to Chief Judge Warren K. Urbom, U.S. District Court for the District of Nebraska, 1982-84.

The author would like to thank the Kerr Foundation of Oklahoma for its generous financial support of this project. The author would also like to thank Peter Dillon and Jay Feinman for their comments and encouragement.

1. G. GILMORE, *THE DEATH OF CONTRACT* 3 (1974).

2. *Id.* at 55-85.

3. RESTATEMENT OF CONTRACTS § 90 (1932). Under the doctrine, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Id.* See Feinberg v. Pfeiffer Co., 322 S.W.2d 163, 167-68 (Mo. Ct. App. 1959); 1 S. WILLISTON, *THE LAW OF CONTRACTS* § 139 (1920) [hereinafter S. WILLISTON, *CONTRACTS* (1920)].

4. Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 884 (1985); G. GILMORE, *supra* note 1, at 88-89; see also RESTATEMENT (SECOND) OF CONTRACTS § 90 comment a (1981) (noting overlap of § 90 and various provisions of the *Restatement (Second) of Torts*). But see Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 905 (1985) (promissory estoppel allows enforcement of promises in contexts where traditional elements of bargain not available).

5. See G. GILMORE, *supra* note 1, at 62-65, 90.

6. G. GILMORE, *supra* note 1, at 70-72; see also Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 343-44, 353-57 (1969) (scope of promissory estoppel expanding beyond area of gratuitous promises and into realm of bargain); Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981) (courts in recent years applying reliance principle to overcome defenses of form in context of bargain). But see Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 680 (1984) (rhetorical dominance of consideration leaves secondary role for promissory estoppel).

7. G. GILMORE, *supra* note 1, at 87-90.

to the paths of righteousness, discipline, order, and well-articulated theory. Contract is dead—but who knows what unlikely resurrection the Easter-tide may bring?"⁸

That someone was not waiting in the wings; he was standing front and center stage. His name was Karl Llewellyn, and his resurrection of contract was Article 2 of the Uniform Commercial Code.

Article 2 was conceived and drafted during the 1930s and 1940s, a time of considerable flux in American contract law. The theory of bargained-for consideration and its attendant formalities were under strong attack,⁹ and the doctrine of promissory estoppel was rapidly gaining popularity, having been endorsed by Samuel Williston,¹⁰ Arthur Corbin,¹¹ and the American Law Institute.¹² One would expect a set of formation rules drafted in this environment to reject consideration as a theory, and Article 2 expressly does so in a number of its provisions.¹³ One would also expect the Code to reflect the influence of promissory estoppel, the new, expanding doctrine. However, the 1962 official text of Article 2 makes only four oblique references to reliance,¹⁴ and the dramatic explosion of the use of promissory estoppel during the 1960s and 1970s¹⁵ has not produced any

8. *Id.* at 103.

9. See, e.g., B. CARDOZO, *GROWTH OF THE LAW* 125 (1924), quoting LLEWELLYN, *X PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE* 331, 338 (1922); Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 453-55 (1937); Corbin, *Some Problems in the Restatement of the Law of Contracts*, 14 A.B.A. J. 652, 653 (1928); Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621, 646 (1919); Wright, *Ought the Doctrine of Consideration to be Abolished From the Common Law?*, 49 HARV. L. REV. 1225, 1238-40 (1936); see also Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 929 (1958).

10. 1 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* §§ 139-140 (rev. ed. 1936) [hereinafter S. WILLISTON, *CONTRACTS* (rev. ed.)]; 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, § 139.

11. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 52 HARV. L. REV. 408, 418-19, (1939); 48 YALE L.J. 426, 436-37, (1939); 39 COLUM. L. REV. 56, 66-67 (1939); Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 455-56 (1937).

12. RESTATEMENT OF CONTRACTS §§ 45, 85-90 (1932).

13. See, e.g., U.C.C. § 2-205 comment 1 (rule that an offer is revocable absent consideration eliminated); U.C.C. § 2-206 comment 1 (former technical rules as to acceptance abolished); U.C.C. § 2-209 comment 1 (rejecting technicalities in existing law that hamper modifications of contracts); U.C.C. § 2-305 comment 1 (rejecting orthodox rule that an agreement to agree is unenforceable); U.C.C. § 2-306 comment 2 (rejecting indefiniteness and mutuality rules for output and requirements contracts).

14. U.C.C. § 2-205 comment 2 provides that oral offers that the industry would enforce and that have been relied upon are still revocable. Section 2-313 comment 3 states that a buyer seeking to enforce an express warranty need not show that he relied upon the warranty in buying the product. Section 2-315 says that a buyer's reliance on the seller's skill or judgment to select goods will create an implied warranty of fitness for a particular purpose. Section 2-206 comment 3 speaks of the effect of reliance on certain types of offers.

Section 1-103, of course, does say that unless otherwise displaced by specific sections, "estoppel" and a number of general principles supplement the provisions of the rest of the Code. The extent to which Article 2's formation sections displace § 1-103, and the manner in which estoppel should "supplement" those sections, is one of the main issues discussed in this Article. See *infra* text accompanying notes 280-332.

15. On the recent explosion of promissory estoppel, see Farber & Matheson, *supra* note 4, at 907-08; Henderson, *supra* note 6, at 343, 353-57; Knapp, *supra* note 6, at 53; see also Drennan v. Star Paving Co., 51 Cal. 2d 409, 414, 333 P.2d 757, 760 (1958) (use of promissory estoppel to make subcontractor's bid enforceable); Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 696-97, 133 N.W.2d 267, 274 (1965) (use of promissory estoppel to create contract based

amendments to the Sales Article. Although Gilmore contended that the tort-based theory of promissory estoppel was becoming the primary basis for enforcing promises, Article 2 instead employs what has been labeled the "Agreement Theory of Contract."¹⁶ What does this strange dichotomy mean to those who use Article 2 on a daily basis, and what does it mean to those who contemplate contracts' future longevity?

This Article has three purposes. The first is to explore the relationship of promissory estoppel and reliance to the formation sections of Article 2 of the Uniform Commercial Code.¹⁷ The second is to analyze what effects that relationship should have on judicial use of promissory estoppel in transactions concerning the sale of goods, and to determine whether modern judicial application of promissory estoppel to goods transactions—an application which is far more common than one might expect¹⁸—has been proper. The third purpose is to discuss what effect experience with promissory estoppel under Article 2 should have on common law use of that doctrine.

This Article will argue that Karl Llewellyn consciously rejected the theory of promissory estoppel when he drafted Article 2, and that he believed reliance should play only a minimal role in both the law of sales and the law of contract. Part I will contend that before he drafted Article 2,

on preliminary negotiations between commercial entities).

16. Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 4-5, 20 (1981).

17. Reliance affects Article 2 in two other areas: warranty and damages. In the former, the question has been whether a buyer must prove that he relied on an express warranty. See J. WHITE & R. SUMMERS, *HANDBOOK OF LAW UNDER THE UNIFORM COMMERCIAL CODE* 332-39 (1980) and materials cited. Section 12 of the Uniform Sales Act required proof of such reliance, but U.C.C. § 2-313 does not mention reliance and instead requires that the promise that forms the basis of the warranty must have been "part of the basis of the bargain."

In the area of damages, the question is whether a court should protect the plaintiff's reliance interest by awarding expectation damages or reliance damages. See Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 73 (1936). Williston argued in favor of expectation damages during the debates on § 90 of the first *Restatement*. 4 A.L.I. PROC. 98-99, 103-04, 111-12 (1926)[hereinafter ALI PROCEEDINGS]; see also Knapp, *supra* note 6, at 55. The section as written reflected that position. Most courts, however, awarded only reliance damages under § 90, see Henderson, *supra* note 6, at 378 n.198, and scholars as of 1969 were still in vigorous disagreement on the subject. *Id.* at 378. Section 90 of the *Restatement (Second) of Contracts* added language that said the remedy should be limited as justice requires, suggesting that reliance damages are generally appropriate. Meanwhile commentators were noting the increasing tendency of courts to do just the opposite, i.e., to award expectation damages under § 90, see Farber & Matheson, *supra* note 4, at 909; Feinman, *supra* note 6, at 687-88. Article 2's remedies are designed to protect either the expectation interest, see U.C.C. §§ 2-706(1), 2-708 to 2-716, or the restitution interest, see U.C.C. §§ 2-702(2), 2-711(3). Article 2's lack of recognition or express protection for the reliance interest is similar to Williston's insistence on the use of expectation damages when recovery was based on a reliance theory.

A full examination of the proper role of reliance in the areas of warranty and damages is beyond the scope of this article.

18. Research for this article uncovered over 40 cases in which promissory estoppel or its element, reliance, was used to form a contract, see *infra* notes 190-91, 358 and accompanying text, or to permit enforceability of a contract despite problems with the statute of frauds, see *infra* notes 141-48, 239-40 and accompanying text.

As will be discussed later, a surprising number of cases use promissory estoppel to enforce transactions that clearly involve goods without even discussing the application of the Code or the relevant Article 2 provision. See *infra* notes 190, 191, 354, and 355.

Llewellyn had rejected much of the theory of bargained-for consideration because its formalities and intricacies prevented the enforcement of actual agreements.¹⁹ It will argue that he had become less than enthusiastic about promissory estoppel because of the practical problems it created and because of its tort-based de-emphasis on assent.²⁰ It also will describe the agreement theory that Llewellyn instead decided to use.²¹ Part II will explore the manner in which the agreement theory implemented in Article 2 reflects Llewellyn's antipathy toward reliance and eliminates or at least significantly reduces the role of promissory estoppel in transactions that concern goods.²² Part II will contend that Llewellyn accomplished this in three ways: by eliminating the technical rules that had plagued bargained-for consideration theory,²³ by requiring courts to look at facts in terms of the existence of agreement rather than promissory estoppel,²⁴ and by rejecting outright the use of promissory estoppel in the areas of the statute of frauds and firm offers.²⁵ Part II also will examine the judicial treatment of cases that involve both goods and reliance, and it will argue that in the areas of the statute of frauds and firm offers, the courts have ignored Llewellyn's intent, improperly using promissory estoppel to bypass the provisions of those sections.²⁶ Finally, Part III will contend that Article 2's legislative history and judicial experience show that both sales law and contract law can operate with only a minimal use of promissory estoppel,²⁷ and that the *Restatement (Third) of Contracts* should make better use of Article 2's formation mechanisms to relegate reliance to the relatively minor position it occupies in Article 2.²⁸ In this manner, today's unnecessary, unlimited, and unwarranted expansion of promissory estoppel can be checked, and contract fully resurrected.

These arguments are based in large part upon the legislative history created by the drafters of the Code, especially Karl Llewellyn. In the past, scholars have confined themselves primarily to the New York Law Revision Commission's report on the Code²⁹ and few have looked at any of the drafts written before 1949.³⁰ In part, this has been because the earlier materials were unavailable,³¹ a problem that has been remedied with the cataloging

19. See *infra* notes 49-129 and accompanying text.

20. See *infra* notes 112-26 and accompanying text.

21. See *infra* notes 127-28 and accompanying text.

22. See *infra* notes 129-360 and accompanying text.

23. See *infra* notes 149-60 and accompanying text.

24. See *infra* notes 161-236 and accompanying text.

25. See *infra* notes 237-360 and accompanying text.

26. See *infra* notes 237-360 and accompanying text.

27. See *infra* notes 361-89 and accompanying text.

28. See *infra* notes 390-418 and accompanying text.

29. STATE OF NEW YORK LAW REVISION COMMISSION REPORT, HEARINGS ON THE UNIFORM COMMERCIAL CODE (1954) [hereinafter 1954 N.Y. COMMISSION REPORT]; STATE OF NEW YORK LAW REVISION COMMISSION REPORT, STUDY OF THE UNIFORM COMMERCIAL CODE (1955) [hereinafter 1955 N.Y. COMMISSION REPORT].

30. See Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 466-67 (1987); see also J. WHITE & R. SUMMERS, *supra* note 17, at 10 (list of main drafts begins with 1949 Proposed Draft).

31. J. WHITE & R. SUMMERS, *supra* note 17, at 11. The first major article to analyze the pre-1949 drafts relied on mimeographed copies kept in the Yale Law Library, that probably had been left there by Arthur Corbin. See Leff, *Unconscionability and the Code—The Emperor's*

and distribution of Llewellyn's personal papers³² and with the 1984 publication of a 23-volume collection of Code drafts.³³ In addition, the Code's comments, in which the drafters explained the intended meaning of the text, and the Code's explicit statement of purpose have reduced the need to use legislative history.³⁴ But the Code's drafters rejected a provision that would have barred the use of prior drafts and other legislative history,³⁵ and commentators have recognized the value of this material for those situations in which the comments do not provide an answer.³⁶ In a surprising number of instances, issues addressed in modern case law were debated before the National Conference of Commissioners on Uniform State Laws, the American Law Institute, and the New York Law Revision Commission, and the answers reached by those bodies deserve consideration.

The Code's legislative history is rare in both its quantity and quality, and that is particularly true for the formation sections of Article 2. Here, the publication of the Code's early drafts is especially valuable, for the language of these sections underwent very few changes after 1949, the traditional starting point for Code legislative history analysis.³⁷ The quality of that history is further enhanced by the special role Llewellyn played in drafting Article 2. Llewellyn is generally credited with masterminding the concept of the Code, with organizing and supervising its drafting, and with defending it before the American Law Institute, the National Conference

New Clause, 115 U. PA. L. REV. 485, 489 n.12 (1967).

32. THE KARL LLEWELLYN PAPERS [hereinafter KLP], located in the University of Chicago Law School Library, are available on microfilm and contain several drafts and debate transcripts that otherwise have not been published. The citations used in this article follow the form suggested by THE KARL LLEWELLYN PAPERS: A GUIDE TO THE COLLECTION (R. Ellinwood & W. Twining rev. ed. 1970) (cataloging the collection).

33. E. KELLY, UNIFORM COMMERCIAL CODE DRAFTS (1984). Some transcripts of the debates are available in the appropriate volumes of the ALI PROCEEDINGS, *supra* note 17, and of the HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, as well as in THE KARL LLEWELLYN PAPERS, *supra* note 32.

34. U.C.C. § 1-102(2).

35. U.C.C. § 1-102(3)(g) (Proposed Final Draft No. 2 Spring 1951), *reprinted in* E. KELLY, *supra* note 33, 1. The draft stated that "prior drafts of the text and comments could not be used to ascertain legislative intent." *Id.* at 25. The American Bar Association apparently suggested this amendment. Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 809 (1958). Braucher did not point out, however, that five years later, the Editorial Board recommended that the language be dropped in its 1956 Recommendations of the Editorial Board, *see* 18 E. KELLY, *supra* note 33, at 3, 27, and that the official edition of the 1957 U.C.C. adopted this recommendation. U.C.C. § 1-103 (1957).

The Indiana legislature considered a bill that contained similar language and barred any use of analysis, testimony, reports, or articles regarding the prior drafts, Braucher, *supra* at 809. However, the bill did not become law. *See* 26 IND. CODE ANN. § 1-1-102 (Burns 1986).

36. *See* Braucher, *supra* note 35, at 814; Hillman, *Construction of the Uniform Commercial Code: U.C.C. § 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COMM. L. REV. 655, 681 (1977).

37. Wiseman points out that the Code's legislative history has come to mean the modified drafts written after 1949 and the New York Revision Commission's Report on the 1952 draft. Wiseman, *supra* note 30, at 467. This may be legitimate for most articles of the Code, which underwent major changes during that time. An examination of the 1944 Revised Act, *reprinted in* 2 E. KELLY, *supra* note 33 at 1, the Uniform Revised Sales Act (April 1, 1946), *reprinted in* KLP, *supra* note 32, at J.VIII.2.a., and the Uniform Revised Sales Act (Jan. 1948), *reprinted in* KLP, *supra* note 32, at J.X.2.c., reveals that, except for § 2-207, the formation sections of Article 2 had attained their modern texts before 1949.

of Commissioners on Uniform State Laws, the New York Commission, and the legal community.³⁸ His contributions to Article 2 were even more significant. In the summer of 1940, Llewellyn wrote a revision of Williston's Uniform Sales Act,³⁹ and this 1940 Uniform Act was the beginning of Articles 1 and 2 of the Code. He was the principal draftsman of those two articles through their major drafts in the early 1940s.⁴⁰ Furthermore, he made public his intentions for the formation sections in a series of law review articles, which explained and defended his plans in great detail.⁴¹ Many of the arguments made in those articles appeared later in the early comments to Article 2⁴² and in the debates over the formation sections. The academic members of both the Institute and the Conference and the members of Llewellyn's Section on Commercial Law undoubtedly were as familiar with Llewellyn's writings as were his assistants,⁴³ and Llewellyn expressly referred to his writings at several points in the debates.⁴⁴ When one looks for the legislative intent of the formation sections of Article 2, one

38. See Corbin, *A Tribute to Karl Llewellyn*, 71 YALE L.J. 805, 807 (1962); Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962); Wiseman, *supra* note 30, at 467, 467 n.10.

39. See Letter from Llewellyn to Hiram Thomas (Aug. 27, 1940), *reprinted in* KLP, *supra* note 32, at J.XXV.4; Letter from Llewellyn to William A. Schnader (Aug. 27, 1940), *reprinted in* KLP, *supra* note 32, at J.XXV.4.

40. See J. WHITE & R. SUMMERS, *supra* note 17, at 4.

41. Llewellyn, *Common-Law Reform of Consideration: Are There Measures?*, 41 COLUM. L. REV. 863 (1941) [hereinafter Llewellyn, *Common Law Reform*]; Llewellyn, *On the Complexity of Consideration: A Forward*, 41 COLUM. L. REV. 777 (1941) [hereinafter Llewellyn, *Consideration*]; Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939) [hereinafter Llewellyn, *Unhorsing Sales*]; Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939) [hereinafter Llewellyn, *Across Sales*]; Llewellyn, *Our Case-Law of Contract: Offer and Acceptance II*, 48 YALE L.J. 779 (1939) [hereinafter Llewellyn, *Offer and Acceptance II*]; Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159 (1938) [hereinafter Llewellyn, *Title*]; Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance, I*, 48 YALE L.J. 1 (1938) [hereinafter Llewellyn, *Offer and Acceptance I*]; Llewellyn, *The Rule of Law in Our Case Law of Contract*, 47 YALE L.J. 1243 (1938) [hereinafter Llewellyn, *Rule of Law*]; Llewellyn, *What Price Contract—An Essay in Perspective*, 40 YALE L.J. 704 (1931) [hereinafter Llewellyn, *What Price Contract*].

42. Compare, e.g., Llewellyn, *Unhorsing Sales*, *supra* note 41, at 873 (approaching "commercial document with the eyes of a conveyancer can lead to pretty awful results") with 1941 Revised Act (2d Draft) Alt. § 3-A comment, *reprinted in* 1 E. KELLY, *supra* note 33, at 349 (expressing need "to negate the practice of some courts to 'read commercial document with the eyes of a conveyancer'").

43. Of the eleven men other than Llewellyn who served on the NCC's Uniform Commercial Acts Section and that Section's Special Committee on the Uniform Revised Sales Act, three were academics. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 10 (1944); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 10 (1943); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 10 (1942); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 10 (1941). These individuals certainly should have read a set of articles in major law journals by their section chairman. A number of other academics had infiltrated the NCC itself and the ALI, and some of them should have read the articles.

44. On one occasion, Llewellyn answered a lengthy attack on his firm offer section by refusing to debate an issue that he said already had received sufficient attention in his articles. NCC PROCEEDINGS, *reprinted in* KLP, *supra* note 32, J.V.2.h., at 53-55; see also Unsigned Note to Llewellyn, Preliminary Draft No. 8, First Installment, for Discussion by Subcommittee (May 12, 1943), *reprinted in* KLP, *supra* note 32, at J.V.2.a. (formation section requires a complete understanding of "your thesis" of formation "and is a 'distillation' of your earlier language").

really is looking for Llewellyn's intent.⁴⁵

The fact that Article 2 later was adopted by 49 state legislatures does not diminish the importance of this earlier legislative history. Because of the specialized nature of the Code and the sophistication of the problems it presented, many legislatures relied heavily upon the favorable report of the New York Commission,⁴⁶ and of course, the main witness and defender of the Code at the Commission's hearings was Karl Llewellyn.⁴⁷ Undoubtedly, legislators also depended on the fact that two prestigious groups, the American Law Institute and the National Conference of Commissioners on Uniform State Laws, had been responsible for writing and analyzing the Code; again, that writing and analysis was led, especially for Article 2, by Karl Llewellyn.

Although legislative history is often valuable, there is always the danger that its use will paralyze the ability of courts to develop and adjust a statute to deal with new situations. This is a particular concern with the Code, which was drafted to provide flexibility and to be a semipermanent piece of legislation that the courts could develop in the light of new and unforeseen circumstances and practices.⁴⁸ But that does not mean that legislative history should be ignored when circumstances that were both foreseen and discussed at great length by the drafters, especially Llewellyn, present themselves. Nor does it mean that courts should be able to ignore the legislative history without expressly explaining what new circumstances

45. The only real exception to this is U.C.C. § 2-207, which addresses the use of form contracts. Llewellyn had argued that new rules were needed to deal with form contracts, see Llewellyn, *Consideration*, *supra* note 41, at 780; Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 799, and that a sound analysis of the situation would revolutionize the rules of consideration, offer, and acceptance, Llewellyn, *Title*, *supra* note 41, at 199 n.79. Nevertheless, he had little success in producing that analysis. The 1941 Draft's form contract provision was withdrawn by the drafters until "adequate machinery" was discovered. 1941 Revised Act § 1-C (2d Draft), *reprinted in* 2 E. KELLY, *supra* note 33, at 263. The 1944 version was completely different from 1941's, bears no resemblance to U.C.C. § 2-207, and has no commentary. See UNIFORM REVISED SALES ACT (Proposed Final Draft No. 1, April 27, 1944)(sales chapter of Proposed Commercial Code) [hereinafter 1944 REVISED ACT], *reprinted in* 2 E. KELLY, *supra* note 33, §23 at 1. Section 2-207 was the only formation section whose language had not been set by 1948, and as a result much of its drafting was done without Llewellyn's assistance. Indeed, 2-207(3) was added after Llewellyn had stopped work on the Code, and the last comments that Llewellyn wrote predated many critical changes in the text. Letter from Grant Gilmore to Robert Summers, Sept. 10, 1980, *reprinted in* R. SPEIDEL, R. SUMMERS & J. WHITE, *COMMERCIAL AND CONSUMER LAW* 53, 54-55 (3d ed. 1981). The section's legislative history should be interpreted on its own rather than in the context of Llewellyn's intent, and I shall leave that for another article.

46. In many states, no legislative history for the Code is available. J. WHITE & R. SUMMERS, *supra* note 17, at 12.

47. The first major document in the N.Y. Commission Report is the *General Statement to the Commission by Llewellyn*. 1954 N.Y. COMMISSION REPORT, *supra* note 29, at 19-36. Item 1 of the *Memoranda and Correspondence Presented to the Law Revision Commission Relating to Article 2—Sales* is a statement by Llewellyn. 1954 N.Y. COMMISSION REPORT, *supra* note 29, at 69. For other examples of Llewellyn's contributions to the Commission, see Item 14, Memorandum by Llewellyn, 1954 N.Y. COMMISSION REPORT, *supra* note 29, at 106-26 and the Oral Statement of Llewellyn, Stenographic Report of Hearing on Article 2 (Feb. 15, 1954), 1954 N.Y. COMMISSION REPORT, *supra* note 29, at 158-84. Furthermore, it was Llewellyn who was the final witness at the last hearing. See Oral Statement of Llewellyn, Stenographic Report of Hearing on the U.C.C. (May 24 & 25, 1954), 1954 N.Y. COMMISSION REPORT, *supra* note 29, at 1434-48.

48. U.C.C. § 1-102 comment 1.

and concerns make that history obsolete. This Article will contend that if the courts do confront history, they will realize that promissory estoppel has no significant role under Article 2, and therefore decisions that accord it attention are incorrect. Further, this Article will contend that both Article 2's legislative history and its proper interpretation by certain courts establish that a major formation doctrine can succeed without the use of promissory estoppel, suggesting that the *Restatement (Third) of Contracts* should relegate the doctrine to a relatively minor role in contract law.

I. LLEWELLYN AND PRE-CODE FORMATION THEORIES

A. *The Rise of Promissory Estoppel*

When Karl Llewellyn began work on the Uniform Commercial Code, there were two major theories of contract formation: bargained-for consideration and promissory estoppel.⁴⁹ The former had been announced by Dean Langdell in 1871⁵⁰ and, by the time Llewellyn was born in 1893, Justice Holmes was busy converting Langdell's idea into "classic" doctrine.⁵¹ Before Langdell and Holmes, consideration was present (and so the agreement was enforceable) if there had been a benefit to the promisor or a detriment to the promisee.⁵² The Langdellian-Holmesian contribution was the addition of a "bargain" requirement: "[T]he promise and the consideration must purport to be the motive each for the other, in whole or

49. The Uniform Sales Act, written by Williston, paid little attention to formation issues. Section 1(1) defined a contract to sell goods as an agreement to transfer "the property in goods to the buyer for a consideration called the price," UNIFORM SALES ACT § 1(1), and § 1(2) used similar language to define "sale." *Id.* at § 1(2). The only other sections regarding formation were §§ 3 and 4. Section 3 said that a sale could be made in writing, orally, or partly in writing and partly by word of mouth, or inferred from the parties' conduct. *Id.* at § 3. Section 4 constituted the Statute of Frauds. *Id.* at § 4.

The major problem under the Uniform Sales Act was not formation, but was the extent to which title in the goods had passed from seller to buyer. *See* 1-2 S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS*, §§ 258-444 (1948) [hereinafter S. WILLISTON, *SALES* (1948)]. Llewellyn blasted this concept, K. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* xiv-xv (1930) [hereinafter K. LLEWELLYN, *SALES*]; Llewellyn, *Title*, *supra* note 41, and did not use it in his law of Sales.

50. *See* C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871) [hereinafter C. LANGDELL, *SELECTION*]; *see also* C. LANGDELL, *SUMMARY OF THE LAW OF CONTRACTS* (2d ed. 1880) [hereinafter C. LANGDELL, *SUMMARY*].

51. Holmes began his advocacy of Langdell's theory in a famous series of lectures later published as *The Common Law* (1881). He continued to champion bargained-for consideration while serving on the Supreme Court of Massachusetts, *see e.g.*, *Martin v. Meles*, 179 Mass. 114, 116, 60 N.E. 397, 398 (1901); 2 KENT, *COMMENTARIES ON AMERICAN LAW* §§ 63-64 (O.W. Holmes, Jr., ed. 1896), [hereinafter KENT'S *COMMENTARIES*], and while a member of the U.S. Supreme Court, *see e.g.*, *Wisconsin & Mich. Ry. v. Powers*, 191 U.S. 379, 386 (1903).

Gilmore was not the first to point out that Holmes's doctrine was classic only because Holmes said it was. *Compare* G. GILMORE, *supra* note 1, at 20-21 with Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 52 HARV. L. REV. 408, 418, 48 YALE L.J. 426, 436, 39 COLUM. L. REV. 56, 66 (1939) and Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 779, 780. *But see* Speidel, *An Essay on the Reported Death and the Continued Vitality of Contract*, 27 STAN. L. REV. 1161, 1167-71 (1975) (arguing that Holmes's bargain theory evolved naturally from eighteenth and nineteenth century American common law).

52. *Hamer v. Sidway*, 124 N.Y. 538, 543, 27 N.E. 256, 257 (1891); G. GILMORE, *supra* note 1, at 19.

at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting."⁵³ The doctrine found rapid acceptance in the United States,⁵⁴ and prevented courts from enforcing promises on which the promisee had relied in a manner that was not part of the alleged agreement. The intent of the doctrine was to narrow the scope of contractual liability,⁵⁵ and that purpose was reinforced by the quick development of a number of corollary or subsidiary rules, all based on the concept of bargain, and all designed to make it more difficult to enforce an agreement.⁵⁶

Thus, for example, a promise to keep an offer open for a stated period of time could not be enforced unless the promisee had paid consideration for that option.⁵⁷ A creditor's promise to settle an existing debt for a lesser sum could not be enforced, because the debtor, having promised only to do what he already had a duty to do, had not furnished the creditor any consideration.⁵⁸ Indeed, new consideration had to be exchanged every time the parties modified a contract.⁵⁹ An offer required acceptance by either a promise or performance, but not both,⁶⁰ and an offer which sought one but received the other had not been accepted.⁶¹ An acceptance was not effective unless it agreed precisely to the offer extended; any variance was fatal.⁶² The terms of the contract and the consideration had to be stated in a definite manner;⁶³ parties could not agree to agree later on a term, and output or requirements contracts were invalid.⁶⁴ Finally, the principle of mutuality had to be satisfied: both parties had to be bound or neither was bound.⁶⁵

These rules sometimes meant that courts could not enforce what otherwise were legitimate agreements that the parties had intended to be enforceable. Of course, when the imposition of one of these rules would create injustice, some courts refused to apply the rule, and others worked their way around it by means of exceptions, artificial distinctions, or questionable factual findings.⁶⁶ Another response was to use the doctrine of promissory estoppel.⁶⁷

53. *Powers*, 191 U.S. at 386; see also O.W. HOLMES, JR., *THE COMMON LAW* 253, 292-95 (1881) ("essence of a consideration" lies in its being given as "motive or inducement of the promise").

54. G. GILMORE, *supra* note 1, at 21.

55. *Id.* at 15-16, 21.

56. *Id.* at 22, 33; Speidel, *supra* note 51, at 1171; Horwitz, *Book Review*, 42 U. CHI. L. REV. 787, 793 (1975).

57. See *infra* text accompanying notes 298-301.

58. *Foakes v. Beer*, 90 App. Cas. 605 (H.L. 1884).

59. See *infra* text accompanying note 156.

60. See *infra* text accompanying notes 202-03.

61. See *infra* text accompanying note 204.

62. See *infra* text accompanying note 154.

63. See *infra* text accompanying note 158.

64. *Wickham & Burton Coal Co. v. Farmers' Lumber Co.*, 189 Iowa 1183, 179 N.W. 417 (1920).

65. See E. FARNSWORTH, *CONTRACTS* 107 (1982).

66. See *Allegheny College v. National Chautauga County Bank of Jamestown*, 246 N.Y. 369, 373, 159 N.E. 173, 174 (1927) (Cardozo, J.); 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 139, n.25; Shattuck, *Gratuitous Promises—A New Writ*, 35 MICH. L. REV. 908, 945 (1937); Note, *Promissory Estoppel*, 13 IOWA L. REV. 332, 332 (1928).

67. See Shattuck, *supra* note 66, at 945; 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at

Before the bargained-for theory of consideration had gained widespread acceptance, a detriment suffered by the promisee in reliance on the promisor's promise was sufficient consideration to enforce the promise.⁶⁸ But when the promisor had not requested or bargained for such reliance, it did not constitute consideration under Holmes's theory.⁶⁹ That theory, however, did not eliminate the principle of equitable estoppel, which said that when a party detrimentally relied on another party's statement of fact, the maker of that statement could not later contradict herself.⁷⁰ Sometime after the turn of the century, courts began to analogize reliance on a promise to equitable estoppel in order to avoid Holmes's elimination of unbargained-for reliance as grounds for enforcement: the resulting doctrine was called promissory estoppel and was used to evade Holmes's requirement of a bargain.⁷¹ Samuel Williston recognized promissory estoppel as early as 1920,⁷² and prominent judges, such as Benjamin Cardozo⁷³ and Learned Hand,⁷⁴ began to use the doctrine during the 1920s.

The doctrine generated considerable discussion during the drafting of the *Restatement of Contracts*, but Williston and Corbin combined to secure for it a place in that work.⁷⁵ After the *Restatement's* publication in 1932, a

§ 139 (recognizing that judicial use of promissory estoppel to overcome requirements of consideration is "by no means without extrinsic merit," but conflicts with weight of authority).

68. See *supra* note 52 and accompanying text.

69. *Wisconsin & Mich. Ry. v. Powers*, 191 U.S. 379, 386; O.W. HOLMES, *THE COMMON LAW* at 253.

70. J. BISHOP, *THE DOCTRINES OF THE LAW OF CONTRACT* § 127 (1878).

71. See, e.g., *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898).

72. See 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 139; Note, *Promissory Estoppel*, *supra* note 66, at 333 (crediting Williston with inventing the term).

73. See, e.g., *De Cicco v. Schweizer*, 221 N.Y. 431, 434-35, 117 N.E. 807, 809-10 (1917); *Allegheny College v. National Bank*, 246 N.Y. 369, 373-74, 159 N.E. 173, 175 (1927); see also Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 52 HARV. L. REV. 408, 413-18, 48 YALE L.J. 426, 431-36, 39 COLUM. L. REV. 56, 61-66 (1939).

74. *Porter v. Commissioner*, 60 F.2d 673, 675 (2d Cir. 1932).

75. See *RESTATEMENT OF CONTRACTS* § 90 (1932). Gilmore contends that Williston opposed the adoption of § 90, and that only Corbin's efforts resulted in the *Restatement's* recognition of promissory estoppel. G. GILMORE, *supra* note 1, at 62-64, although he admits that his account may not be completely accurate. *Id.* Contemporary evidence, however, suggests that Williston was less opposed to the inclusion of promissory estoppel than Gilmore implies.

Williston was credited with formal recognition of the term "promissory estoppel," Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 459 n.1 (1950); Note, *supra* note 66, at 333 n.5, although he drew it from the suggestions of earlier sources, see 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 139 nn. 23-24. The 1920 edition of his treatise recognized a split in American case law over the legitimacy of the doctrine, see *id.*, and while Williston cannot be said to have endorsed promissory estoppel then, his recognition of the doctrine's existence and his discussion of cases that had used the theory undoubtedly helped legitimize it. His 1936 revised edition greatly expanded the coverage of estoppel and noted its recognition in the *Restatement*. 1 S. WILLISTON, *CONTRACTS* (rev. ed.), *supra* note 10, at § 140. Indeed, Williston wrote that § 90 was a "useful coordination" of existing estoppel doctrine and did not go beyond existing law. *Id.* He also said that the use of the doctrine to avoid the harshness of consideration theory was "by no means without extrinsic merit," and that while it conflicted with the great weight of authority, "[t]here would seem however, to be compelling reasons of justice for enforcing promises, where injustice cannot be otherwise avoided, when they have led the promisee to incur any substantial detriment on the faith of them," even though the promisor did not request this as part of a bargain. *Id.* He also complained of what he called an "inadvised" attempt to limit the use of the doctrine to noncommercial situations. *Id.* at § 140, n.3.

number of courts continued to reject the doctrine or limit its use to noncommercial cases,⁷⁶ but a growing number endorsed it.⁷⁷ That growing acceptance was helped by Fuller and Perdue's landmark article on the reliance interest,⁷⁸ by Williston's revised edition of *Contracts*,⁷⁹ which endorsed promissory estoppel more clearly and broadly than his 1920 version, and by Corbin's continued advocacy.⁸⁰

B. Llewellyn's Response

Even as commentators and the courts started to examine the *Restatement's* theory of promissory estoppel, Karl Llewellyn began to express his displeasure with the theory of consideration as it applied to both the law of contracts and the law of sales. That displeasure, combined with several other factors, prodded him to revise the Uniform Sales Act and, ultimately, to create the Uniform Commercial Code.

Llewellyn fired his opening salvo in his 1930 text on sales,⁸¹ where he criticized the Uniform Sales Act as an obsolete machine, born in an age of

Although it could be argued that the 1936 edition's much more favorable discussion of promissory estoppel was a product of Corbin's efforts, it bears noting that contemporary writers credited § 90 to Williston. See, Llewellyn, *Rule of Law*, *supra* note 41, at 1262 n.48; Lloyd, *Consideration and the Seal in New York—An Unsatisfactory Legislative Program*, 46 COLUM. L. REV. 1, 26-27 (1946).

In addition, Williston was one of the first to question the rule by which the maker of an unilateral offer could revoke it despite partial performance by the offeree. Williston's 1920 *Contracts* treatise recognized that this was the majority rule, but said that nevertheless, "it is certainly true that a rule of law which is opposed to the understanding of business men is undesirable unless there are strong reasons of policy in its favor," and cited Corbin, *Offer and Acceptance, And Some of the Resulting Legal Relations*, 26 YALE L.J. 169 (1917). 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 60. He also noted that some civil law countries had said that a unilateral offer remained irrevocable until the offeree had a reasonable chance to perform. He said this solution was desirable, and was likely eventually to find favor in America, but that it could not be implemented without a statute. *Id.* at § 60a.

76. See, e.g., *Hosner v. Skelly*, 72 Cal. App. 2d 457, 463-64, 164 P.2d 573, 577 (1945); *Bank of Am. of Cal. v. Pacific Ready-Cut Home*, 122 Cal. App. 554, 562-64, 10 P.2d 478, 482 (1932); *Swinney v. Modern Woodmen of Am.*, 95 S.W.2d 655, 657 (Mo. Ct. App. 1936); *In re Watson's Estate*, 177 Misc. 308, 317, 30 N.Y.S.2d 577, 586 (Sur. Ct. 1941); *Beraducci v. Diano*, 60 R.I. 305, 308, 198 A. 351, 353 (1938); *Anderson v. Polleys*, 54 R.I. 296, 300-01, 173 A. 114, 116 (1934); *Barnes v. Boyd*, 18 Tenn. App. 55, 58, 72 S.W.2d 573, 575 (1934); *Reclamation Co. v. Western Brokerage & Supply Co.*, 57 S.W.2d 274, 277 (Tex. Civ. App. 1933), *aff'd*, 127 Tex. 386, 93 S.W.2d 393 (1936).

77. See, e.g., *Times-Mirror Co. v. Superior Court*, 3 Cal. 2d 309, 332-33, 44 P.2d 547, 556-57 (1935) (applying promissory estoppel under the guise of equitable estoppel); *Hetchler v. American Life Ins. Co.*, 266 Mich. 608, 613-16, 254 N.W. 221, 223-24 (1934); *Martin v. Dixie Planning Mill*, 199 Miss. 455, 463-64, 24 So. 2d 332, 334 (1946); *Brewer v. Universal Credit Co.*, 191 Miss. 183, 190-91, 192 So. 902, 904 (1940); *Lusk-Harbison-Jones v. Universal Credit Co.*, 164 Miss. 693, 698-99, 145 So. 623, 624 (1933); *Lacy v. Wozencraft*, 188 Okla. 19, 20, 105 P.2d 781, 783 (1940); *General Elec. Co. v. N.K. Ovalle*, 335 Pa. 439, 445-446, 6 A.2d 835, 838 (1939); *Fried v. Fisher*, 328 Pa. 497, 503-04, 196 A. 39, 42-43 (1938); *Hanna State & Sav. Bank v. Matson*, 53 Wyo. 1, 15-16, 77 P.2d 621, 625 (1938).

78. Fuller & Perdue, *supra* note 17.

79. Compare 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 139 with 1 S. WILLISTON, *CONTRACTS* (rev. ed.), *supra* note 10, at §§ 139-140.

80. See A. CORBIN, *CASES ON THE LAW OF CONTRACTS* 200 (3d ed. 1947); Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 455-56 (1937).

81. K. LLEWELLYN, *SALES*, *supra* note 49.

face-to-face transactions and unsuited for the modern reality of a nationwide, indirect marketing structure.⁸² He criticized courts for "mechanical, deductive reasoning from formulae which crush to death some needed, budding, economic institutions."⁸³ The next year, he published an article that outlined his view of the role of contract in modern society.⁸⁴ In that article, he also criticized existing doctrine for ignoring new business needs and growing increasingly rigid in its requirements.⁸⁵ By 1936, Llewellyn had begun to work toward a revision of Williston's Uniform Sales Act⁸⁶, and his activities toward that end increased in 1937, when two Federal Sales Bills were introduced in Congress.⁸⁷ During the next three years, he spent a great deal of time lobbying with various political, legal, and commercial groups for a revision of the Uniform Sales Act,⁸⁸ but he did not neglect to rouse the academic community. Between January 1938 and May 1941, he published no fewer than eight major law review articles that directly exposed the weaknesses of the Uniform Sales Act and extolled the need for a new Act.⁸⁹ He also led a symposium on commercial law, which was published in the *Virginia Law Review* in 1940.⁹⁰

It was in the summer of 1940 that Llewellyn took the final plunge, devoting five full weeks to revising the Uniform Sales Act.⁹¹ He presented this 1940 Uniform Sales Act to the National Conference of Commissioners on Uniform State Laws in August of 1940.⁹² He realized, however, that his 1940 version did not go far enough: in the fall of 1941 he presented the Conference with a heavily revised second draft.⁹³ The formation provisions of this draft were less a revision of Williston's Act than they were a completely new set of rules for transactions involving the sale of goods. Two other major drafts followed, one in 1943⁹⁴ and the other in

82. *Id.* at xvi.

83. *Id.* at x.

84. Llewellyn, *What Price Contract*, *supra* note 41, at 710 n.16, 714.

85. *Id.*

86. Wiseman, *supra* note 30, at 477.

87. H.R. 1619, 75th Cong., 1st Sess. (1937), *reprinted in* 1 E. KELLY, *supra* note 33, at 1; H.R. 7824, 75th Cong., 1st Sess. (1937), *reprinted in* 1 E. KELLY, *supra* note 33, at 111.

88. Wiseman, *supra* note 30, at 482-89.

89. See J. WHITE & R. SUMMERS, *supra* note 17, at 4.

90. Symposium, *The Proposed Federal Sales Act*, 26 VA. L. REV. 537 (1940); Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558 (1940).

91. Letter from Llewellyn to Hiram Thomas (Aug. 27, 1940), *reprinted in* KLP, *supra* note 32, at J.XXV.4; Letter from Llewellyn to William A. Schnader (Aug. 27, 1940), *reprinted in* KLP, *supra* note 32, at J.XXV.4.

92. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 95 (1940). The 1940 Uniform Sales Act [hereinafter 1940 UNIFORM ACT] is *reprinted in* 1 E. KELLY, *supra* note 33, at 171.

93. REPORT AND SECOND DRAFT: THE REVISED UNIFORM SALES ACT (1941), *reprinted in* 1 E. KELLY, *supra* note 33, at 269 [hereinafter 1941 REVISED ACT (2d Draft)]; see also Consideration in Committee of the Whole of the Revised Uniform Sales Act (transcript) (Sept. 22-27, 1941), *reprinted in* KLP, *supra* note 32, at J.III.2.c. (explaining reasoning of second draft).

94. REVISED UNIFORM SALES ACT (1943) (3d Draft), *reprinted in* KLP *supra* note 32, at J.H.h.2 [hereinafter 1943 REVISED ACT (3d Draft)]. As Wiseman observes, the text of this draft is missing from the Llewellyn archives. Llewellyn, however, read the text of each section before the NCC discussed it. WISEMAN, *supra* note 30, at 516 n.227. Quotations and references are to the transcript of those discussions. See NCC Consideration in Committee of the Whole of the Revised Uniform Sales Act (Aug. 17-21, 1943), *reprinted in* KLP, *supra* note 32, at J.V.2.h.

1944.⁹⁵ By that time, the language of what was to become Article 2 of today's Code had, for the most part, emerged. The drafters made very few changes in the formation sections of the 1946,⁹⁶ 1948,⁹⁷ and 1949⁹⁸ drafts. Instead, they focused most of their attention and efforts on the remaining articles of the Code and on paving the way for passage in the state legislatures. This was a tortuous process that culminated in hearings before the New York Law Revision Commission. Those hearings, however, merely rehashed questions and concerns regarding Article 2 that had been dealt with a decade earlier.

To understand Llewellyn's intent for the formation sections of Article 2, one must examine his reaction to the two existing formation theories—consideration and promissory estoppel. Llewellyn's lack of respect for Langdell's and Holmes's theory of bargained-for consideration, already noted above, resurfaced as he began preparations for revising the Uniform Sales Act. In 1938 he labeled the theory "one 'great' doctrinal pseudo-achievement"⁹⁹ which rested on "very dubious over-generalization."¹⁰⁰ There were several reasons for his attitude. First, he believed that the Langdellian/Holmesian approach was not businesslike because it imposed artificial and technical requirements of form on business people who rarely thought about—or had time to think about—satisfying those requirements.¹⁰¹ When the parties reached agreement but failed to satisfy the technical rules, the courts often held under this theory that no enforceable contract had been created,¹⁰² frustrating the intent of the parties. Llewellyn wrote that when orthodox rules were used to decide that a contract had not been created, they were "utterly untrustworthy," "false," and "often vicious."¹⁰³

This was maddeningly frustrating to Llewellyn because of his belief that the theory behind bargained-for consideration was internally flawed and inadequately supported. He pointed out that it was not even a single doctrine, but rather a conglomeration of various rules¹⁰⁴ that failed to cover two important contractual areas¹⁰⁵ and that required a host of

95. 1944 REVISED ACT, *reprinted in* 2 E. KELLY, *supra* note 33, at 1.

96. UNIFORM REVISED SALES ACT (April 1, 1946), *reprinted in* KLP, *supra* note 32, at J.VIII.2.a.

97. UNIFORM REVISED SALES ACT (Jan. 1948), *reprinted in* KLP, *supra* note 32, at J.X.2.c.; UNIFORM REVISED SALES ACT COMMENTS (§§ 1-42) (Feb. 20, 1948), *reprinted in* KLP, *supra* note 32, at J.X.2.e.

98. U.C.C. (1949), *reprinted in* 6 E. KELLY, *supra* note 33, at 1, and in KLP, *supra* note 32, at J.XI.1.a.

99. Llewellyn, *Rule of Law*, *supra* note 41, at 1262.

100. *Id.*

101. Llewellyn, *What Price Contract*, *supra* note 41, at 724 n.45 (citing *Grain Elevators*, 6 AM. L. REV. 450, 471 (1872)); Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 791.

102. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 798, 799; *Statement to the Law Revision Commission by Prof. Karl N. Llewellyn*, 1954 N.Y. COMMISSION REPORT, *supra* note 29, at 26-31.

103. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 799. Llewellyn later lamented the manner in which property law had rigidified many judges, and he complained that approaching "a commercial document with the eyes of a conveyancer can lead to pretty awful results." Llewellyn, *Unhorsing Sales*, *supra* note 41, at 873.

104. Llewellyn, *Consideration*, *supra* note 41, at 778.

105. See Llewellyn, *Rule of Law*, *supra* note 41, at 1263 (bilateral contracts); Llewellyn, *Consideration*, *supra* note 41, at 780 (form contracts).

exceptions.¹⁰⁶ Furthermore—and this appeared to be the major flaw to Llewellyn—bargained-for consideration was completely unrelated to case law.¹⁰⁷ He accused Langdell of starting with cases dating from the time of Queen Elizabeth,¹⁰⁸ labeled the *Restatement of Contracts* “caseless,”¹⁰⁹ and fervently contended that the study of case law was needed more in contracts than in any other field of law.¹¹⁰

Llewellyn's attacks on the theory of bargained-for consideration were not surprising, but his suggestion for a replacement theory was. Llewellyn was extremely close to Professor Corbin of Yale. Law student Llewellyn and law professor Corbin wrote over half the material published between 1918 and 1919 in the *Yale Law Journal*,¹¹¹ and Llewellyn publicly and privately referred to Corbin as his “father-in-the-law,”¹¹² an accolade which the latter seems to have enjoyed.¹¹³ Corbin saw the problem posed by promises that were unenforceable because of the technical requirements of consideration theory, but his response was the doctrine of promissory estoppel, which he allegedly persuaded Williston to include as section 90 of the first *Restatement*.¹¹⁴ Llewellyn recognized the value of that new theory—he called the *Restatement's* sections on “Contracts without Consideration” . . . “as fine a compromise between honor to the past and furtherance of case-law reform as has ever been in our system conceived.”¹¹⁵ Nevertheless, he had his doubts.

Llewellyn's first concern about using the presence of reliance to differentiate between enforceable and unenforceable promises lay in the presence of reliance in every commercial transaction.¹¹⁶ Reliance always arises in business because people do not distinguish between promised deals and performed deals. They must treat every deal as if it will be performed. The retailer who buys a carload of merchandise cannot wait until the goods arrive before hiring the staff needed to sell them: the retailer must adjust the shelf space in the store, make room for the excess goods in the warehouse, prepare inventory records, price lists, and sales projections, and do a hundred other little things.¹¹⁷ Furthermore, since the retailer knows the goods are coming, there is no need to actively seek

106. Llewellyn, *Consideration*, *supra* note 41, at 779.

107. Llewellyn, *Rule of Law*, *supra* note 41, at 1259-61. Llewellyn stressed that a doctrine that did not square with case law is not valid. *Id.* at 1269-70. He praised Corbin's extensive use of cases and predicted such use would soon embarrass orthodox contract law. *Id.* at 1265-69.

108. *Id.* at 1269.

109. *Id.*

110. *Id.* at 1259.

111. Corbin, *A Tribute to Karl Llewellyn*, 71 *YALE L.J.* 805, 805 (1962).

112. See Llewellyn, *Rule of Law*, *supra* note 41, at 1243 n.7; Letter from Llewellyn to Corbin (Oct. 29, 1942), *reprinted in KLP*, *supra* note 32, at J.XXV.6.

113. Letter from Corbin to Llewellyn (March 16, 1943), *reprinted in KLP*, *supra* note 32, at J.XXV.7 (signed “Dad”); Letter from Corbin to Llewellyn and Soia Mentschikoff (March 25, 1943), *reprinted in KLP*, *supra* note 32, at J.XXV.7 (signed “Love to both, Dad”).

114. G. Gilmore *supra* note 1, at 62-64 (1974). *But see* note 75.

115. Llewellyn, *Rule of Law*, *supra* note 41, at 1262 n.48.

116. Llewellyn, *What Price Contract*, *supra* note 41, at 709; Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 802-803.

117. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 802-03.

similar goods from other suppliers, and good offers may be rejected.¹¹⁸ Such reliance is a tacit presupposition in any credit society and in almost every commercial transaction. Should all commercial transactions be enforced merely because of the existence of this ever-present reliance?

Second, proving the existence of such passive, subtle reliance or the amount of damage suffered was "administratively baffling," and something to be avoided.¹¹⁹ Indeed, Llewellyn contended that the problems of proving substantial reliance meant that businesspeople should not build their transactions with it in mind. He pointed out that it would be folly for an attorney to advise a client to rely on an otherwise unenforceable agreement, because if the court found insufficient proof of reliance, the client would be out a considerable sum.¹²⁰

A third problem with the use of reliance theory as it then existed arose from the fact that an act of reliance bound only the offeror, and not the offeree.¹²¹ A general contractor could use a subcontractor's bid to prepare his own bid, thereby committing the act of reliance that would bind the subcontractor to perform. Secure in the knowledge that he could force that subcontractor to perform at a set price, the general contractor could see whether other subcontractors would make better offers.¹²²

This suggested the fourth problem. To Llewellyn, sections 85 through 94 of the first *Restatement* were grouped under an almost revolutionary title: "Informal Contracts *Without Assent or Consideration*."¹²³ How could one have a contract with mutual obligation but without assent? The key to a functional theory of contract, as Llewellyn saw it, was the existence of assent, of an agreement between two parties to bind themselves to each other. Consideration theory was false and vicious because it often prevented enforcement of transactions where there truly had been agreement. The doctrine's emphasis on form and technical requirements caused courts to ignore the existence of an agreement between the parties. The tort-based theory of reliance that Gilmore later offered to resolve this problem¹²⁴ suffered the opposite defect. Because reliance abandoned the need for assent, it might enforce deals when no agreement had been reached.¹²⁵ As

118. *Id.*

119. *Id.* at 804. As Llewellyn put it, once an agreement is reached:

[I]t is to be expected that the participants in the deal will rely soon, and will rely hard, and will rely in intangible ways absurdly difficult to prove, upon the deal so closed.

That expectation may properly be standardized, for it is standard. It would be a hardship, in fact, it would be felt as injustice, to put any plaintiff to his detailed proof.

Id. at 803.

120. Llewellyn, *Consideration*, *supra* note 41, at 865. See also Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 785 n.7.

121. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 795 n.23.

122. See *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 415, 333 P.2d 757, 760 (1958).

123. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 797.

124. G. GILMORE, *supra* note 1, at 87-94, 100-01.

125. See Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 807; cf. Llewellyn, *Offer and Acceptance I*, *supra* note 41, at 34 (importance of agreement in determining whether there has been an acceptance); *id.* at 34 n.62 (referring to "utter immateriality" of detrimental reliance when promises are clearly present on both sides). The recognition of agreement as the key to formation under Article 2, of course, is not original to this article. See Murray, *supra* note 16, at 5. Rather, this article seeks to explain why Llewellyn focused on agreement instead of

a result, Llewellyn anticipated and rejected Gilmore's future theory:

[T]he place of tort analogy in contract law lies elsewhere than in the law of agreement Not so much in reliance as in decent promise then decently enforced lies the essential base-line and the line of growth. There simply is more to promise than there is to tort.¹²⁶

If the problem with consideration theory was that its technical requirements caused courts to ignore the existence of agreement between the parties, the solution was not to eliminate the need for agreement, as did reliance. The solution Llewellyn proposed did away with the technical requirements,¹²⁷ wherever possible, so that courts could focus on whether the parties had or had not agreed. This shift in focus would increase the number of agreements the courts could enforce. Increased enforcement, in turn, would provide greater protection not only to the overt, easily-proved reliance present in some cases, but also to the subtle or passive reliance that Llewellyn believed existed in every transaction.¹²⁸

This meant that the formation sections of the Code would have few, if any, strict requirements. It also meant that the actual presence of an agreement would be the key factor in determining whether a transaction was enforceable; acts that constituted detrimental reliance would be relevant only to the extent they indicated that an agreement had been reached. Finally, where transactions involved the statute of frauds and firm offers, in which acts of detrimental reliance could not provide solid evidence that an agreement had been reached, those acts would be ignored and promissory estoppel would not be available. This was the general plan. The question is to what extent Article 2 implemented it.

II. ARTICLE 2'S APPROACH TO PROMISSORY ESTOPPEL

A. Introduction

Llewellyn's antagonistic attitude toward promissory estoppel had profound effects on the development of the Uniform Commercial Code. The development of the formation sections of Article 2 consciously reflected his desire to make promissory estoppel unnecessary wherever possible. In most areas Llewellyn effected this purpose by eliminating the technical rules of bargained-for consideration theory that had created the need for promissory estoppel in the first place. Conceptually, reliance remained in other areas, but only as a nondeterminative factor helping to indicate the presence or absence of agreement. In still other areas, Llewellyn overtly eliminated the doctrine's use.

The success of Llewellyn's strategy is shown in three ways. First, although promissory estoppel is an extremely common method of forma-

estoppel and how that focus affects the proper use of promissory estoppel under the Code.

126. Llewellyn, *Offer and Acceptance I*, *supra* note 41, at 34 n.62.

127. Cf. 1954 N.Y. COMMISSION REPORT, *supra* note 29, at 29 (statement by Professor Karl N. Llewellyn) (continuing presence of large number of technical traps must be cured).

128. See *supra* notes 119-20 and accompanying text.

tion under the *Restatement (Second) of Contracts*, it is rarely used under Article 2. Since its publication in 1981, section 90 of the *Restatement (Second) of Contracts* has been cited over 120 times;¹²⁹ extensive research for that same period has revealed only about 40 cases involving transactions in goods that used reliance or promissory estoppel.¹³⁰ Although a number of scholars have predicted that promissory estoppel is the formation mechanism of the future,¹³¹ Article 2 appears to function well without it. Second, except for two situations, the relationship of promissory estoppel and the formation sections of Article 2 has received little attention in the literature.¹³² Llewellyn so firmly separated his statute from the doctrine that the two seem a world apart. Finally, the two situations in which the doctrine has been applied under the statute—the statute of frauds and the firm offer cases—concern areas in which Llewellyn did not completely implement his agreement theory. In these two areas Llewellyn merely altered, rather than abandoned, the technical requirements of bargained-for consideration. The result has been a series of cases in which the courts have used estoppel to evade the requirements that Llewellyn intended to be followed.¹³³

Overall, Llewellyn's efforts to eliminate technical requirements and to limit use of reliance in the formation sections of the U.C.C. only to showing the existence of agreement have been notably successful in preventing the use of promissory estoppel in the domain of Article 2.¹³⁴ The reason that promissory estoppel plays a minor role in formation under the U.C.C. does not lay in an inherent incompatibility between the doctrine and contract problems found in the field of sales. In fact, a number of pre-Code decisions used the doctrine to enforce transfers of goods.¹³⁵

Article 2 itself does not expressly exclude the use of promissory estoppel, and may appear at first reading to invite use of the doctrine. While the early drafts defined a contract as a transfer of goods in return for "a consideration called the price,"¹³⁶ this language intentionally was

129. See SHEPARD'S RESTATEMENT OF THE LAW CITATIONS *Contracts (Second)* § 90 (1986). The same source reveals over 400 citations to § 90 of the first *Restatement*, *id.*, and another 50 references to § 45 of both works. See *id.*; see also G. GILMORE, *supra* note 1, at 70-72 (promissory estoppel principle of § 90 has essentially swallowed up bargain principle of § 75); Henderson, *supra* note 6, at 343-44, 353-57 (scope of promissory estoppel expands beyond area of gratuitous promises and into realm of bargain); Knapp, *supra* note 6, at 53 (courts in recent years apply reliance principle to overcome defenses of form in context of bargain).

130. See *infra* notes 190-91, 239-40, 358.

131. See, e.g., Knapp, *supra* note 6, at 77-79.

132. Discussion of promissory estoppel regarding the statute of frauds and firm offers is fairly common. See *infra* notes 237, 293. None of the major authorities discuss the doctrine in other contexts. See, e.g., J. WHITE & R. SUMMERS, *supra* note 17, at 1236; R. HILLMAN, J. McDONNELL & S. NICKLES, *COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE* 1-10 § 3.03[1][a] (1985) (only discussion of promissory estoppel concerns statute of frauds).

133. See *infra* text accompanying notes 238-89, 308-59.

134. See *infra* text accompanying notes 135-360.

135. See, e.g., *Goodman v. Dicker*, 169 F.2d 684, 685 (D.C. Cir. 1948); *White Marble Lime Co. v. Consolidated Lumber Co.*, 205 Mich. 634, 643-45, 172 N.W. 603, 606 (1919), cited in Llewellyn, *Drafts of Sales Act Comments on Remedies*, comment on §§ 8-9 (S. 118), reprinted in KLP, *supra* note 32, at J.VI.2.i; *Martin v. Dixie Planning Mill*, 199 Miss. 455, 463-64, 24 So. 2d 332, 334 (1946).

136. *UNIFORM SALES ACT* § 1 (definition of contract; no definition of sales included); H.R. 1619, 75th Cong., 1st Sess. § 2 (1932)(same); H.R. 8176, 75th Cong., 3d Sess. (1938)(same).

dropped to avoid invoking the doctrine of consideration.¹³⁷ Article 1's general definitions of contract and agreement also omit any mention of consideration.¹³⁸ And, of course, section 1-103 provides that "unless displaced by the particular provisions of this Act," the principles of law and equity and estoppel, among others, supplement the Act's provisions. This certainly could open Article 2 to the use of promissory estoppel, as several scholars have suggested,¹³⁹ and there is at least one case involving the transfer of goods in which the use of bald promissory estoppel was the only way to justify enforcement.¹⁴⁰

The problem with this apparent intent to use promissory estoppel, however, is the extent to which section 1-103 should be allowed to supplement the formation sections of Article 2.¹⁴¹ Professor Summers has

137. Section one of the 1941 Revised Act (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 263 defined both a contract to sell and a sale as a transfer of property in goods "for a return called the price." When asked why "return" was used instead of "consideration," Llewellyn answered that use of the latter term would get the Code "in trouble with that line of doctrine" and that there "is just too darned much in the books that you don't want to have around messing with your act." NCC PROCEEDINGS (1941), *reprinted in* KLP, *supra* note 32, J.III.2.c., at 54. Section 9 of the 1944 Revised Act dropped even the use of the word "return." 1944 REVISED ACT, *reprinted in* 2 E. KELLY, *supra* note 33, at 1.

138. A contract is "the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." U.C.C. § 1-201(1). This definition is result-oriented and does not suggest any particular requirements; indeed, its reference to "other applicable rules of law" suggests that promissory estoppel might be used to create a contract. Agreement is defined as "the bargain of the parties in fact," U.C.C. § 1-201(3), a definition that does not require consideration.

139. See J. WHITE & R. SUMMERS, *supra* note 17, at 19; Hillman, *supra* note 36, at 701; Summers, *General Equitable Principles under § 1-103 of the Uniform Commercial Code*, 72 Nw. U.L. REV. 906, 935-42 (1978).

140. See, e.g., *Standard Structural Steel Co. v. Debron Corp.*, 515 F. Supp. 803, 810-12 (D. Conn. 1980) (subcontractor who purchased steel from supplier A based price on supplier B's inaccurate estimate of number of bolts required for the steel; trial court determined application of Code was proper and then allowed recovery under promissory estoppel), *aff'd*, 657 F.2d 265 (2d Cir. 1981).

141. Unfortunately, the legislative history of § 1-103 is too sparse to be of help. The Uniform Sales Act and the early drafts of the Code contained a version of § 1-103 that did not include the word estoppel. See UNIFORM SALES ACT § 73; 1940 UNIFORM ACT § 4, *reprinted in* 1 E. KELLY, *supra* note 33, at 171; 1941 REVISED ACT § 1-F (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 338-39. The term "estoppel" first appears in the Sales Act Preliminary Draft No. 8 First Installment (May 12, 1943). The addition caused only a brief debate in the NCC. Llewellyn explained:

We wanted to be free of the need of saying . . . what can be done by agency in this section can also be done by estoppel, although the agency be not real and the authority is merely apparent. We wanted to include wherever the act didn't include it such things as general equity exceptions on straight rules of law.

NCC Consideration in Committee of the Whole of the Revised Uniform Sales Act (August 1943), *reprinted in* KLP, *supra* note 32, J.V.2.h., at 4. The problem is that Llewellyn in other instances expressly rejected the use of equitable principles in regard to certain sections, especially §§ 2-201 and 2-205. See *infra* text accompanying notes 237-360. In addition, while later sets of comments written by Llewellyn on the section refer to a number of principles, they do not mention estoppel. See Uniform Revised Sales Act Comments (Feb. 20, 1948), Comment on § 2, *reprinted in* KLP, *supra* note 32, at J.X.2.e.; 1944 REVISED ACT § 2 comment, *reprinted in* 2 E. KELLY, *supra* note 33, at 1. Later, the N.Y. Commission Report noted the addition of "estoppel," but said that it did "not seem to be very significant" and did not add any new matter, since estoppel was an equitable principle that long had been in Sales Law. 1955 N.Y. COMMISSION REPORT, *supra* note 29, at 168.

argued that under section 1-103, general equitable principles such as estoppel can carve out exceptions from or modify specific rules delineated by the Code,¹⁴² although he concedes that a section's legislative history may affect the manner in which section 1-103 applies to those rules.¹⁴³ Summers is reluctant to use legislative history for two reasons. First, the history of the drafting process is not easily accessible; second, the drafters often omitted matters that appeared to be implicit.¹⁴⁴

The first reason is no longer valid; the recent publication of Uniform Commercial Code Drafts by Elizabeth Kelly and the distribution of the Karl Llewellyn Papers on microfilm have dramatically increased the availability of the early drafts, especially those drafts which Summers did not use.¹⁴⁵ Summers's second reason for minimizing legislative history has more force. The second draft of the 1941 Revised Act, the third draft of the 1943 Revised Act, and the 1944 Revised Act all contain large doses of commentary the drafters included to persuade the ALI and NCC to endorse the relevant provision. The drafters neither intended nor designed the commentary for use by the courts.¹⁴⁶ They dropped a great deal of this commentary from the 1949 Uniform Commercial Code simply because it had served its purpose.¹⁴⁷

A final problem exists with regard to the idea that the drafters intended the U.C.C. to limit the use of promissory estoppel. It always is dangerous to argue by negative implication—*i.e.*, to contend that merely because a section does not include promissory estoppel, the drafters intended to exclude it. Fortunately, however, there is plenty of positive evidence available to show that they did intend exclusion. As the rest of Part II of this Article will show, not only do the formation sections of Article 2 and their comments repeat the same anti-estoppel arguments Llewellyn made in his law review articles,¹⁴⁸ but in both his drafts and his statements to the ALI and NCC, Llewellyn often expressly rejected the use of promissory estoppel in specific situations. This is the kind of powerful affirmative evidence Summers sought.

B. *Reducing the Need for Promissory Estoppel*

Llewellyn's first tactic in reducing the need for promissory estoppel lay in the elimination of the numerous technical rules required under the bargained-for consideration theory. The results of this elimination perme-

142. See Summers, *supra* note 139, at 935-42.

143. *Id.* at 938; see also Hillman, *supra* note 36, at 681 (legislative history aids determining Act's objectives).

144. J. WHITE & R. SUMMERS, *supra* note 17, at 11.

145. See *id.* at 10. White and Summers's list of the major drafts of the Code begins with the 1949 draft, and makes no mention of the earlier versions. *Id.*

146. Llewellyn admitted that the comments in the 1941 Draft went "freely into discussion and justification." 1941 REVISED ACT (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 269.

147. Report of the Special Committee on a Revised Uniform Sales Act 30, cited in 1 E. KELLY, *supra*, note 33, at 310. Llewellyn also said that the comments eventually would have to be rewritten in an explanatory and expository form.

148. See *supra* text accompanying notes 259-66 (discussing reliance and statute of frauds) and text accompanying notes 214-15, 222-26 (discussing reliance and unilateral offers).

ated the formation sections of Article 2. Section 2-201 abandoned the traditional rule that the statute of frauds can be satisfied only by a writing that completely and accurately states all the terms of the contract.¹⁴⁹ Section 2-204 provided that a court no longer need determine the moment when a contract was made, and recognized that a contract for sale that leaves one or more terms open does not automatically fail for indefiniteness.¹⁵⁰

The following provision, section 2-205, expressly repudiated the former rule that an offer was not binding unless there had been consideration for it.¹⁵¹ Section 2-206 abandoned a number of rules. For example, the section made a unilateral offer acceptable without full performance and revocable until that full performance is given,¹⁵² and dropped the requirement that an offer made by telegraph be accepted by telegraph.¹⁵³ As for form contracts, traditional rules required the acceptance to be a mirror image of the offer: if there was the least difference, a contract had not been formed.¹⁵⁴ Section 2-207 rejected that rule and allowed for the formation of a contract despite minor differences between the terms of the offer and the terms of the acceptance.¹⁵⁵ Section 2-209 reformed the rule of consideration that held modifications made without consideration invalid,¹⁵⁶ and instead directed courts to determine whether the parties made the modification voluntarily.¹⁵⁷ Finally, the gap-filler provisions eliminated the old requirements of definiteness and mutuality¹⁵⁸ that

149. Compare 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, § 575; 1 S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* § 102 (2d ed. 1924) [hereinafter S. WILLISTON, *SALES* (1924)]; 1941 REVISED ACT § 4 comment 4 (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 365-66 with U.C.C. § 2-201(1) (requiring only a statement of quantity) and § 2-201 comment 1 (required writing need not contain all material terms of the contract).

150. Under the common law, some courts refused to enforce agreements that omitted terms such as the quantity, the price, or the duration of the contract. See, e.g., *Terre Haute Brewing Co. v. Dugan*, 102 F.2d 425, 426-27 (8th Cir. 1939) (duration time omitted); *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001, 1003-06 (4th Cir. 1933) (quantity and duration omitted); *Wickham & Burton Coal Co. v. Farmers Lumber Co.*, 189 Iowa 1183, 1188-95, 179 N.W. 417, 419-21 (1920) (quantity omitted); *Ansorge v. Kane*, 244 N.Y. 395, 398-400, 155 N.E. 683, 685-87 (1927) (price omitted); *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.*, 235 N.Y. 338, 345-47, 139 N.E. 470, 471-72 (1923) (price omitted); *Oscar Schlegal Mfg. Co. v. Peter Cooper's Glue Factory*, 231 N.Y. 459, 464, 132 N.E. 148, 150 (1921) (price omitted); see also Prosser, *Open Price in Contracts for the Sale of Goods*, 16 MINN. L. REV. 733, 734-36 (1932).

151. Compare U.C.C. § 2-205 comment 1 (expressly modifying traditional consideration requirement) with materials cited in notes 299-301 (without separate consideration, offer revocable until accepted, even if offeree relies on offer).

152. Compare 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at §§ 60-60b; *Gray v. Hinton*, 7 F. 81, 83-85 (C.C. Neb. 1881) with U.C.C. §§ 2-206(2) and 2-206 comment 3.

153. U.C.C. § 2-206 comment 1.

154. *Poel v. Brunswick-Balke-Collender Co. of N.Y.*, 216 N.Y. 310, 318-20, 110 N.E. 619, 621-22 (1915); *J. Bishop*, *supra* note 70, at 179; 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 73, and cases cited therein at n.38.

155. U.C.C. § 2-207(1) and comment 2.

156. *Alaska Packers' Ass'n v. Domenico*, 17 F. 99 (9th Cir. 1902); *Lingenfelder v. Wainwright Brewery Co.*, 103 Mo. 578, 15 S.W. 844 (1891); 1 S. WILLISTON, *CONTRACTS* (1920); *supra* note 3, at § 132; *Discussions: Proposed Final Draft of the Uniform Revised Sales Act*, 21 A.L.I. Proc. 63, 115-16 (1944) [hereinafter *Discussions*] (statement of Karl Llewellyn).

157. U.C.C. § 2-209(1) and comments 1-2.

158. See U.C.C. § 2-305(1) (parties may make a contract for sale even though price is not

frequently required judicial evasion by the judicious use of promissory estoppel.¹⁵⁹ Under the theory of bargained-for consideration, each of these traditional, technical rules had prevented courts from determining whether the parties truly had made an agreement and whether the resulting injustices merited either covert evasion or overt evasion through the use of section 90.¹⁶⁰ Llewellyn, by freeing courts from the technical rules, freed them from having to use promissory estoppel.

C. *Regarding Promissory Estoppel as Immaterial*

1. *Section 2-204*

Section 2-204(1), the basic formation provision of Article 2, says that a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by the parties.¹⁶¹ Since it is the key formation provision of Article 2, it is the place where the drafters would have been most likely to include promissory estoppel, and indeed the section's references to "any manner sufficient to show agreement" and to "conduct by the parties" might be read to legitimate that doctrine. The history of section 2-204, however, contains no evidence that it was intended to endorse the use of promissory estoppel under the Code. To the contrary, the history establishes that Llewellyn instead wanted courts to focus on his own formation device, the agreement-in-fact. While it is true that some conduct can satisfy the requirements of both promissory estoppel and agreement-in-fact, the legislative history reveals that Llewellyn wished courts to look at conduct only as it related to the latter. In his view, the presence of detrimental reliance might occasionally support a finding that there was an agreement, but such reliance, in and of itself, was not a sufficient basis to grant recovery.

As discussed earlier, Llewellyn disagreed strongly with the way in which bargained-for consideration theory and its many encrustations of technical requirements had developed as a tool to prevent the enforcement of many agreements. Such a view did not mean that all of the theory—the need for consideration, the exchange of that consideration, and offer and acceptance—should be abolished. Those core elements still were, for the most part, useful for Llewellyn's theory of agreement, and he intended to retain them.

settled); U.C.C. § 2-306(1) (parties may make contract which measures quantity by seller's output or buyer's requirements); U.C.C. § 2-311(1) (contract may leave particulars of performance to be specified by one of the parties).

159. 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 38 (if plaintiff has partially performed contract for indefinite time, courts are reluctant to regard contract as terminable at will by defendant); *Goodman v. Dicker*, 169 F.2d 684, 684-85 (D.C. Cir. 1948) (fairness requires estoppel in situations of reliance on misrepresentations in sales contract); *Terre Haute Brewing Co. v. Dugan*, 102 F.2d 425, 427-28 (8th Cir. 1939) (better proof of reliance on indefinite contract would have justified enforcement); *Bassick Mfg. Co. v. Riley*, 9 F.2d 138, 139 (E.D. Pa. 1925) (reliance on indefinite dealership agreement makes contract enforceable).

160. 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 139 n.25; 1 S. WILLISTON, *CONTRACTS* (rev. ed.), *supra* note 10, at § 139; G. GILMORE, *supra* note 1, at 62.

161. *See* U.C.C. § 2-204(1).

In his 1931 essay, *What Price Contract?*,¹⁶² he wrote that contract law, which required mutual promises to support each other before a contract could be found, was arbitrary but "utterly necessary."¹⁶³ Indeed, contract law comfortably cared for the great bulk of business promises, giving trouble only on the fringes.¹⁶⁴ Those fringes included four classes of cases: firm offers, unilateral offers revoked after partial performance, modifications of ongoing business arrangements, and unbargained-for reliance.¹⁶⁵ To this list, of course, must be added the many minor technicalities, the elimination of which has just been discussed and the concept of title, which Llewellyn completely abolished.

What is striking about this list is the way in which Llewellyn later discussed these four types of cases. He repeatedly argued for the enforceability of firm offers,¹⁶⁶ spent two articles explaining how the courts should handle unilateral and bilateral contracts,¹⁶⁷ and frequently discussed his proposed treatment of modifications.¹⁶⁸ He made his views regarding these three trouble areas clear. He said nothing, however, about his views on promissory estoppel. The article questions even the doctrine's relevancy, saying that the use of unbargained-for reliance lay "chiefly in the field of family affairs" and had only a "doctrinal connection" with business.¹⁶⁹ Llewellyn's later writings recognized a much stronger connection between certain types of passive unbargained-for reliance and business,¹⁷⁰ but still he never suggested that courts should use this reliance as the basis for enforcement of promises. Indeed, he frequently contended the opposite.¹⁷¹

The strongest suggestion that promissory estoppel should be used when agreement could not be found came in the following lines:

When minds have really and unmistakably not only met but joined up, neither a precise process nor a precise instant has importance. But we pick a milestone. This sets a picture of non-inquiry into any "how much" or "whether" of demonstrative overt reliance; an inquiry which is administratively baffling, anyhow, and to be avoided if may be.¹⁷²

162. Llewellyn, *What Price Contract?*, *supra* note 41, at 704.

163. *Id.* at 742.

164. *Id.* at 742.

165. *Id.* See, e.g., Llewellyn, *Title*, *supra* note 41; Corbin, *The Uniform Commercial Code-Sales; Should it be Enacted?*, 59 YALE L.J. 821, 824-27 (1950) (removal of title concept from Code focuses attention on crucial matters, not inoperative concepts); see also *infra* text accompanying notes 202-336.

166. See *infra* text accompanying notes 308-13.

167. See Llewellyn, *Offer and Acceptance I*, *supra* note 41; Llewellyn, *Offer and Acceptance II*, *supra* note 41.

168. See Llewellyn, *Common-Law Reform*, *supra* note 41, at 867-69; Llewellyn, *Consideration*, *supra* note 41, at 778; Llewellyn, *Title*, *supra* note 41, at 200; Llewellyn, *What Price Contract?*, *supra* note 41, at 742.

169. See Llewellyn, *What Price Contract?*, *supra* note 41, at 742.

170. See *supra* text accompanying notes 116-20.

171. See *supra* text accompanying notes 116-26.

172. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 804. That same article made another favorable but uncertain reference to reliance. In a footnote, Llewellyn noted that Fuller's and Perdue's distinctions between the expectation interest and reliance interest were not relevant to his own arguments at the time, but that they would be relevant to his next article, especially

Llewellyn at this point was exalting only the value of his agreement theory: stressing agreement to the exclusion of reliance was advantageous because a court need never look at reliance. The other interpretation—that agreement theory was good because it required courts to look at reliance only when there was no agreement and when an inquiry into reliance could not be avoided—is quite improbable. In the first place, Llewellyn's writings are replete with criticisms of reliance theory. In the second, those same writings are devoid of discussions about promissory estoppel's application or explanations of its elements. If Llewellyn did intend promissory estoppel to serve as a backup to agreement theory, coming into play only when a court could find no agreement but still believed a promise should be enforced, why did he pay so little attention as to how it should work? In short, the only evidence that Llewellyn supported the use of promissory estoppel as a backup is that he did not expressly exclude it. Such an argument by negative implication cannot be trusted.

The development of section 2-204 before the NCC and ALI reinforces the idea that Llewellyn intended to reduce the importance of the bargained-for consideration doctrine and to emphasize the importance of agreement in fact, and that he did not intend to use promissory estoppel as a formation device. The drafters of section 2-204's antecedents intended a continuation of existing law,¹⁷³ whereas the statutorily mandated use of promissory estoppel in any significant capacity would have marked a major change. The first version of section 2-204 merely repeated the Uniform Sales Act's language that a contract could be made orally, in writing, by a mix of the two, or by inference from the conduct of both or all of the parties.¹⁷⁴ Reliance, of course, involved conduct by only one party.¹⁷⁵

The 1941 draft more clearly revealed Llewellyn's use of agreement at the expense of reliance. Although section 3 retained the language of the Uniform Sales Act, alternate section 3-A(I) said flatly that the first question for determination is whether the parties, as a matter of fact, had reached a business agreement,¹⁷⁶ and the introductory comment described the search for the agreement as the search for the substance of the case.¹⁷⁷ The same alternative section elaborated on the type of conduct that would suffice: the parties, by "their action," had to have recognized the existence

in its discussion of nonagreement based deals. See *id.* at 781 n.3. It is not clear to what article he was referring: *Offer and Acceptance II* marked the end to his series of four articles in the *Yale Law Journal*, and his next published pieces concerned the need for a new Sales Law. See Llewellyn, *Unhorsing Sales*, *supra* note 41; Llewellyn, *supra* note 90; Llewellyn, *Across Sales*, *supra* note 41. In his only later reference to Fuller and Perdue, Llewellyn suggested that their point—that courts tighten formation requirements when the legal obligation is too heavy—might explain existing judicial treatment of unfairness and unconscionability and the manner in which courts subconsciously tighten their interpretation of consideration's requirements when the proposed contract seems unfair. See Llewellyn, *Common-Law Reform*, *supra* note 41, at 875.

173. Uniform Revised Sales Act Comments (Feb. 1948) § 17, *reprinted in* KLP, *supra* note 32, at J.X.2.e. ("Subsection (1) continues without change the basic policy of Section 3 of the Original Act. . .").

174. 1940 UNIFORM ACT § 12(1), *reprinted in* 2 E. KELLY, *supra* note 33, at 183.

175. See, e.g., RESTATEMENT OF CONTRACTS § 90 (1932).

176. See 1941 REVISED ACT § 3-A(1) (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 347.

177. See *id.* alt. § 3-A(1) comment, *reprinted in* 1 E. KELLY, *supra* note 33, at 348-50.

of an agreement.¹⁷⁸ Unbargained-for reliance, of course, was action by only one party that had no necessary relation to whether an agreement had been made. The comments made the necessity of action related to performance even more clear. They described conduct as action in performance of the agreement.¹⁷⁹ This definition could not include unbargained-for reliance, since reliance does not necessarily involve performance. Further, the comments said the conduct had to relate to the factual closing of an agreement.¹⁸⁰ The doctrine of promissory estoppel required only evidence of reliance on a promise, not evidence of agreement.

Later drafts simplified the language of these comments but still referred to agreements in "which the parties have so proceeded," again excluding unbargained-for reliance and retaining the need for actions by both parties.¹⁸¹ The final version of section 2-204 and its comments omitted express exclusion of unbargained-for reliance, but retained the insistence on mutual, not unilateral, conduct.¹⁸² Furthermore, while comments to the 1944 and 1948 drafts said that the section was qualified by the statute of frauds, the general law of fraud, consideration, legality, "and the like," no mention was made of promissory estoppel.¹⁸³

The only comment that involved unbargained-for reliance by one party did not say that such reliance created an enforceable transaction.¹⁸⁴ Instead, the comment made the transaction enforceable because the conduct of both parties showed that they had reached an agreement.¹⁸⁵

Despite this legislative history, at least six cases have used promissory estoppel to enforce a transaction for the sale of goods, even though the

178. See *id.* alt. § 3-A(1), reprinted in 1 E. KELLY, *supra* note 33, at 347.

179. 1941 REVISED ACT alt. § 3-A(2) comment (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 348.

180. *Id.*

181. 1944 REVISED ACT § 17 comment (3d Draft), reprinted in 2 E. KELLY, *supra* note 33, at 128.

182. U.C.C. § 2-204(1) and comment (1978).

183. 1944 REVISED ACT § 17 comment (3d Draft), reprinted in 2 E. KELLY, *supra* note 33, at 128; Uniform Revised Sales Act Comments (Feb. 1948) § 17 comment, reprinted in KLP, *supra* note 32, at J.X.2.e.

184. See 1944 REVISED ACT § 17 comment (3d Draft), reprinted in 2 E. KELLY, *supra* note 33, at 128-29.

185. *Id.* In the comment, a dairy farmer had a marketing arrangement with a distributor. *Id.* at 128. When someone offered to buy his herd of milk cows, the farmer demanded that the distributor raise the price it paid for his milk. *Id.* The distributor responded with a proposal that the farmer found acceptable, except for one clause. *Id.* The distributor did not respond to the farmer's request for an additional term. *Id.* at 129. Instead of negotiating further, the farmer kept his herd and sold his milk to the distributor on the distributor's new terms. The distributor paid for the milk on the basis of its proposal. *Id.* The comment said that "[u]nder these circumstances it becomes clear . . . that the new contract has been closed." *Id.*

At first glance, this seems to refer to the farmer's unbargained-for reliance, that is, his decision to keep his herd because of the distributor's promise to raise the price it paid for his milk. But there is no evidence that the distributor knew that the farmer was contemplating the sale of his herd, nor is there evidence that the market for dairy herds declined after the farmer made his decision. This means that the farmer's reliance was neither foreseeable nor detrimental. Furthermore, the farmer continued to supply milk and the distributor continued to accept it on the terms of the distributor's proposal. This conduct in and of itself is sufficient to establish a contract. The comment does not suggest that the farmer's unbargained-for reliance alone would have supported enforcement; such reliance merely reinforced the conclusion that the parties' mutual conduct had formed a contract.

elements of a traditional contract for sale were clearly present. In *Pedi Bares, Inc. v. P & C Food Markets, Inc.*,¹⁸⁶ the court found that the plaintiff-seller accepted orders from the defendant-buyer's stores, shipped the goods, billed the buyer, received partial payment from the buyer, was assured that unpaid invoices would be paid, continued to ship, received additional payments, and, after filling all orders, learned that the buyer had stopped payment.¹⁸⁷ The court's summary of its holding can best be described as an example of cognitive dissonance:

The record shows an offer, acceptance, shipment of the goods by Pedi Bares, the receipt of the goods, and partial payment by P. & C. Pedi Bares relied to its detriment on the conduct of P & C. We agree with the trial court that the doctrine of promissory estoppel bars P & C from denying the contract.¹⁸⁸

The court did not explain why it used promissory estoppel when all the elements of an agreement were present, nor did it explain why it believed Article 2 resolved the statute of frauds question but did not apply to the formation issue—the opinion does not even mention section 2-204.¹⁸⁹

The *Pedi Bares* court is not alone in this error. A number of cases that involve a transaction for the sale of goods discuss enforcement based on promissory estoppel without mentioning or considering section 2-204.¹⁹⁰ Although Professor Summers suggested that courts use general equitable principles to carve out exceptions to Code rules in cases where those rules produce injustice, these courts seem oblivious to the rules,¹⁹¹ let alone to the question of whether the rules would produce an injustice. In other words, the wholesale use of promissory estoppel for non-Code transactions has tempted some courts into doctrinal sloppiness when the U.C.C. clearly applies.

A number of cases, however, do use section 2-204 as it was intended regarding promissory estoppel.¹⁹² In *Intersynco Suisse, S.A. v. Amtraco Supply*

186. 567 F.2d 933 (10th Cir. 1977).

187. See *id.* at 935-36.

188. *Id.* at 936 (citation omitted).

189. This is not because the court had doubts about Article 2's general application: immediately after the promissory estoppel discussion, the court applied U.C.C. § 2-201(3)(c) (7 KAN. STAT. ANN. § 84-2 201(3)(c)) to defeat the statute of frauds problem. *Id.* at 936.

190. See, e.g., *Walters v. Marathon Oil Co.*, 642 F.2d 1098, 1099 (7th Cir. 1981) (gasoline); *Burk v. Emmick*, 637 F.2d 1172, 1173 & n.2 (8th Cir. 1980) (cattle); *Burst v. Adolph Coors Co.*, 503 F. Supp. 19, 21-23 (E.D. Mo. 1980) (beer distributorship); *A & M Fix-It v. Schwinn Bicycle Co.*, 494 F. Supp. 175, 178 (D. Utah 1980) (bicycles); *Crook v. Mortenson-Neal*, 727 P.2d 297, 300-04 (Alaska 1986) (building materials); *Pacific Architects Collaborative v. California*, 166 Cal. Rptr. 184, 189-91, 100 Cal. App. 3d 110, 122-23 (1979) (mobile housing trailers); *Southwest Water Servs. v. Cope*, 531 S.W.2d 873, 877 (Tex. Civ. App. 1975) (water).

191. This is especially true in those cases that use Article 2 to decide other issues in the case, but ignore Article 2's formation rules. See, e.g., *Pedi Bares*, 567 F.2d at 936; *Burk v. Emmick*, 637 F.2d at 1173 n.2.

192. See *Cayuga Constr. Corp. v. Vanco Eng'g Co.*, 423 F. Supp. 1182, 1185 (W.D. Pa. 1976) (court considers plaintiff's promissory estoppel argument but finds no contract absent an offer and acceptance); *Smith v. Boise Kenworth Sales*, 102 Idaho 63, 68, 625 P.2d 417, 422 (1981) (promissory estoppel not a substitute for an agreement between the parties); *Gumz v. Starke County Farm Bureau Coop. Ass'n*, 383 N.E.2d 1061, 1065-66 (Ind. Ct. App. 1978) (court notes seller knew buyer had resold goods promised by seller, but court uses communications between parties and partial performance by both parties to find agreement); *Jos. Schlitz*

Co.,¹⁹³ the court ignored the presence of reliance and instead focused on the presence of agreement. In the transaction involved in that case, the seller promised to provide materials to a supply company, which then planned to resell those materials. The seller delivered some of the materials, the buyer paid for them, and the seller refused to deliver the rest.¹⁹⁴ The court found that an agreement had been reached under section 2-204 based on the exchange of several communications and the partial performance by both parties;¹⁹⁵ the court did not consider the buyer's unbargained-for reliance in reselling the goods.

Other courts, somewhat less properly, have found that an agreement existed and then have used promissory estoppel as a backup or alternative holding. The court in *Bullock v. Joe Bailey Auction Co.*,¹⁹⁶ found that a crane had been sold at an auction, but also pointed out that the seller contesting the contract had allowed the buyer to perform costly repairs on the crane while it was within the seller's control.¹⁹⁷

Finally, and most importantly, a number of courts have found that no agreement existed and denied liability, even though the plaintiff had committed an act of reliance. A good example of this is *D.R. Curtis Co. v. Mason*,¹⁹⁸ in which a grain elevator operator wanted to buy a farmer's crops. The evidence was that the parties had discussed the sale orally, including all other terms, the operator sent the farmer a memorandum that the operator regarded as confirmation of an agreement, and the operator then resold the grain he believed he had purchased. Meanwhile, the farmer received the form, stuck it in the glovebox of his pickup, and said nothing to the elevator until, after several calls from the buyer, he finally wrote "not accepted" on the form and mailed it back.¹⁹⁹ The court proceeded entirely under section 2-204, found that no agreement had been reached, and denied liability, even though the operator's reliance was clear.²⁰⁰ Other cases have held that an offeree who receives a promise and relies on it before formally accepting cannot recover under section 2-204, reflecting Llewellyn's concern that promissory estoppel was unfair because it bound only one side and left the other side free to back out of the deal.²⁰¹

Brewing Co. v. Central Beverage Co., 172 Ind. App. 81, 93-94, 359 N.E.2d 566, 575 (1977) (trial court could have found agreement under § 2-204 based on course of performance by parties; plaintiff's expenditures in reliance on defendant's promise not used); *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 540, 369 A.2d 1017, 1024 (1977) (presence of agreement based on letters and course of performance by parties; no use made of plaintiff's acts of reliance); *Kleinschmidt Div. of SCM Corp. v. Futuronics Corp.*, 41 N.Y.2d 972, 980, 363 N.E.2d 701, 707 (1977) (court states basic philosophy of § 2-204 is that without agreement there is no contract).

193. 590 F.2d 55 (2d Cir. 1979).

194. *Id.* at 56.

195. *Id.*

196. 580 P.2d 225 (Utah 1978). See also *United McGill Corp. v. Gerngross Corp.*, 689 F.2d 52, 53 n.2 (3rd Cir. 1982).

197. *Bullock*, 580 P.2d at 228.

198. 103 Idaho 476, 649 P.2d 1232 (1982).

199. *Id.* at 476-77, 649 P.2d at 1232-33.

200. *Id.* at 478, 649 P.2d at 1234.

201. See *Cayuga Constr. Corp. v. Vanco Eng'g Co.*, 423 F. Supp. 1182, 1185 (W.D. Pa. 1976) (promissory estoppel cannot be used by plaintiff who failed to accept offer); *Smith v. Boise*

Llewellyn's vision for section 2-204, as shown by his articles, his comments to the ALI and NCC, and his drafts of the section and its comments, was that the presence of an agreement-in-fact would become the crucial issue for courts. To the extent that an act of reliance supported the existence of such an agreement, it could be used, but otherwise it was irrelevant. Those courts that have ignored this injunction have done so only by ignoring the very existence of section 2-204, let alone Llewellyn's intent as to how that section should be used.

2. Section 2-206 and the Rules of Acceptance

Section 2-206 deals with the problem of an acceptance that would bind the offeree but not the offeror under bargained-for consideration rules. Orthodox doctrine divided offers into unilateral and bilateral offers: the former could be accepted only by full performance²⁰² and the latter only by a promise from the offeree.²⁰³ The doctrine created several problems. A recipient of a bilateral offer who performed the contract without making a promise to do so had not accepted, and thus no contract had been made. More importantly, the maker of a unilateral offer could revoke the offer anytime before the offeree had completed performance, even if the offeree had begun to perform.²⁰⁴ To prevent the injustices that these rules caused, some courts took covert action, sometimes ruling that reliance by an offeree on a unilateral offer converted it into a bilateral offer,²⁰⁵ other times finding a bargain where the rules clearly said none existed.²⁰⁶ The first *Restatement* and Article 2 confronted the problem in ways that appear similar, but that are actually quite different.

The first *Restatement* attacked the problem by means of a half-hearted effort to eliminate the technical nature of the rules and by means of promissory estoppel. If it was unclear whether the offer was unilateral or bilateral, a court was to presume the latter.²⁰⁷ If the offeree partially performed in response to a unilateral offer, the offeror was bound to perform, contingent upon completion of performance by the offeree.²⁰⁸

Kenworth Sales, 102 Idaho 63, 68, 625 P.2d 417, 421-22 (1981) (same); Kleinschmidt Div. of SCM Corp. v. Futurionics Corp., 41 N.Y.2d 972, 973, 363 N.E.2d 701, 702 (1977) (affirming trial court finding that, despite bargained-for reliance by plaintiff, no agreement had been reached).

202. *Petterson v. Pattberg*, 248 N.Y. 86, 88, 161 N.E. 428, 429 (1928); 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at §§ 60, 60b; Wormser, *The True Conception of Unilateral Contracts*, 26 *YALE L.J.* 136, 136-39 (1916).

203. 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 65.

204. *Id.* at §§ 60-60b; *Gray v. Hinton*, 7 F. 81, 83-85 (C.C. Neb. 1881); Wormser, *supra* note 179, at 138.

205. 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 60b; *see, e.g.*, *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 P. 1086 (1902); *Hayes v. Clark*, 95 Conn. 510, 111 A. 781 (1920).

206. Havighurst, *The Restatement of the Law of Contracts*, 27 *ILL. L. REV.* 910, 922 (1933).

207. *RESTATEMENT OF CONTRACTS* § 31 (1932). Of course, there remained the problem of a doubtful offer to which the offeree responded by performing. In theory, § 31 would have said the offer was bilateral, and § 52 then said that if an offer was bilateral, acceptance did not occur until the promise was given, except as stated in § 63, which said that performance with notice was an acceptance of a bilateral offer. The relationship of § 52 and its "exception," § 63, was soon questioned; *see* Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 809 n.45.

208. *RESTATEMENT OF CONTRACTS* § 45 (1932).

Llewellyn recognized the value of the latter rule,²⁰⁹ but his resolution of the problem was quite different. The *Restatement* had tried to make the difference between unilateral and bilateral contracts less important—Llewellyn announced that he did not believe unilateral contracts really existed.²¹⁰ The vast majority of offerors, he argued, merely wanted an acceptance and did not care whether it was in the form of performance or promise.²¹¹ In addition, he blasted the orthodox theory that a unilateral offer was revocable until full performance had been completed.²¹² Unlike the *Restatement*, however, which said that partial performance bound the offeror, conditioned upon full performance by the offeree, Llewellyn proposed going a step further. He contended that partial performance was an acceptance that, standing alone, created a contract.²¹³ He stressed that partial performance by the offeree constituted an acceptance that created a contract binding both sides. He criticized his mentor, Arthur Corbin, for adhering to the *Restatement* position and for insisting that partial performance bound only the offeror.²¹⁴ Llewellyn's reasoning was simple, and reflected one of the basic problems of reliance doctrine:

We have seen that it will be rough on the offeree if he is not permitted to rely on having obligated the offeror; but it will be even rougher on the offeror if he is obligated whereas the offeree, at the offeree's option, is not—when there is no reason for the inequality.²¹⁵

In a sense, reliance doctrine bound only one side, leaving the other side free to play the market. Section 90's substantial detriment element required a considerable investment by the offeree before the offeror was bound, an investment which the offeree would have to sacrifice in order to play the market.²¹⁶ For the analogous situation presented by unilateral contracts, however, section 45 merely required part performance, and did not require that such performance be significant.

Llewellyn's arguments that the *Restatement's* treatment of unilateral

209. See, e.g., NCC Consideration in Committee of the Whole of the Revised Uniform Sales Act (August 18, 1943), reprinted in KLP, *supra* note 32, J.V.2.h., at 59 (statement of Llewellyn); 1941 REVISED ACT alt. § 3-D comment 1 (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 254; Llewellyn, *What Price Contract?*, *supra* note 41, at 742, 742 n.79.

210. Llewellyn, *Offer and Acceptance I*, *supra* note 41, at 36 (dividing offers into unilaterals and bilaterals is like dividing mankind into those who are bearded ladies and those who are not; it suggests the presence of more bearded ladies than there actually are); Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 813-14.

211. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 788, 809.

212. *Id.* at 786-89, 802-18. He mourned the fact that there was "a fine flag pole outside my classroom window, with a golden crown on top, and something very lovely went out of my life two years ago when the cases finally compelled me to stop revoking with the student almost up to the crown." *Id.* at 787 n.9.

213. Llewellyn, *Offer and Acceptance I*, *supra* note 41, at 35. The language he used clearly foreshadowed the text of U.C.C. § 2-206(1), and he wrote that its widespread use would mean that half the purpose of his article had been fulfilled. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 788-89.

214. Llewellyn, *Offer and Acceptance I*, *supra* note 41, at 35.

215. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 795 n.23.

216. Section 90's substantial detriment element requires a considerable investment that the offeree would have to sacrifice if she decided to back out of the transaction because of changes in the market. RESTATEMENT OF CONTRACTS § 90 (1932).

offers was both unrealistic and biased against the offeror reappeared when Llewellyn presented the predecessors of section 2-206 to the NCC and ALI. Neither the Uniform Sales Act nor Llewellyn's 1940 Uniform Act had addressed the problems noted above; the second draft of the 1941 Revised Act addressed the problem in two sections. The first, which was to become section 2-206(1)(b), stated that an offer to buy goods for prompt shipment could be accepted either by delivery or a promise of such delivery,²¹⁷ thereby eliminating the distinction between unilateral and bilateral short-term offers. The other relevant provision of the 1941 Revised Act, alternative section 3-D, addressed the problem more directly. Its introductory comments suggested the solution which Llewellyn had selected. It noted that courts were beginning to handle the problem of the unilateral offer and partial performance by determining whether there was in fact an agreement instead of formally applying traditional rules.²¹⁸ Alternative section 3-D followed that policy. In language greatly resembling the modern section 2-206(1)(a), it said that an offer was open to acceptance "in any manner which is reasonable in the circumstances," and its comments also condemned the unilateral offer as the "queerest aberration of classroom doctrine."²¹⁹ The language of the 1943 draft was even closer to the modern version.²²⁰ In presenting the 1943 draft to the National Conference of Commissioners on Uniform State Laws, Llewellyn said that his proposed language followed sections 45 and 90 of the *Restatement of Contracts*,²²¹ but his assurance was somewhat questionable. Sections 45 and 90 used reliance by one party, not agreement by two parties, to enforce transactions, and while Llewellyn said unilateral offers were merely classroom aberrations, section 45 was written expressly to govern the use of unilateral offers in the real world.

Significantly, Llewellyn did not repeat his assurances in 1944. The 1944 draft failed to cite sections 45 and 90 of the *Restatement*,²²² and its comments clearly revealed Llewellyn's concerns with the one-sided nature of the *Restatement's* reliance-based provisions. The comments noted that sometimes the beginning of performance by a recipient of a unilateral offer was a promise to fully perform and thus accept the offer, while, in other cases, the offeree was merely testing out the feasibility or the wisdom of accepting the offer.²²³ To protect the offeror, who did not know the offeree's true intentions, the comments said that partial performance was an acceptance "only if it is unambiguously expressive of intention to

217. 1941 REVISED ACT § 3(1)(a), at 61 (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 342.

218. *Id.* Introductory Comment on alt. §§ 3 to 3-J at 64-65, *reprinted in* 1 E. KELLY, *supra* note 33, at 344-45.

219. *Id.* alt. § 3-D comment on subsection 1, *reprinted in* 1 E. KELLY, *supra* note 33, at 354.

220. 1943 REVISED ACT § 19 (3d Draft), *reprinted in* KLP, *supra* note 32, at J.V.2.h.2.

221. NCC Consideration in Committee of the Whole of the Revised Uniform Sales Act (August 18, 1943), *reprinted in* KLP, *supra* note 32, J.V.2.h., at 59.

222. Compare 1944 REVISED ACT § 19 comments 1 & 2, *reprinted in* 2 E. KELLY, *supra* note 33, at 137-39 with 1941 REVISED ACT alt. § 3-D comment on Subsection 1, at 74 (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 354 and NCC Consideration in Committee of the Whole of the Revised Uniform Sales Act (August 18, 1943), *reprinted in* KLP, *supra* note 32, J.V.2.h., at 59 (statement of Llewellyn).

223. 1944 REVISED ACT § 19 comment on subsection 3, at 127, *reprinted in* 2 E. KELLY, *supra* note 33, at 139.

engage" the offeree.²²⁴ This observation was supported by an illustration warning that an offeree could not begin performance and then, without the buyer's agreement and beyond a reasonable time for notification (which would bind the offeree) "combine irrevocability of the offer with absence of obligation on his own part to perform."²²⁵ The final comments to section 2-206 retained this rule, flatly stating that to constitute acceptance "a beginning of performance must unambiguously express the offeree's intention to engage himself."²²⁶ In short, reliance in and of itself does not create a contract. What creates a contract is an act that clearly expresses the offeree's intent to accept the offer and only incidentally constitutes detrimental reliance. Again, the emphasis is not on reliance itself, but on the manner in which reliance can be used to show the presence of agreement.

This emphasis on agreement and de-emphasis on the value of reliance is further reflected in the notice requirement of section 2-206(2). The *Restatement* said that if the recipient of a unilateral offer decided to perform, she did not have to notify the offeror, unless she should have known that the offeror lacked adequate means to discover the performance.²²⁷ The problem with the rule lay in the fact that during the time between partial performance by the offeree and discovery of that partial performance by the offeror, the offeror was bound while the offeree was free to withdraw. To protect the offeror in a similar situation under the Code, the 1943 Revised Act (3rd Draft) said that an offeror who relied to his prejudice on an offeree's failure to give notice of acceptance by performance could treat the offer as having lapsed before acceptance.²²⁸ In essence, this allowance balanced protection of the offeree's reliance interest against the offeror's reliance interest.

The 1944 Revised Act, however, made a significant change that was far more consistent with Llewellyn's general antipathy toward reliance. That year, Llewellyn told the NCC that it would be a serious burden to require the offeror to show reliance on a lack of notice.²²⁹ In response, the 1944 draft simply said that an offeror who did not receive notice could treat the offer as having lapsed before acceptance.²³⁰ In short, the 1944 revision dropped the reliance requirement. The final version of section 2-206(2) retained this language with minor changes,²³¹ and the final comments were even more explicit. The notice requirement in the text of section 2-206(2) suggests that notice is the primary way by which the offeree who begins performance declares her intention to accept the offer and to bind herself, and comment 3 reinforces this idea. The first sentence of that comment says that beginning performance by the offeree binds the offeror *only* if followed by notice within a reasonable time. Such notice obviously reduces

224. *Id.*

225. *Id.* illustration 1, reprinted in 2 E. KELLY, *supra* note 33, at 140.

226. U.C.C. § 2-206 comment 3 (1962).

227. RESTATEMENT OF CONTRACTS § 56 (1932).

228. 1943 REVISED ACT § 19 (3d Draft), reprinted in KLP, *supra* note 32, at J.V.h.2.

229. NCC Consideration in Committee of the Whole of the Report on Status of the Uniform Revised Sales Act (Sept. 5-9, 1944), reprinted in KLP, *supra* note 32, J.VI.2.m., at 3 (statement of Llewellyn).

230. 1944 REVISED ACT § 19(3), reprinted in 2 E. KELLY, *supra* note 33, at 33.

231. U.C.C. § 2-206(2) (1962).

the offeree's ability to play the market. The third sentence explains that notice is necessary to protect both parties. The final sentence goes even further in its protection of the offeror, stating it is possible under common law that "at the offeror's option" beginning performance may constitute acceptance. This truly would protect the offeror against the offeree who, while playing the market herself, began token performance in order to bind the offeror.

The final version of section 2-206(1) appears to have produced relatively little case law in which reliance played a role, a tribute perhaps to the section's ability to eliminate traditional litigation over unilateral and bilateral offers. The case law that does exist is consistent with Llewellyn's intent, as *Empire Machinery v. Litton Business Tel. Systems* suggests.²³² In that case, the defendant-seller issued to the plaintiff-buyer an offer that said that the agreement would become binding only upon approval by the seller's home office, approval that never was granted.²³³ The buyer, however, had purchased other equipment at the seller's request that was needed to make the seller's system work.²³⁴ The seller later tried to escape liability, and won in the trial court. The appellate court, however, reversed and remanded. It directed the trial court to consider the conduct of both parties, including the buyer's purchase of other equipment at the seller's request.²³⁵ According to the court, "if the offeree takes steps in furtherance of its contractual obligations which would lead a reasonable businessman to believe that the contract had been accepted, [that] may constitute acceptance."²³⁶ This rule is quite consistent with section 2-206's legislative history, which indicates that an offeree's reliance cannot be an acceptance unless it unambiguously evidences an intent to be bound.

232. 115 Ariz. 568, 566 P.2d 1044 (1977).

233. *Id.* at 571, 566 P.2d at 1046.

234. *Id.*

235. *Id.* at 574, 566 P.2d at 1049.

236. *Id.* at 574, 566 P.2d at 1050. The need for reliance to show a clear acceptance of the contract by the relying party also appears in *Smith v. Boise Kenworth Sales*, 102 Idaho 63, 68, 625 P.2d 417, 421-22 (1981) (despite plaintiff's reliance, no contract present because plaintiff testified he thought he could "bow out" of transaction at any time); see also *Nasco Corp. v. Dahltron, Inc.*, 74 Ill. App. 3d 302, 308-09, 392 N.E.2d 1110, 1116 (1979) (bargained-for reliance by offeree, when combined with other facts, showed existence of contract).

This concept was extremely important in the improbable case of *Farley v. Clark Equipment Co.*, 484 S.W.2d 142 (Tex. Ct. App. 1972). The plaintiff's agents visited defendant's business, asked him if he could make 100 trailers for the plaintiff, received a price quotation, and left. *Id.* at 147. Several months later, the defendant received from the plaintiff a check for \$77,420 (an \$18 reduction per unit from the defendant's quoted price), but the defendant purchased the needed materials and began work anyway. *Id.* Unfortunately, plaintiff had meant to send the check to a third-party, whose account number with the plaintiff was similar to the defendant's account number. *Id.* The plaintiff demanded return of the check and contended that no contract had been created, despite the defendant's acts of reliance. *Id.* at 147. The court agreed, noting, among other things, that the defendant did not inform the plaintiff of his "acceptance," and, citing § 2-206 comment 3's injunction that to protect both parties, notice must follow in due course after reliance for the reliance to constitute acceptance. *Id.* at 148.

D. Rejecting Promissory Estoppel

1. Section 2-201: The Statute of Frauds

One of the most common debates involving reliance and Article 2 concerns the propriety of using promissory estoppel to enforce a contract that otherwise would not be enforceable because of section 2-201, Article 2's statute of frauds.²³⁷ The courts that have addressed the issue are split: some completely refuse to use promissory estoppel,²³⁸ some apply it only when fraud or unconscionability are present,²³⁹ and some apply it whenever the ordinary elements of promissory estoppel are present.²⁴⁰ Although the last approach appears more consistent with Article 2's general tendency to abolish technical requirements, it actually conflicts sharply with Llewellyn's attitude toward the statute of frauds as reflected in section 2-201's legislative history, language, and structure. Section 2-201 was Llewellyn's effort to establish easily-satisfied standards that, if met, would enable a court to be sure that a contract really had been made. Because promissory

237. See P. HILLMAN, J. McDONNELL & S. NICKLES, *supra* note 132, at ¶ 3.03[1]; J. WHITE & R. SUMMERS, *supra* note 17, at 68-70; Metzger & Phillips, *Promissory Estoppel and § 2-201 of the Uniform Commercial Code*, 26 VILL. L. REV. 63, 68-69 (1980). A number of commentators have favored repealing or significantly modifying § 2-201. Bruckel, *The Weed and The Web: Section 2-201's Corruption of the U.C.C.'s Substantive Provisions—The Quantity Problem*, 1983 U. ILL. L. REV. 811, 815, and materials cited. Bruckel briefly discusses Llewellyn's intentions *re* § 2-201, but the only legislative history she uses is the 1954 N.Y. COMMISSION REPORT. *Id.* at 846-50. The purpose of this section is not to debate the merits of Llewellyn's intentions or the wisdom of repealing § 2-201, but rather to argue that until § 2-201 is repealed, it should be interpreted as Llewellyn intended it to be interpreted.

238. See, e.g., *FMC Fin. Corp. v. Reed*, 592 F.2d 238, 243 (5th Cir. 1979); *C.R. Fedrick v. Borg-Wagner Corp.*, 552 F.2d 852, 856-57 (9th Cir. 1977); *Cox v. Cox*, 292 Ala. 106, 110-11, 289 So. 2d 609, 612 (1974); *C.G. Campbell & Son v. Comdeq Corp.*, 586 S.W.2d 40, 41 (Ky. Ct. App. 1979); *Farmland Serv. Coop v. Klein*, 196 Neb. 538, 542-45, 244 N.W.2d 86, 89-90 (1976); *Schott Grain Co. v. Rasmussen*, 197 Neb. 267, 267-68, 248 N.W.2d 42, 42 (1976); *H. Molsen & Co. v. Hicks*, 550 S.W.2d 354, 356 (Tex. Civ. App. 1977); *Lige Dickson Co. v. Union Oil Co. of Cal.*, 96 Wash. 291, 299, 635 P.2d 103, 107 (1981).

239. See, e.g., *Austin Power v. Insulation Servs.*, 467 F. Supp. 110, 113 (N.D. Tex. 1979); *Rockland Indus. v. Frank Kasmir Assocs.*, 470 F. Supp. 1176, 1180 (N.D. Tex. 1979); *Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance*, 463 F. Supp. 543, 552-54 (N.D. Miss. 1978); *Tiffany v. W.M.K. Transit Mix*, 16 Ariz. App. 415, 419-21, 493 P.2d 1220, 1224-26 (1972); *Del Hayes & Sons v. Mitchell*, 304 Minn. 275, 281-86, 230 N.W.2d 588, 592-95 (1975); *Farmers Coop. Ass'n of Churchs Ferry v. Cole*, 239 N.W.2d 808, 812-14 (N.D. 1976); *Edward Joy Co. v. Noise Control Prods.*, 111 Misc. 2d 64, 65-66, 443 N.Y.S.2d 361, 362 (1981); *Swerdloff v. Mobil Oil Corp.*, 427 N.Y.S. 266, 268-70, 74 A.D.2d 258, 261-63 (1980); *Darrow v. Spencer*, 581 P.2d 1309, 1312-13 (Okla. 1978).

240. *Allen M. Campbell Co. v. Virginia Metal Indus.*, 708 F.2d 930, 932-34 (4th Cir. 1983); *R.S. Bennett & Co. v. Economy Mechanical Indus.*, 606 F.2d 182, 186-88 (7th Cir. 1979); *Ralston Purina Co. v. McCollum*, 271 Ark. 840, 843 44, 611 S.W.2d 201, 203 (Ark. Ct. App. 1981); *Warder & Lee Elevator v. Britten*, 274 N.W.2d 339, 341-43 (Iowa 1979); *Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, 177-80, 547 P.2d 323, 329-30 (1976); *Northwest Potato Sales v. Beck*, 41 Mont. 362, 364-65, 678 P.2d 1138, 1140-41 (1984); *Jamestown Terminal Elevator v. Heib*, 246 N.W.2d 736, 741-42 (N.D. 1976); *Potter v. Hatter Farms*, 56 Or. App. 254, 258-64, 641 P.2d 628, 631-34 (1982); *Atlantic Wholesale Co. v. Solondz*, 283 S.C. 36, 40-41, 320 S.E.2d 720, 723-24 (S.C. Ct. App. 1984); *Farmers Elevator Co. of Elk Point v. Lyle*, 90 S.D. 86, 91-92, 238 N.W.2d 290, 293 (1976); see also *Meylor v. Brown*, 281 N.W.2d 632, 635-36 (Iowa 1979) (holding that unbargained-for reliance may overcome § 2-201, but strongly suggesting that trial court determine whether oral agreement existed before it decides to use promissory estoppel).

estoppel frequently does not supply a court with this kind of evidence, section 2-201 rejects its use.

At first glance, the Uniform Sales Act appeared far stricter than what emerged as section 2-201. The Act itself required only a signed writing,²⁴¹ but courts had interpreted this to mean that the writing must accurately express all of the terms of the contract.²⁴² Furthermore, oral testimony was allowed to show that a term had been omitted from or inaccurately expressed in the document.²⁴³ This meant a defendant could succeed in persuading a court that the written document was insufficient by falsely testifying that a term had been omitted. Both rules posed serious obstacles to anyone suing on a written contract.

Actually, the impact of these strict rules was lessened significantly in two ways. First, the statute allowed courts to fully enforce a contract that failed to satisfy the statute if the party seeking enforcement had partially performed,²⁴⁴ even if the partial performance was only a small part of the contract.²⁴⁵ Such partial performance could be established by oral testimony that, for example, the defaulting seller had accepted one dollar in partial payment on the price of the goods.²⁴⁶ This particular exception was a godsend to not only unscrupulous parties, but also to parties who believed their defaulting opponent was using the statute of frauds in bad faith. Of course, a court that believed one of the parties was using the statute of frauds in bad faith could find, albeit with a troubled conscience, that a partial payment or delivery had been made, and then enforce the entire contract.

Second, some courts used estoppel to enforce a promise that did not satisfy the statute. Equitable estoppel long had been used by courts of equity for this purpose.²⁴⁷ Since the doctrine prevented only the defendant

241. UNIFORM SALES ACT § 4(1), *reprinted in* I. MARIASH, A TREATISE ON THE LAW OF SALES app. A at 754-84 (1930).

242. I. MARIASH, A TREATISE ON THE LAW OF SALES § 62 (document must identify buyer, seller, price, goods involved, and warranties, if any) and § 54 n.24 (proof of additional term not in the writing makes the writing defective) (1930); 1 S. WILLISTON, CONTRACTS (1920), *supra* note 3, at § 575; 1 S. WILLISTON, SALES (1924), *supra* note 149, at § 102. However, a memorandum was not deficient for omitting a term, such as price, if the parties involved had intended to make a contract without establishing that term. *Id.* at § 171 (price), § 183 (warranty); L. VOLD, HANDBOOK ON THE LAW OF SALES, § 15, n.56 (2d ed. 1959) (delivery); 1 S. WILLISTON, CONTRACTS (1920), *supra* note 3, at § 575 (time); or if the term could be implied from the writing, *id.* at § 73; 1 S. WILLISTON, SALES (1948), *supra* note 40, at § 102a.

243. I. MARIASH, *supra* note 241, § 44; 1 S. WILLISTON, CONTRACTS (1920), *supra* note 3, § 573.

244. UNIFORM SALES ACT § 4(1), *reprinted in* I. MARIASH, *supra* note 241, app. A at 754-84; 1 S. WILLISTON, CONTRACTS (1920), *supra* note 3, at § 571.

245. I. MARIASH, *supra* note 241, § 59, *citing* *Coleman v. St. Paul & Tacoma Lumber Co.*, 110 Wash. 259, 188 P. 532 (1920); 1 S. WILLISTON, SALES (1948), *supra* note 49, § 94; Corbin, *The Uniform Commercial Code-Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 831 (1950); 1944 REVISED ACT (Proposed Final Draft No.1), *reprinted in* 2 E. KELLY, *supra* note 33, § 14(4)(c) comment, at 110-11.

246. 1 S. WILLISTON, SALES (1948), *supra* note 49, § 96 (presence of partial performance for jury to decide); Corbin, *The Uniform Commercial Code-Sales; Should it be Enacted?*, 59 YALE L.J. 821, 831 (1950); 1944 REVISED ACT (Proposed Final Draft No.1), *reprinted in* 2 E. KELLY, *supra* note 33, § 14 comment, at 110-11.

247. R. HILLMAN, J. McDONNELL & S. NICKLES, *supra* note 132, at ¶ 3.03[1]; Costigan, *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329, 343-45 (1913); Metzger & Phillips,

from going back on a prior affirmation of an existing fact,²⁴⁸ however, courts could use it to defeat the statute of frauds only when the defendant had told the plaintiff that the contract was enforceable without a writing, that the contract as written satisfied the statute, or that the defendant would put the contract in writing at some time in the future.²⁴⁹

The first *Restatement* adopted this position. It said that equitable estoppel could be used to overcome the statute of frauds, but it did not suggest that promissory estoppel could be used for the same purpose.²⁵⁰ Meanwhile, courts expressly refused to enforce oral contracts on which one party had relied,²⁵¹ although a few were lenient.²⁵²

Llewellyn held strong opinions on the subjects of the statute of frauds and promissory estoppel: he praised the former and rejected the latter. The extent to which he favored a strong statute is surprising but clear. His 1930 sales book recognized that the statute occasionally created an injustice, but said that it was "worth its cost in pinching some unfortunates from time to time."²⁵³ Later he would argue that the statute was even better suited to modern business needs than it had been for the commercial needs of 1677, and that its net effect was "almost certainly wholesome."²⁵⁴ He based his praise on his belief that the statute encouraged business people to put their deals in writing,²⁵⁵ which prevented fraud (although he found that to be a minor problem)²⁵⁶ and reduced good faith litigation by parties who honestly could not remember the exact language of an oral agreement.²⁵⁷ He did not believe the statute caused significant injustices, and argued that standard business practice was to put agreements in writing.²⁵⁸ Indeed, Llewellyn went so far as to say that business people should not rely on agreements that were not either put in writing or confirmed in writing.²⁵⁹

supra note 236, at 75.

248. *Fields v. Continental Ins. Co. of New York*, 170 Ga. 28, 152 S.E. 60 (1930); *Butler Bros. Co. v. Levin*, 166 Minn. 158, 207 N.W. 315 (1926); *Anderson v. Polleys*, 54 R.I. 296, 173 A. 114 (1934); E. FARNSWORTH, *CONTRACTS* 92 (1982).

249. 2 S. WILLISTON, *CONTRACTS* (rev. ed.), *supra* note 10, § 533A; Note, *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281, 290-92 (1951).

250. RESTATEMENT OF CONTRACTS § 178 comment f (1932).

251. 1 S. WILLISTON, *SALES* (1924), *supra* note 149, § 90, citing *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 136 P. 1158 (1913); 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 565; see also *Kahn v. Cecelia Co.*, 40 F. Supp. 878, 880 (S.D.N.Y. 1941).

252. See, e.g., *Union Packing Co. v. Cariboo Land & Cattle Co.*, 191 F.2d 814, 815 (9th Cir. 1951); *Moore v. Day*, 123 Cal. App. 2d 134, 140-41, 266 P.2d 51, 55 (1954); *Sessions v. Southern Cal. Edison Co.*, 47 Cal. App. 2d 611, 616-20, 118 P.2d 935, 938-39 (1941); *Tuck v. Gudnason*, 11 Cal. App. 2d 626, 631, 54 P.2d 88, 90 (1936); *Harmonie Club v. Smirnow*, 106 Conn. 243, 247-49, 137 A. 769, 770-71 (1927); *B.F.C. Morris Co. v. Mason*, 171 Okla. 589, 591-92, 39 P.2d 1, 3-4 (1934) (per curiam).

253. K. LLEWELLYN, *SALES*, *supra* note 49, at 917.

254. Llewellyn, *What Price Contract?*, *supra* note 41, at 747. Llewellyn went so far as to say that Ponce de Leon could have found the source of perpetual youth in the statute. *Id.*

255. *Id.*; K. LLEWELLYN, *SALES*, *supra* note 49, at 917.

256. K. LLEWELLYN, *SALES*, *supra* note 49, at 916.

257. *Id.*

258. Llewellyn, *What Price Contract?*, *supra* note 41, at 740, 747; K. LLEWELLYN, *SALES*, *supra* note 49, at 916-17.

259. Llewellyn, *What Price Contract?*, *supra* note 41, at 744.

Not only did Llewellyn support the statute of frauds, he opposed the use of reliance to avoid its requirements. In one article,²⁶⁰ he mused that perhaps a court should enforce an oral agreement if there was an objective indication of action by the plaintiff that was difficult to explain unless the defendant had made some kind of promise. In the next breath, however, he reconsidered, concluding by way of example that such a rule would not work on an employment contract for five years, nor should it, because it would violate the basic policy of the statute to require and thereby encourage written records.²⁶¹

This hostility to the use of reliance became even more clear when Llewellyn discussed Williston's Uniform Sales Act. That Act protected bargained-for reliance by making partial performance grounds for enforcing the contract.²⁶² Llewellyn flatly opposed this because even though such performance established the existence of a contract, it did not establish the quantity of goods involved in the contract.²⁶³

Llewellyn's support for the statute of frauds and his opposition to the use of promissory estoppel continued during the drafting of the Code. On several occasions, he expressed his belief that the statute's goal of encouraging written transactions was laudatory.²⁶⁴ He also tightened the Uniform Sales Act's rule regarding partial performance. No longer would such partial performance make the contract fully enforceable; instead, it would allow enforcement only to the extent of the partial performance.²⁶⁵ He reminded the ALI and NCC that the old rule's use of reliance to justify enforcement presented significant potential for abuse, and contended that his new rule would protect defendants against perjury by plaintiffs.²⁶⁶

Having severely limited this use of reliance, Llewellyn went on to approve the use of reliance in one limited instance. His drafts provided that if an oral contract involved goods that were to be specially made for the buyer and were not suitable for sale to others in the ordinary course of the seller's business, a seller who had begun substantially manufacturing them

260. Llewellyn, *Rule of Law*, *supra* note 41.

261. *Id.* at 1264.

262. UNIFORM SALES ACT § 4(1).

263. K. LLEWELLYN, *SALES* *supra* note 49, at 918.

264. 1941 REVISED ACT § 4 comment 3 (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 365 (draft based on position that encouraging written deals is "highly salutary" and that confirmation of oral deals is so common that "the statute no longer costs the price in occasional hardship which it cost a century ago."); *Discussions*, *supra* note 156, at 81.

265. U.C.C. § 2-201(3)(c) (1957). Section 14 (1)(c) of the third draft of the 1943 Revised Act provided that the contract was enforceable if the party had fully performed, *see* 1943 REVISED ACT § 14(1)(c) (3d Draft), *reprinted in* KLP, *supra* note 32, J.V.2.h., at 28-29, while § 14(2) stated that if there had been partial performance and the price could be apportioned among the goods delivered, the contract was enforceable to the extent of the partial performance. *See id.* § 14(2), *reprinted in* KLP, *supra* note 32, J.V.2.h., at 28-29. Section 14(4)(c) of the 1944 Revised Act featured language that was very close to the modern § 3(c). *See* 1944 REVISED ACT, *reprinted in* 2 E. KELLY, *supra* note 33, at 21.

266. 1941 REVISED ACT § 4 comment 4 (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 365-67; NCC Consideration in Committee of the Whole of the Revised Uniform Sales Act (Sept. 1941) (transcript), *reprinted in* KLP, *supra* note 32, at J.III.2.c.; 1954 COMMISSION REPORT, *supra* note 29, at 164; *see also Discussions*, *supra* note 156, at 81.

could enforce the deal.²⁶⁷ He carefully pointed out, however, that if the goods involved were not custom made for the buyer, the seller's commencement of work would not justify enforcement since this would not afford any evidence that he had agreed to sell them to the particular buyer.²⁶⁸ He told the ALI that this subsection was aimed at a "quite peculiar hardship," that it was much broader than orthodox law, and that "we should be very undesirous of going" beyond it.²⁶⁹ Despite his comments, he received a suggestion from the floor that the rule should protect a seller of custom-made goods if she had "made commitments otherwise prejudicial to the seller."²⁷⁰ This was a clear effort to protect unbargained-for reliance on the part of a custom-goods seller and Llewellyn flatly rejected it, stating that the existing section "goes as far as the cases and the sense of the situation warrant in taking protection where there is no memorandum at all."²⁷¹

The final version of section 2-201 was substantially similar to the drafts presented in 1943 and 1944, and all three versions reflected Llewellyn's opposition to the use of promissory estoppel in this area. First, they eliminated the two technical requirements of the traditional statute of frauds and thereby significantly reduced the number of cases in which promissory estoppel would be needed. Traditional doctrine provided that a writing did not satisfy the statute unless it was a full, accurate, and complete expression of all the terms of the contract. This enabled a defendant to escape liability if she could "prove" the existence of a term that was not in the writing.²⁷² The new section 2-201 explicitly rejected that rule.²⁷³ It also stated that when a merchant confirmed an oral deal in writing, both parties were bound if the recipient of that confirmation did not object within ten days.²⁷⁴ Under traditional law, only the person who had sent the confirmation was bound, leading to great injustices that Llewellyn previously had criticized.²⁷⁵ The Code's treatment of these two situations dramatically reduced the need for a plaintiff even to plead promissory estoppel.

Second, section 2-201 said that its exceptions to the statute of frauds were the only exceptions. The opening words of its first subsection stated that "[e]xcept as otherwise provided in this section" an oral contract for more than 500 dollars is not enforceable.²⁷⁶ Similarly, comment 4 provided

267. 1944 REVISED ACT § 14 (4)(a), *reprinted in* 2 E. KELLY, *supra* note 33, at 20; 1941 REVISED ACT § 4(1)(c)(iv) (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 363; *see also* U.C.C. § 2-201(3)(a) (1957).

268. *See Discussions*, *supra* note 156, at 80.

269. *Id.* at 84.

270. *Id.* at 85-86.

271. *Id.* at 86.

272. *See supra* text accompanying note 242. Llewellyn complained frequently and bitterly about this rule. *See, e.g.*, 1941 REVISED ACT § 4 comment 4 (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 365-67; NCC Consideration in Committee of the Whole of the Revised Uniform Sales Act (Sept. 1941) (transcript), *reprinted in* KLP, *supra* note 32, J.III.2.c., at 42; 1954 N.Y. COMMISSION REPORT, *supra* note 29, at 118, 163-64; *see also Discussions*, *supra* note 156, at 77, 82.

273. U.C.C. § 2-201(1) (1957); *id.* comment 1.

274. U.C.C. § 2-201(2) (1957).

275. The law said a writing was enforceable only against the party who signed, who would also be the party sending the confirmation.

276. U.C.C. § 2-201(1) (1957).

that “[f]ailure to satisfy the requirements of this section” prevents enforcement of a contract.²⁷⁷ This language indicates that section 2-201 itself is the only source of exceptions to its rules. The doctrine of estoppel, whose application is controlled by a different section,²⁷⁸ was excluded.

Third, the use of promissory estoppel would frustrate the statute’s purpose of ensuring that the parties actually had made the contract, at least when standard goods were involved. A manufacturer who made a thousand radios may claim that he did so in reliance on an oral order from a store, but he also may have produced those radios in anticipation of getting an order from that store or any other store. Llewellyn told the ALI that such a fact pattern furnished no evidence that the store actually had placed an order and said that the seller should not be allowed to overcome the statute of frauds.²⁷⁹

Fourth, section 2-201’s very structure shows that it was not intended to allow general application of promissory estoppel. The use of the doctrine would make superfluous subsections (3)(a) (the specially manufactured goods provision) and (3)(c) (the partial performance provision) since they merely protect a reliance interest. Curiously, these subsections provide statutory protection to the two types of situations in which a common-law court, employing section 1-103, would be most likely to invoke promissory estoppel. The manufacture of custom-made goods and partial performance of the contract are the two types of reliance that least needed statutory protection if section 1-103 could override section 2-201. Yet they were the only types that received such protection. This strongly suggests that sections 2-201(3)(a) and 2-201(3)(b) were intended to displace the promissory estoppel doctrine of section 1-103.²⁸⁰

That apparent structural anomaly was thoroughly intentional. During the ALI discussion of the statute of frauds in 1944, a member suggested from the floor that the protection afforded reliance should be expanded to protect unbargained-for reliance by makers of custom goods.²⁸¹ Llewellyn flatly rejected the proposal, saying that he was “very undesirous of going” beyond the limited protection that the subsection already gave unbargained-for reliance.²⁸² The ALI agreed and rejected the proposal,²⁸³ clearly indicating that it regarded subsection 3 as the maximum protection necessary for the reliance interest. During other discussions of the statute of frauds, Llewellyn continued to make clear his point that businesspeople had a duty to memorialize a transaction in writing before they relied on it,²⁸⁴ and he wrote that an “unconfirmed oral offer is therefore relied on at peril.”²⁸⁵

In short, the legislative history, the language, and the structure of section 2-201 show that promissory estoppel was not to be used to evade the rather simple requirements of the section. Whatever the inherent

277. *Id.* at § 2-201 comment 4.

278. *See id.* at § 1-103.

279. *See Discussions, supra* note 156, at 80.

280. U.C.C. § 1-103 (1957) (stating that section’s supplementary principles apply unless other provisions of the Code displace them).

281. *See Discussions, supra* note 156, at 85-86.

282. *Id.* at 84.

283. *Id.* at 86.

284. *Id.* at 84.

285. 1941 REVISED ACT § 3 comment 2 (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 343.

merits of this decision by the drafters,²⁸⁶ courts have paid little respect to the drafters' intent. Although a number of courts refuse to use promissory estoppel to avoid the statute of frauds,²⁸⁷ and others use the doctrine only in limited circumstances,²⁸⁸ a substantial number have freely used it.²⁸⁹ Many of the cases involve the operators of Midwestern grain elevators who claimed that they had orally agreed to buy grain from a farmer, that in reliance on the farmer's promise to sell they had immediately resold the grain, and that when the market price of grain later rose, the farmer backed out of the deal, forcing them to purchase substitute grain at a high price.²⁹⁰ Although the elevator's claim frequently was true, the use of promissory estoppel in such a situation would enable an elevator to sell grain it had not purchased, and then to claim that it did so in reliance on a promise by an unsuspecting farmer. In that respect, the situation is much like the case of the manufacturer of standard goods who claims that she has begun manufacture based on an oral order. Llewellyn feared the possibility for perjury by the plaintiff in such a case as well as good faith disagreements between the parties who honestly could not remember a particular term of the oral agreement.²⁹¹ He flatly said that in such a case the court should not protect a plaintiff.²⁹² Modern courts may disagree with Llewellyn's concerns, but until they confront those concerns and prove them wrong (or, of course, until modern legislatures amend section 2-201), they should follow Llewellyn's intent and abandon the use of promissory estoppel in this area.

2. Section 2-205: Reliance and the Firm Offer

The revocability of offers long has troubled contract law experts.²⁹³ The problem usually arises when an offeror—a manufacturer, supplier, or subcontractor—submits an oral or written bid to supply materials or labor to a general contractor, who, in turn, relies on that bid and uses it to establish the amount of his own proposal on the general contract.²⁹⁴ Frequently, between the time the general contractor submits his proposal and the time he learns he has won the job, the supplier will attempt to withdraw her bid, either because she has discovered a mistake, or because

286. Section 2-201 was one of the few parts of Article 2 that Corbin publicly criticized. See Corbin, *The Uniform Commercial Code-Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 832-34 (1950).

287. See *supra* note 238.

288. See *supra* note 239.

289. See *supra* note 240.

290. See *Warder & Lee Elevator v. Britten*, 274 N.W.2d 339, 340-41 (Iowa 1979); *The Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, 173-74, 547 P.2d 323, 326 (1976); *Jamestown Terminal Elevator v. Hieb*, 246 N.W.2d 736, 738-39 (N.D. 1976); *Farmers Elevator of Elk Point v. Lyle*, 90 S.D. 86, 87-89, 238 N.W.2d 290, 291-92 (1976).

291. K. LLEWELLYN, *SALES*, *supra* note 49, at 916.

292. Llewellyn, *What Price Contract?*, *supra* note 41, at 744.

293. See generally Closen & Weiland, *The Construction Industry Bidding Cases: Application of Traditional Contract, Promissory Estoppel and Other Theories to the Relations Between General Contractors and Subcontractors*, 13 J. MARSHALL L. REV. 565 (1980); Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952); Sharp, *Promissory Estoppel I*, 7 U. CHI. L. REV. 1 (1939).

294. See, e.g., *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 414-15, 333 P.2d 757, 760 (1958).

the bid is unprofitable.²⁹⁵ The question is whether the general contractor can force the supplier to perform, even though the supplier revoked her offer before acceptance. A number of courts have held that the general contractor can use promissory estoppel to hold the supplier to her bid for the sale of goods.²⁹⁶ These decisions, however, are completely inconsistent with the legislative history of the Code's firm offer provision, section 2-205, and produce several problems.

Over the past century, courts have made significant changes in their attitudes toward the revocability of offers. One hundred years ago, courts said that since the supplier—the offeror—was master of her offer, she could withdraw it at any time before it was accepted, even if the offeree had furnished consideration for the right to have the offer remain open.²⁹⁷ After the turn of the century, however, the law changed: courts generally held that the offeree could pay the offeror a small sum to keep the offer open for a set period of time, creating an option contract and preventing revocation.²⁹⁸ But without such consideration, the offer was revocable,²⁹⁹ even if the offeror promised to keep it open for a period of time³⁰⁰ or if the offeree relied on the offer.³⁰¹

The most famous application of this theory was Judge Learned Hand's opinion in *James Baird Co. v. Gimbel Brothers*,³⁰² where a linoleum supplier sent general contractors a written offer which "absolutely guaranteed" that it would supply goods at a set price.³⁰³ After a contractor had submitted a bid based on the supplier's quote, but before the contractor had won the job and accepted the supplier's offer, the supplier discovered that its bid was badly mistaken and withdrew the bid. Judge Hand found for the supplier on a number of grounds. The most important was a rejection of promissory estoppel. Hand wrote that this doctrine had been used "chiefly" in cases of

295. See *id.* at 412-14, 333 P.2d at 758-59.

296. See *infra* text accompanying note 358.

297. A. CORBIN, *CASES ON THE LAW OF CONTRACTS* 176 (3d ed. 1947) (citing C. LANGDELL, *SUMMARY, supra* note 50, at § 178; C. ASHLEY, *THE LAW OF CONTRACTS* 25-27 (1911). But see J. BISHOP, *supra* note 70, at 130.

298. *RESTATEMENT OF CONTRACTS* § 46 (1932).

299. 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at §§ 25 & 55 (1920); see also *Bullock v. McKeon*, 104 Cal. App. 72, 78, 285 P. 392, 395 (1930) (offers without exchange of consideration generally revocable); *James L. Kernan Co. v. Cook*, 162 Md. 137, 142, 159 A. 256, 258 (1932) (unsealed promises, without consideration, may be revoked anytime before acceptance); *Walton's Executor v. Franks*, 191 Ky. 32, 35, 228 S.W. 1025, 1026, (1921) (without consideration, optional agreements to pay are revocable); *Womack v. Dalton Adding Machine Sales Co.*, 285 S.W. 680, 681 (Tex. Civ. App. 1926) (offer may be withdrawn anytime before acceptance); *American Constr. Co. v. Kraft*, 264 S.W. 636, 639 (Tex. Civ. App. 1924) (contracts without consideration not binding without part performance by offeree).

300. 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 55; see also *Grieve v. Mullaly*, 211 Cal. 77, 79, 293 P. 619, 620 (1930) (if designated period of time for offer to remain open, offeror may revoke at any time before acceptance); *Wm. Weisman Realty Co. v. Cohen*, 157 Minn. 161, 165, 195 N.W. 898, 899 (Minn. 1923) (same); J. BISHOP, *supra* note 70, at § 180; 2 KENT'S COMMENTARIES, *supra* note 51, at 477.

301. *Comstock v. North*, 88 Miss. 754, 767 68, 41 So. 374, 376 (1906); *Ganss v. J.M. Guffey Petroleum Co.*, 125 A.D. 760, 762-63, 110 N.Y.S. 176, 178 (1908); C. LANGDELL, *SUMMARY supra* note 50, at 3-4; 1 S. WILLISTON, *CONTRACTS* (1920), *supra* note 3, at § 61.

302. 64 F.2d 344 (2d Cir. 1933).

303. *Id.* at 345.

charitable subscriptions³⁰⁴ and did not apply to this case because the supplier's offer was for an exchange and was not meant to become a promise until consideration had been received, such as the contractor's acceptance.³⁰⁵ Hand wrote that promissory estoppel could not substitute for the consideration needed to create an option contract; the supplier, he said, did not intend to subject itself to such a one-sided arrangement, where it would be bound but the contractor would not.³⁰⁶ Hand also noted that the contractor could have protected itself during the bidding process, and said that in commercial transactions courts should not strain to protect those who do not protect themselves.³⁰⁷

Llewellyn could not have been pleased with *Baird*. Several years earlier, he had complained that the doctrine of consideration prevented enforcement of what he called "firm" offers,³⁰⁸ offers made by businessmen who intended them to remain open for a short period of time. Even after *Baird*, Llewellyn continued to argue that firm offers should be enforceable despite a lack of consideration,³⁰⁹ and he noted that permitting revocation caused two types of reliance damages. The first was obvious: the general contractor who relied on a bid that the subcontractor later revoked had to find a substitute, generally at a higher price.³¹⁰ The second was more subtle: a revoked offer frequently upset the general contractor's planning, production or construction schedules, record-keeping, and the like.³¹¹ Llewellyn also recognized that while consideration theory would enforce

304. *Id.* at 346. Some commentators have read *Baird* as saying that promissory estoppel could not be applied to commercial transactions. See 1955 COMMISSION REPORT, *supra* note 29, at 626 n.97 (N.Y. courts refuse to use promissory estoppel to form commercial contracts); see also *Comfort v. McCorkle*, 149 Misc. 826, 828-29, 268 N.Y.S. 192, 195 (1933) (N.Y. courts apply § 90 only to charitable subscriptions). But see *Debron Corp. v. National Homes Constr. Corp.*, 493 F.2d 352, 356-57 (8th Cir. 1974) (applying state precedent); *Lyon Metal Prods., Inc. v. Hagerman Constr. Corp.*, 181 Ind. App. 336, 338-41, 391 N.E.2d 1152, 1154-56 (1979) (well accepted that promissory estoppel applies in commercial transactions); *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 6 Mass. Ct. App. 152, 154-57, 374 N.E.2d 306, 308-09 (recognizing trend of case law), *aff'd*, 376 Mass. 757, 384 N.E.2d 176 (1978); *E.A. Coronis Assocs. v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 75-77, 216 A.2d 246, 250-51 (1965) (equity and new judicial attitudes justify use of promissory estoppel in commercial cases). Hand merely said that the doctrine had been applied "chiefly" to charitable subscriptions; he went on to say that the doctrine had been applied much more broadly and "has now been generalized" in § 90 of the *Restatement of Contracts*. *Baird*, 64 F.2d at 346. What may have confused courts was Hand's statement that promissory estoppel could not apply to offers involving exchanges, since most commercial transactions do involve exchanges. *Id.* Some, however, do not. *Montello Oil Corp. v. Apex Oil Co.*, 571 F. Supp. 389 (E.D. Mo. 1983); *Standard Structural Steel Co. v. Debron Corp.*, 515 F. Supp. 803 (D. Conn. 1980), *aff'd*, 657 F.2d 265 (2d Cir. 1981).

305. *Baird*, 64 F.2d at 346.

306. *Id.*

307. *Id.*

308. Llewellyn, *What Price Contract?*, *supra* note 41, at 742. Llewellyn wrote that firm offers were one of four classes of cases where consideration doctrine was badly out of joint and noted that for the other three classes, the courts and the *Restatement of Contracts* had strained to enforce despite the deficiencies of consideration theory. *Id.*

309. See, e.g., Llewellyn, *Consideration*, *supra* note 41, at 872; Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 790 n.11.

310. See, e.g., *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 413-15, 333 P.2d 757, 758-59 (1958).

311. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 804.

such offers if the proper form was used, that is, if consideration was supplied, businessmen either ignored or remained ignorant of that formal requirement.³¹²

Llewellyn's arguments in favor of enforcement appear frequently in his drafts of the Code and his statements during hearings on the Code.³¹³ Although his 1940 draft followed the Uniform Sales Act and the Federal Sales Bills in not mentioning the problem, the *Baird* problem received considerable attention in 1941. The main 1941 draft contained a firm offer provision that was similar to section 2-205 as finally adopted. It said that when a merchant signed a written offer to buy or sell goods that was to be "firm" for not more than ten days, the offer was not revocable merely for lack of consideration.³¹⁴ The comments made Llewellyn's position on reliance clear:

The ordinary case of application of subsection (2) will involve either an offer by mail or wire, or a telephoned offer followed by confirmation. An unconfirmed oral offer is therefore relied on at peril; but no other rule affords the needed guaranty that the offer in fact had this obligatory form.³¹⁵

For some reason, Llewellyn temporarily relented in the fall of 1941. After the main 1941 draft had been presented to the NCC, Llewellyn gave his committee a set of alternative formation provisions, which he then redrafted in November or December of 1941.³¹⁶ A firm offer provision was included,³¹⁷ but alternative section 3-F directly addressed the *Baird* problem:

When an offer is such as reasonably to induce the offeree, before the time for notification of acceptance, to act in reliance on the offer by making material commitments, outlays, or adjustments, then, subject to subsection 2, such action by the offeree in good faith constitutes a bar to revocation until the time for notification of acceptance, or for due completion of performance.³¹⁸

Subsection 2 required the offeree to notify the offeror of acceptance within a reasonable time; failure to do so allowed the offeror to treat the offer as lapsed. The comments to alternative section 3-F made it clear Llewellyn intended the section to cover the *Baird* situation and noted that the

312. *Id.* at 791.

313. NCC PROCEEDINGS (1943), reprinted in KLP, *supra* note 32, J.V.2.h., at 52; Uniform Revised Sales Act Comment to § 18, [2-5], reprinted in KLP, *supra* note 32, at J.X.2.e. (unpaginated) (April 20, 1948); 1941 REVISED ACT § 3(2), § 3 comment 2 (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 342-43.

314. 1941 REVISED ACT § 3(2) (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 342. Comment 2 noted the *New York Law of General Obligations*, which made many types of promises enforceable without consideration if they were made in writing and signed, and said that in comparison, the Code's provision was "in no way novel—except in its caution." *Id.* at 343.

315. 1941 REVISED ACT § 3 comment 2 (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 343.

316. 1941 REVISED ACT alt. § 3 comment (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 347.

317. 1941 REVISED ACT § 3(2) (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 342.

318. 1941 REVISED ACT alt. § 3-F(1) (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 357.

desirable remedy might be one that protected the offeror's reliance interest.³¹⁹

There is no evidence as to why Llewellyn proposed this section³²⁰ but the proposal was significant for several reasons. First, it was both a dramatic expansion of promissory estoppel and a rejection of *Baird*. Second, its presence indicated that Article 2's provision for firm offers, by itself, did not protect a general contractor who relied on an oral bid by a subcontractor. If the firm offer provision did, why was alternative section 3-F necessary? Third, and most importantly, alternative section 3-F was drafted, distributed, and then ignored. The 1943 draft retained the 1941 draft's firm offer provision,³²¹ but did not mention alternative section 3-F or its principles.

The reason for alternative section 3-F's disappearance is unclear. The 1941 comment to alternative section 3-F said, without explanation, that "the draftsman" doubted whether subsection 1 of the section as redrawn met the objections raised in committee, indicating that there was some opposition even from the beginning.³²² *Baird* was the only real authority on the issue, although in February of 1941, the Seventh Circuit, in dictum, advocated the use of promissory estoppel in such situations.³²³ The first solid rejection of *Baird* appeared in 1943, when the South Dakota Supreme Court held that promissory estoppel protected general contractors who relied on bids.³²⁴ The court issued that opinion on August 20, 1943,³²⁵ two days after delegates to the annual National Conference of Commissioners on Uniform State Laws discussed the revocability of offers. The lack of case law support for alternative section 3-F may have been reinforced by what Llewellyn recognized as a rather obvious political problem: one of the most prominent members of the American Law Institute, before whom Lle-

319. 1941 REVISED ACT alt. § 3-F comment (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 357-59. The comment also recognized that the law "affords as yet small basis for that solution; but it does afford some basis." Llewellyn probably was referring to the landmark article in the area, Fuller & Perdue, *supra* note 17, which Llewellyn himself favorably cited. Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 781 n.3, 818 n.56. This comment is one of the few published, official suggestions that Article 2's remedies should include reliance-based damages.

320. The section may have been prompted by the Seventh Circuit's opinion in *Robert Gordon v. Ingersoll-Rand Co.*, 117 F.2d 654 (7th Cir. 1941), which stated that if a general contractor proved reliance on an otherwise unenforceable offer by a subcontractor, promissory estoppel could be used to collect. *See id.* at 660-61. *Gordon* was decided February 10, 1941 and noted in several law reviews. *See* Comment, *Judicial Recognition of the Promissory Estoppel Section in the Contracts Restatement*, 36 ILL. L. REV OF NW. U. 187 (1941); Recent Cases and Statutes, *Contracts—Promissory Estoppel in a Commercial Transaction—Detrimental Reliance*, 20 TEX. L. REV. 478 (1942); Recent Cases, *Contracts—Formation, Promissory Estoppel in Business Transactions*, 9 U. CHI. L. REV. 153 (1941). Llewellyn should have been aware of *Gordon*.

321. 1943 REVISED ACT § 2 (3rd Draft), reprinted in KLP, *supra* note 32, at J.V.2.h.

322. 1941 REVISED ACT Alt. § 3-F comment (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 357.

323. *See Gordon*, 117 F.2d at 660-61 (mere fact transaction is commercial should not preclude use of promissory estoppel).

324. *Northwestern Eng'g Co. v. Ellerman*, 69 S.D. 397, 407-08, 10 N.W.2d 879, 883-84 (1943) (subcontractor bound by promise to general contractor who relied on promise in seeking government contract).

325. *Id.* at 397, 10 N.W.2d at 879.

wellyn eventually would have to defend Article 2, was Judge Learned Hand, the author of *Baird*.

Whatever the reason for the 1943 draft's abrupt retreat from the use of reliance, it is clear that the retreat was both intentional and permanent. That draft's provision, which was similar to the main section in the 1941 draft, drew considerable attention during the 1943 NCC Proceedings when Professor Harold Havighurst exploded at its presence.³²⁶ Havighurst made two major arguments. First, he protested the provision's departure from the doctrine of consideration. He contended that under the provision, a general contractor who did not rely on a subcontractor's bid could enforce the bid even if the subcontractor discovered a mistake in the bid.³²⁷ Second, citing sections 45 and 90 of the *Restatement of Contracts*, he complained that the firm offer provision overlooked "the main trend" of the law to use substantial reliance as the basis for enforcement.³²⁸

Llewellyn's response was blunt: he said that his committee differed "violently" with Havighurst.³²⁹ Llewellyn recognized that the enforcement of a subcontractor's bid that turned out to be seriously mistaken depended on whether the general contractor had relied on it,³³⁰ but he vigorously defended the firm offer section as written, without express reference to reliance.³³¹ He also rejected a suggestion from the floor that a reference to the law of mistake should be added to the firm offer provision; Llewellyn said this was unnecessary because the Code's supplementary principles of law provision³³² already included mistake.³³³

The next draft, in April 1944, continued in the same direction. The comment to the firm offer provision made use of reliance only in regard to its effect in cases of mistake, and there was no suggestion that reliance on a bid that did not satisfy the firm offer requirements would justify enforcement of that bid.³³⁴ Indeed, the first illustration said that such a bid was revocable because

326. NCC PROCEEDINGS (1943), reprinted in KLP, *supra* note 32, J.V.2.h., at 52. Since Havighurst admitted he was new to the Conference, *id.*, it is not clear whether he knew of Alternative § 3-F's brief lifespan, or whether his opposition was directed entirely at the remaining firm offer provision. 1943 REVISED ACT § 18 (3d Draft), reprinted in KLP, *supra* note 32, at J.V.2.h.

327. NCC PROCEEDINGS (1943), reprinted in KLP, *supra* note 32, J.V.2.h., at 53-54.

328. *Id.* at 54.

329. *Id.* at 55. Llewellyn went so far as to say it would be "unwise and unbecoming if I should indulge before this group in further discussion of an ancient difference of theory" with Havighurst. A year earlier, Havighurst had blasted a symposium on Consideration in Volume 41 of the *Columbia Law Review*, suggesting that codifying laws was a form of escapism and accusing Llewellyn of "crying for the moon." Havighurst, *Consideration, Ethics and Administration*, 42 COLUM. L. REV. 1, 1, 5 (1942).

330. See *infra* text accompanying notes 340-44.

331. NCC PROCEEDINGS (1943), reprinted in KLP, *supra* note 32, J.V.2.h., at 55.

332. U.C.C. § 1-103 (1962).

333. NCC PROCEEDINGS (1943), reprinted in KLP, *supra* note 32, J.V.2.h., at 56. Curiously, the 1944 Revised Act § 18 comment, reprinted in 2 E. KELLY, *supra* note 33, at 133, did expressly incorporate the law of mistake, as did comment 5 to § 2-205 in the 1962 Official Draft. Those comments, however, failed to make any positive reference to use of promissory estoppel in regard to an oral offer.

334. 1944 REVISED ACT § 18 comment, reprinted in 2 E. KELLY, *supra* note 33, at 132-36.

Authentication by a writing is of the essence of this section; the law of consideration can be displaced neither by express agreement nor by course of dealing or usage of trade, and the relaxing provision of Section 18 is limited by its reason. The men in the business must on this matter continue to do their own policing and continue to absorb any losses due to misreliance.³³⁵

That comment was thoroughly consistent with Llewellyn's yearning for authentication as expressed in the section on the Statute of Frauds,³³⁶ and it was a strong warning that he believed that since it was so easy for a businessman to insist on a firm offer, those who did not should pay the price.

Later drafts and conferences did not make significant changes. The 1944 draft's firm offer provision survived debate in the ALI, where Llewellyn described it as an attempt to set a standard of commercial practice,³³⁷ and "in certain rather limited circumstances" freeing business from the requirement of consideration.³³⁸ When asked whether the common law would bind a subcontractor who tried to revoke an oral offer, Llewellyn repeatedly said that it would not,³³⁹ indicating his belief that promissory estoppel would not apply even in the absence of the firm offer provision. Furthermore, he said that while he personally believed such a subcontractor "ought" to be bound, he believed it was unwise "to extend this section so as to actually bind him."³⁴⁰

The next mention of reliance is cryptic. During the summer of 1944, Llewellyn prepared brief notes for a meeting of a joint revising committee. They indicated that the Institute had produced many suggestions that any use of implied power of estoppel, oral assent, or course of dealings to bind a subcontractor should be avoided. The notes also state the comment to the firm offer provision should explain "the possibility of estoppel."³⁴¹ That was not done. Comments drafted in 1948 contained a section entitled "Safeguards against possible inequitable operation: the question of reliance."³⁴² This was clearly the place for a statement that reliance on an oral offer or an offer which did not meet the requirements of a firm offer would still permit enforcement. Instead, the comment spoke, as had Llewellyn, only as to how reliance can be used to defeat a subcontractor's claim of mistake.³⁴³

The 1949 draft dropped the 1944 draft's illustration rejecting the use

335. *Id.*

336. See text accompanying notes 253-71, 281-85. Indeed, Llewellyn earlier had expressed concern that the word "signed" in the firm offer provision would be interpreted by the courts in the same loose manner that they had read the same term in the Statute of Frauds. 1941 REVISED ACT alt. § 3-C comment (2d Draft), reprinted in 1 E. KELLY, *supra* note 33, at 353.

337. See *Discussions*, *supra* note 156, at 96.

338. *Id.* at 100.

339. *Id.* at 101.

340. *Id.* at 100.

341. Memorandum for Joint Revising Committee for Use at the Meeting in Boston, July 27-29, 1944, reprinted in KLP, *supra* note 32, J.VI.2.e. (unpaginated).

342. 1948 REVISED ACT, reprinted in KLP, *supra* note 32, J.X.2.e., Comment on § 18 [2-5] Firm Offers, at 4.

343. *Id.* at 4-5.

of promissory estoppel³⁴⁴ because of a decision to drop all illustrations. The comments to what finally had been named section 2-205 still quite insisted on the need for a signature to show the existence and the authenticity of the offer. Oral or unsigned offers, even those on which a party relied, "remain[ed] revocable under this Article since authentication by a writing is the essence of this section."³⁴⁵ That comment was retained unchanged in the final version of section 2-205.³⁴⁶

In short, section 2-205's history shows that reliance on an offer that does not satisfy that section's requirements does not make the offer enforceable, although reliance will overcome a claim by the offeror that the offer was a mistake. There were two reasons for Llewellyn's position. The first was his quest for authentication, for hard evidence that an offer actually had been made.³⁴⁷ Sometimes reliance does produce such evidence, but an unscrupulous contractor easily could testify falsely that he had received an oral bid from a subcontractor or testify falsely as to the amount of a bid that he actually had received, and then claim he had relied on that bid.

The second reason was that permitting the use of reliance as an enforcement mechanism was decidedly one-sided. It is easy for a general contractor to prove it relied on a subcontractor's bid, but it is extremely difficult for a subcontractor to use reliance against a general contractor.³⁴⁸

344. U.C.C. § 2-205 comment 3 (1949). The illustration in the 1944 Revised Act § 18 comment, *reprinted in* 2 E. KELLY, *supra* note 33, at 1, which had said that reliance on an oral offer did not make the offer irrevocable, had been dropped, but apparently because of a general policy decision to eliminate all illustrations from the comments. It may be significant that Comment 3 in the 1949 version said that such oral offers were revocable "under this Article" rather than merely under that particular section.

345. U.C.C. § 2-205 comment 2 (1962).

346. *Id.*

347. *See Discussions, supra* note 156, at 102 (writing requirement provides "objective evidence not resting in word of mouth to serve as a substitute for the guarantee now given by the law of consideration."). Llewellyn's desire for written evidence of the offer paralleled his desire for written, signed evidence of a contract in the context of the Statute of Frauds. *See supra* text accompanying notes 253-71, 281-85. Indeed, at one point he worried that the courts would interpret the word "signed" in § 2-205 as loosely as they had interpreted that word in Statute of Frauds cases. 1941 REVISED ACT alt. § 3-C comment (2d Draft), *reprinted in* 1 E. KELLY, *supra* note 33, at 353. Oral bids by subcontractors, of course, present their own Statute of Frauds problems, and several such cases have been decided on the basis of § 2-201, not § 2-205. *See, e.g.,* C.G. Campbell & Son v. Comdeq Corp., 586 S.W.2d 40, 40-41 (Ky. App. 1979); Edward Joy Co. v. Noise Control Prods., 111 Misc. 2d 64, 65, 443 N.Y.S.2d 361, 362 (1981); Tiffany v. W.M.K. Transit Mix, 16 Ariz. App. 415, 419-20, 493 P.2d 1220, 1225 (1972); Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, 463 F. Supp. 543, 549-54 (N.D. Miss. 1978); Anderson Constr. Co. v. Lyon Metal Prods., 370 So. 2d 935, 937 (Miss. 1979).

348. The subcontractor's difficulties in using promissory estoppel are legion. First, except in the rare case where the general contractor tells a subcontractor that it has used that subcontractor's bid, or where the state requires that the general contractor list and publicly reveal the names of the subcontractors whose bids he is using, *see, e.g.,* Southern Cal. Acoustics Co. v. C.V. Holder, 71 Cal. 2d 719, 79 Cal. Rptr. 319, 456 P.2d 975 (1969), the subcontractor does not even know whether the low bid should have received the job. Second, the general contractor's detrimental reliance is usually easy to prove: he simply shows that his own bid incorporated the subcontractor's bid. The subcontractor's reliance is usually passive and more difficult to prove. Unless he can actually show that he turned down other specific and profitable job offers in order to make himself available for this particular project, his detrimental reliance usually will consist of nothing more than not actively seeking other jobs.

Although Llewellyn recognized that firm offers were inherently one-sided arrangements, he also believed that businessmen never issued offers in a firm form unless they intended to subject themselves to that one-sidedness.³⁴⁹ The use of promissory estoppel by general contractors, however, would bind subcontractors who had not used the firm offer form and who presumably had not intended to bind themselves.³⁵⁰

Llewellyn's position and the legislative history of section 2-205 have been long forgotten. In 1958, *Drennan v. Star Paving Co.*³⁵¹ held that a general contractor who relied on a subcontractor's bid to do paving work could force the subcontractor to perform. The court based its opinion in *Drennan* on section 90 of the first *Restatement*.³⁵² Eventually its holding was transformed into section 87(2) of the *Restatement (Second)*.³⁵³ The combination of *Drennan* and the two sections of the *Restatements* is so powerful in construction bids involving labor that it has made serious inroads into Article 2's domain over bids involving goods. It is easy to find cases where a court bases its decision on section 90 or on *Drennan* without even indicating what the subject matter of the bid in question was, let alone considering whether Article 2 should apply.³⁵⁴ It is only slightly more

This passivity is difficult to prove, since it is easy to argue that more active job hunting would not have produced any jobs. Third, since a general contractor rarely communicates anything to a subcontractor, and since many subcontractors' bids are unsolicited, it is difficult to find a promise by the general contractor on which the subcontractor can rely. In the absence of a statute to the contrary, see, e.g., *Southern Cal. Acoustics Co.*, 71 Cal. 2d at 725-26, 79 Cal. Rptr. at 324-25, 456 P.2d at 980-81, the general rule goes against the subcontractor. See *Finney Co. v. Monarch Constr. Co.*, 670 S.W.2d 857, 859-60 (Ky. 1984); *Plumbing Shop v. Pitts*, 67 Wash. 2d 514, 518-20, 408 P.2d 382, 384 (1965).

The author's research unearthed only two cases where a subcontractor who had bid on a contract to supply goods to a general contractor tried to enforce the transaction against the general contractor. See *R.S. Bennett & Co. v. Economy Mechanical Indus.*, 606 F.2d 182, 186-87 (7th Cir. 1979) (remanded because of factual question regarding theory of promissory estoppel); *Chicopee Concrete Serv. v. Hart Eng'g Co.*, 20 Mass. App. 315, 317-19, 479 N.E.2d 748, 749-50 (1985), *aff'd*, 498 N.E.2d 121 (Mass. 1986) (contract formed under § 2-204).

349. NCC PROCEEDINGS (1943), reprinted in KLP, *supra* note 32, J.V.2.h., at 58.

350. See, e.g., 1941 REVISED ACT alt. § 3-F(2), reprinted in E. KELLY, *supra* note 33, at 357. This alternative section attempted to reduce the problems of one-sidedness by requiring an offeree who relied on an offer to inform the offeror of that within a reasonable time. Some general contractors use a subcontractor's bid, thereby establishing the reliance needed to enforce it, and then shop around for lower bids or use the leverage they receive from *Drennan* to force the subcontractor to chop its bid. See *Southern Cal. Acoustics Co.*, 71 Cal. 2d at 725 n.5, 726 n.7, 456 P.2d at 980 n.5, 981 n.7, 79 Cal. Rptr. at 324 n.5, 325 n.7; cf. *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F.2d 772, 778 (7th Cir. 1976) (warning that a general contractor cannot delay acceptance in order to bid shop or chop); *Drennan v. Star Paving Co.*, 55 Cal. 2d 409, 414, 333 P.2d 757, 760 (1958) (general contractor cannot reopen bargaining with subcontractor after accepting original offer); *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 374 N.E.2d 306, 310 (Mass. App. Ct. 1978) (general contractor may not reasonably delay to get better price).

351. 51 Cal. 2d 409, 333 P.2d 757 (1958).

352. *Id.* at 413-15, 333 P.2d at 759-761.

353. See RESTATEMENT (SECOND) OF CONTRACTS § 87 illustration G and reporter's note; E. FARNSWORTH, CONTRACTS 186 (1982).

354. See, e.g., *Bumby & Stimpson v. S. Reinforcing Steel Co.*, 348 So. 2d 1216 (Fla. Dist. Ct. App. 1977) (reversing summary judgment on issue of contract formation without mentioning subject matter of contract); *C.H. Leavell & Co. v. Grafe & Assocs., Inc.*, 90 Idaho 502, 414 P.2d 873 (1966) (court refers to mechanical contract but nothing more); *S.N. Nielsen Co. v. National Heat & Power Co.*, 32 Ill. App. 3d 941, 337 N.E.2d 387 (1975) (mechanical contract).

difficult to find decisions that clearly involved the sale of goods and also failed to mention Article 2.³⁵⁵ Several decisions employ promissory estoppel to decide the revocation issue—without mentioning section 2-205 or its history—and then refer to Article 2 in connection with other issues in the case.³⁵⁶ Only a few courts consider the relevance of section 2-205 before going on to promissory estoppel.³⁵⁷

The result, obviously, is that section 2-205's requirements, comment, and legislative history are almost completely ignored. At least ten courts have used *Drennan*, the *Restatements*, or promissory estoppel generally to hold that a general contractor's reliance on an offer to sell goods makes the offer enforceable,³⁵⁸ and several commentators have reached the same

355. C.R. Fedrick v. Sterling-Salem Corp., 507 F.2d 319, 319 (9th Cir. 1974) (sewage pumping equipment and prefabricated sewage stations); Debron Corp. v. National Homes Constr. Corp., 493 F.2d 352, 354 (8th Cir. 1974) (steel); Jackson County Grain Drying Coop. v. Newport Wholesale Elec., 9 Ark. App. 41, 42, 652 S.W.2d 638, 639 (1983) (electrical materials); Gerson Elec. Constr. Co. v. Honeywell, 117 Ill. App. 3d 309, 310, 453 N.E.2d 726, 727 (1983) (security equipment); Lyon Metal Prods., Inc. v. Hagerman Constr. Corp., 181 Ind. App. 336, 337, 391 N.E.2d 1152, 1153 (1979) (metal lockers); Ferrer v. Taft Structurals, 21 Wash. App. 832, 834-35, 587 P.2d 177, 178 (1978) (structural steel framing).

356. R.S. Bennett & Co. v. Economy Mechanical Indus., 606 F.2d 182, 184 (7th Cir. 1979) (pumps; court found contract was not enforceable under § 2-201 but used § 90 to enforce bid); Harry Harris v. Quality Constr. Co., 598 S.W.2d 872, 874 (Ky. App. 1979) (kitchen equipment; court noted that defendant had not raised a defense based on § 2-201); Loranger Constr. Corp. v. E.F. Hauserman Co., 384 N.E.2d 176, 178-181 (Mass. 1978) (metal partitions; § 2-201 not considered because defendant failed to press the issue on appeal); Loranger Constr. Corp. v. E.F. Hauserman Co., 6 Mass. App. 152, 154-59, 374 N.E.2d 306, 307-11 (1978) (metal partitions; court used promissory estoppel and then expressed doubt that § 2-201 applies when recovery is based on that doctrine).

357. See Janke Constr. Co. v. Vulcan Materials Co., 386 F. Supp. 687 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976). In *Janke*, the trial court found that the offer to supply special pipes failed the requirements of § 2-205. *Id.* at 691-92. Both courts enforced the offer on the basis of promissory estoppel. *Id.* at 692-95, 527 F.2d at 777-79. Another court, in discussing an offer to furnish various metal products and structural steel, noted the existence of § 2-205 but enforced the offer on the basis of § 90 and did not apply § 2-205. *Jenkins & Boller Co. v. Schmidt Iron Works*, 36 Ill. App. 3d 1044, 1046-47, 344 N.E.2d 275, 277-78 (1976). A third court found that an offer to supply gravel was not firm under § 2-205, but went on to consider whether sufficient detrimental reliance was present to provide a ground for enforcement. *R.J. Taggart, Inc. v. Douglas County*, 31 Or. App. 1137, 1140-44, 572 P.2d 1050, 1052-54 (1977). In *E.A. Coronis Associates v. M. Gordon Construction Co.*, 90 N.J. Super. 69, 216 A.2d 246 (1966), the court took an even more puzzling approach. It expressly found that an offer did not satisfy the requirements of § 2-205, *id.* at 75, 216 A.2d at 249, endorsed the general use of promissory estoppel to enforce offers upon which a general contractor had relied, *id.* at 75-80, 216 A.2d at 250-52, and remanded the case so that the trial court could determine if the elements of promissory estoppel had been satisfied. *Id.* at 79-80, 216 A.2d at 252-53. In a concluding footnote, however, it said it was not considering whether the existence of § 2-205 precluded reliance on an offer that did not conform to its provisions. *Id.* at 80 n.2, 216 A.2d at 253 n.2. Even more curiously, *Coronis* is the only case to cite or quote comment 2 to § 2-205. *Id.* at 74, 216 A.2d at 249. It made no effort to reconcile that comment with promissory estoppel.

358. See R.S. Bennett & Co. v. Economy Mechanical Indus., 606 F.2d 182, 186-88 (7th Cir. 1979); Janke Constr. Co. v. Vulcan Materials Co., 527 F.2d at 777-79; Jackson County Grain Drying Coop v. Newport Wholesale Elec., 652 S.W.2d 638, 640 (Ark. Ct. App. 1983); *Jenkins & Boller Co. v. Schmidt Iron Works*, 36 Ill. App. 3d 1044, 1046-47, 344 N.E.2d 275, 277-78 (1978); *Lyon Metal Prods., Inc. v. Hagerman Constr. Corp.*, 181 Ind. App. 336, 338-39, 391 N.E.2d 1152, 1154-55 (1979); *Harry Harris v. Quality Constr. Co.*, 593 S.W.2d 872, 874 (Ky. Ct. App. 1980); *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 6 Mass. App. Ct. 152, 154-55, 374 N.E.2d 306, 308-310, *aff'd*, 376 Mass. 757, 384 N.E.2d 176, 179, 179 n.1 (1978); *Ferrer v.*

conclusion.³⁵⁹ A small minority of courts have reached the opposite conclusion.³⁶⁰ It may be that the late alternative section 3-F should be resurrected, but until it is, the courts should respect the intent of the Code's drafters.

III. THE RESTATEMENT (THIRD) OF CONTRACTS

The legislative history of Article 2 and the cases in which courts have failed to respect that history provide several lessons. The most important lesson is that agreement theory has done a far better job than promissory estoppel in eliminating the evils caused by the technical requirements of consideration theory. Agreement has eliminated those evils simply by eliminating the rules that created them.³⁶¹ As a result, one does not find courts debating whether under Article 2 consideration is needed for a valid modification, or whether a given offer can be accepted only by promise. Promissory estoppel, however, has created exceptions to the technical requirements of consideration theory, leaving the main rules in place for those cases in which reliance is not an issue.³⁶²

Another lesson is that the limited use of promissory estoppel by courts confronting Article 2 cases has produced the four problems that Llewellyn predicted.³⁶³ First, the presence of reliance is not always strong evidence that an agreement was created. In many cases in which the plaintiff has sought to use promissory estoppel to overcome a statute of frauds problem, it is difficult to tell whether one party relied on an actual agreement or on inconclusive negotiations that the other party treated as an agreement.³⁶⁴

Taft Structural, 21 Wash. App. 832, 835-36, 587 P.2d 177, 179 (1978).

359. See, e.g., J. WHITE & R. SUMMERS, *supra* note 17, at §§ 1-3; R. HILLMAN, J. McDONNELL & S. NICKLES, *supra* note 132, at ¶ 2.04 (citing J. WHITE & R. SUMMERS, *supra* and *Hoffman v. Red Owl Stores*, 515 Wis. 2d 683, 133 N.W.2d 267 (1955)). *Hoffman* was considered before Wisconsin adopted Article 2, and so did not discuss the relationship of § 2-205 and promissory estoppel.

360. *Tiffany, Inc. v. W.M.K. Transit Mix*, 16 Ariz. App. 415, 421, 493 P.2d 1220, 1226 (1972) (holding for defendant because oral offer did not satisfy § 2-201); *C.G. Campbell & Son v. Comdeq Corp.*, 586 S.W.2d 40, 41 (Ky. Ct. App. 1979) (*Drennan* did not apply because it was decided before adoption of Code; court found for defendant on statute of frauds grounds); *Tatsch v. Hamilton-Erickson Mfg. Co.*, 76 N.M. 729, 732-33, 418 P.2d 187, 189 (1966) (oral offer to supply tables not enforceable, citing *Baird*); *Edward Joy Co. v. Noise Control Prods.*, 111 Misc. 2d 64, 65, 443 N.Y.S.2d 361, 362 (1982) (holding for defendant because oral offer did not satisfy § 2-201); cf. *Ivey Plumbing & Elec. Co. v. Petrochem*, 463 F. Supp. 543, 549-54 (1978) (decision based on § 2-201); *Anderson Constr. Co. v. Lyon Metal Prods.*, 370 So. 2d 935, 937 (Miss. 1979); *R.J. Taggart, Inc. v. Douglas County*, 31 Or. App. 1137, 1143-44, 572 P.2d 1050, 1054 (1977) (finding no detrimental reliance because bid was withdrawn before main contract awarded, but suggesting that detrimental reliance could only occur if the bid contained a provision stating that it was irrevocable for a certain period).

361. See, e.g., U.C.C. § 2-205 comment 2 (modification no longer needs consideration to be effective); § 2-206(1)(b) (abandoning distinction between unilateral and bilateral offers).

362. See, e.g., *Aciri v. International Ass'n of Machinists & Aerospace Workers*, 595 F. Supp. 326, 331 (N.D. Cal. 1983) (rejecting use of promissory estoppel in labor cases).

363. See *supra* text accompanying notes 116-26.

364. Indeed, courts have subconsciously recognized this. In cases where the factual evidence of an agreement is weak, courts tend to find as a matter of law that promissory estoppel should not be used to overcome § 2-201. See, e.g., *Del Hayes & Sons v. Mitchell*, 304 Minn. 275, 284-85, 230 N.W.2d 588, 594 (1975) (after delivery of some items, parties disputed

Second, the presence of reliance is not always easy to prove, even when that reliance is real. For example, a subcontractor who submits a low bid to a general contractor, learns that the general contractor has won the main job, and then declines to bid on competing jobs will have a difficult time convincing a court to use promissory estoppel against the general contractor.³⁶⁵ Meanwhile, general contractors who rely on bids from subcontractors successfully use promissory estoppel on a regular basis,³⁶⁶ showing the third major flaw of promissory estoppel: its one sided nature. Fourth, the use of promissory estoppel has produced decisions which either ignore plain evidence of an agreement or fail even to look for such evidence.³⁶⁷ Courts that have ignored the legislative intent of Article 2 regarding promissory estoppel also have created a fifth problem Llewellyn did not discuss: doctrinal sloppiness. A number of courts that discuss the common-law doctrine of promissory estoppel have ignored the very existence of Article 2 even where the transaction clearly was for the sale of goods.³⁶⁸

whether additional items were part of contract; no corroborative evidence present); *Farmland Serv. Coop. v. Klein*, 196 Neb. 538, 541, 244 N.W.2d 86, 89 (1976) (defendants denied contract and plaintiff's manager said only that he was "relatively sure" it had been made); *Farmers Coop. Ass'n of Churchs Ferry v. Cole*, 239 N.W.2d 808, 810-11 (N.D. 1976) (defendant denied contract; plaintiff's testimony was only evidence of contract). Conversely, where there is evidence to corroborate the plaintiff's testimony about the existence of a contract, courts tend to find that promissory estoppel is an exception to § 2 201. *See, e.g., Ralston Purina Co. v. McCollum*, 611 S.W.2d 201, 202 (Ark. App. 1981) (defendant tried to modify contract); *Warder & Lee Elevator v. Britten*, 274 N.W.2d 339, 341 (Iowa 1979) (evidence defendant tried to rescind deal and offered to settle soon thereafter); *Sacred Heart Farmers Coop. Elevator v. Johnson*, 305 Minn. 324, 326, 232 N.W.2d 921, 922 (1975) (bystander corroborated existence of contract); *Jamestown Terminal Elevator v. Hieb*, 246 N.W.2d 736, 739 (N.D. 1976) (third party testimony that defendant farmer admitted sale in private conversation).

365. *See supra* note 348 and accompanying text.

366. *See supra* note 358 and accompanying text.

367. The best example of this is the Tenth Circuit, which in one opinion found that an offer, an acceptance, and consideration were present, but enforced on the grounds of promissory estoppel. *Pedi Bares v. P & C Food Markets*, 567 F.2d 933, 936 (10th Cir. 1977). Cases in which the court failed to look for agreement include *Walters v. Marathon Oil Co.*, 642 F.2d 1098, 1099 (7th Cir. 1981) (gasoline); *Burk v. Emmick*, 637 F.2d 1172, 1173, 1173 n.2 (8th Cir. 1980) (cattle); *Burst v. Adolph Coors Co.*, 503 F. Supp. 19, 21-23 (E.D. Mo. 1980) (beer distributorship); *A & M Fix-It v. Schwinn Bicycle Co.*, 494 F. Supp. 175, 178 (D. Utah 1980) (bicycles); *Crook v. Mortenson-Neal*, 727 P.2d 297, 300-04 (Alaska 1986) (building materials); *Pacific Architects Collaborative v. State Dep't of Employment*, 166 Cal. Rptr. 184, 189-91, 100 Cal. App. 3d 110, 122-26 (1979) (mobile housing trailers); *Southwest Water Servs. v. Cope*, 531 S.W.2d 873, 877 (Tex. Civ. App. 1975) (water).

368. *See C.R. Fedrick v. Sterling Salem Corp.*, 507 F.2d 319, 319 (9th Cir. 1974) (sewage pumping equipment and prefabricated sewage stations); *Debron Corp. v. National Homes Constr. Corp.*, 493 F.2d 352, 354 (8th Cir. 1974) (steel); *Jackson County Grain Drying Coop. v. Newport Wholesale Elec.*, 9 Ark. App. 41, 42, 652 S.W.2d 638, 639 (1983) (electrical materials); *Gerson Elec. Constr. Co. v. Honeywell*, 117 Ill. App. 3d 309, 310, 453 N.E.2d 726, 727 (1983) (security equipment); *Lyon Metal Prods., Inc. v. Hagerman Constr. Corp.*, 181 Ind. App. 336, 336, 391 N.E.2d 1152, 1153 (1979) (metal lockers); *Ferrer v. Taft Structurals*, 21 Wash. App. 832, 833, 587 P.2d 177, 178 (1978) (structural steel framing). Courts also have been known to ignore Article 2's provisions on the subject of firm offers, but to use Article 2 for other matters. *See, e.g., R.S. Bennett & Co. v. Economy Mechanical Indus.*, 606 F.2d 182, 184-89 (7th Cir. 1979) (pumps; court found contract was not enforceable because of § 2-201 but used § 90 to enforce the bid); *Harry Harris v. Quality Constr. Co.*, 593 S.W.2d 872, 873-74 (Ky. App. 1979) (kitchen equipment; the court noted that the defendant had not raised a

These problems are even more apparent when one examines the use of promissory estoppel for transactions not governed by Article 2. A thorough statistical analysis of the hundreds of published opinions that have used promissory estoppel is the subject of another article, but even a brief look at the cases that cite section 90 of the Restatement (Second) of Contracts suggests that the use of promissory estoppel has caused the same problems forseen by Llewellyn in Article 2 situations. First, as Llewellyn observed, reliance does not reliably indicate which transactions should be enforced because it is present in nearly all cases, regardless of the parties' intent to be bound.³⁶⁹ Consequently, a number of modern cases involve a primary claim based on traditional contract law and a subsidiary promissory estoppel claim on the same promise that allegedly created the contract.³⁷⁰ In the past, when one could not be sure whether a court would use a technical requirement of consideration theory to prevent enforcement of an agreement, the use of promissory estoppel as backup made sense. In many modern cases, however, courts reject both claims for the same reason: the lack of a promise. These are cases in which the evidence of an agreement is weak, and the plaintiff has tried to pair his marginal contract claim with a reliance argument in the forlorn hope that two swings at the same pitch will produce better results than one. In these cases, the promissory estoppel count merely duplicates the contract count, needlessly consuming court time, energy, and effort.³⁷¹

Second, courts have been confronted repeatedly by plaintiffs whose

defense based on § 2-201); *Loranger Constr. Corp. v. E. F. Hauserman Co.*, 5 Mass. App. 152, 153-60, 374 N.E.2d 306, 307-11 (1978) (metal partitions; court used promissory estoppel and expressed doubt that § 2-201 applies when recovery is based on that doctrine).

369. See *supra* text accompanying notes 116-18.

370. See, e.g., *Abbingtion v. Dayton Malleable*, 561 F. Supp. 1290 (S.D. Ohio 1983) (primary claim a collective bargaining agreement; court concluded promissory estoppel claim without merit); *Campbell v. Sirak*, 476 F. Supp. 21 (S.D. Ohio 1979) (main claim is breach of employment contract; promissory estoppel claim failed); *Amana Soc'y v. Colony Inn*, 315 N.W.2d 101 (Iowa 1982) (essential elements for promissory estoppel claim not established in shareholder's challenge to land-use restrictions).

371. A survey of the 110 cases which pay more than tangential attention to § 90 of *Restatement (Second)* produced more than 20 such cases. See *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476 (D.C. Cir. 1984); *Forstmann v. Culp*, 648 F. Supp. 1379 (M.D.N.C. 1986); *Day v. City of Dayton*, 604 F. Supp. 191 (S.D. Ohio 1984); *Abbingtion v. Dayton Malleable*, 561 F. Supp. 1290 (S.D. Ohio 1983); *Rawson v. Sears, Roebuck & Co.*, 554 F. Supp. 327 (D. Colo. 1983); *Campbell v. Sirak*, 476 F. Supp. 21 (S.D. Ohio 1979); *Cantrell v. City Fed. Sav. & Loan Ass'n*, 496 So. 2d 746 (Ala. 1986); *Scott v. Castle*, 104 Idaho 719, 662 P.2d 1163 (Ct. App. 1983); *Security Bank & Trust Co. v. Bogard*, 494 N.E.2d 965 (Ind. Ct. App. 1983); *Amana Soc'y v. Colony Inn*, 315 N.W.2d 101 (Iowa 1982); *Martin v. Scott Paper Co.*, 511 A.2d 1048 (Me. 1986); *Kari v. General Motors Corp.*, 79 Mich. App. 93, 261 N.W.2d 222 (1977); *AFSCME Councils 6, 14, 65 & 96 v. Sundquist*, 338 N.W.2d 560 (Minn. 1983); *Montana Power Co. v. Public Serv. Comm'n*, 692 P.2d 432, 439 (Mont. 1984); *De Los Santos v. Great W. Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984); *Ski-View v. State*, 129 Misc. 2d 106, 492 N.Y.S.2d 866 (Ct. Cl. 1985); *Cooke v. Blood Sys.*, 320 N.W.2d 124 (N.D. 1982); *McCroskey v. State*, 8 Ohio St. 3d 29, 456 N.E.2d 1204 (1983); *Talley v. Teamsters, Chauffeurs, Etc.*, 48 Ohio St. 2d 142, 357 N.E.2d 44 (1976); *B.M.L. Corp. v. Greater Providence Deposit Corp.*, 495 A.2d 675 (R.I. 1985); *Rose v. Allied Dev. Co.*, 719 P.2d 83 (Utah 1986); *Stack Constr. Co. v. Continental Constr. Corp.*, 88 Wis. 2d 637, 277 N.W.2d 769 (1979); *Tremblay v. Reid*, 700 P.2d 391 (Wyo. 1985); see also *MacNaughton v. Cossin*, 493 A.2d 1040, 1042 (Me. 1985) (on appeal, plaintiffs abandoned contract claim and advanced only promissory estoppel argument).

claims of reliance are difficult to prove or disprove. For example, it is difficult for a discharged employee to prove that she accepted her job or failed to seek other employment primarily because of the termination procedures in an employee handbook or the presence of a pension plan. Some courts have ruled against such plaintiffs for lack of proof.³⁷² More frequently, they have ignored the proof problem and found for the plaintiff.³⁷³ The first approach is unfair to those plaintiffs who did rely; the second is equally unfair to defendants when no reliance was present.

These cases also demonstrate the third flaw of promissory estoppel: its one-sided nature. The plaintiff employee in each case tried to persuade the court that the promissory estoppel obligated the defendant employer to employ the plaintiff and provide certain benefits or rights but there are no cases in which an employer has tried to use promissory estoppel to force an employee to remain on the job. The availability of promissory estoppel to general contractors but not to subcontractors, a problem which has arisen in connection with section 2-205,³⁷⁴ appears in *Drennan v. Star Paving Co.* and its progeny.³⁷⁵ In addition, reliance's one sided nature has inspired the imagination of at least a few plaintiffs. One claimed recovery based on reliance when the defendant failed to exercise an option the plaintiff offered.³⁷⁶ Others have claimed reliance on offers despite their failure to satisfy important conditions of those offers.³⁷⁷

Fourth, courts have allowed promissory estoppel to erode the need for agreement. It is not difficult to find cases where a contract clearly was present or the parties had admitted the existence of a contract, but the court instead used section 90.³⁷⁸ There is even one case where the plaintiff

372. See, e.g., *Acri v. International Ass'n of Machinists & Aerospace Workers*, 595 F. Supp. 326, 331 (N.D. Cal. 1983); *LaRose v. Agway*, 508 A.2d 1364, 1366 (Vt. 1986); cf. *Chewning v. Palmer*, 133 Ariz. 136, 138, 650 P.2d 438, 440 (1982) (trial needed to determine existence of reliance when plaintiff gave contradictory statements as to whether defendant's promise had induced plaintiff's actions).

373. See, e.g., *Continental Air Lines v. Keenen*, 731 P.2d 708, 710, 712 (Colo. 1987) (employee admitted not relying on manual in accepting job; court held employee need only show that employer should have expected employee to rely); *Jones v. East Center for Community Mental Health*, 19 Ohio App. 3d 19, 23-24, 482 N.E.2d 969, 972-74 (1984) (employee did not receive manual until after she was hired; court held that such manuals are "quite likely" to create expectations of continued employment).

374. See *supra* notes 296, 348, & 358-59 and accompanying text.

375. Compare *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958) (general contractor may use promissory estoppel to bind subcontractor) with *Southern Cal. Acoustics Co. v. C.V. Holder*, 71 Cal. 2d 719, 79 Cal. Rptr. 319, 456 P.2d 975 (1969) (subcontractor cannot use promissory estoppel against general contractor in bid dispute).

376. *Central Storage & Transfer Co. v. Kaplan*, 487 Pa. 485, 487-88, 410 A.2d 292, 293-94 (1979).

377. *Atkinson v. American Agency Life Ins. Co.*, 165 Ga. App. 102, 103-04, 299 S.E.2d 600, 601-02 (1983); *Havas v. Temple Univ.*, 516 A.2d 17, 19-20 (Pa. Super. Ct. 1986); *B.M.L. Corp. v. Greater Providence Deposit Corp.*, 495 A.2d 675, 677-78 (R.I. 1985).

378. See, e.g., *Esquire Radio & Elecs. v. Montgomery Ward & Co.*, 804 F.2d 787, 791-93 (2d Cir. 1986) (promissory estoppel used despite undisputed testimony that defendant had agreed to buy parts it had asked plaintiff to acquire from third party); *Kiely v. St. Germain*, 670 P.2d 764, 766-67 (Colo. 1983) (promissory estoppel used although parties twice told neutral third person that they agreed on all major terms); *Eavenson v. Lewis Means, Inc.*, 105 N.M. 161, 162, 730 P.2d 464, 465 (1986) (plaintiff described claim as one based on "agreement to employ"; court said issue for trial was promissory estoppel).

used promissory estoppel to recover on an offer that the defendants had earlier rejected.³⁷⁹ Several courts have heard cases in which plaintiffs claimed reliance on a statement that clearly was not intended by its maker to be binding.³⁸⁰

Two other problems, unforeseen by Llewellyn in his rejection of the doctrine for use in Article 2 situations, have arisen in the common law cases. As has been the case in situations where Article 2 was applicable, the use of promissory estoppel also has produced more than a few instances where its application led to serious doctrinal errors. Courts have used promissory estoppel to resolve disputes involving contract modifications;³⁸¹ others have used the doctrine instead of the parol evidence rule.³⁸² Indeed, there is at least one case in which promissory estoppel was used to enforce an alleged oral promise which preceded and flatly contradicted the terms of the written agreement.³⁸³

In addition, courts apparently have failed to develop a consistent theory regarding the proper relationship between bargained-for consideration theory and promissory estoppel. The latter doctrine has enabled some

379. *Goldstick v. ICM Realty*, 788 F.2d 456, 463 (7th Cir. 1986).

380. See, e.g., *Campbell v. Sirak*, 476 F. Supp. 21, 31 (S.D. Ohio 1979); *Kari v. General Motors Corp.*, 79 Mich. App. 93, 98, 261 N.W.2d 222, 224 (1977); *AFSCME Councils 6, 14, 65, & 96 v. Sundquist*, 338 N.W.2d 560, 567-68 (Minn. 1983); cf. *Fridenmaker v. Valley Nat'l Bank of Arizona*, 23 Ariz. App. 565, 568, 571, 534 P.2d 1064, 1067, 1070 (1975) (plaintiff unsuccessfully claimed reliance on term bank expressly rejected during negotiations).

381. See, e.g., *Glover v. Sager*, 667 P.2d 1198 (Alaska 1983) (promissory estoppel used to reject defendant's attempted unilateral modification of employment contract); *Continental Air Lines v. Keenan*, 731 P.2d 708 (Colo. 1987) (dispute over validity of terms in employment manual given to employee after employee began work); *Finley v. Aetna Life & Casualty Co.*, 5 Conn. App. 394, 499 A.2d 64 (1985) (evidence of promissory estoppel sufficient to grant new trial to enforce promise of lifetime employment made after plaintiff began working for defendant); *Reeder v. Sanford School*, 397 A.2d 139 (Del. Super. Ct. 1979) (plaintiff stated promissory estoppel cause of action by alleging reliance on promise that reduction of duties would not affect his salary); *Royal Assocs. v. Concannon*, 200 N.J. Super. 84, 490 A.2d 357 (1985) (promissory estoppel relevant to statements made at time written document signed); *Jones v. East Center for Community Mental Health*, 19 Ohio App. 3d 19, 482 N.E.2d 969 (1984) (plaintiff stated promissory estoppel cause of action when she relied on promises in employment manual which she received after she was hired); *Farm Crop Energy v. Old Nat'l Bank of Washington*, 38 Wash. App. 50, 685 P.2d 1097 (1984) (where bank had made loan commitment with conditions, promissory estoppel used to enforce bank promise to advance money before conditions were met).

382. See, e.g., *Yankton Prod. Credit Ass'n v. Larsen*, 219 Neb. 610, 613-14, 365 N.W.2d 430, 432-33 (1985) (promissory estoppel may allow enforcement of oral promise of continuing line of credit despite written contract to contrary); *Royal Assocs. v. Concannon*, 200 N.J. Super. 84, 89, 490 A.2d 357, 362 (1985) (promissory estoppel relevant to statements made at time written document was signed); *Fenstermaker v. Elwood*, 17 Ohio App. 3d 250, 251-55, 479 N.E.2d 908, 910-13 (1984) (defendant liable under promissory estoppel for promises made during negotiations which were not included in written document); cf. *Fridenmaker v. Valley Nat'l Bank of Arizona*, 23 Ariz. App. 565, 568, 571, 534 P.2d 1064, 1067, 1070 (1975) (where plaintiff relied on promises which were not in written document and which defendant had rejected during negotiations, plaintiff's promissory estoppel claim was properly dismissed). But see *Abbington v. Dayton Malleable*, 561 F. Supp. 1290, 1296 n.19 (S.D. Ohio 1983) (questioning whether promissory estoppel can be used to enforce terms which parol evidence rule would exclude).

383. *Yankton Prod. Credit Ass'n v. Larsen*, 219 Neb. 610, 613-14, 365 N.W.2d 430, 432-33 (1985) (though loan documents gave lender option to advance funds, promissory estoppel may enforce alleged contemporaneous oral promise to advance funds at borrower's demand).

courts to avoid injustice when the parties have failed to properly form a contract.³⁸⁴ For others, promissory estoppel has become a substitute for consideration or for lack of bargain.³⁸⁵ Still other courts have used promissory estoppel as a primary means to enforce a deal, even though the facts indicated a contract had been formed.³⁸⁶ Some courts have done the opposite in exactly the same situation, refusing to use promissory estoppel when a contract had been formed between the parties.³⁸⁷ Others have gone so far as to use promissory estoppel as a conscious method to avoid making a decision as to whether a contract existed.³⁸⁸ Still more frequently, courts completely fail to discuss or consider the relationship between the two doctrines.³⁸⁹

Only a more complete examination of promissory estoppel case law can analyze the full extent of these difficulties, but it is clear that the doctrine has caused serious problems that deserve further study. The next question is whether Agreement Theory can better shoulder the enforcement responsibilities promissory estoppel now bears. This does not mean Agreement Theory would result in the enforcement of more contracts than promissory estoppel, for promissory estoppel has enforced transactions that perhaps should not have been enforced.³⁹⁰ The real question is

384. See, e.g., *Jones v. East Center for Community Mental Health*, 19 Ohio App. 19, 23-24, 482 N.E.2d 969, 974 (1984); *Farm Crop Energy v. Old Nat'l Bank of Washington*, 38 Wash. App. 50, 53, 685 P.2d 1097, 1100 (1984).

385. See, e.g., *Forstmann v. Culp*, 648 F. Supp. 1379, 1384 (M.D.N.C. 1986); *Finley v. Aetna Life & Casualty Co.*, 5 Conn. App. 394, 414-15, 499 A.2d 64, 77-78 (1985); *Folks v. Dobbs*, 181 Ga. App. 311, 314, 352 S.E.2d 212, 215 (1986); *Eby v. York-Division, Borg-Wagner*, 455 N.E.2d 623, 627 (Ind. Ct. App. 1983).

386. See, e.g., *Esquire Radio & Elecs. v. Montgomery Ward & Co.*, 804 F.2d 787, 791-93 (2d Cir. 1986); *Glover v. Sager*, 667 P.2d 1198, 1201-02 (Alaska 1983); *Kiely v. St. Germain*, 670 P.2d 764, 767 (Colo. 1983); *Eavenson v. Lewis Means*, 105 N.M. 161, 162, 730 P.2d 464, 465 (1986).

387. *Abbington v. Dayton Malleable*, 561 F. Supp. 1290, 1296 n.19 (S.D. Ohio 1983); see also *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1493-94 (D.C. Cir. 1984) (where no contract yet formed, plaintiff had no reason to rely on anything); *Campbell v. Sirak*, 476 F. Supp. 21, 31 (S.D. Ohio 1979) (where contract said no tenure, administrator could not rely on assumption he was on tenure track).

388. See, e.g., *Esquire Radio & Elecs. v. Montgomery Ward & Co.*, 804 F.2d 787, 795 (2d Cir. 1986); *John Price Assocs. v. Warner Elec.*, 723 F.2d 755, 757 (10th Cir. 1983).

389. There are about 40 published decisions in which courts resolve two claims, one based on contract law and the other on § 90 of the *Restatement (Second)*, without explaining the relationship of the two. Several courts have expressly noted the problem. See, e.g., *AFSCME Councils 6, 14, 65, & 96 v. Sundquist*, 338 N.W.2d 560, 568 n.10 (Minn. 1983) (criticizing dissent for failing to distinguish between contract and promissory estoppel theories); *Bickerstaff v. Gregston*, 604 P.2d 382, 384 (Okla. Ct. App. 1979) (criticizing counsel for confusing agreement and promissory estoppel arguments). Others merely decided the contract and promissory estoppel claims without even noting that the two might have some relation. See, e.g., *Day v. City of Dayton*, 604 F. Supp. 191 (S.D. Ohio 1984); *Neal v. Bergland*, 489 F. Supp. 512 (E.D. Tenn. 1980); *Cantrell v. City Fed. Sav. & Loan Ass'n*, 496 So. 2d 746 (Alabama 1986); *Alaska Bussell Elec. Co. v. Vern Hickel Constr. Co.*, 688 P.2d 576 (Alaska 1984); *Continental Air Lines v. Keenan*, 731 P.2d 708 (Colo. 1987); *Reeder v. Sanford School*, 397 A.2d 139 (Del. Super. Ct. 1979); *Havas v. Temple Univ.*, 516 A.2d 17 (Pa. Super. Ct. 1986).

390. See, e.g., *Goldstick v. ICM Realty*, 788 F.2d 456 (7th Cir. 1986) (reliance may allow enforcement of offer which plaintiff had rejected before relying upon); *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740 (Minn. 1983) (employees recovered in part because of reliance on state pension statutes even though statutes created no contract rights).

whether Agreement Theory is better adapted than promissory estoppel to enforce transactions in which the parties have committed themselves to each other. An examination of a sample of over one hundred cases in which courts have considered or followed section 90 of the second *Restatement*³⁹¹ provides some answers.

An analysis of these cases strongly suggests that many modern courts consciously or subconsciously use promissory estoppel as a way to avoid factual questions about the presence or absence of assent among the parties. As mentioned above, some courts have said expressly that the existence of reliance made it unnecessary to resolve or even to consider a count based on contract theory.³⁹² Other courts to which a plaintiff has presented both a contract count and a promissory estoppel count have decided the latter claim first, and, having found that reliance was present, left the first claim languishing without comment.

There also are a large number of cases in which the court's findings of fact strongly suggest that an agreement may have been present, yet the court instead used promissory estoppel to enforce the transaction. A good example is *Esquire Radio & Electronics, Inc. v. Montgomery Ward & Co.*³⁹³ Esquire was to import appliances for Ward to market, import spare parts for those appliances, store them, and supply them to Ward as needed.³⁹⁴ The Second Circuit characterized Esquire as a service affiliate of Ward, providing storage, inventory control, and expense deferrals for the latter firm.³⁹⁵ For twenty years, Esquire imported only those spare parts Ward ordered orally, and Ward repeatedly made what the court said were "specific, clear, and unambiguous statements" that it would buy all the items it asked Esquire to acquire.³⁹⁶ Ward, however, terminated the arrangement, leaving Esquire with a huge inventory of parts that were usable only by Ward. Esquire sued on an implied contract to provide services, a similar oral contract, and promissory estoppel.³⁹⁷ The jury found for Esquire on all three counts; the Second Circuit affirmed only on the promissory estoppel count and expressly refused to address the other claims.³⁹⁸ Twenty years of conduct by the parties and repeated promises by Ward should have provided compelling evidence of a series of agreements between the parties and also should have made the court's consideration of section 90 of the *Restatement (Second)* unnecessary. The *Esquire* court, however, is not alone in its needless use of promissory estoppel: several other courts, despite solid evidence of an agreement, have relied on section 90 to enforce a transaction.³⁹⁹

391. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

392. See *supra* note 388 and accompanying text.

393. 804 F.2d 787 (2d Cir. 1986).

394. *Id.* at 790-91.

395. *Id.* at 795. Characterizing Esquire as a service affiliate allowed the court to decline to treat the transactions as sales of goods under Article 2.

396. *Id.* at 793.

397. *Id.* at 795.

398. *Id.*

399. See *Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1559 (11th Cir. 1984) (court found liability under both contract and promissory estoppel theories); *John Price Assocs. v. Warner Elec.*, 723 F.2d 755, 757 (10th Cir. 1983) (trial court found contract existed,

While section 90 led the courts in *Esquire* and its companion cases to use the wrong method to reach the correct decision, its use in a number of other decisions may not have been without prejudicial effect. A good example is *Cincinnati Fluid Power, Inc. v. Rexnord, Inc.*,⁴⁰⁰ in which the plaintiff applied to be a distributor of Rexnord's products. During the negotiations, Rexnord officials made oral and written statements indicating their intent to grant the application.⁴⁰¹ In addition, the plaintiff, with Rexnord's knowledge, moved to a large facility in order to handle the increased business expected from Rexnord.⁴⁰² The plaintiff did this even though the parties had not executed a written distributorship agreement, and even though, as the plaintiff's president admitted at trial, his own practice and the industry's custom was to put any such agreement in writing.⁴⁰³ The plaintiff did not even present a claim based on contract, but persuaded a jury that it had relied to its detriment on Rexnord's statements.⁴⁰⁴ The Sixth Circuit remanded for a new trial because of an improper instruction, but clearly stated that a second jury also could use a reliance theory.⁴⁰⁵

In such a case, when it is unclear whether the parties reached an agreement, the court's use of promissory estoppel may have resulted in serious prejudice to the defendant. If the jury found credible the testimony of the plaintiff's president that he and members of the industry always put the distributor contracts into writing, then he should have known that until he and Rexnord executed a written document, the deal was not enforceable. Consequently, he should have known that any acts taken in reliance on a still inchoate deal were taken at his own risk. The same holds true for a large number of other cases in which there are enough reported facts to show that an agreement may have been reached, but not enough facts to resolve the issue conclusively.⁴⁰⁶ In these cases, if there was an agreement,

but appellate court affirmed only on basis of reliance); *Glover v. Sager*, 667 P.2d 1198, 1202 (Alaska 1983) (court found prima facie case of promissory estoppel and then found contract had been formed); *Ravelo by Ravelo v. County of Haw.*, 66 Haw. 194, 199-200, 658 P.2d 883, 887 (1983) (county told plaintiff in writing that his job application had been accepted and that in three weeks he would be sworn in); *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980); (court found liability under promissory estoppel and contract theories); *Fenstermaster v. Elwood*, 17 Ohio App. 3d 250, 254, 479 N.E.2d 908, 913 (1984) (promissory estoppel used instead of parol evidence rule to add statements made during negotiations to terms of written contract).

400. 797 F.2d 1386 (6th Cir. 1986).

401. *Id.* at 1389-90.

402. *Id.* at 1388-89.

403. *Id.* at 1388.

404. *Id.* at 1390.

405. *Id.* at 1392.

406. See, e.g., *Billman v. V.I. Equities Corp.*, 743 F.2d 1021, 1024 (3rd Cir. 1984) (apparent implied agreement not to enforce condition of written contract); *Vastoler v. American Can Co.*, 700 F.2d 916, 919 (3rd Cir. 1983) (potential modification of employment contract); *Coca-Cola Co. Foods Div. v. Olmarc Packaging Co.*, 620 F. Supp. 966, 972 (N.D. Ill. 1985) (potential agreement in which Coca-Cola would increase dealings with Olmarc if Olmarc would buy necessary equipment); *Walker v. KFC Corp.*, 515 F. Supp. 612, 616 (S.D. Cal. 1981) (actual written contract and apparent collateral agreement); *Continental Air Lines v. Keenan*, 731 P.2d 708, 712 (Colo. 1987) (potential modification of employment contract to add termination procedures); *State Dep't of Highways v. Woolley*, 696 P.2d 828, 831 (Colo. Ct. App. 1984) (apparent agreement allowing department to enter land); *Vigoda v. Denver Urban*

the use of promissory estoppel was unnecessary; if there was not an agreement, the plaintiff's reliance was unjustified and enforcement based on section 90 was improper. The real issue in each of these cases should have been whether the parties had intended to be bound to each other; promissory estoppel merely obfuscated that issue and will continue to do so until replaced by the Agreement Theory.

While the replacement of promissory estoppel by Article 2's Agreement Theory and related formation sections would improve the ability of courts to decide which transactions should be enforced, the expansion of Article 2's statute of frauds⁴⁰⁷ and firm offer provisions⁴⁰⁸ into the general law of contract might not produce the same result. Since those provisions reject the use of reliance in cases where the parties did not create an adequate written record,⁴⁰⁹ incorporating them into general contract law undoubtedly would produce cases in which legitimate agreements could not be enforced. The fact should not cast doubt upon the greater utility of the Agreement Theory in general, however, for both 2-201 and 2-205 depart from that doctrine in their insistence on the formality of writing.

Section 2-205 provides the clearest example. As explained earlier, an interpretation of that section that incorporated its comments and its legislative history would refuse to enforce a subcontractor's bid upon which a general contractor has relied.⁴¹⁰ But that is not Agreement's fault. It was because of the Agreement Theory that the section makes an offer firm without consideration, in derogation of the common law. Pure Agreement Theory, uninfluenced by the writing requirement, might have gone so far as to require that when a subcontractor submits a bid to a general contractor, there is an implied understanding that if the general contractor uses that bid and wins the main project, he will hire the subcontractor, and the subcontractor will honor the bids he made.⁴¹¹ Indeed, given the strong

Renewal Auth., 646 P.2d 900, 905 (Colo. App. Ct. 1984) (apparent agreement to bargain in good faith for 90 days); *Finley v. Aetna Life & Casualty Co.*, 5 Conn. App. 394, 413-14, 499 A.2d 64, 76 (1985) (potential agreement to modify employment contract); *Reeder v. Sanford School*, 397 A.2d 139, 141 (Del. Super. Ct. 1979) (potential modification of employment contract); *Folks v. Dobbs*, 181 Ga. App. 311, 313-14, 352 S.E.2d 212, 215 (1986) (court, in using promissory estoppel to reject summary judgment motion, suggests the presence of consideration); *Eby v. York-Division, Borg Wagner*, 455 N.E.2d 623, 627 (Ind. Ct. App. 1983) (potential agreement to pay hiree's moving expenses); *McAndrew v. School Comm. of Cambridge*, 20 Mass. App. Ct. 356, 362, 480 N.E.2d 327, 330-31 (1985) (potential agreement that school officials would use best efforts to convince school board to hire plaintiff); *Opdyke Inv. Co. v. Norris Grain Co.*, 413 Mich. 354, 359-60, 320 N.W.2d 836, 839 (1982) (potential agreement to agree or to bargain in good faith); *Southside v. Clark*, 460 So.2d 113, 115 (Miss. 1984) (potential agreement by insurance agency to provide plaintiff with insurance coverage); *Eavenson v. Lewis Means*, 105 N.M. 161, 163, 730 P.2d 464, 465 (1986) (potential employment agreement); *Jones v. East Center for Community Mental Health*, 19 Ohio App. 3d 19, 23, 482 N.E.2d 969, 974 (1984) (potential modification of employment contract); *Farm Crop Energy v. Old Nat'l Bank of Washington*, 685 P.2d 1097, 1100 (Wash. Ct. App. 1984) (potential agreement to modify terms of loan).

407. U.C.C. § 2-201.

408. U.C.C. § 2-205.

409. See *supra* text accompanying notes 237-340.

410. See *supra* text accompanying notes 308-50.

411. In *Electrical Construction & Maintenance v. Maeda Pacific Corp.*, 764 F.2d 619, 620-21 (9th Cir. 1985), the court held that a claim that the parties expressly—though orally—

judicial, legislative, and societal opposition to bidshopping and bidchopping⁴¹² (practices *Drennan v. Star Paving* does little to discourage), one could argue that these understandings were included in any bid by means of the Code's usage of trade and good faith provisions.⁴¹³ Section 2-205, however, bars the use of this pure Agreement Theory. Because of Llewellyn's desire for written evidence of a transaction, comment 2 expressly prevents courts from using trade usage or prior courses of dealing to enforce oral bids. The obstacle is not Agreement Theory; it is Llewellyn's evidentiary concern.

The application of section 2-201's ideas to the general law of contract, including its rejection of promissory estoppel, also would prevent the enforcement of legitimate agreements. Again, that is not the fault of Article 2's Agreement Theory. Like section 2-205, section 2-201 sacrifices part of Agreement Theory in return for written evidence of the agreement,⁴¹⁴ and, like section 2-205, its requirement of a writing cannot be overcome by contrary trade usage. In short, the problems accompanying these provisions are not caused by Agreement, but instead are the results of the exceptions Llewellyn made to his Agreement Theory because of evidentiary concerns.

Curiously, although courts have used promissory estoppel as a solution to the problems these two exceptions create, their strategy actually may have contributed to the problem. By serving as a judicial escape hatch from the rigors of Llewellyn's evidentiary concerns, promissory estoppel may have reduced pressure on courts and legislatures to altogether reconsider the wisdom of those concerns. It may be that the common law's urge for written evidence of a transaction, which Llewellyn adopted, and Llewellyn's belief that such evidence existed for the vast majority of transactions no longer are justified. If that is true, however, one should abolish the rule completely, rather than merely create a few exceptions to it. Such a response, of course, would expand rather than contract the force of the Agreement Theory.

IV. CONCLUSION

The above discussion leads to a suggestion that is somewhat heretical in an era in which promissory estoppel has expanded dramatically and in which the barriers between contract and tort allegedly are crumbling. While the common law makes frequent use of the doctrine, Article 2 seems quite content without it, especially when one considers that the few Article 2 cases

agreed on this type of understanding stated a cause of action based on contract law.

412. See, e.g., *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 414-15, 333 P.2d 757, 760 (1958); *Southern Cal. Acoustics Co. v. C.V. Holder*, 71 Cal. 2d 719, 726 n.7, 79 Cal. Rptr. 319, 325 n.7, 456 P.2d 975, 981 n.7 (1969); CAL. GOV'T CODE § 4101 (Deering 1973).

413. Any problems with the Statute of Frauds should be obviated by industry customs that make it likely that both the general contractor and subcontractor have created written documents in connection with the bid. The general contractor almost always submits a written bid on the main project and maintains records as to which subcontractors' bids were used in his own bid. Subcontractors, in all but minor jobs, prepare work sheets in the process of compiling their own bids.

414. See Bruckel, *supra* note 236, at 811-14, 846-50.

which have employed promissory estoppel have done so improperly.⁴¹⁵ It is also true that while Llewellyn implemented his opposition to promissory estoppel in Article 2, he first revealed his concerns in a series of articles about the need for a substantial overhaul of contract law in general.⁴¹⁶ Article 2 was Llewellyn's chance to implement a unified, coherent package of formation rules, and, after twenty-five years of testing the 1962 Official Text, it appears that the experiment—at least in its efforts to do away with promissory estoppel—has largely succeeded. Indeed, the *Restatement (Second) of Contracts* has recognized that success by partially or completely adopting a number of Article 2's formation rules. These rules have eliminated the technical requirements of traditional bargained-for consideration theory.⁴¹⁷ If Llewellyn intended these rules to reduce the need for promissory estoppel, and if their adoption by the Code has reduced the use of that doctrine, then should not the same hold true for the general law of contract? Is it not curious that the use of promissory estoppel continues to develop even as the justification for its use falters?

These lessons should not be lost upon courts or the framers of the *Restatement (Third) of Contracts*. Whomever the latter may be, they have an obligation to explore the concerns about promissory estoppel and reliance that Karl Llewellyn posed fifty years ago, as well as the manner in which he developed a formation scheme that avoided those pitfalls. They can do this by continuing to relax formal rules that prevent courts from determining whether parties really had reached an agreement, by adopting rules which stress that the presence of agreement is the key basis for determining enforceability, and by making clear—perhaps clearer than Llewellyn did—which formal rules are intended to provide solid evidence of agreement, and which cannot be evaded by the use of promissory estoppel. The doctrine of section 90 should be relegated to the role Learned Hand foresaw for it, the area of interfamily promises and donative gifts. Contract,

415. See *supra* notes 289-92, 358-60 and accompanying text.

416. See Llewellyn, *Common Law Reform*, *supra* note 41, at 863; Llewellyn, *Consideration*, *supra* note 41, at 777; Llewellyn, *Unhorsing Sales*, *supra* note 41, at 873; Llewellyn, *Across Sales*, *supra* note 41, at 725; Llewellyn, *Offer and Acceptance II*, *supra* note 41, at 779; Llewellyn, *Title*, *supra* note 41, at 159; Llewellyn, *Offer and Acceptance I*, *supra* note 41, at 1; Llewellyn, *Rule of Law*, *supra* note 41, at 1243; Llewellyn, *What Price Contract*, *supra* note 41, at 704.

417. Some *Restatement (Second)* provisions parallel Article 2 provisions. For example, *Restatement (Second) of Contracts* § 22(2) and U.C.C. § 2-204(2) both provide that mutual assent can occur even though neither the offer nor acceptance can be identified and the moment of formation cannot be determined. *Restatement (Second) of Contracts* § 33 comment e and U.C.C. § 2-305 recognize that the parties may be bound even though they fail to set a price. *Restatement (Second) of Contracts* § 33 comment f and U.C.C. § 2-306 provide for the use of requirements contracts. *Restatement (Second) of Contracts* § 79 abolishes the requirement of mutuality of obligation, which does not appear in Article 2. Other provisions of the *Restatement (Second) of Contracts* partially adopt Code formation devices. For example, *Restatement (Second) of Contracts* § 89 allows modifications without consideration in three specific circumstances; U.C.C. § 2-209 allows such modifications wherever commercially reasonable. *Restatement (Second) of Contracts* § 87(1) contains a firm offer provision much like U.C.C. § 2-205, but adds a requirement that the offer recite purported consideration. *Restatement (Second) of Contracts* §§ 32 and 62 minimize the traditional significance of the difference between unilateral and bilateral offers, while U.C.C. § 2-206(2) eliminates completely the difference for short-term transactions. The *Restatement (Second) of Contracts* § 59, comment a, encourages courts to apply the mirror image rule with less vigor; U.C.C. § 2-207 abolishes the rule for nondickered terms.

in the form of agreement, can then be resurrected as a growing, vital body of law capable of fulfilling the needs of modern business. After all, there simply is more to agreement than to tort.⁴¹⁸

418. Llewellyn, *Offer and Acceptance I*, *supra* note 41, at 34 n.62.

