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# Smashing the Broken Mirror: The Battle of the Forms, UCC 2-207, and Louisiana's Improvements

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# Smashing the Broken Mirror: The Battle of the Forms, UCC 2-207, and Louisiana's Improvements

*N. Stephan Kinsella\**

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## I. INTRODUCTION

While a broken mirror is supposed to bring seven years of bad luck, the breaking of the common law's mirror image rule<sup>1</sup> by section 2-207 of the Uniform Commercial Code has been seen in a more positive light. The UCC abolished the mirror image rule because it is problematic and can lead to unjust results.<sup>2</sup> In Louisiana, where the UCC has not been completely adopted, the mirror image rule, as embodied by Louisiana Civil Code article 1943,<sup>3</sup> has recently been eliminated as well.<sup>4</sup>

Effective January 1, 1995, Article 1943 will be superceded by New Louisiana Civil Code articles 2601 and 2602, which closely follow the structure of UCC section 2-207. Articles 2601 and 2602 were part of the Sales Revision Projet of the Louisiana State Law Institute, and are designed such that some of the defects of section 2-207, which have become apparent over time, may be avoided. To the extent that these articles accomplish this goal, they are a "new and improved" version of section 2-207, and can be a guide for further modification of section 2-207. To that end, this paper will examine Louisiana's solutions to some of section 2-207's problems.<sup>5</sup>

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1. See Part II, *infra*.

2. See 1 Saül Litvinoff, Obligations § 186, in 6 Louisiana Civil Law Treatise (1969), and *Consent Revisited*, 47 La. L. Rev. 699, 736-39 (1987).

3. See *infra* note 7 and accompanying text.

4. 1993 La. Acts 841, § 1, § 4.

5. In making suggestions concerning legislation, I am not unaware of the problems inherent in making law by legislation (as opposed to common law or judge-made law, or even privately produced law). As noted by the late Italian legal theorist Bruno Leoni in his *Freedom and the Law* (3d ed., Liberty Fund 1991) (1961), "*there is more than an analogy between the market economy and a judiciary or lawyers' law, just as there is much more than an analogy between a planned economy and legislation.*" *Id.* at 23 (emphasis in original). The knowledge of legislators (and of commentators, as well) about the society they will affect by their actions is, like that of central planners, severely limited. Because of this ignorance, all the effects of a given legislated law cannot be predicted. In the same way that a centrally-planned economy is inefficient, centrally-planned laws (i.e., legislation) are also problematic. Therefore, both the efficacy and legitimacy of legislation are uncritically taken for granted in today's society. Of course the problems inherent in legislation are also inherent in making suggestions for legislation, such as the comments in this paper. Nevertheless, where the choice is between legislators passing *this* law or *that* law, I do not hesitate to recommend the better of the two, for having judge- or market-produced law is simply not an option today.

## II. THE MIRROR IMAGE RULE AND THE LAST SHOT PRINCIPLE

Under the mirror image rule, a purported acceptance which does not perfectly "mirror" the terms of the offer is not an acceptance; instead, it is a rejection and counteroffer. An ostensible acceptance of *this* counteroffer may, by the same token, be instead a counter-counteroffer. The true acceptance occurs when a party finally starts performing, after receiving the latest counteroffer of the other party. By the performer's acceptance, the contract embodies the terms of the last counteroffer.

In this way the mirror image rule leads to the last shot principle: he who makes the last offer (i.e., the "last shot") before performance/acceptance has his terms locked into the contract. As White and Summers state,

The original draftsman of 2-207 designed it (though not exclusively) to keep the welsher in the contract. He had cases like *Poel v. Brunswick-Balke-Collender Co.*<sup>[6]</sup> in mind. There the buyer's underling sent back its own order form which happened to coincide with the seller's terms except in one minor respect. It added: "The acceptance of this order . . . in any event you must promptly acknowledge." Thereafter, the seller failed to acknowledge, and the buyer for other reasons backed out. When the seller sued the buyer, the court held that the buyer's order form did not constitute an acceptance. At common law an acceptance had to be a mirror image of the offer. The buyer's form therefore could not be an acceptance; it was a counteroffer. The rigidity of the common law rule ignored the modern realities of commerce. Where preprinted forms are used to structure deals, they rarely mirror each other, yet the parties usually assume they have a binding contract and act accordingly. Section 2-207 rejects the common law mirror image rule and converts many common law counteroffers into acceptances under 2-207(1).<sup>7</sup>

The last shot principle was largely eliminated by the enactment of UCC section 2-207. Some vestiges of the last shot principle have, however, escaped total elimination;<sup>8</sup> also, the application of section 2-207 is not without uncertainty.<sup>9</sup> Section 2-207 is not yet perfect.

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6. 110 N.E. 619, 621 (N.Y. 1915).

7. James J. White & Robert S. Summers, *Uniform Commercial Code 29-30* (3d ed. 1988) (footnotes omitted).

8. See *infra* note 21 and accompanying text.

9. See, e.g., Richard W. Duesenberg, *Contract Creation: The Continuing Struggle with Additional and Different Terms Under Uniform Commercial Code Section 2-207*, 34 *Bus. Law.* 1477 (1979), for a discussion of some uncertainties created by UCC § 2-207.

## III. FORMATION OF CONTRACTS IN LOUISIANA—PRESENT AND FUTURE

Louisiana's mirror image rule—present Louisiana Civil Code article 1943—reads: "An acceptance not in accordance with the terms of the offer is deemed to be a counteroffer." Louisiana courts have been able, in some cases, to avoid the inequities of such a rule by holding that an acceptance with different terms is really "substantially" an acceptance. For example, if a buyer offers to purchase something at \$1000, and the seller "accepts" but at a price of \$800, this is an acceptance—even though the terms do not mirror those in the offer—because the seller has changed a term in the buyer's favor.<sup>10</sup> However, except in a similarly limited and rare situation, a court would be largely unable to prevent unjust outcomes resulting from application of current Louisiana Civil Code article 1943, because the mirror image rule it prescribes ineluctably leads to the last shot principle.

Under new Articles 2601 and 2602, the mirror image rule is repealed in favor of a provision similar to section 2-207 of the UCC. New Article 2601, which corresponds to UCC subsections 2-207(1) and (2), reads as follows:

Art. 2601. Additional terms in acceptance of offer to sell a movable

An expression of acceptance of an offer to sell a movable thing suffices to form a contract of sale if there is agreement on the thing and the price, even though the acceptance contains terms additional to, or different from, the terms of the offer, unless acceptance is made conditional on the offeror's acceptance of the additional or different terms. Where the acceptance is not so conditioned, the additional or different terms are regarded as proposals for modification and must be accepted by the offeror in order to become a part of the contract.

Between merchants, however, additional terms become part of the contract unless they alter the offer materially, or the offer expressly limits the acceptance to the terms of the offer, or the offeree is notified of the offeror's objection to the additional terms within a reasonable time, in all of which cases the additional terms do not become a part of the contract. Additional terms alter the offer materially when their nature is such that it must be presumed that the offeror would not have contracted on those terms.

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10. See, e.g., *Spiers v. Seal*, 426 So. 2d 631 (La. App. 1st Cir. 1982); *Wendel v. Dixon Real Estate Co.*, 232 So. 2d 791 (La. App. 4th Cir. 1970); and *Ward v. Parker*, 151 So. 2d 108 (La. App. 1st Cir. 1963).

Source: New. See U.C.C. 2-207; U.N. Convention on the International Sale of Goods, Art. 19.<sup>11</sup>

New Article 2602, which corresponds to UCC subsection 2-207(3), reads as follows:

**Art. 2602. Contract by Conduct of the Parties**

A contract of sale of movables may be established by conduct of both parties that recognizes the existence of that contract even though the communications exchanged by them do not suffice to form a contract. In such a case the contract consists of those terms on which the communications of the parties agree, together with any applicable provisions of the suppletive law.

Source: New. See U.C.C. 2-207.<sup>12</sup>

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11. 1993 La. Acts 841, § 1. The comments to Article 2601 are provided below:

(a) This Article is new. It changes the law in that it departs from the general rule of Civil Code Article 1943 (Rev. 1984) that requires the acceptance to conform to the terms of the offer. That departure is however limited to the particular case of contracts for the sale of movables.

(b) The rule of this Article is applicable to all kinds of offer and acceptance where the sale of movables is involved and is not limited to communications contained in printed forms like those habitually used by merchants.

(c) Under this Article, when the parties are not merchants, or one of them is not, a contract is formed in the original terms of the offer unless the offeror assents to the additional or different terms contained in the acceptance.

(d) Under this Article, when both parties are merchants, an expression of acceptance containing additional or different terms that materially alter the offer does not prevent the formation of a contract of sale without such terms.

(e) Under this Article, when both parties are merchants and the offer limits the acceptance to the terms of the offer or the offeror timely objects to the additional or different terms, the contract is formed in the original terms of the offer.

(f) Under this Article, a term contained in an expression of acceptance is "additional" when it contemplates a matter not addressed in the offer, as when the acceptance names a date for delivery, but the offer does not. A term in an acceptance is "different" when it varies a term contained in the offer, as when the offer names a date for delivery, but the acceptance names a date that does not coincide with the one in the offer.

(g) Under this Article, a term contained in an acceptance alters the offer materially when it is of such a nature that it gives rise to the presumption that the offeror would not enter a contract with that term. An arbitration clause, or a clause relative to the extent of the parties' liability, are examples of such terms.

(h) Under this Article, a party to a contract of sale is regarded as a merchant when he habitually manufactures, or buys and sells things of the kind involved in the contract. A merchant, however, may be regarded as a consumer when purchasing things of a kind different from those he manufactures, or buys and sells.

12. 1993 La. Acts 841, § 1. The comments to Article 2602 are provided below:

(a) This Article is new. It changes the law so that a performance rendered after

For ease of comparison, UCC section 2-207 is provided below:

Sec. 2-207. Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

#### IV. UCC SECTION 2-207 PROBLEMS AND CIVIL CODE SOLUTIONS

##### A. *Where Acceptance is "Expressly Conditional"*

###### 1. *The Meaning of "Expressly Conditional"*

UCC section 2-207 attempts to solve problems arising from the mirror image rule by eliminating the rule. Under subsection 2-207(1), an "ex-

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the sending of an acceptance not conforming to the terms of the offer does not imply the formation of a contract in the terms of the counteroffer, but gives rise to a contract consisting of those terms of the offer and the acceptance that agree plus all applicable provisions of the suppletive law.

(b) In this Article, the expression "suppletive law" means the rules contained in the provisions of this Title and the general principles of the law of obligations, namely provisions intended to supply solutions for situations the parties did not expressly provide for. See Garro, "Codification Technique and the Problem of Imperative and Suppletive Laws," 41 La. L. R. 1007 (1981).

pression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered . . . .” Thus, the mere fact that an ostensible acceptance does not perfectly mirror the offer does not mean that it cannot operate as an acceptance. By this provision the traditional mirror image rule is eliminated. However, under subsection 2-207(1) the offeror can invoke the mirror image rule, preventing the reply from being an acceptance, if the “acceptance is expressly made conditional on assent to the additional or different terms.”<sup>13</sup>

The courts have encountered some problems in deciding whether a purported acceptance was “expressly” made conditional on the offeror’s assent to the additional or different terms. For example, in *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*,<sup>14</sup> the court held that a responding document which contained a condition (a disclaimer) was expressly conditional and thus did not operate as an acceptance, even though, according to White and Summers,<sup>15</sup> this holding was inconsistent with the policies embodied in UCC section 2-207. Professor Hawkland suggests that courts should “emphasize the words ‘expressly made conditional.’”<sup>16</sup> Thus, to be “expressly conditional,” a purported acceptance would have to explicitly state, in unambiguous language, and in a conspicuous position on the form, that acceptance is “expressly conditioned” upon the offeror’s assent to such conditions.

Under UCC subsection 2-207(1), an “acceptance” which contains the “expressly conditional” language buried in small type or in an inconspicuous place on the form usually will not be sufficient to prevent the form from being a true acceptance.

The placement and nature of the qualifying language in the purported acceptance is critical in determining whether or not there is an acceptance under the first part of section 2-207(1), or a rejection and counter-offer under the second part. The qualifying language does not have to use the word “condition” to become expressly conditional within the meaning of the proviso, but it must be stated in such a place, manner and language that the offeror will understand in the commercial setting of the transaction that no acceptance has occurred, despite initial language stating that the offeree is happy to accept.<sup>17</sup>

The jurisprudence is consistent with this reading of subsection 2-207(1). In *Clifford-Jacobs Forging Co. v. Capital Engineering & Manu-*

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13. See *infra* note 21 and accompanying text for an explanation of how this provision of subsection 2-207(1) gives rise to a “last shot” effect.

14. 297 F.2d 497 (1st Cir. 1962).

15. White & Summers, *supra* note 7, at 33.

16. William D. Hawkland, Uniform Commercial Code Series § 2-207:02, at Art. 2, p. 160 (1992).

17. *Id.* at 161 (citations omitted).



*facturing Co.*, the court stated that an acceptance will be considered a counteroffer only if the acceptance is *expressly* made conditional on *assent* to the additional terms. This provision of the statute has been construed narrowly to apply only to an acceptance which clearly shows that the offeree is unwilling to proceed absent assent to the additional or different terms.<sup>18</sup>

In *Mace Industries, Inc. v. Paddock Pool Equipment Co.*,<sup>19</sup> the court held that to convert an acceptance into a counteroffer under UCC subsection 2-207(1), the conditional nature of the acceptance must be clearly expressed, in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract.

## 2. Article 2601—Omission of “Expressly”—Apparent Disadvantages

Article 2601, in stating that an “expression of acceptance . . . suffices to form a contract . . . unless acceptance is made conditional on the offeror’s acceptance of the additional or different terms,” does not require the acceptance to be *expressly* conditional, unlike UCC subsection 2-207(1). This appears to be, at first glance, a major and unfortunate change from the wording of section 2-207, for it will be easier for an “acceptance” to fail to be a true acceptance, because the conditioning need not be express.

Thus, under Article 2601, the communications between the parties will fail to form a contract more frequently than under the UCC. Where subsequent conduct of the parties nevertheless recognizes the existence of a contract, suppletive terms, not those of (one of) the parties, will define the contract. Consequently, there will be more resort to Article 2602, which covers this situation and supplies suppletive terms, than there is to subsection 2-207(3) under the UCC, which also provides for suppletive terms.

An advantage of the “expressly conditioned” language in UCC subsection 2-207(1) is that it allows an ambiguous acceptance—e.g., one which is conditional, but not expressly so—to be held against the offeree.<sup>20</sup> Under Article 2601, a similarly “ambiguous” acceptance possibly would not be held against the offeree, but would instead prevent acceptance altogether, because Article 2601 does not require the conditioning of acceptance to be express; i.e., the absence of the word “expressly” allows more ambiguous conditioning of acceptances to bar formation of a con-

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18. 437 N.E.2d 22, 24 (Ill. App. 4th Cir. 1982), citing *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972).

19. 339 S.E.2d 527 (S.C. App. 1986).

20. *Hawkland*, *supra* note 16, § 2-207:02 at Art 2, p. 161.

tract. Courts may still attempt to hold ambiguous conditioning of acceptances against the offeree, but will be less able to do so because the removal of the word "expressly" clearly indicates that a court should more often find that there was no acceptance. Lack of the word "expressly" in Article 2601 will allow offerees to condition more ambiguously—i.e., less expressly—their "acceptances" and still avoid the contract being formed on the offeror's terms.

### 3. Article 2601—Omission of "Expressly"—Advantages

There is, however, some reason in support of such an eased standard for conditioning one's acceptance. Conditions attached to an acceptance (though not expressly), in a sense, still convey a rejection of the offer. If the conditioned acceptance were to form a contract on the offeror's terms, there would exist a situation similar to that arising under the "last shot principle" that revocation of the mirror image rule was meant to eliminate. When an offeree's "acceptance" is, indeed, "conditioned" on the offeror's assent to additional or different terms—even if not "expressly" conditioned—the offeree's "acceptance" is not a true acceptance, technically speaking. Thus, omission of the word "expressly" is an improvement because it will actually remove some of the remaining vestiges of the last shot principle.<sup>21</sup>

Some courts have worried that a more lenient standard for finding no true acceptance, because the acceptance was conditioned, would actually lead to a *resurgence* of the mirror image rule. For example, in *Boese-Hilburn Co. v. Dean Machinery Co.*, the court stated:

[T]his court believes that the drafters of the Uniform Commercial Code, by use of the language "expressly made conditional,"

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21. See Paul Barron & Thomas W. Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 Clev. St. L. Rev. 171, 213 (1975), stating that "[t]he basic criticism of section 2-207, as interpreted, is that it still contains a preference for the terms of one party over another, allowing that party's terms to dominate the transaction. In most instances, the dominant party will be the original offeror whose terms control . . ." If a reply no longer needs to be "expressly" conditioned, then it will be easier for a reply to fail to be an acceptance, which will lead to more resort to the suppletive terms under Article 2602; such a reduction in the occurrence of the "last shot principle" is an improvement.

In Charles M. Thatcher, *Sales Contract Formation and Content—An Annotated Apology for a Proposed Revision of Uniform Commercial Code § 2-207*, 32 S.D. L. Rev. 181, 185 (1987), it is stated that "[t]he insistence that the offeree must 'expressly' make his acceptance conditional has invited mechanical interpretations of the subsection (1) proviso. The results achieved under such interpretations often fail to separate bargains and non-bargains in fact from bargains and non-bargains in form" (footnote omitted). Again, according to the rationale expressed here, omission of the word "expressly" is an improvement, as it may eliminate "mechanical" interpretations of when a reply is a conditioned "acceptance."

See also Fairfax Leary, Jr. & David Frisch, *Is Revision Due for Article 2?*, 31 Vill. L. Rev. 399, 428-29 (1986), for examples of how UCC § 2-207 "has not abolished the mirror image rule."

clearly intended that an acceptance which merely implied that it was "conditional" on an offeror's assent to a different or additional provision was insufficient to convert an acceptance into a rejection and a counteroffer. Otherwise, many of the problems which prompted the drafting and adoption of U.C.C. § 2-207 would not be alleviated and the specter of the "mirror image" rule would still haunt the marketplace.<sup>22</sup>

In this case, the court was concerned that a looser standard for finding that an acceptance is "conditional" may lead to an increase in mirror image results.

The court's concern appears to be unfounded, for, rather than finding that a failed acceptance is a counteroffer—whose terms will rule if the offeror then performs (an example of the last shot principle)—the court could find that there has been no contract formed at all by the writings of the parties, and instead resort to suppletive law, as provided in UCC subsection 2-207(3) and in new Louisiana Civil Code article 2602. That is, when a reply to an offer is conditioned so that it is not an acceptance, the offeree does not get his terms embodied in the contract if the offeror then performs; rather, suppletive terms are applied.

Let us assume a situation where no contract exists under UCC subsection 2-207(1), but the parties nevertheless perform. A court can proceed to analyze contract formation in one of two ways.

First, a court can take the common law, *Roto-Lith*,<sup>[23]</sup> approach and find that the second document is a counteroffer and hold that subsequent performance by the party who sent the first document constitutes acceptance. This approach gives one party (who fortuitously sent the second document) all of his terms. In our view, Code draftsmen did not choose to take this approach. Instead, they proceeded on to contract formation via section 2-207(3) . . . .<sup>24</sup>

Similarly, under Articles 2601 and 2602, if an "acceptance" fails to form a contract because it is conditioned on additional or different terms, instead of being a counteroffer and the offeree getting his terms under the last shot principle if the offeror were to perform, Article 2602 would instead look to the suppletive law to determine the terms of the ensuing contract. Thus, making it easier to condition one's acceptance by not requiring it to be "express" will lead to greater use of the suppletive law, not to increased last-shot results. And while increased occurrence of last-shot results may be undesirable, increased resort to suppletive law

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22. 616 S.W.2d 520, 526 (Mo. App. 1981).

23. *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

24. *White & Summers*, *supra* note 7, at 42 (footnote omitted).

may, in many situations, be a beneficial change in the law, because it would in some situations prevent the counterofferor from getting the "last shot."

If the parties go on to perform the contract, where the offeree conditioned his acceptance (though not expressly), there is some justice in holding them equally "at fault" for failing to reach an agreement by their communications, so that neither is in a position to complain about suppletive law determining the terms of the contract.<sup>25</sup> In a sense, then, a more equitable system results from the removal of the word "expressly" and the corresponding increased ability of an offeree to condition his offer, because neither offeror nor offeree receives an inordinate advantage; rather, where there has been acceptance only by performance, both parties, having performed, are subjected to the suppletive law as mandated in Article 2602.

### B. *Expression of Acceptance*

One of the problems often encountered with an application of UCC subsection 2-207(1) is that a reply may have terms so radically different from those in the initial offer that, although acceptance is not made expressly conditional on the offeror's assent to the different terms, the reply cannot be said to contain an expression of acceptance. White and Summers state that "in our view, it is clear that a document may be an

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25. Incidentally, saying that the parties are not "in a position to complain" about the application of suppletive law when they have failed to clearly reach an agreement on certain terms is akin to saying that the parties are estopped from complaining. Estoppel's relevance to UCC interpretation is shown by UCC section 1-103, which authorizes the application of the doctrine of estoppel to supplement various provisions of the UCC. Under this doctrine, persons are estopped, in certain situations, from complaining or asserting something contrary to prior conduct or assertions. Here, it could be said that a party who fails to reach an agreement on a given term is simultaneously "asserting" that, or acting as if, he does not care what that term is, within certain boundaries. Thus it would be inconsistent of him to later assert that he does mind certain provisions—namely, suppletive law—being used to fill in the missing terms. Although this does not exactly fit under the *legal* scope of the estoppel doctrine, it is within its spirit. Because estoppel is a concept arising from considerations of equity or justice, this somewhat creative use of estoppel demonstrates the justice of holding the parties equally at fault for failing to reach an agreement, and for saying that the parties are not in a position to complain about the application of suppletive law to their agreement.

Other similarly "creative" uses of estoppel are possible. The ideas that underlie the doctrine can even be used to support a theory of rights. See N. Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, 17 Reason Papers 61 (Fall 1992). For example, showing that a murderer is "estopped" from complaining about his punishment shows that there is a right to not be murdered; showing that a publisher of pornography, or an employer offering a prospective employee less than the minimum wage, having engaged in no violence against anyone, are not estopped from complaining if the government punishes them, demonstrates that there are rights, against the government, to freedom of speech, expression, association, trade, and so forth.

acceptance under 2-207(1) and yet differ substantially from the offer. . . . But how much can an acceptance differ? Certainly there is some limit."<sup>26</sup>

In *Alliance Wall Corp. v. Ampat Midwest Corp.*,<sup>27</sup> quoting in part from *White & Summers*,<sup>28</sup> the court said:

Not all return documents are 2-207(1) "acceptances." If the return document diverges significantly as to a dickered term, it cannot be a 2-207(1) acceptance. For example, if the purchase order calls for the sale of 200,000 pounds of lard at ten cents a pound and the acknowledgment responds with 200,000 pounds at fifteen cents a pound, the second document is not an acceptance under 2-207(1), and no contract is formed via the exchange of forms.<sup>29</sup>

Article 2601 is an improvement because it more clearly defines what is necessary for acceptance. It provides that an acceptance forms a contract of sale "if there is agreement on the thing and the price, even though the acceptance contains terms additional to, or different from, the terms of the offer." This is a precisely worded definition of "acceptance," which should reduce uncertainty for buyers, sellers and courts in determining whether there has been an acceptance to the offer.

### C. *Additional and Different Terms as Proposals for Modification*

When a UCC subsection 2-207(1) expression of acceptance has been found, the rules of subsection 2-207(2) govern the fate of the additional and different terms in the acceptance. Where the contract is not "between merchants," subsection 2-207(2) provides that "additional terms are to be construed as proposals for addition to the contract." The subsection is silent with respect to the manner of acceptance of these proposals, but apparently they can be accepted in the ordinary manner by the offeror.

Although the words "different terms" are not included in UCC subsection 2-207(2), presumably any different terms in the offeree's reply are also to be treated as proposals which can be accepted by the offeror. The wording of section 2-207 is somewhat unclear here, but it is likely that omission of the "different terms" language, if it was intended at

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26. *White & Summers*, *supra* note 7, at 32. See also Bill Shaw, *U.C.C. § 2-207: Two Alternative Proposals for Change*, 13 Am. Bus. L.J. 186, 194-95 (1975), favoring retention of the general nature of the "acceptance" requirement, because "laymen and merchants alike know the meaning of the word *acceptance* and invite upon themselves the consequences of using it loosely."

27. 477 N.E.2d 1206 (Ohio App. 1984). See *Hawkland*, *supra* note 16, § 2-207:02 at Art. 2, p. 166 n.6, citing this case.

28. James J. White & Robert S. Summers, *Uniform Commercial Code* 37 (2d ed. 1980). For the corresponding discussion in the current third edition, see *White & Summers*, *supra* note 7, at 47-48.

29. *Alliance Wall Corp.*, 477 N.E.2d at 1211 n.5.

all, relates to the second sentence of subsection 2-207(2), which applies to a contract between merchants.<sup>30</sup>

However, there is another possible explanation for the lack of the "different terms" language in UCC subsection 2-207(2). "Why the failure to treat 'different' terms? The answer is simple and startling—the *present Code contains a critical printer's omission.*"<sup>31</sup> It appears that subsection 2-207(2) was supposed to include the "or different" language, but "[i]t was lost as the result of a typographical or printer's error."<sup>32</sup>

In any event, it appears that, under UCC section 2-207, if an acceptance (not between merchants) contains additional or different terms, these terms are to be treated as proposals for modification, which may be accepted or not by the offeror.

Article 2601 is drafted in more explicit language, providing that "the additional or different terms" in an acceptance "are regarded as proposals for modification and must be accepted by the offeror in order to become a part of the contract." Thus, mere implications in UCC section 2-207—that additional terms are proposals for modification that may be accepted by the offeror, and that different terms are also proposals for modification—are made explicit in Article 2601. This reduction of uncertainty and ambiguity is an improvement.

#### D. Additional Terms that "Materially Alter" the Contract

##### 1. "Different Terms" and Acceptance by Silence

Under UCC section 2-207, between merchants, additional terms—but not different terms—can become accepted, effectively, by the silence of the offeror, unless the offeror in some manner objects to the additional terms, or the terms "materially alter" the contract. Presumably, under current interpretations of section 2-207, different terms by their nature "materially alter" the contract and thus cannot be accepted by the mere

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30. Hawland, *supra* note 16, § 2-207:03, at Art. 2, p. 168. As Professor Hawland points out, UCC section 2-207, comment 3, clearly suggests that, between merchants, both additional *and* different terms can become part of a contract by operation of subsection 2-207(2). See also Duesenberg, *supra* note 9, at 1483, 1486, for a similar view.

31. John L. Utz, *More on the Battle of the Forms: The Treatment of "Different" Terms Under the Uniform Commercial Code*, 16 UCC L.J. 103, 105 (1983).

32. *Id.* at 111. It is interesting to note that in Montana, the only state with a statutory variation of § 2-207 (according to Leary & Frisch, *supra* note 21, at 422), the state's version of § 2-207 *does* include the "or different" words after the words "The additional" in § 2-207(2). Mont. Code Ann. § 30-2-207 (1991).

silence of the offeror.<sup>33</sup> However, as discussed above,<sup>34</sup> there is some reason to think that it should be possible for different terms, as well as additional terms, to be accepted by silence, because the "or different terms" language may have been erroneously left out of subsection 2-207(2).

Article 2601, paragraph 2—the analog of UCC subsection 2-207(2)—provides that, between merchants, "additional terms become part of the contract unless certain events occur." If it is true that the drafters of the UCC originally intended to include the "or different terms" language in subsection 2-207(2), it is unfortunate that this omission is continued in Article 2601. It is not obvious that there is any reason for allowing "additional," but not "different," terms to be accepted by silence,<sup>35</sup>

33. See Barron & Dunfee, *supra* note 21, at 188, for a discussion of *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.*, 206 N.W.2d 414 (Wis. 1973). The court in *Air Products* cites *American Parts Co. v. American Arb. Ass'n*, 154 N.W.2d 5 (Mi. App. 1967), as having limited the application of subsection (2) to additional terms. "The implication seems clear. A party cannot be expected to have assented to a different term." *Air Products*, 206 N.W.2d at 424. As Barron & Dunfee point out, "the court in *American Parts* does not appear to have offered any justification for making the distinction other than the language of subsection (2)." Barron & Dunfee, *supra* note 21, at 188. See also Utz, *supra* note 31, at 117 n.31 and accompanying text, for further cases which make this distinction.

34. See *supra* notes 31-32 and accompanying text.

35. See Utz, *supra* note 31, at 112-18. See also Barron & Dunfee, *supra* note 21, at 187-88, stating that

there are several strong reasons supporting the interpretation that no distinction between additional or different terms should be made in applying subsection (2). . . .

. . . .

Unless some policy justification relating to a significant variance between additional and different terms is advanced, there appears to be no basis for making such a distinction.

Barron & Dunfee also note, however, that "one wonders why so much controversy has been generated" because "given the language of (a), (b) and (c) of subsection (2), only the most inoffensive of terms, *whether different or additional*, are likely to find their way into the contract" by silence of the offeror. Barron & Dunfee, *supra* note 21, at 187.

As noted in *supra* note 32, Montana has included the "or different" words in § 2-207(2), and thus its legislators apparently did not see any reason why "different" terms should not be as acceptable by silence as are "additional" terms, although, admittedly, the actions of legislators are not very relevant nor persuasive authority in normative considerations.

Indeed, even the comments to Article 2601 imply that both "different" as well as "additional" terms may be accepted by silence. Comment (d) states that "when both parties are merchants, an expression of acceptance containing additional *or different* terms that materially alter the offer does not prevent the formation of a contract of sale without such terms." (emphasis added). Paragraph 2 of Article 2601, which deals with contracts "between merchants" and states that "additional terms become part of the contract unless they alter the offer materially," does not mention "different" terms at all. Thus it is curious why comment (d) would state that if different terms "materially alter" the offer, a contract may

except perhaps for the weak reason that an offeror may be presumed to object to any different term as it contradicts his offer. However, "additional" terms appear to contradict the offer also, yet they may be accepted by silence. It is suggested that the silence of the offeror should operate as an acceptance of "different" terms under paragraph 2 of Article 2601 in the same manner as the silent acceptance of "additional" terms. To this extent, Article 2601—as well as, of course, UCC section 2-207(2)—should be amended.

## 2. "Materially Alter"

In considering whether the offeror has accepted additional terms by silence, the principal difficulty has been in deciding whether the additional terms "materially alter" the contract. As Professor Hawkland explains,

[t]he concept "materially alter" is not defined by section 2-207(2), but it is explained by comment 4. That comment suggests that any term is a material alteration if its incorporation into the contract without express awareness by the other party would result in surprise or hardship. . . .

Comments 4 and 5 give examples of terms in the offeree's form which do and do not materially alter the contract created by the exchange of forms, but they are not particularly helpful . . . because they merely indicate the way trade usage functions under the Code.<sup>36</sup>

Thus, UCC section 2-207 does not define "materially alter," and the comments do not make the language much clearer.

Article 2601 also provides a definition of "materially alter" that is an improvement over the indefinite wording of UCC section 2-207. Article 2601 states that "[a]dditional terms alter the offer materially when their nature is such that it must be presumed that the offeror would not have contracted on those terms." This functional test should make it easier for courts and merchants to predict whether a contract has been formed.

Comment (g) to Article 2601 elaborates on the text of the article. It states that a term materially alters an offer when it can be presumed that "the offeror would not enter a contract with that term." This wording is not as accurate as the wording of Article 2601, paragraph 2, because

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still be formed, when paragraph 2 does not refer to such "different terms" at all. Perhaps it was assumed that additional and different terms are similar in concept and thus are on an "equal footing" in some sense. In that case, there is no reason why only additional, and not different, terms could be accepted by silence, between merchants.

36. Hawkland, *supra* note 16, § 2-207:03 at Art. 2, pp. 169-70 (footnotes omitted). See also Leary & Frisch, *supra* note 21, at 433, where the clarity of the "materially altered" language in UCC § 2-207 is questioned.



of the use of the word "a." It would be beneficial to substitute the word "the" for "a" in the comment. It is not true that a term is material because the offeror would *never* contract with that term, in "a" contract. Certainly, "a" contract could be written, which would include the "material" term, but which would also be acceptable to the offeror given other terms to complement and make up for the "material" term. Rather, a term should be considered material if *the* contract under consideration would not be accepted if it contained the material term.

While containing some minor semantic problems, however, the material alteration test in Article 2601 is helpful.

3. *Is it the Offer, or is it the Contract, that is "Materially Altered"?*

A final comment can be made here. UCC subsection 2-207(2) states that additional terms "become part of the contract unless . . . they materially alter it." The word "it" apparently refers to the *contract*. However, it is not obvious whether the offeree's additional terms (may) materially alter the offer, or the contract. If the additional term is so material that it prevents formation of a contract, there is, it would seem, no contract to alter. There is, however, an offer, and thus it is better to speak of terms materially altering the *offer*.

Article 2601, in a change from the wording of UCC subsection 2-207(2), states that "[b]etween merchants . . . additional terms become part of the contract unless they alter the *offer* materially."<sup>37</sup> While this distinction is somewhat technical, it does improve the clarity and structure of the law.

*E. Where the Offer Limits Acceptance to the Terms of the Offer*

Between merchants, by UCC subsection 2-207(2), additional, but not different,<sup>38</sup> terms can be accepted by silence of the offeror, unless "the offer expressly limits acceptance to the terms of the offer" or "notification of objection to them has already been given." If the offer prohibits the formation of a contract on any terms other than those in the offer, such restriction would be an objection by the offeror to any additional terms, which is contemplated in subsections 2-207(2)(a) and (c). Thus, any additional terms in the offeree's acceptance would fall, under these subsections, because objection to them would have already been made by the offeror.

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37. New La. Civ. Code art. 2601 (emphasis added).

38. See *supra* notes 33-35 and accompanying text.

1. *Ambiguity of Offer-Restrictions in UCC Subsections 2-207(a) and (c) Abolished*

White and Summers offer another possible interpretation of such restrictive language in the offer:

On the other hand if the offer is read to mean "This offer can be accepted only by a document that contains neither additional nor different terms," any response that contains either additional or different terms would not constitute an acceptance and the case would fall entirely outside 2-207(1) and 2-207(2).<sup>39</sup>

A similar interpretation is less plausible under the language of Article 2601, which states that "[b]etween merchants . . . additional terms become part of the contract unless . . . the offer expressly limits the acceptance to the terms of the offer . . . in all of which cases the additional terms do not become a part of the contract." This language implies that, even where the offeror restricts his offer, and the offeree nevertheless includes additional terms in his acceptance, the additional terms do not become part of the contract, but "the contract" would still exist. Comment (e) to Article 2601 supports this reading: "when both parties are merchants and the offer limits the acceptance to the terms of the offer . . . the contract is formed in the original terms of the offer." Thus, Article 2601 is less ambiguous in this respect than is UCC subsection 2-207(2) because the second possible interpretation of offer-restrictions is ruled out.

2. *Reduction in Redundancy*

UCC subsection 2-207(2)(a) prevents any additional terms from becoming part of the contract where "the offer expressly limits acceptance to the terms of the offer." Subsection 2-207(2)(c) has an identical effect on additional terms when "notification of objection to them has already been given." There is a redundancy here because, if the offer limits acceptance to its terms (satisfying subsection 2-207(2)(a)), the restriction is also a "notification" of objection to additional terms (satisfying subsection 2-207(2)(c)). Thus, under both subsections, the additional terms would not become part of the contract where the offer limits acceptance to its terms.

Article 2601 is very similar in operation to these two provisions; however, it slightly simplifies the redundancy by providing that, "between merchants . . . additional terms become part of the contract unless . . . the offeree is notified of the offeror's objection to the additional terms within a reasonable time." Article 2601 omits the unnecessary language of UCC subsection 2-207(2)(c) which addresses the situation where no-

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39. White & Summers, *supra* note 7, at 41 (footnote omitted).

tification of objection has already been given, because this situation is already covered where Article 2601 provides "the offer expressly limits the acceptance to the terms of the offer," which is the analog of 2-207(2)(a). Thus, Article 2601 combines the redundant aspects of subsections 2-207(2)(a) and (c) into a more general rule.

### 3. Article 2601—Asymmetry in Use of Term "Expressly"

One structural criticism of Article 2601 is a lack of symmetry in its use of the term "expressly." In UCC section 2-207, the word "expressly" is used in subsection (1) (expressly conditioning an acceptance) and in subsection (2)(a) (expressly limiting an acceptance to the terms in the offer). Similarly, under Article 2601, paragraph 2, the article retains the "expressly" language which is also present in subsection 2-207(2)(a), when it states that between merchants an additional term is accepted by silence unless "the offer expressly limits the acceptance to the terms of the offer." However, as discussed above,<sup>40</sup> an acceptance under Article 2601 need not be made "expressly" conditional to additional or different terms in order to prevent formation of the contract.

The justification for this asymmetry is difficult, at first glance, to see. It seems unbalanced for the standard to be changed for the offeree and not for the offeror. If an offeree can condition his acceptance on assent to his additional or different terms, without "expressly" so conditioning, it would seem that an offeror should be able to limit the ability of the offeree to accept to the terms of the offer, without "expressly" so limiting.

When an offeree responds to an offer with an ostensible acceptance, Article 2601 allows him to effectively reject the offer by merely (i.e., not "expressly") conditioning the acceptance; the conditioning of an offeree's reply need not be "express" in order to reject the offer. When an offeror limits the acceptance to the terms of the offer, the offeror is effectively rejecting (ahead of time) the offeree's proposals for modification; however, unlike the offeree's ability to nonexpressly condition his acceptance, the offeror must "expressly" so limit. An offeree, through conditioning his acceptance, can effectively object without doing so "expressly"; an offeror, in "pre-objecting," must do so expressly.

One possible explanation for the asymmetry is that, as discussed above,<sup>41</sup> Article 2601 may have deviated from UCC section 2-207 in allowing an acceptance to condition itself without doing so expressly in order to minimize the occurrence of situations where the offeror gets the "last shot." The drafters may have felt that resort to suppletive law is

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40. See *supra* note 20 and accompanying text.

41. See *supra* note 21 and accompanying text.

more equitable than the offeror getting all his terms, even where the acceptance was "merely" conditional. This rationale may be lacking with respect to the "expressly limits" language in paragraph 2 of Article 2601, for the last-shot principle is not likely to arise here: even if the offeror does not "expressly" limit the acceptance to the terms of the offer, the offeror retains the ability to (later) reject any additional terms of the offeree.

Thus, the asymmetry appears to be justified. Removal of the word "expressly," in allowing the offeree to condition his acceptance, may prevent the offeror from unjustly getting the last shot. Retaining the word "expressly," in requiring that an offeror "expressly limit" the manner of acceptance, does not harm the offeror, as he may still reject any additional terms after the acceptance, and helps to ensure that the offeree is aware that his proposed terms have been rejected ahead of time.

#### F. Confirmations

UCC subsection 2-207(1) refers to written confirmations. It is a strange provision to have in an offer-and-acceptance context, because written confirmations are sent after the parties have already reached an oral agreement, and so it would appear that subsection 2-207(1) cannot apply at all to a written confirmation.<sup>42</sup> However, comment 1 to subsection 2-207(1), along with the specific language of the subsection, indicates that the subsection does, indeed, apply to "confirmations." Evidently, despite the fact that a prior oral agreement may have been formed, a later written "confirmation" can serve as an "acceptance" for purposes of subsections 2-207(1) and (2). Thus, "certain additional terms in the confirmation may become (retroactively, as it were) a part of the original contract by virtue of the operation of 2-207(2)."<sup>43</sup>

Article 2601 omits any mention of confirmations. This is beneficial because a confirmation cannot technically be an acceptance to an already-formed contract. As Professor Hawkland points out, "[b]asically, section 2-207 undertakes to answer two questions: (1) Is there a contract? (2) If so, what are its terms? Subsections 2-207(1) and (3) answer the first question; subsections 2-207(2) and (3) answer the second."<sup>44</sup> Articles 2601 and 2602 attempt to answer the same questions. To answer these two questions, it is not necessary to refer to confirmation forms, except perhaps as evidence of a prior intent to be bound. If a contract has been formed, its terms are not defined by future confirming forms. If a contract has

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42. Hawkland, *supra* note 16, § 2-207:05 at Art. 2, p. 183; White & Summers, *supra* note 7, at 44; Barron & Dunfee, *supra* note 21, at 185; Shaw, *supra* note 26, at 192-93; Thatcher, *supra* note 21, at 184; and Leary & Frisch, *supra* note 21, at 425 n.94.

43. White & Summers, *supra* note 7, at 45.

44. Hawkland, *supra* note 16, § 2-207:01 at Art. 2, p. 159.

not been formed, there can be no contract to confirm. Thus, it is proper and an improvement for Article 2601 to omit confirmations, because conceptually that subject should be dealt with separately.<sup>45</sup>

*G. Oral Versus Written Communications—Inconsistencies and Ambiguities*

Article 2602 states that suppletive law should provide the terms of a contract which is evidenced by conduct of both parties when the communications between the parties do not form a contract. This provision is very much like its counterpart, UCC subsection 2-207(3) and should operate similarly. The major difference is that Article 2602 refers to "communications" between the parties which fail to form a contract, whereas subsection 2-207(3) refers to "writings of the parties [which] do not . . . establish a contract."

UCC section 2-207 appears to be slightly inconsistent. Subsection 2-207(3) implies that a contract must either be formed by conduct or by writings. However, subsection 2-207(1) speaks only of an "expression of acceptance or a written confirmation which is sent . . ." This wording appears to allow a non-written (i.e., oral) expression of acceptance to form a contract. That conflicts with the implication of subsection 2-207(3) that a non-written contract may not be formed under section 2-207. Subsection 2-207(1) does, however, imply, consistently with subsection 2-207(3), that an expression must be in writing, as it would be difficult to imagine that a non-written acceptance could be "sent."

Articles 2601 and 2602 are less ambiguous. Article 2601 states that an "expression of acceptance . . . suffices to form a contract" while

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45. See Shaw, *supra* note 26, at 193, where Professor Shaw states that "[s]ince the offer and acceptance or contract formation process has already gone before, letters of confirmation should be separated from subsection (1) of 2-207 not only for the sake of clarity but also for the purpose of emphasizing conceptual differences between the two."

Professor Brown believes that "[t]he purpose of the inclusion of confirmations in subsection (1) was to clarify that a confirmation inconsistent with the terms of the agreed contract does not negate contractual intent." Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. Rev. 893, 940-41 (1991). When parties make an oral agreement with details left to be finalized later, "the parties' later *behavior* may influence the court's decision about the parties' intentions at the time of making the putative contract." *Id.* at 941 (emphasis added). But their later *intentions*, as perhaps expressed in a later confirming form, should be irrelevant. "The inclusion of confirmations under section 2-207(1) thus appropriately refutes the otherwise arguable evidentiary value of the preprinted form's additional or different terms; such terms, merely of themselves, do not justify the conclusion that no contractual intent was present at the time of the putative oral agreement." *Id.*

The omission of confirming forms in Article 2601, however, is still desirable for, despite Professor Brown's conclusions, there does not appear to be a great danger of confirming forms having any improper evidentiary value in deciding whether intent existed at the time of the original alleged agreement.

Article 2602 refers to a contract formed by conduct where "the communications exchanged by" the parties do not form a contract. Neither of these articles seems to require that a contract be formed by writings, but rather by "expressions" or "communications." An oral contract may be impossible to prove, but in this case Article 2602 presumably provides for suppletive law to govern if the parties' conduct nevertheless evinces a contract.

In any event, the language of the articles is more coordinated than under UCC section 2-207 so that they more effectively complement each other. "Communications" and "expressions," as used in Articles 2601 and 2602, have similar general connotations, because it is at least possible that they both refer to oral communications as well as to written ones. In contrast, "expression" and "writings," as used in subsections 2-207(1) and (3), have less compatible meanings, for "expression" does not necessarily rule out an oral expression, while "writings" does.

Although Articles 2601 and 2602 are more consistent than UCC section 2-207 in this respect, it is still unclear whether they contemplate only written "expressions" and "communications," or also oral ones. Comment (b) to Article 2601 states that "[t]he rule of this Article is applicable to *all* kinds of offer and acceptance . . . and is not limited to communications contained in printed forms like those habitually used by merchants."<sup>46</sup> This implies that the article is not limited to preprinted forms, but it is not clear whether Article 2601 covers oral contracts, although the word "all" would seem to encompass both oral and written offers and acceptances. The articles would be improved if that ambiguity were resolved.<sup>47</sup>

## V. CONCLUSION

UCC section 2-207 eliminated the mirror image rule, though not without some problems. Louisiana's proposed Civil Code articles 2601 and 2602 follow in the footsteps of this provision of the UCC. Some commentators have suggested a complete rewriting of UCC section 2-207.<sup>48</sup> Louisiana, in adopting Articles 2601 and 2602, has rejected this

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46. New La. Civ. Code art. 2601, comment (b) (emphasis added).

47. Professor Brown argues that, not only does § 2-207 not apply to oral agreements, but it also does not apply to written agreements unless they are embodied on "preprinted forms." Brown, *supra* note 45, at 899-900. However, Professor Hawkland states that "[t]he section, however, is not limited to situations where forms have been used, though most commonly that is where it will come into operation. The section also applies to negotiated contracts and written confirmations." Hawkland, *supra* note 16, § 2-207:01 at Art. 2, p. 158. In any event, it is clear that Article 2601 is certainly *not* limited to preprinted forms, as comment (b), quoted immediately above in the text, shows, although the status of oral communications remains uncertain.

48. See, e.g., Barron & Dunfee, *supra* note 21, at 204-13; Shaw, *supra* note 26, at 195; Thatcher, *supra* note 21; and John E. Murray, *The Chaos of the "Battle of the Forms": Solutions*, 39 Vand. L. Rev. 1307, 1384 (1986).

approach, and has instead elected to retain the basic structure of section 2-207, while making some improvements. This is a good idea, because the UCC, though not perfect, is fairly stable, is accepted in other states, and has been interpreted for many years. Further, modeling the new articles after the UCC provision helps make Louisiana's civil law system more compatible with the law of the other states.

The new articles are drafted in the spirit and tradition of the Civil Code, broken into two articles rather than one for the sake of structural integrity, and are an improvement upon UCC section 2-207 in several ways. The word "expressly" in subsection 2-207(1) has been eliminated, which helps to eliminate some remaining vestiges of the last shot principle. The definition of "acceptance" is more precise, contributing to certainty, predictability, and uniformity. The fact that, when not "between merchants," additional terms are proposals for modification and may be accepted by the offeror, is made explicit, as is the fact that different terms are also such proposals for modification. The concept of "materially alter" is given a useful functional test. The provision allowing for an offer to restrict acceptance to the terms of the offer is given a less ambiguous meaning than in subsections 2-207(2)(a) and (c); the redundancy of subsections 2-207(a) and (c) is also done away with. "Confirmation" issues, which should conceptually be dealt with elsewhere, are eliminated. And, finally, there is more consistency between the words "communications" and "expressions," than in 2-207's use of "expression" and "writings."

Unfortunately, however, the new articles do not allow "different" terms to be accepted by silence, and they also are unclear as to whether "expressions" and "communications" include oral communications.

UCC section 2-207, the parent of new Articles 2601 and 2602, can now learn from its progeny. In building upon the successes of their predecessor, while eliminating many flaws, the new articles promise to better facilitate commerce, with justice and predictability. With a few minor adjustments, the new articles can be better still.