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The Chaos of the "Battle of the Forms": Solutions

John E. Murray, Jr.

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This kind of thing does not make for good business, it does not make for good counselling, and it does not make for certainty. It means that you never know where you are, and it does a very bad thing to the law indeed. The bad thing that it does to the law is to lead to precedent after precedent in which language is held not to mean what it says and indeed what its plain purpose was, and that upsets everything for everybody in all future litigation.†

I. INTRODUCTION

Whatever may be said of the lack of certainty, stability, and predictability in many areas of the law, chaos rarely is discovered. Unfortunately, we have now reached that point in matters involving attempts by innumerable buyers and sellers to make contracts through an exchange of printed forms. Because printed forms will continue to be the written evidence of the overwhelming majority

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† Statement of Karl Llewellyn, 1 State of New York, 1954 Revision Commission Report, Hearings on the Uniform Commercial Code 114 (178).

of attempted contracts in America,[1] this chaos threatens the institution of contract in our society. There should be no doubt that "chaos" is an accurate characterization of the state of the law in the "battle of the forms" arena. Courts and commentators have disagreed on the proper application, interpretation, and construction of the statute governing contracts for the sales of goods, section 2-207 of the Uniform Commercial Code.[2] Courts have been inconsistent and devoid of intellectual acuity in attempting to apply 2-207. Fair results in these cases often have been the product of sheer coincidence, and many litigants have not been fortunate.[3] The challenge of judicial elaboration that Karl Llewellyn created in this section of Article 2 has not been approached.[4]

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1. Professor W. David Slawson suggests that standard forms are probably the written evidence of the contract in up to 99% of all contracts. Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

2. Section 2-207 provides:

(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.

U.C.C. § 2-207 (1978).

3. Professor Thatcher states:

Although many courts have managed to achieve viscerally satisfying results in applying the statute, this has been done in spite of the curious statutory wording, not because of it. Strained and manipulative interpretations of Section 2-207 indicate a need to supply commercial parties with a revised statute that does not require fine tuning by repeated judicial recourse to covert tools.

Thatcher, *Battle of the Forms: Solution by Revision of Section 2-207*, 16 U.C.C. L.J. 237, 240-41 (1984).

4. Article 2 is singular in its emphasis upon purposive interpretation and construction. This emphasis is not remarkable in light of the jurisprudential proclivities of Karl Llewellyn, Article 2's principal draftsman. "A piece of legislation, like any other rule of law, is, of course, meaningless without reason and purpose." K. LLEWELLYN, JURISPRUDENCE 228 (1962). "[A] statute must at need be implemented to effect its purpose by going far beyond its text." Llewellyn, *The Modern Approach to Counseling and Advocacy—Especially in Commercial Transactions*, 46 COLUM. L. REV. 167, 181 (1946). There has never been another statute that so expressly relies upon judicial elaboration, analogy, and fidelity to its underlying purposes as Article 2 of the Uniform Commercial Code. Article 2 may be viewed as a

Because there is no conventional wisdom concerning 2-207, no recognized scholarship can be relied on.[5] In their well-known commercial law text, Professors White and Summers express unusually candid disagreement on the proper interpretation and construction of 2-207.[6] Moreover, neither author is particularly pleased with his view and each would prefer that the statute be redrafted. The statute itself is not merely a "murky bit of prose."[7] It is riddled with angular phraseology and features a subsection which was tacked on belatedly without the aid of the statute's principal draftsman. In the view of one of commercial law's giants, that added subsection converted a troublesome statute into a "disaster."[8] Resorting to

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set of common law guidelines providing a context through which courts may mold and remold what a Comment to Article 1 calls a "semi-permanent" piece of legislation into a body of merchant law which reacts effectively to the needs of commercial society. Article 2 can be understood only as a prism, with each section representing one facet of that prism. *See* Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 2 (1981) [hereinafter Murray, *The Article 2 Prism*]; *see also* Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978); *infra* note 80.

5. I do not mean to say that there have been no thoughtful contributions to a better understanding of 2-207. *See, e.g.*, Baird & Weisberg, *Rules, Standards, and the Battle of the Forms: Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982); Barron & Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 CLEV. ST. L. REV. 171 (1975); Duesenberg, *Contract Creation: The Continuing Struggle with Additional and Different Terms Under Uniform Commercial Code Section 2-207*, 34 BUS. LAW. 1477 (1979); Murray, *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597 (1978) [hereinafter Murray, *Incipient Unconscionability*]; Murray, *Intention Over Terms: An Exploration of U.C.C. 2-207 and New Section 60, Restatement of Contracts*, 37 FORDHAM L. REV. 317 (1969) [hereinafter Murray, *Intention Over Terms*]; Shanker, *Contract by Disagreement? (Reflections of U.C.C. 2-207)*, 81 COM. L. J. 453 (1976); Taylor, *U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality*, 46 U. CIN. L. REV. 417 (1977); Thatcher, *supra* note 3; Travalio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207*, 33 CASE W. RES. L. REV. 327 (1983).

6. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 27-31 (2d ed. 1980).

7. Southwest Eng'g Co. v. Martin Tractor Co., 205 Kan. 684, 694, 473 P.2d 18, 25 (1970); *see also* Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497, 500 (1st Cir. 1962) ("The statute is not too happily drafted."); Ebasco Servs., Inc. v. Pennsylvania Power & Light Co., 460 F. Supp. 163, 205 (E.D. Pa. 1978) ("[an] enigmatic section of the Code"); R. DEUSENBERG & L. KING, SALES AND BULK TRANSFERS, 3 BENDER'S U.C.C. SERVICE, § 3.02 1986 (2-207 is "one of the most important, subtle, and difficult in the entire Code, and well it may be said that the product as it finally reads is not altogether satisfactory.")

8. In a letter to Professor Robert Summers, Professor Grant Gilmore made the following statement regarding section 2-207:

> The 1952 version of 2-207 was bad enough . . . but the addition of subsection (3), without the slightest explanation of how it was supposed to mesh with (1) and (2), turned the section into a complete disaster. . . .
>
> My principal quarrel with your discussion of 2-207—and all the other discussions I have read—is that you treat the section much too respectfully—as if it had sprung, all

the Official Comments[9] accompanying 2-207 is something akin to a metaphysical experience until one realizes that the creators of the Comments were as confused as all others who have attempted to deal with the section since its enactment. Amendments to the Comments, designed to patch the section where it did not work, have succeeded only in exacerbating the confusion. The practicing bar always has been wary of 2-207's charms,[10] and the academic community has retreated more than substantially from its initial high praise of the section.[11] Demands for the abolition of 2-207 and a new start are mounting,[12] and suggested substitutions in the

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of the piece, like Minerva from the brow of Jove. The truth is that it was a miserable, bungled, patched-up job—both text and Comment—to which various hands—Llewellyn, Honnold, Braucher and my anonymous hack—contributed at various points, each acting independently of the others (like the blind men and the elephant). It strikes me as ludicrous to pretend that the section can, or should, be construed as an integrated whole in light of what "the draftsmen" "intended". (I might note that, when subsection (3) was added, Llewellyn had ceased to have anything to do with the project).

Letter from Professor Grant Gilmore to Professor Robert Summers, *reproduced in* R. SPEIDEL, R. SUMMERS & J. WHITE, COMMERCIAL AND CONSUMER LAW 54-55 (3d ed. 1981).

9. Although many courts have relied on the Comments in construing and applying particular Code sections, the Comments have not been enacted into law. Therefore, although the Comments may be useful in determining what the drafters intended in a particular Code section, when a conflict between the Code's language and a Comment exists, the Code must control. Murray, *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 736 n.10 (1982) [hereinafter Murray, *Standardized Agreement*].

10. In a statement to a continuing legal education audience, Professor Grant Gilmore said:

> [O]ne of the problems in this field, which has always been the delight of law professors . . . is the so-called battle of the forms where seller and buyer, each dedicated to his own brand of insanity, exchange forms which have nothing . . . to do with each other and then ask counsel, "Well, where are we?" That was a problem that Professor Llewellyn dearly loved, and he put in a long section in Article 2 which has been, generally, hailed by the academic community as nothing less than Magna Carta and, as far as I can tell, generally hailed by members of the . . . bar as probably the end of civilization as we know it.

Coogan, Dunn, Farnsworth, Gilmore, Hogan, Kripke, Leary & Sachse, *Advanced ALI-ABA Course of Study on Banking and Secured Transactions Under the Uniform Commercial Code*, Transcript at 108 (1968).

11. *Id.*

12. A member of the ABA Committee on the Uniform Commercial Code, Mr. Ronald J. Thomas, Assistant General Counsel of Burndy Corporation, Norwalk, Connecticut pleaded in exasperation:

> I recommend that we eliminate Section 2-207 and start from scratch to construct a law that is clear and comprehensible to lawyers, judges and laymen. I believe, and I do not say this lightly, that we could encourage no greater replacement in the U.C.C. [than] by throwing out 2-207 and starting again.

Duesenberg, *supra* note 5, at 1477. "Because Section 2-207 has too often been an impediment to the effectuation of the underlying purposes and policies of the Code, it is overdue

literature are not difficult to discover.[13] Some had hoped that the *Restatement (Second) of Contracts,* which appeared long after the enactment of 2-207 throughout the country, would provide elaboration and guidance concerning the entire standardized agreement phenomenon, including the "battle of the forms." Instead, the *Restatement* is unfortunately counterproductive.[14]

Bringing order from the current chaos of 2-207 through the judicial process may not be possible. The statute may be fatally flawed. Before reform of any kind can be successful, understanding the purposes of 2-207 as a species of the purposes of Article 2 of the Uniform Commercial Code is essential. This Article first will explore those purposes. In doing so, it will confront the highly controversial problems faced in interpreting and construing 2-207. The Article then will reexamine the section's drafting history, case law, and scholarship to provide workable analyses of the counter-offer riddle and the puzzle over different versus additional terms. Resolving these well-known problems leaves the final enigma, which has not been understood, much less confronted. Finally, the denouement is discovered, through understanding the normative assumptions of 2-207 as facets of the normative assumptions of the Article 2 prism,[15] to promote fidelity to the underlying philosophy of Article 2 in the particular context of the inevitable "battle of the forms."

II. The Purpose of Section 2-207 Within Article 2

The Article 2 revolution is predicated upon a more precise and fair identification of the parties' factual bargains.[16] The emphasis

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for an overhaul." Thatcher, *supra* note 3, at 241; *see also infra* note 13.

13. *See, e.g.,* Baird & Weisberg, *supra* note 5, at 1260-61; Barron & Dunfee, *supra* note 5, at 206-07; Kaufman, *The Scientific Method in Legal Thought: Legal Realism and the Fourteen Principles of Justice,* 12 St. Mary's L. J. 77, 81-82 n.20 (1980); Kove, *"The Battle of the Forms": A Proposal to Revise Section 2-2-207,* 3 U.C.C. L.J. 7, 11-12 (1970); Shaw, *U.C.C. § 2-207: Two Alternative Proposals for Change,* 13 Am. Bus. L.J. 185 (1975); Thatcher, *supra* note 3, at 245-54.

14. *See* Murray, *The Standardized Agreement, supra* note 9, at 744-61.

15. *See* Murray, *The Article 2 Prism, supra* note 4, at 2.

16. R. Speidel, R. Summers & J. White, Commercial and Consumer Law 677 (3d ed. 1981) (quoting Murray, *The Realism of Behaviorism Under the Uniform Commercial Code,* 51 Or. L. Rev. 269, 297 (1972)).

In testimony before the New York Law Revision Commission, Karl Llewellyn made it clear that the changes he contemplated would be revolutionary:

> In the third paragraph on page 2 it is stated that the Code "does not purport to change the suhstantive law of this State except in a few particulars." But if there is one thing which the Code does undertake to do, it is to remake the sales law of New York State *vigorously and over the whole field* in order that the law may he made to con-

is upon the "agreement" of the parties, which is defined as "the bargain of the parties *in fact* as found in their language, or by implication from other circumstances including course of dealing, or usage of trade or course of performance . . . ."[17] The discovery of this factual bargain must be unfettered by the "technical"[18] constraints of classical contract law. As heirs to the Article 2 revolution, we are particularly interested in identifying the "commercial understanding"[19] of the parties, and we will recognize a closed deal if the parties manifest their intention that it should be closed.[20]

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form to commercial practice, and may be read and make sense. It is beyond my understanding how anybody can either read the Article (knowing the present law) or can read the comments on the Article (even though he does not know the present law), or can read any of the literature about the Article or can criticize, for instance, the Statute of Frauds section, and still urge upon your Honorable Commission that the "Code *does not purport to change the substantive law of sales in New York except in a few particulars.*" The changes are, in fact, deep, wide, vital. And they are utterly needed in order to produce intelligent and workable commercial law. Miss Mentschikoff's comments in your final session are peculiarly in point: The present law "works" by being *ignored* by the *decent* business man.

1 State of New York, 1954 Law Revision Commission Report, Hearings on the Uniform Commercial Code 49 (113) (emphasis in original) [hereinafter 1954 Law Revision Commission Hearings].

In emasculating the old Sales Act concept of title, the first comment in Article 2 (§ 2-101) suggests this pervasive philosophy:

> The legal consequences [in Article 2] are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

U.C.C. § 2-101 comment 1 (1978).

17. U.C.C. § 1-201(3) (1978) (emphasis added).

18. For examples of the antitechnical nature of Article 2, see *id.* § 2-204(3) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); *id.* § 2-206 Comment 1 ("Formal technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphic acceptance, etc., are rejected . . . . "); *id.* § 2-209(1) ("An agreement modifying a contract within this Article needs no consideration to be binding."); *id.* § 2-209(1) Comment 1 ("This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."). *See also* Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971). In *Columbia Nitrogen* the court required the implication of trade usage and prior course of dealing to determine the factual bargain of the parties. "Faithful adherence to this mandate reflects the reality of the marketplace and avoids the overly legalistic interpretations which the Code seeks to abolish." *Id.* at 10. "Indeed, the Code's official commentator urges that overly simplistic and overly legalistic interpretation of a contract should be shunned." *Id.* at 11.

19. U.C.C. § 2-207 Comment 2 states in part: "Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract."

20. *Id.*

We will not be troubled by missing terms as long as we can discover an intention to be bound[21] and a reasonable basis to afford a remedy.[22] We will not worry about the precise time of contract formation,[23] and we will sanction any reasonable manner of acceptance in any reasonable medium.[24] The parties may vary the terms of the statute by their factual bargain[25] in all but a few cases in which the failure to prohibit variance would be absurd.[26]

The Article 2 revolution further demands that every aspect of every transaction will assume the standard of good faith, which, in the case of merchants, includes commercial reasonableness.[27] That standard is one of the normative assumptions of Article 2 that the parties cannot change by factual bargain. Our task is to approximate, as closely as the objective evidence permits, the "true understanding"[28] of the parties. No matter how complete and final the written evidence of the deal may be,[29] notions of "plain meaning" interpretations[30] or refusals to consider trade usage,[31] course of dealing,[32] and course of performance[33] will be rejected to permit

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21. U.C.C. § 2-204(3) (1978).

22. *Id.*

23. U.C.C. § 2-204(2) (1978).

24. U.C.C. § 2-206(1)(a) (1978).

25. U.C.C. § 1-102(3) (1978).

26. See comment 2 to § 1-102, which, *inter alia*, suggests that even though nothing explicitly prohibits varying the statute of frauds, a fair reading of the Code would prohibit any variance, for to do otherwise would render the statute absurd.

The same analysis would apply to an attempt to vary the good faith and unconscionability policies of Article 2. *See* U.C.C. §§ 1-201(19), 2-103(1)(b), 2-302 (1978).

27. U.C.C. § 2-103(1)(b) (1978); *see also id.* § 1-201(19). The definition of good faith for all parties, merchants and nonmerchants, is "honesty in fact in the conduct or transaction concerned." *Id.*

28. U.C.C. § 2-202 comment 2 (1978).

29. *Id.* § 2-202(a). For an elaboration of the U.C.C. parol evidence approach and the RESTATEMENT (SECOND) approach, see Murray, *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts* 123 U. PA. L. REV. 1342 (1975).

30. *Id.* § 2-202 comment 1(b), (c).

31. U.C.C. § 1-205(2) provides:

> A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

32. U.C.C. § 1-205(1) provides: "A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."

33. U.C.C. § 2-208 provides:

> (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection

discovery of the parties' agreement. If the parties reasonably believe that they have modified their deal, and that they did so in good faith, we will not insist upon a technical requirement to enforce the modification.[34] Because the parties should be permitted to modify their factual bargain without technical interference, their course of performance not only will provide the strongest evidence of their contract's intended meaning;[35] it also will operate to overcome their previously expressed terms.[36]

Unfair surprise[37] and oppression[38] are incongruous with Article 2's good faith standard. Therefore, the "total legal obligation which results from the parties' agreement [their contract]"[39] will not include any oppressive terms. The statute includes safeguards against oppression in particularly tempting instances,[40] but mechanical formalistic compliance with safeguard technicalities should not be used to frustrate the overriding standards of good faith and conscionability.[41] Therefore, the factual bargain that we

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to it by the other, any course of performance accepted or acquiesced in without ohjection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

34. U.C.C. § 2-209(1) (1978).

35. *Id.* § 2-208(2).

36. *Id.* §§ 2-208(3), -209; *see also supra* note 18.

37. U.C.C. §§ 2-207 comment 4, 2-302 comment 1 (1978).

38. *Id.*

39. U.C.C. § 1-201(11) (1978).

40. *See, e.g., id.* § 2-205 (indicating that when the printed form is supplied by the offeree, any assurance that the offer will become a firm offer must be separately signed by the offeror who may not have noticed it). A similar safegnard is found in 2-209(2). Section 2-316(2) contains a conspicuousness requirement, as well as the requirement that the term "merchantability" must be used in order to disclaim the implied warranty of merchantability. *See also* U.C.C. § 2-719(3) (expressing the conscionability limitation as a safeguard, rather than simply having courts apply it pursuant to the general conscionability standard of 2-302).

These examples of conscious adversion to overreaching are designed as threshold safeguards against unconscionable results. Consider, for example, comment 4 to 2-205, which, after explaining the purpose of the separate authentication required when the offeree supplies a form, adds: "Section 2-302 may operate, however, to prevent an unconscionable result which otherwise would flow from other terms appearing in the form." U.C.C. § 2-205 comment 4 (1978).

41. Commentators have disagreed on whether a disclaimer of warranty which meets all of the requirements of 2-316(2) may still be unconscionable. For an affirmative answer, see

will recognize as the total legal obligation of the parties—their contract—will be the factual bargain that they, in good faith, reasonably understand, regardless of the written evidence of their deal. The contract between the parties will be the contract they thought they were making, including terms they reasonably expect, whether or not any writings evidencing their deal include such terms. Their contract will not include terms they did not reasonably expect, notwithstanding the inclusion of those terms in the printed evidence of the deal.[42]

One of the most difficult applications of Article 2's philosophy occurs in the typical merchant transaction involving printed forms. Reasonable merchants use printed forms to make deals, and they disregard certain printed provisions of those forms. Fulfilling the underlying philosophy of Article 2 requires emphasizing their factual bargain and ignoring printed terms that a reasonable merchant would not expect to find in the forms or would regard as surplusage. The classic illustration of pre-Code, mechanical jurisprudence in this context occurred in *Poel v. Brunswick-Balke-Collender Co.*[43] In *Poel* a seller offered to sell a large quantity of rubber to a buyer. In the blank spaces of the buyer's purchase order, the buyer's agent inserted a description of the goods, the quantity, the price, and the delivery term. These "dickered"[44] terms were

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generally Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969). For a negative view, see generally Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

42. For an elaboration of this concept, particularly in relation to the *Restatement (Second) of Contracts*, see Murray, *Standardized Agreement, supra* note 9, at 780-81; Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

43. 216 N.Y. 310, 110 N.E. 619 (1915).

44. *See* U.C.C. § 2-313 comments 1, 4 (1978). Karl Llewellyn suggested that "dickered terms" were terms to which the parties have consciously adverted:

> The answer, I suggest is this: Instead of thinking about "assent" to boiler plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

In a report accompanying the original draft on unconscionability (now § 2-302, but then numbered § 1-C), the following statement concerning "dickered terms" appears:

> The Draft proceeds . . . upon the assumption-in-fact that choosing to bargain means resorting to deliberate and intentional dicker about particular terms . . . . Deliberate and intentional dickering is not shown in fact by a series of printed, unread clauses.

identical to the terms of the offer. The purchase order form also contained printed clauses captioned, "Conditions on Which Above Order is Given." One of the printed "conditions" read as follows: "The acceptance of this order *which in any event you must promptly acknowledge* will be considered by us as a guarantee on your part of prompt delivery within the specified time."[45] The purchase order was dated April 4 and delivery was not to begin, under the matching dickered terms, until the following January. In January the buyer advised the seller that the employee who had made the deal with the seller had no authority to effect the transaction. Because that defense did not augur success, the buyer's attorney scurried to the documents evidencing the transaction and discovered the quoted printed provision from the purchase order. The defendant-buyer argued that no contract existed because, by the terms of the purchase order, the "acceptance" had to be acknowledged promptly and the seller had not done so. The requirement of prompt acknowledgment turned what appeared to be a definite expression of acceptance into a counter-offer pursuant to the technical requirement that the acceptance must match exactly the terms of the offer. Use of the "matching acceptance" or "mirror image" rule permitted the "welsher"[46] to escape its contractual obligation.

In a precocious effort the trial judge in *Poel* held that the parties never intended the printed "conditions" to have any bearing on the closed deal they assumed they had made. Had the New York Court of Appeals adopted that view in 1915, *Poel* might have been the landmark beginning of a judicial evolution of the concept that Karl Llewellyn, more than three decades later, felt compelled

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> When such a series appears, . . . the reasonableness of assuming *both* parties to have chosen and agreed to incorporate such a set of clauses, in silence and without dickering, depends upon whether the series of clauses presents the kind of balanced background which parties can fairly, or indeed accurately, be thought to incorporate by silence.

National Conference of Commissioners on Uniform State Laws Report on and Second Draft of a Revised Uniform Sales Act 24 (1941) *reprinted in* 1 UNIFORM COMMERCIAL CODE DRAFTS 269, 304 (E. Kelly compiler 1984) (printed version) (emphasis in original) [hereinafter 1941 Proposed Report]. The entire quotation appears *infra* note 67.

There are two drafts of this Report, the 1941 Mimeo Draft, which is not widely available, and the 1941 printed version, which is available in many libraries. The Mimeo Draft was identified in a letter from Karl Llewellyn to Professor Underhill Moore at the Yale Law School as a "Second Draft of a Revised Sales Act, for the Committee's discussion . . . Sept. 19-22" (letter dated Sept. 5, 1941). The Mimeo Draft and the printed version differ in some respects. References to the Report in this Article will specify either the Mimeo or printed version.

45. *Poel*, 216 N.Y. at 316-17, 110 N.E. at 621 (emphasis added).

46. J. WHITE & R. SUMMERS, *supra* note 6, at 25.

to introduce as part of the Uniform Commercial Code. Unfortunately, the court of appeals reverted to the traditional, mechanistic view that the response to the offer was to be read literally, printed terms and all. The response in *Poel* did not match the terms of the offer and was, therefore, a counter-offer creating no contractual obligation on the part of the buyer. It is clear beyond peradventure that the buyer thought it was making a contract by sending the purchase order. The purchaser's initial effort to escape its contractual obligations—arguing a lack of agency authority—did not include the argument that won the day in the New York Court of Appeals. The seller easily could have "acknowledged" the "acceptance" in the purchase order, but saw no reason to do so because it too assumed a contract had been formed. Finally, it is apparent that the seller was the typical merchant; it did not read the printed terms in a response to an offer any more extensively than merchants read them today.[47]

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47. Without a doubt, 2-207 is based on the assumption that merchants do not read or understand the printed terms of their exchanged forms. Section 2-207's language appeared radical because it found an operative acceptance of an offer even though the acceptance contained different or additional terms.

Comment 1 to 2-207 notes: "Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction." U.C.C. § 2-207 comment 1 (1978). Comment 2 emphasizes the "commercial understanding" of the parties, regardless of differences in their exchanged forms. The original purpose of 2-207 was clearly set forth by its principal draftsman, Karl Llewellyn. *See infra* notes 52-53 and accompanying text.

The only recent divergence from the assumption that merchants do not read printed forms is found in Baird & Weisberg, *supra* note 5, at 1253-54: "Merchants, however, probably do look for, and pay attention to, preprinted terms that may prove important in the transaction, including terms, such as warranty disclaimers, that turn up so frequently as the subjects of reported battle of the forms litigation." As authority for this proposition, the authors rely upon a British study by Beale & Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies*, 2 BRIT. J.L. & SOC'Y 45, 50 (1975), which Baird and Weisberg initially characterize as "more recent empirical work [suggesting] that parties are aware of the legal consequences of documents that differ." Baird & Weisberg, *supra* note 5, at 1219 n.5. Later, however, they suggest that the Beale and Dugdale study was "[b]ased on a survey of only 19 engineering manufacturers [and, therefore,] the study must be regarded as merely suggestive." *Id.* at 1254 n.87. The Beale and Dugdale study was "more recent" than the only significant American study which took a contrary position. *See* Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 59-62 (1963).

In Murray, *Standardized Agreement*, *supra* note 9, at 778-79 n.207, I reported my experience with more than 5,000 purchasing agents, over a period of more than a decade, and suggested that I never found one purchasing manager who read printed terms, and that, when the purchasing agents were asked to explain a printed term from their own purchase order forms, they could not do so. I understand that my sample is statistically siguificant. I also can report that the typical purchasing agent has no understanding of the agreement

The *Poel* case exemplified the "battle of the forms" problem, which Karl Llewellyn "dearly loved."[48] During the New York Law Revision Commission's study of the Uniform Commercial Code, Llewellyn stated: "Those unhappy cases which find a condition where no businessman would find one are carefully disapproved."[49] A reasonable seller in the *Poel* situation would not have discovered any condition to the buyer's acceptance expressed in the purchase order response to the seller's offer. A technical bar to finding a contract led the court of appeals to find that no contract had been made. The parties' factual bargain was ignored. The buyer was permitted to operate in bad faith, and the result unfairly surprised and oppressed the seller. Thus, the holding in *Poel* was diametrically opposed to the underlying philosophy of what was to become Article 2, and the case provided an excellent illustration of why classical contract law needed to be modified substantially in the new contract law Llewellyn contemplated. This new contract law would insist upon recognizing the contract as reflecting the "commercial understanding"[50] of the parties. If the parties reasonably believed that their deal "has in fact been closed,"[51] it would be treated as having been legally closed, regardless of classical contract law's technical shackles. The paradigm would be an offeree's response that, to a reasonable merchant, appeared to be an acceptance even though the response contained terms that varied the

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process (e.g., whether a "quote" is an offer), and does not identify his or her company as offeror or offeree. Purchasing agents typically have no understanding of the writing requirement with respect to a contract for the sales of goods when the price is $500 or more. They do not understand the concept of warranty (e.g., that the implied warranty of merchantability may be highly preferable to the typical warranty of repair or replacement preferred by the party they invariably call the "vendor" rather than the "seller"). They not only have no understanding of disclaimers of warranties; they have no concept of buyer or seller remedies or, a fortiori, consequential damages. They typically do not know what arbitration is unless they have been involved in that process. Because purchasing agents make the overwhelming majority of merchant-to-merchant contracts in America, the agents' level of understanding of what they perceive to be the arcane science of law is a critical empirical base underlying 2-207. At the same time, purchasing agents have at least a visceral reaction to "indecent" terms, and they do have a clear sense of their "commercial understanding." When informed of the "normative assumptions of Article 2," which are dealt with in the final section of this Article, purchasing agents suggest an identity between those assumptions and their "commercial understanding." Whatever criticism may have been leveled at Llewellyn for the lack of empirical verification underlying Article 2, this sample suggests that his "hunches" were correct. *See* Murray, *The Realism of Behaviorism Under the Uniform Commercial Code*, 51 OR. L. REV. 269 (1972).

48. *See supra* note 10.

49. 1954 Law Revision Commission Hearings, *supra* note 16, at 55 (119).

50. U.C.C. § 2-207 comment 2 (1978).

51. *Id.*

terms of the offer. Notwithstanding such variant terms, if a reasonable offeror would view the response as an acceptance, it would be an acceptance.

III. The Original Statutory Solution

Karl Llewellyn proposed a statutory solution to the battle of the forms that appeared radical, but, in comparison with subsequent drafts, was relatively simple. In keeping with his virtual obsession with emphasizing the *purpose* of the statute,[52] Llewellyn provided a preamble to 2-207, which was to become, with some revision, subsection (1) in subsequent versions. The preamble found an operative acceptance "[w]here either a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time states terms additional to those offered or agreed upon. . . . "[53]

In addition to his concern that a deal which, according to a reasonable commercial understanding, was closed should be treated as closed, notwithstanding variant terms, Llewellyn was even more concerned about the problem that arose when an oral contract was confirmed by one or more printed forms containing terms that varied the oral agreement.[54] He criticized cases that disregarded the oral agreement and concentrated exclusively on the confirmations whenever one or both confirmations were inconsis-

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52. The general importance of unearthing purpose in statutory construction cannot be gainsaid. *See* Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1-57 (1975); *see also supra* note 4.

U.C.C. § 1-102 reads, in part: (1) "This Act shall be liberally construed and applied to promote its underlying purposes and policies." U.C.C. § 1-102(1) (1978). Comment 1 reads in part:

> The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

Id. § 1-102 comment 1.

53. U.C.C. § 2-207 (May 1949 Draft), *reprinted in* 7 Uniform Commercial Code Drafts 85 (E. Kelly compiler 1984).

54. At the Law Revision Commission Hearings, Llewellyn stated:

> Matter number 2 is more troublesome. In [sic] deals with the now hopelessly confused situation presented when deals are made by phone or by shorthand message and "confirmations" are sent on forms which reach beyond the dickered terms; or when an "acceptance" occurs on "our standard form," and tbe like—often enough answered by a varying "*our* standard form" from the other side. The "orthodox" law of offer, counter-offer, and the like gives no satisfactory answer to this problem.

1954 Law Revision Commission Hearings, *supra* note 16, at 55-56 (119-20) (emphasis in original).

tent with the terms of the oral deal. Because the variant terms contained in the confirmations were unrelated to the factual bargain, it was crucial to Llewellyn that courts focus upon the parties' true understanding and not be caught in a bramble bush of inconsistent terms. Thus, Llewellyn's proposed statutory language dealt with both an expression of acceptance containing variant terms and confirmations containing terms that varied the terms of the oral agreement. If acceptances containing additional terms are permissible, the statutory language must direct the courts in dealing with those additional terms. Llewellyn proposed the following:

> (a) The additional terms are to be construed as proposal (*sic*) for modification or addition; and
> (b) between merchants the additional terms become part of the contract unless they materially alter it or notice of objection is given within a reasonable time after they are received.[55]

If additional terms are mere proposals for modification, the original offeror must accept those terms if he or she wants them to become operative terms of the deal. If the parties are merchants, however, any immaterial additional term becomes an operative term unless the offeror objects to its inclusion. Material alterations, by contract, are inoperative. This proposal constituted the complete 2-207 in May 1949. A preamble and two subsections would solve the problem of variant terms and place these situations squarely within the underlying philosophy of Article 2.

Commentators generally assume that "[t]he original draftsman of 2-207 designed it mainly to keep the welsher in the contract."[56] This statement may view Llewellyn's original intention too narrowly in light of the underlying philosophy of Article 2. While Llewellyn certainly had cases like *Poel* in mind when he drafted his proposal, he must have realized that once courts are statutorily directed to assume that certain terms are not to be given operative effect, restricting that directive to cases factually similar to *Poel* would be impossible. Llewellyn was certainly aware of the importance of a change that would refuse operative effect to certain terms in the writing evidencing a contract. At one point he suggested that he regarded the section on unconscionability "as perhaps the most valuable section in the entire Code."[57] He explained the necessity of the section by criticizing lawyers who draft

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55. U.C.C. § 2-207 (May 1949 Draft).

56. J. WHITE & R. SUMMERS, *supra* note 6, at 25 (Llewellyn had cases like *Poel* in mind).

57. 1954 Law Revision Commission Hearings, *supra* note 16, at 57 (121).

"to the absolute limit of what the law can conceivably bear,"[58] and then "the court kicks [the contract] over."[59] Under the classical theory, however, the courts used "covert tools"[60] to prevent unconscionable results. Llewellyn was concerned that the existing judicial process lacked certainty, stability, and predictability. He believed that section 2-302 brought this process "out into the open," and that the section in essence said, "[W]hen it gets too stiff to make sense, then the court may knock it out."[61] He did not expect that 2-302 alone would provide the necessary certainty, stability, and predictability, for the section required case law development. He attempted to overcome doubts about factual questions through subsection (1) of 2-302,[62] which allocates the determination of unconscionability to courts rather than juries. The result is "precedent."[63] He then placed restraints on "the untutored imagination of courts"[64] by including subsection (2), which permits "all kinds of [business] background to be presented to instruct the court."[65] Consequently, 2-302 "greatly advance[d] certainty in a . . . most baffling, most troubling, and almost unreckonable situation."[66] Sections 2-302 and 2-207 are premised upon the same theme: terms that are reasonable in commercial understanding will remain operative; other terms will be "knocked out." The fundamental difference between the purpose of 2-302 and the purpose of 2-207, however, is exposed. The former deals with nullifying terms of a contract because they unfairly surprise and oppress the party

58. *Id.* at 113 (177).

59. *Id.* at 114 (178).

60. Llewellyn, *Book Review*, 52 HARV. L. REV. 700, 703 (1939), (reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937) ("The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools."); *see also* 1954 Law Revision Commission Hearings, *supra* note 16, at 114 (178) ("The clause is perfectly clear and the court said, 'Had it been desired to provide such an unbelievable thing, surely language could have been made clearer.' Then counsel redrafts, and they not only say it twice as well, but they wind up saying, 'And we really mean it,' and the court looks at it a second time and says, 'Had this been the kind of thing really intended to go into an agreement, surely language could have been found,' . . . .").

61. 1954 Law Revision Commission Hearings, *supra* note 16, at 114 (178).

62. If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. U.C.C. § 2-302(1); *see also infra* note 79.

63. 1954 Law Revision Commission Hearings, *supra* note 16, at 114 (178).

64. *Id.*

65. *Id.*

66. *Id.*

against whom they would operate. On the other hand, 2-207 presents a threshold question: What are the terms of the contract? If a party would not reasonably understand that certain terms were included in the contract *ab initio,* they will not be included, because their inclusion would unfairly surprise and oppress the party against whom they would have operated. Section 2-207, therefore, may be viewed as addressing incipient unconscionability—its philosophy is identical to 2-302's.[67]

IV. THE COUNTER-OFFER RIDDLE

One of the most troublesome questions arising out of 2-207 concerns the interpretation and construction of the last proviso of 2-207(1): "unless acceptance is expressly made conditional on assent to the additional or different terms." That language did not appear in the statutory text of the 1949 version of 2-207. It did appear, however, in slightly different terms, in a Comment to the 1949 draft: "unless the acceptance is made conditional on the ac-

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67. *See* Murray, *Incipient Unconscionability, supra* note 5. The original drafting history of what was to become 2-302 (then numbered § 1-C) provides further support for the suggestion of identity in the philosophy of sections 2-302 and 2-207. A report accompanying the draft contained the following statement:

> *Balance in any background sought to be substituted*
>
> The Draft proceeds upon the assumption-in-policy that buyers and sellers ought (within the limits of such rules as those on legality) to be free to bargain as they choose. It proceeds upon the assumption-in-fact that choosing to bargain means resorting to deliherate and intentional dicker about particular terms, producing the kind of transaction known in law as an effective contract. Deliberate and intentional dickering is not shown in fact by a series of printed, unread clauses. When such a series appears, the position of the Draft is that the reasonableness of assuming *both* parties to have chosen and agreed to incorporate such a set of clauses, in silence and without dickering, depends upon whether the series of clauses presents the kind of balanced background which parties can fairly, or indeed accurately, be thought to incorporate by silence.

1941 Proposed Report 24 (printed version); *see also infra* notes 238, 249-50.

In Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 569 P.2d 751, 141 Cal. Rptr. 157 (1977), the court said:

> Section 2-207 is thus of a piece with other recent developments in contract law. Instead of fastening upon abstract doctrinal concepts like offer and acceptance, section 2-207 looks to the actual dealing of the parties and gives legal effect to that conduct. Much as adhesion contract analysis teaches us not to enforce contracts until we look behind the facade of the formalistic standardized agreement in order to determine whether any inequality of bargaining power between the parties renders contractual terms unconscionable, or causes the contract to be interpreted against the more powerful party, section 2-207 instructs us not to *refuse* to enforce contracts until we look below the surface of the parties' disagreement as to contract terms and determine whether the parties undertook to close their deal. Section 2-207 requires courts to put aside the formal and academic stereotypes of traditional doctrine of offer and acceptance and to analyze instead what really happens.

Id. at 100, 569 P.2d at 758, 141 Cal. Rptr. at 164 (emphasis in original).

ceptance of the additional terms."[68] The Comment to the 1949 draft originated with Mr. B.D. Broeker of the Bethlehem Steel Company, who requested a Comment clarifying subsection (1) to 2-207.[69] The Executive Secretary and Director of Research of the New York Law Revision Commission, John W. MacDonald, queried Karl Llewellyn regarding why the "unless" proviso was housed in a Comment, rather than in the text of 2-207. Llewellyn explained: "That is supposed to be a comment on the first line of subsection (1),. . .[A definite and seasonable expression of acceptance]. . . . We are attempting to say, whether we got it said or not, that a document which said, 'This is an acceptance only if the additional terms we state are taken by you' is not a definite and seasonable expression of acceptance but is an expression of a counter-offer."[70] MacDonald was not satisfied: "Wouldn't it have been fine, to put in the text, 'definite, unconditional and seasonable' ?"[71] Broeker answered: "That's right, but, as Professor Llewellyn says, the text was final at that time and the comments weren't. That is why that phrase got in the comments."[72] Llewellyn hastened to add: "If you said, 'unconditional and seasonable,' you would simply incorporate the completely confused body of present case law."[73]

Llewellyn's rejection of the term "unconditional" focuses upon the major problem in the existing case law. He emphasized the importance of "carefully" disapproving "[t]hose unhappy cases which

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68. The terms "expressly" and "different" were added in later drafts. The revision usually referred to as Supplement No. 1, January 1955, phrased the unless clause as follows: "unless the acceptance is explicitly made conditional on assent of the offeror to any additional term." The unless clause applied to an offer "not accompanied by form clauses." When a written offer was accompanied by form clauses, the draft phrased the unless clause as follows: "unless . . . the expression of acceptance conspicuously makes its own operation conditional on the offeror's agreement to any specified one of its form clauses or to all of tbem." "Different" did not appear until the second revision, which is the current language of 2-207.

69. 1954 Law Revision Commission Hearings, *supra* note 16, at 119 (183).

70. *Id.* at 117 (181). MacDonald replied: "But we don't find that in the text of the statute." *Id.* Llewellyn countered: "It is found in the word 'acceptance' in the first line of subsection (1). We don't see how that can be an expression of acceptance which says, 'This is not an acceptance unless you take the terms that we put here in addition.' " *Id.* MacDonald answered: "I see the way you are construing it, ... " *Id.* Mr. Broeker intervened to inform MacDonald that Broeker had asked Llewellyn to insert it in a Comment "because [he] wanted something in there to make clear that first line of (1) where it says it wasn't a 'definite and seasonable expression of acceptance.' " *Id.* at 119 (183).

71. *Id.* at 119 (183).

72. *Id.*

73. *Id.*

find a condition *where no businessman would find one.*"[74] Classical theory would find such a condition in a response to an offer if the response contained any additional terms. Therefore, if 2-207 were to include "unconditional" along with "definite and seasonable," it would invite courts to discover conditions in responses when no businessman would find them. If, however, a reasonable businessman would understand that the "acceptance" of an offer was conditioned on the offeror's assent to the response's additional terms, the response is *not* a definite and seasonable expression of acceptance *ab initio.* According to Llewellyn, it "is an expression of a counter-offer."[75] Nothing indicates that this counter-offer would operate in any fashion other than as a normal counter-offer. It would reject the original offer and create a new power of acceptance in the original offeror.[76] In addition, evidence tends to show that those who dealt with 2-207 at this stage believed that the section created a typical counter-offer. An expert for the Commission provided the following commentary on 2-207:

> Under subsection (1) [the former preamble], an expression of acceptance adding to or varying from the offer does not have the effect of an acceptance if it is expressly conditioned upon assent to the new terms. In other words, if it is expressly couched in terms of a counter-offer, it will have that effect.[77]

This view strictly conformed with the Llewellyn view that an "acceptance" that "mentions further terms, but not as an explicit condition to acceptance. . ."[78] would still act as an acceptance because no businessman would find it a conditional acceptance amounting to a counter-offer. The fundamental and dramatic change in classical contract law that Llewellyn intended to effect may be stated as follows: Under classical contract law, a response varying the terms of the offer created an assumption that the offeree was making a counter-offer unless he made it very clear that he was not making a counter-offer and that the variant terms were mere suggestions not intended to interfere with the exercise of the power of acceptance. Under the radical Llewellyn modification, the reverse is true: variant terms in the response to an offer will be treated as proposals for modification without any intent to inter-

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74. *Id.* at 55 (119).

75. *Id.* at 117 (181).

76. *See* RESTATEMENT (SECOND) OF CONTRACTS § 39 Comment *a* (1981).

77. 1 Law Revision Commission Report, (1955) State of New York, Study of the Uniform Commercial Code 392 (726) [hereinafter cited as 1955 Law Revision Commission Report].

78. 1954 Law Revision Commission Hearings, *supra* note 16, at 55 (119).

fere with the exercise of the power of acceptance unless the offeree makes it very clear that the response is a counter-offer. Again, the response must be "very clear" *to a reasonable merchant-offeror*. If the test were otherwise—if courts interpreted the response in their own light rather than in the illumination afforded by commercial understanding—Llewellyn justifiably feared that no change would be effected. Courts would discover a counter-offer if variant or additional terms were found in the response to the offer.

Notwithstanding its radical departure from pre-Code assumptions, Llewellyn's concept is relatively simple. The reasonable offeror who receives a response that appears to be a definite expression of acceptance will not be frustrated by technical doctrines that would have converted the response to a counter-offer under classical contract law. The burden will be on the offeree to ascertain that a reasonable offeror understands that the response is expressly conditional on the offeror's assent to variant terms. Before the response will be treated as a counter-offer, a reasonable merchant-offeror must understand it to be a counter-offer. If it is a counter-offer, acceptance of the counter-offer will create a contract on the terms proposed by the offeree. Neither the offeror nor the offeree should be surprised unfairly. The recognized factual bargain will be the bargain as understood by reasonable merchants, as contrasted with an arrangement that results from procrustean notions of classical contract law. A return to Lex Mercatoria pervades this entire sequence as it pervades all of Article 2.[79] Prior to Llewellyn's changes, if the legalized agreement resembled the factual bargain, the similarity was due to sheer coincidence. In the future, the factual bargain would be the legal bargain—the contract.

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79. Those who knew Llewellyn's views on commercial law were convinced that the model he wished to follow was, essentially, the law merchant. A number of his contemporaries would attest to this belief that "Lord Mansfield had it right."

A comment attached to the original draft of the unconscionability section, 2-302 (then section 1-C), emphasizes tbe importance of permitting such questions to be decided exclusively by tbe court ratber than by tbe jury. Llewellyn, however, would bave preferred a return to the merchants' jury.

> *Question for the court.* The total estimate of the effect of a body of provisions, in terms of balance, is a job for which a court is peculiarly fitted. The question of whether the provisions fit the circumstances of a particular trade is one which a special merchants' jury can best decide under Section 1-C. But tbe merchant runs some risk of accepting a provision merely as it is written hecause it is so written; and he has little training in sizing up a transaction from both ends at once, to reach a view of halance. As against this stands the fact that the *issue* to be tried is the issue of balance; and given that focus of attention, the merchants' jury would seem an adequate tribunal.

1941 Proposed Report (Mimeo Draft) § 1-C comment B(2) (emphasis in original).

It is unlikely that Llewellyn recognized the severe problems that courts would face in attempting to elaborate this relatively simple concept. He had absolute confidence in the judicial creation of a magnificent edifice of fidelity to factual bargains with the skeletal foundation of 2-207 as the driving force.[80] Had he lived to witness the actual judicial development, his disappointment would have been profound.

A. An Interim Solution

The difficulty in attempting to create a statutory solution that includes all the necessary operative elements for dealing with battle of the forms problems is evidenced by what this Article shall call the "interim draft," the 1954 revision of 2-207 officially known as "Supplement No. 1."[81] That draft expanded 2-207 to five sub-

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80. Karl Llewellyn felt that the existing pre-Code law that related to additional or varying clauses in printed forms was

> [i]n a word . . . confused and uncertain. Some improvement is to be hoped [for] from the provision of Sec. 2-207(2) which allows minor additional terms to enter into the contract without that express consent which (more frequently than not) never occurs. What terms will be construed as "materially" altering the contract is . . . a question for the court's determination.

1954 Law Revision Commission Hearings, *supra* note 16, at 56 (120).

Llewellyn was attempting to develop "precedent," and he regarded 2-207 as the basis for judicial development in this area. He suggested that "[t]he Code represents a material step towards greater reckonability than we now have" with respect to 2-207 matters. *Id.*

81. The text of the interim draft reads as follows:

> Section 2-207. Additional Terms in Acceptance or Confirmation.
>
> (1) Where a contract for sale is concluded by word of mouth and terms additional to or different from those of the agreement are included in the written confirmation of one party or of each then the oral agreement controls. This provision is subject to the statute of frauds (Section 2-201) and to the provisions on final written expression (Section 2-202), and to the operation of subsection (6).
>
> (2) Where a written offer is not accompanied by form clauses a seasonable and definite expression of acceptance operates as an acceptance even though it states terms additional to those offered unless the acceptance is explicitly made conditional on assent of the offeror to any additional term. Any additional term is to be read as a proposal for addition to the contract.
>
> (3) Where a written offer of one party is accompanied by form clauses prepared by the other party the clauses are incorporated into the offer unless they are manifestly unreasonable.
>
> (4) When a written offer is accompanied by form clauses prepared by the offeror, a definite and seasonable expression of acceptance operates as an acceptance even though it contains form clauses additional to or at variance with those of the offer, unless either
>
> (a) the offer conspicuously makes its acceptance conditional on the offeree's agreement to any specified one of its form clauses or to all of them; or
>
> (b) the expression of acceptance conspicuously makes its own operation conditional on the offeror's agreement to any specified one of its form clauses or to all

sections. Subsections (4) and (5) are important for this analysis. Subsection (4), which is the progenitor of the present statutory language, provides that a written offer accompanied by form clauses may be accepted even though the definite and seasonable expression of acceptance contains additional or variant form clauses. Subsections 4(a) and 4(b) contain two express exceptions to this general rule. Under subsection 4(a) of the interim draft, when the offer conspicuously limits acceptance to the form clauses of the offer, a response containing additional or variant form clauses would not constitute an acceptance. This result is consistent with the intensified Code view that the offeror is master of the offer and may restrict the power of acceptance in any fashion.[82] A faulty response—one containing additional or variant form clauses—would not be a counter-offer. It simply would fail as an acceptance. If the parties, having failed to form a contract, then proceeded to perform—the seller shipped and the buyer accepted the goods—a contract by conduct would be formed under subsection (5). The terms of that contract would be the terms upon which the exchanged writings agreed, and any gaps would be filled through supplementary Code provisions. This solution is plausible. The parties have formed a contract, as evidenced by their conduct. If the ineffective exchanged writings include matching terms, why not insert these terms in the contract by conduct because they evidence the parties' intent with respect to the terms?[83]

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of them.

(5) Even though by reason of such conspicuous conditions as are described in subsection (4) a contract fails by reason of such exchange of writings, yet conduct by both parties which recognizes the existence of an agreement about the subject matter is sufficient to establish the fact of agreement. In such case the terms of the particular agreement consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under either the next subsection or any other provisions of this Act.

(6) Between merchants an additional term which has not been the subject of specific negotiation and which in good faith is added to a written expression or confirmation of acceptance becomes part of the contract unless it is at variance with the terms of the offer or unless notification of objection has been given in advance or is given within a reasonable time after notice of the additional term is received or unless the additional term is manifestly unreasonable.

1955 Law Revision Commission Report, *supra* note 77, at 390-91 (724-25).

82. Murray, *Contracts: A New Design for the Agreement Process*, 53 CORNELL L. REV. 785, 787-88 (1968) [hereinafter Murray, *A New Design*].

83. Although this solution is plausible, a contrary argument exists. For example, the seller might not have been willing to sell at the price the buyer offered if the seller was not going to receive a disclaimer of warranties or exclusion of consequential damages. To say that a party intended to sell at the same price regardless of the terms that would be in the contract is arguably unfair to the party who loses favorable exclusionary terms.

The problem arises with the second exception to the general rule that a definite and seasonable expression of acceptance may operate as an acceptance even though it contains additional or variant terms. Under subsection 4(b), if an "acceptance" is conspicuously[84] conditioned on the offeror's agreement to any form clauses in the acceptance, the "acceptance" would be a counter-offer. Again, no contract would exist between the parties. If the parties proceeded to perform as if they had a contract, however, a contract by conduct would be created. As in the case of an offer conspicuously limiting acceptance to the form clauses of the offer, the terms of the contract by conduct formed following a counter-offer would be the writings' matching terms with the gaps filled by Code provisions. Unlike its application in subsection 4(a), this analysis is unsound as applied in subsection 4(b). It ignores the counter-offer. If a response to an offer conditions acceptance on the offeror's agreement to additional or variant terms in the response, it is unquestionably a counter-offer. A counter-offer is not only a rejection of the offer; it is much more. "A counter-offer must be capable of being accepted; it carries negotiations on rather than breaking them off. The termination of the power of acceptance by a counter-offer merely carries out the usual understanding of bargainers that one proposal is dropped when another is taken under consideration."[85]

If an offeror reasonably understands the offeree's response as a counter-offer, the offeror should understand that the offeree shipped the goods with the intention of making a contract only on the terms of the counter-offer. The interim draft's requirement that the conditioning language in the response be conspicuous was designed to make sure that the offeror would understand the response as a counter-offer. Nothing indicates that the drafters intended the counter-offer to be treated as a mere proposal by the offeree to insert terms to which the offeror would bave to assent expressly. Indeed, the official analyst of the New York Law Revision Commission commented on both conditions—the offer limiting acceptance and the conditional "acceptance" (counter-offer): "[I]f an offer, or counter-offer, says in so many words that it must be accepted 'as is,' then that limitation controls."[86] But under the interim draft, the limitation does not control when the counter-

84. A term or clause is "conspicuous" when it is written so that a reasonahle person against whom it is to operate ought to notice it. U.C.C. § 1-201(10). The term "conspicuous," however, was deleted from subsequent drafts.

85. RESTATEMENT (SECOND) OF CONTRACTS § 39 comment *a* (1981).

86. 1955 Law Revision Commission Report, *supra* note 77, at 392 (726).

offer is accepted by performance—acceptance of the goods. To emphasize this difficulty, consider the following example.

B sends a purchase order (offer) to S, who responds by sending its acknowledgment form containing the following conspicuous language on its face:

> The terms of any contract must be the terms on this form rather than any form you supplied. This is an express condition of our acceptance. Since you are, apparently, in need of the goods described herein, we will ship immediately. It must be understood that your acceptance of the goods will constitute acceptance of all of the terms of this form and any terms on your form which conflict with the terms of this form will not be enforceable.

The acknowledgment form contains additional or variant terms. If the buyer accepts the goods, under the interim draft, would a contract be formed on the terms of the counter-offer, or would the court recognize a contract by conduct and insert matching terms from the exchanged writings and the Code's gap-filling terms? Nothing in the interim draft or the discussion of that draft indicates that the drafters considered this difficulty.

This situation worsens under the Second Revision, which eventually became the current statutory language.[87] Under the present language of 2-207, an offer that expressly limits acceptance to the terms of the offer should be viewed as the first of three operative alternatives[88] for dealing with "additional" terms in a response that is otherwise a definite and seasonable expression of acceptance. There is no express provision in the current 2-207 that would preclude an acceptance of an offer expressly limiting acceptance to the terms of the offer if the response contains additional or different terms. The absence of a specific provision akin to subsection 4(a) of the interim draft suggests two alternative interpretations.

First, the Code drafters may have intended to eliminate the possibility of an offer that cannot be accepted by a response containing different or additional terms, although they otherwise insisted that the offeror is master of the offer and may limit the power of acceptance in any fashion. This interpretation would restrict the effect of statements in the offer limiting acceptance to the terms of the offer to excising any variant terms in the acceptance under 2-207(2)(a).

Second, although the current 2-207 does not deal expressly with the situation, the drafters may have intended to continue the power of an offer limiting acceptance to the terms of the offer to

87. *See supra* note 2.
88. *See* U.C.C. § 2-207(2)(a), (b), (c).

preclude *any* acceptance if additional or different terms appear in the response to the offer. One commentary suggests that the second interpretation is correct, but warns that distinguishing these interpretations of language "is subtle and not easily determined."[89] If the second interpretation is followed, a response adding different or additional terms would not be either an acceptance of the offer or a counter-offer. Subsequent performance by the parties would form a contract by conduct under current subsection (3) (interim draft (5)). Again, this is a plausible interpretation.[90] The current draft, however, may continue the implausible as well. If a response expressly conditions acceptance on the terms of the acceptance, it is a counter-offer. Again, no contract exists through the exchanged writings. If the parties perform, is there a contract by conduct containing matching terms and the Code's supplementary terms? In the example of the clear counter-offer inviting acceptance of the goods to indicate acceptance of the counter-offer's terms, does subsection (3) apply and emasculate the counter-offer "accepted" by performance? Courts have inevitably confronted this problem.

B. The Counter-Offer Case Law

The first significant interpretation of 2-207 occurred in the now infamous *Roto-Lith*[91] case. In *Roto-Lith* the court was unable to assimilate the radical change provided by 2-207. It deemed a variant term in a response to an offer a material alteration.[92] The court could not conceive of an operative acceptance containing a materially different term. It concluded that the response was necessarily a counter-offer and that the buyer's subsequent acceptance of the goods effectively accepted the terms of the counter-offer. This interpretation of 2-207 was devastating because it recon-

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89. J. SUMMERS & R. WHITE, *supra* note 6, at 33.

> We hasten to forewarn the reader that the distinction between these two interpretations of this language is subtle and not easily determined. The courts have encountered great difficulty in dealing with such cases. In addition the drafters of the Code apparently had similar problems in anticipating such situations. Under the interpretation of the restrictive language that makes a responsive document containing additional terms an acceptance, note that both 2-207(2)(a) and 2-207(2)(c) preclude such additional terms from becoming part of the contract. It is not clear to us that there could ever be a situation where 2-207(2)(a) alone precludes such an additional term from becoming incorporated into the agreement under such an interpretation.

Id.

90. *But see supra* note 88.

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

92. *Id.* at 499.

firmed the pre-Code "last shot" principle.[93] The materially different term in the seller's response to the offer created a counter-offer. The seller fired the "last shot" in the battle of the forms, and its form controlled by constituting a counter-offer accepted by the purchaser's accepting the goods. *Roto-Lith* was the product of a court so obsessed with the classical analytical framework that it arrived at a conclusion and a rationale diametrically opposed to the statutory language. *Roto-Lith*, therefore, was destined to be disapproved if 2-207 was to have any operative effect.[94]

In *Dorton v. Collins & Aikman Corp.*[95] the court attempted to provide a comprehensive framework for the application of 2-207. It recognized that the statute's purpose was to alter the "matching acceptance" rule, which oppressed the offeror under the "last shot" principle. The unjust result became a just result under 2-207, which recognizes that printed forms used by buyers and sellers of goods are seldom identical and often ignored by the parties.[96] Although classical contract theory would prevent the consummation of a contract because of a disparity in the fine print terms of the forms, 2-207 recognizes the parties' intent to form a contract, notwithstanding additional or different terms in what otherwise reasonably appears to be a definite and seasonable expression of acceptance. The court proceeded to describe the operation of 2-207:

> Thus, under Subsection (1), a contract is recognized notwithstanding the fact

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93. In pre-Code days the party that sent the last form controlled the terms of the contract. The different terms in the form were considered a counter-offer, and a contract was formed on those terms when the goods were accepted. Typically, the seller "fired the last shot" and won the battle of the forms.

> The intent of the draftsmen in enacting Section 2-207 was to reject the common law "mirror image rule" which in essence stated that if the acceptance in any way differed from the offer, it was to be viewed as a counter-offer, and no contract would arise. . . .
>
> This application of the "mirror image rule" and the prevailing notions regarding acceptance had the effect of creating a contract in favor of the party who prepared the last form, that is, the one who fired the "last shot."

R. ALDERMAN, 1 A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 15 n.42 (2d ed. 1983) (formerly Hawkland).

94. *Roto-Lith* has been criticized frequently. *See, e.g.*, C. Itoh & Co. (America) Inc. v. Jordan Int'l Co., 552 F.2d 1228, 1235 n.5 (7th Cir. 1977); Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168 & n.5 (6th Cir. 1972); Ebasco Servs. Inc. v. Pennsylvania Power & Light Co., 402 F. Supp. 421, 437-38 (E.D. Pa. 1975); Steiner v. Mobil Oil Corp., 70 Cal. 3d 70, 107, 569 P.2d 751, 763, 141 Cal. Rptr. 157, 169 (1977); Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 177 Ind. App. 508, 517-18, 380 N.E.2d 571, 578 (1978).

95. 453 F.2d 1161 (6tb Cir. 1972).

96. *Id.* at 1166. The court stated: "Whereas under common law the disparity between the fine-print terms in the parties' forms would have prevented the consummation of a contract when tbese forms are exchanged, Section 2-207 recognizes that in many . . . cases the parties do not impart such significance to the terms on the printed forms. *Id.*

> that an acceptance or confirmation contains terms additional to or different from those of the offer or prior agreement, provided that the offeree's intent to accept the offer is definitely expressed, . . . and provided that the offeree's acceptance is not expressly conditioned on the offeree's assent to the additional or different terms.[97]

If the "acceptance" were "expressly conditioned on the offeror's assent to the additional or different terms," the drafting history clearly and convincingly indicates that the expressly conditional language converts the response into a counter-offer. *Dorton*, however, does not mention this particular effect. Rather, the *Dorton* court held that if the "offeree's acceptance is expressly conditioned on the offeror's assent to the additional or different terms—*the entire transaction aborts to this point.*"[98]

This interpretation is the genesis of the counter-offer riddle. Although it studiously avoided using the term "counter-offer," the court undoubtedly recognized the power of acceptance created by an "expressly conditional acceptance." If the buyer had signed and delivered the seller's acknowledgment containing an expressly conditional acceptance, this act "indeed could have been recognized as the buyer's assent to [the seller's variant] terms."[99] The court, however, refused to distinguish the effects of a nonacceptance from the effects of a counter-offer—the entire transaction aborts in either case. If a seller-offeree sends a nonacceptance in response to a buyer's offer, but subsequently ships the goods, the seller's written response to the offer is not a counter-offer and, therefore, creates no power of acceptance. The shipment of the goods is a new offer by conduct, and the buyer's acceptance of the goods is an acceptance by conduct. The situation is precisely described in subsection (3) of 2-207, which provides: "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."[100]

If the response from the seller-offeree expressly conditions acceptance on the buyer's assent to variant terms, however, the offeree has sent a counter-offer. Although it rejects the buyer's offer, the counter-offer does not break off negotiations; it seeks to carry them forward by creating a new power of acceptance.[101] If the

97. *Id.*

98. *Id.* (emphasis added).

99. *Id.* at 1168.

100. *Id.* at 1165 (quoting U.C.C. § 2-207(3)) (emphasis added).

101. RESTATEMENT (SECOND) OF CONTRACTS § 39 comment *a* (1981); *see supra* text accompanying note 85.

seller has made a counter-offer, the transaction does *not* "abort." Subsequent shipment of the goods by the offeree who has made the counter-offer is not a new offer. It is shipment pursuant to the terms of the previously sent counter-offer. Because the court in *Dorton* recognized the possibility of a contract including the variant terms of the offeree's acknowledgment, it thereby recognized the possibility of a counter-offer and the buyer's assent to that counter-offer. The court, however, did not recognize the possibility that the offeror's *conduct* in accepting the goods could be an acceptance of the counter-offer. Its failure to recognize this possibility is the result of a curious analysis.

The court believed its responsibility included determining whether the language of the offeree's acknowledgment was the equivalent of an expressly conditional acceptance. The response to the offer contained the following language: "The acceptance of your order is *subject to* all of the terms and conditions on the face and reverse side hereof, including arbitration."[102] The court held this language insufficient to meet the 2-207(1) standard that the acceptance must be "expressly conditional on [the offeror's] assent to additional or different terms." The court reasoned that:

> [I]t is not enough that an acceptance is expressly conditional on additional or different terms; rather, an acceptance must be *expressly* conditional on the offeror's *assent* to those terms. . . [T]he Subsection (1) proviso. . . was intended to apply only to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms therein.[103]

This construction of the 2-207(1) proviso is consistent with the original intention of the principal draftsman. Unless the acceptance "clearly reveals" the offeree's unwillingness to proceed with the deal except on the terms of the response, the response is not a counter-offer. Suppose, however, the response does "clearly reveal" that intention of the offeree. How may the offeror *assent* to the counter-offer? Noting that the Code does not define "assent,"[104] the court considered the acknowledgment form before it. The acknowledgment form specified "at least seven types of action or inaction on the part of the buyer [offeror] which. . . would be deemed to bind the buyer to the terms therein."[105] The court discussed only the following two of the seven types of action or inac-

102. 453 F.2d at 1164 (emphasis added).
103. *Id.* at 1168 (emphasis in original).
104. *Id.*
105. *Id.*

tion: (1) the buyer's signing and delivering the acknowledgment to the seller "which indeed could have been recognized as the buyer's assent. . .,"[106] and (2) the buyer's retention of the acknowledgment for ten days without objection "which could never have been recognized as the buyer's assent to the additional or different terms where acceptance is expressly conditional on that assent."[107] A footnote explains that the latter could not be a manifestation of assent: "The common law has never recognized silence or inaction as a mode of acceptance."[108] There can be no argument with this explanation. Suppose, however, the buyer-offeror had not signed and delivered the seller's expressly conditional response, but had manifested silence and *action* rather than silence and inaction. Suppose the buyer had accepted the goods. Would this active conduct in response to a *clear* counter-offer constitute acceptance of the counter-offer containing the variant terms? The court's response can be gleaned only from another footnote. The trial court had held the "subject to" language in the acknowledgment sufficient to meet the requirements of the 2-207(1) proviso. Having decided that the response was expressly conditional on the buyer's assent to variant terms, the trial court then found a contract by conduct under 2-207(3) because the parties had performed—the seller shipped and the buyer accepted the goods. Thus, the trial court found that the seller had made a counter-offer, but that the buyer's accepting the goods did not constitute an acceptance of the counter-offer. Rather, a contract by conduct was formed and the variant terms in the counter-offer were excised. On appeal, the court upheld this view.[109]

As the court noted, the Code does not define "assent." Therefore, the common-law definition of "assent" is mandated.[110] That conduct may manifest "assent" is hornbook law.[111] If the counter-

106. *Id.*

107. *Id.*

108. *Id.* at 1168 n.4.

109. *Id.* at 1169 n.6 ("Absent our conclusion that [the] acknowledgments do not fall within the subsection 2-207(1) proviso, we believe that the District Court correctly applied Subsection 2-207(3) . . .").

110. U.C.C. § 1-103 (1978). This section requires the application of pre-Code law unless the Code expressly displaces the pre-Code concept.

111. RESTATEMENT (SECOND) OF CONTRACTS § 19 (1979):

Conduct as Manifestation of Assent

(1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.

(2) The conduct of a party is not effective as a manifestation of his assent unless be intends to engage in the conduct and knows or has reason to know that the other party

offer in this case had been clear to a reasonable offeror, why should the offeror's acceptance of the goods after receiving the counter-offer be ignored as a manifestation of acceptance? Apparently, the trial and appellate courts in *Dorton* viewed the buyer's acceptance of the goods as inaction rather than action. At least one judge in a subsequent case cites *Dorton* as exclusive authority for the proposition that the offeror's acceptance of the goods in response to a counter-offer was ineffective as an acceptance because acceptance of the goods manifests silence and *inaction.*[112] Yet, if a counter-offer clearly reveals that the seller-offeree is shipping the goods on his own terms, and the buyer has reason to know that clear intention, the buyer's acceptance of the goods should manifest a conduct acceptance of the counter-offer. The *Dorton* conclusion finds no support in 2-207 or any other section of the Code. Yet *Dorton* creates an anomalous and unworkable precedent because it fears that recognizing a conduct acceptance would be a return to the "last shot" principle[113]—the basic evil that 2-207 was designed to overcome.

The basic evil that *Dorton* sought to avoid was the characterization of a response to an offer as a counter-offer simply because it contained variant terms, but otherwise appeared to be an acceptance. The conventional wisdom of 2-207 recognizes that purpose. Offerees respond by seeking to avoid the excision of variant terms in their responses to offers by including conditional language like the "subject to" language in *Dorton.* Should the same response be called a counter-offer simply because it adds "subject to" or similar language to its "terms and conditions"? *Dorton* answers no, and that result provokes no quarrel. To hold otherwise would unfairly surprise the offeror. Again, suppose the language in the response indicated clearly that the offeree will proceed with the transaction only on the terms of the response, and a buyer-offeror *would* understand sufficiently the response to mean that the seller will deal only on the seller's terms.[114] If the goods are subsequently

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may infer from his conduct that he assents.

(3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.

Id.

112. Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 380 N.E.2d 571, 582 n.2 (Ind. Ct. App. 1978) (Buchanan, C.J., concurring).

113. *See supra* note 93.

114. Should the offeror "reasonably understand" the response as an acceptance or a counter-offer? RESTATEMENT (SECOND) OF CONTRACTS § 57 (1979). Should the offeror "fairly

shipped and the buyer accepts them, *Dorton* will find a contract by conduct under 2-207(3), which will excise the seller's variant terms. The contract would include those terms from the counter-offer only if the buyer manifested assent verbally rather than by conduct. Under *Dorton*, accepting even the clearest counter-offer by conduct seems impossible. Why does *Dorton* insist upon this radical view of 2-207? Only three explanations appear plausible.

First, *Dorton*'s analysis of the statutory proviso in 2-207(1) is confused. The case suggests that the acceptance must be *expressly* conditional on the offeror's *assent* to the variant terms in the response. It cites a dictionary as authority for the following view: "That the acceptance is predicated on the offeror's assent must be 'directly and distinctly stated or expressed rather than implied or left to inference.' "[115] The requirement that an expressly conditional acceptance must be clearly stated to be viewed as a counter-offer is not arguable. This requirement, however, deals with the response to the offer and not the acceptance of that counter-offer. The court unwittingly may have required the acceptance of the counter-offer to be "distinctly stated or expressed rather than implied or left to inference." Second, the court in *Dorton* may have felt compelled to make subsection (3) of 2-207 operative in *any* situation in which the exchanged writings of the parties did not form a contract. Thus, it concluded that whether the response to the offer was a nonacceptance or a counter-offer, "the entire transaction aborts." The language of 2-207(3), which considers conduct by *both* parties as evidence of the contract,[116] is necessarily applicable in the offer/nonacceptance situation, but is not necessarily applicable in the offer/counter-offer situation. Third, although *Dorton* insists upon a "clear" statement in the response to create a counter-offer, the court may have doubted the ability of courts to determine whether a particular response to a counter-offer was sufficiently clear to constitute a second counter-offer. Insistence on express language manifesting assent to the counter-offer avoids that problem. It also constitutes an unwarranted modification of the law of counter-offers.

Dorton leaves a number of questions unanswered. What is a

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interpret" the response as an acceptance or a counter-offer? RESTATEMENT (SECOND) OF CONTRACTS § 61 (1979). For an integration of these two tests, see Murray, *Standardized Agreements, supra* note 9.

115. 453 F.2d at 1168.

116. *See supra* text accompanying note 100. For text of U.C.C. 2-207(3), see *supra* note 2.

sufficiently clear manifestation of the offeree's unwillingness to deal only on the terms of the offer? What test should be used to determine sufficient clarity? To whom must the manifestation be sufficiently clear? Is it ever possible to recognize a conduct acceptance of a sufficiently clear counter-offer? If the "subject to" language was insufficient to create a counter-offer in *Dorton*, would language more precisely tracking the statutory proviso of 2-207(1) necessarily create a counter-offer?

In *C. Itoh & Co. (America) Inc. v. Jordan International Co.*[117] the Seventh Circuit Court of Appeals addressed some of these questions in extrapolating *Dorton*. In *Itoh* the seller's response to a purchase order contained the following language: "Seller's acceptance . . . expressly conditional on Buyer's assent to the additional or different terms and conditions set forth below and printed on the reverse side. If these terms and conditions are not acceptable, Buyer should notify Seller at once."[118] The response to the offer contained an arbitration term. After the exchange of forms, the parties performed. The court was asked to decide whether the arbitration term was part of the contract. *The language was construed to be a counter-offer because the printed form response was sufficiently similar to the statutory proviso language*, unlike the language in *Dorton*.[119] One reading of *Dorton* may require language sufficiently similar to the statutory proviso. Another reading of *Dorton*, however, may require language that "clearly revealed" the offeree's unwillingness to contract on any terms other than its own. The relevant question, therefore, is whether the offeree's response in *Itoh* clearly revealed that intention.

On its face, the response in *Itoh* replicating the statutory proviso is anything but clear. The statutory proviso is angular. Law students require some time to reflect upon the proviso's language before they can comprehend its significance. Members of the New York Law Revision Commission wondered about the language when it first appeared in Comment form.[120] Karl Llewellyn accepted a paraphrase of the language in Comment form as permitting a conditional acceptance *that would be understood as conditional* by the reasonable merchant.[121] Llewellyn sought to avoid

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117. 552 F.2d 1228 (7th Cir. 1977).

118. *Id.* at 1230.

119. *See supra* text accompanying note 102.

120. 1954 Law Revision Commission Report, *supra* note 16, at 116 (180); *see supra* text accompanying notes 69-73.

121. *Id.* at 117 (181).

the technical discovery of a conditional acceptance when no reasonable businessman would find one. Should a reasonable offeror understand that language similar to that found in *Itoh* results in a counter-offer? In other words, does that language clearly reveal the offeree's willingness to proceed only on the terms of the response? Certainly Llewellyn would not be satisfied with language that operates technically regardless of the offeror's understanding. The more interesting question is whether the *Itoh* court assumed that language tracking the proviso language would be clearly understood as a counter-offer. The emphatic answer is no.

The court explained the ramifications of its holding for the seller-offeree. By ignoring the seller's counter-offer and insisting that the buyer's acceptance of the goods did not constitute an acceptance of the counter-offer, the court followed *Dorton* in finding a contract by conduct under 2-207(3). The court was convinced that this conclusion "does not result in any unfair prejudice to a seller who elects to insert in his standard sales acknowledgment form the statement that acceptance is expressly conditional on buyer's assent to additional terms contained therein."[122] The benefit to the seller is that using the "expressly conditional" clause permits him "to walk away from the transaction without incurring any liability so long as the buyer has not in the interim expressly assented to the additional terms."[123] If the seller does not intend to enter into a contract unless the buyer assents to his terms, he may simply forbear delivery of the goods until the buyer expressly assents. If the seller chooses to ship the goods without the buyer's assent, "he can hardly complain when the contract formed under Subsection (3) as a result of the parties' conduct is held not to include those [additional] terms."[124] Thus, the seller has the benefit of being able to "walk away" from the deal, but he suffers the detriment of losing the effect of his counter-offer if he proceeds with performance before obtaining the buyer's express assent to his terms. Precisely why does the seller lose the effect of his counter-offer? The court's answer to this question is particularly revealing. The court stated: "Since the seller *injected ambiguity into the transaction by inserting the 'expressly conditional' clause*

122. 552 F.2d at 1237. The court refers to the seller's form as a counter-offer and states that, although under common law the buyer's performance would have constituted an acceptance of the seller's counter-offer, "the Code has effectuated a radical departure from the common law rule." *Id.* at 1236.

123. *Id.* at 1237-38.

124. *Id.* at 1238.

in his form, he, and not the buyer, should bear the consequence of that ambiguity under Subsection (3)."[125]

The ramifications of this analysis are astonishing. A buyer sends a purchase order, which is an offer to purchase goods. The seller sends its acknowledgment containing the "expressly conditional" clause. The fundamental question under 2-207(1) is whether the response to the offer was "a definite and seasonable expression of acceptance." Neither *Dorton* nor *Itoh* deals effectively with that fundamental question. No case law concentrates on that question. The only relevant statement in *Dorton* suggests that a response containing additional or different terms is an acceptance, "provided that the offeree's intent to accept the offer is definitely expressed."[126]

Itoh is even less helpful in deciding the basic question of how one decides whether a response is an acceptance. The opinion, however, does contain one clear instruction: if the response contains an expressly conditional clause sufficiently similar to the statutory proviso, the response *must* be a counter-offer; it cannot possibly be an expression of acceptance. Moreover, this directive is stated in the teeth of the court's insistence that a response containing such a clause is necessarily ambiguous. The only possible conclusion to draw from *Itoh* is that an offeree who inserts an "expressly conditional" clause in its response has (a) injected ambiguity in that response, *and* (b) made a counter-offer. Is the response a counter-offer because the original offeror reasonably would understand it as one? The question scarcely survives its statement. Because the response is ambiguous, the original offeror would not understand its import. The response is a counter-offer only because it contains formula language from the last proviso of 2-207(1). If a response to an offer is ambiguous or equivocal, the offeror reasonably may understand or fairly interpret the response as an acceptance. The *Restatement (Second) of Contracts* clearly sets forth tests of the offeror's reasonable understanding or fair interpretation to be applied to ambiguous responses on the basis that the offeror is an innocent party who neither knew, nor had reason to know, that the seller intended the reply as a counter-offer rather than an acceptance.[127] Yet *Itoh* insists that an ambiguous response containing formula language is a counter-offer regardless of the of-

125. *Id.* (emphasis added).

126. 453 F.2d at 1166.

127. RESTATEMENT (SECOND) OF CONTRACTS § 57 (1979); *see* Murray, *Standardized Agreement*, *supra* note 9, at 747-48.

feror's reasonable understanding or fair interpretation. A subsequent case in the *Dorton* and *Itoh* line confirms this analysis.

In *Uniroyal, Inc. v. Chambers Gasket & Manufacturing Co.*[128] the offeree's "order acknowledgment" contained the following sentence: "Our acceptance of the order is conditional on the buyer's acceptance of the conditions of sale printed on the reverse side hereof."[129] The majority opinion held this language sufficiently similar to the statutory proviso to characterize it as an "expressly conditional acceptance." Like *Dorton*, the court studiously avoided the counter-offer characterization, although it recognized the power of acceptance created by the "expressly conditional acceptance." If a buyer-offeror expressly assented to the expressly conditional acceptance, a contract would be formed on the seller's terms. Therefore, the expressly conditional acceptance is a counter-offer, notwithstanding the majority's refusal to characterize it as one. A concurring opinion insists on the counter-offer characterization.[130] Both opinions reject a conduct acceptance of the counter-offer because the "hypothesis" of 2-207 is that "businessmen do not read exchanged printed forms. . ."[131] and that the buyer-offeror would not learn of any variant terms in the response to the offer. Yet the court insisted that the buyer-offeror may assent expressly to the counter-offer. Therefore, the buyer-offeror *may* learn of the variant terms. If he learns of them and expressly assents to them, he will be bound by them. The court refused to consider the possibility of a counter-offer that could be accepted by conduct regardless of the counter-offer's clarity. It ignored the possibility that a counter-offer could be *sufficiently* clear to allow conduct acceptance, although it was willing to admit the theoretical possibility of the buyer-offeror learning of the variant terms and expressly assenting to them. Like *Dorton* and *Itoh*, *Uniroyal* does not suggest a test to determine whether a response to an offer should be deemed "expressly conditional." The court assumed the test is mechanical—sufficient compatibility between the statutory proviso's language and the language of the response to the offer, regardless of the offeror's reasonable understanding. It felt compelled to inter-

128. 380 N.E.2d 571.

129. *Id.* at 577.

130. *Id.* at 582 (Buchanan, C.J., concurring).

131. *Id.* at 578. The court stated: "[T]be hypothesis of Section 2-207 that businessmen do not read exchanged printed forms assumes that the offeror-buyer would not learn of the term." *Id.* (quoting R. DEUSENBERG & L. KING, SALES & BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 3.06[4] (1977).

pret the language in the form before it as counter-offer language, even though it suggested that the buyer-offeror would not understand the language as a counter-offer. Because the offeror would not understand the language, protecting the offeror was essential. The only sufficient protection was to insist that the offeror must assent expressly to the counter-offer before he would be bound to the counter-offer's terms.

This line of cases suggests that an offeror reasonably may assume that the original exchange of writings formed a contract, notwithstanding the proviso language in the response to the offer. Because of the necessary, technical interpretation of the response's proviso clause, however, no contract will be recognized and the offeree may "walk away" from the deal. An offeror may be surprised to learn that no contract was formed—unfairly surprised and oppressed. The implication is that fairness to the offeror must be sacrificed to some notion of fidelity to technical language, even though that notion is diametrically opposed to the underlying philosophy of 2-207 and all of Article 2—fidelity to the *factual* bargain of the parties. The offeror and offeree may believe, pursuant to their reasonable commercial understanding, that they have a "closed deal."[132] Under the *Dorton-Itoh-Uniroyal* line of cases, that reasonable belief is overcome by inserting in the response to the offer formalistic language that no reasonable businessman would treat as language creating a counter-offer. If the parties proceed to perform, the offeror now needs protection. Because he may not have been aware of the technical constraints, he should not be oppressed by the terms of the formalistic counter-offer. To avoid this oppression, we simply will ignore normal counter-offer rules and insist that this counter-offer, unlike others, requires the offeror's assent before the offeror will be bound by the terms of the counter-offer. Because the offeror did not understand the response to be a counter-offer, he never is going to assent. Therefore, the scenario lacks verisimilitude. We will achieve a fair result in the most tortuous fashion, ignoring the value of law settlement. But we also will tolerate a manifestly unfair result. If the offeree chooses not to perform after sending its technical counter-offer—not because its counter-offer is not accepted, but, for example, because the offeree chooses to exact a higher price—no contract exists, notwithstanding the defeat of the offeror's reasonable expectations. The prece-

132. According to comment 2 to U.C.C. § 2-207, if in commercial understanding a proposed deal has in fact been closed, it is recognized as a contract.

dent set by this analysis contributes heavily to the chaos of 2-207.

What would a court following this line of cases do with a genuine counter-offer—a response to an offer containing a clear statement that the goods will be shipped as an accommodation to the buyer, who should reject them if the terms in this genuine counter-offer are not acceptable? If a reasonable offeror should understand this statement to be exactly what it purports to be, may the offeror ignore this response, accept the goods, and rely upon the *Dorton-Itoh-Uniroyal* precedent and expect judicial recognition of a 2-207(3) contract? If a court fulfilled that expectation, the oppression and unfair surprise to the offeree would be extreme. Nothing in the case law precludes this result, although the rationale based on fairness to the offeree/counter-offeror because of the ambiguity in his response to the offer would not apply.[133] Unless courts begin

133. An opinion rendered on July 22, 1986, provides an illustration of this oppressive situation in conformity with *Itoh* and its ancestry. In Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440 (9th Cir. 1986), Metal-Matic ("Metal") supplied tubing to Krack for the manufacture of cooling units. Krack and Metal contemplated a ten year contract for the supply of tubing. At the beginning of each year, Krack sent its purchase order stating its estimated requirements for the year to Metal. Metal's acknowledgment responses contained clauses disclaiming warranties and excluding consequential damages. It also contained a clause tracking the statutory proviso of § 2-207(1). Sometime during the ten year relationship, Krack's purchasing manager discussed the warranty and remedy clauses on the Metal acknowledgment with an officer of Metal. The manager tried to convince Metal to change the clauses. Metal refused. After the discussion, Krack continued to accept and pay for the tubing shipped by Metal. Later, Krack sold a cooling unit to Diamond Fruit Growers. A defect in the unit which caused a loss of fruit was traced to a defect in the tubing supplied by Metal. Diamond sued Krack to recover the loss and Krack brought a third-party complaint against Metal. Metal claimed that its exclusion of consequential damages clause and its clause limiting liability to refund of the purchase price or replacement or repair of the tubing protected it against the liability that Krack sought to impose on Metal. If there had been no discussion of the clauses in the Metal form, a strict application of *Itoh* would have resulted in an application of § 2-207(3)—a contract by conduct resulting in the excision of the Metal clauses from the contract because Krack would not have "assented" to the Metal clauses. Metal argued that the discussion of these clauses, Metal's refusal to delete or change them, and the subsequent acceptance of further shipments by Krack constituted assent to Metal's terms. The court found Metal's argument "appealing" because the seller (Metal) had not only included the clauses in its form, but orally stated that these were the only terms on which it was willing to sell the tubing. Nonetheless, the court rejected Metal's argument. The court interpreted the § 2-207(1) proviso language as requiring "a specific and unequivocal expression of assent on the part of the offeror when the offeree conditions its acceptance on assent to additional or different terms." 794 F.2d at 1445. A conduct acceptance, even with full knowledge of the offeree's terms and with the further actual knowledge that the offeree would ship only on those terms, was deemed inadequate. The court cited *Itoh* for this extrapolation. This analysis suggests that a buyer-offer or will ultimately prevail under 2-207(3) if he does not seek to have such clauses removed from the seller's acknowledgment. Moreover, a buyer-offeror will still prevail under 2-207(3) even if he attempts to have such clauses removed and knows that the seller's further shipments are based upon such terms in the acknowledgment form. Thus, the holding supports the pro-

to focus upon the essential question—the reasonable understanding or fair interpretation of the response to the offer—this question will remain unanswered.

C. The Commentators

In prior efforts to dispel the confusion of the current case law and to suggest fidelity to the underlying philosophy of Article 2 and 2-207, I have suggested a test that has been characterized subsequently as "symmetrical and uncomplicated"[134] and as presenting "a principled means"[135] of resolving 2-207 problems. My test is described as inquiring "in every case whether a reasonable offeror would believe that the offeree intends to close the deal by its response. If so, the response concludes the deal on the offeror's terms, subject to the possible addition of nonmaterial terms appearing on the offeree's form."[136] Notwithstanding the other attributes of this approach, the test has been criticized. One commentator argued that:

> [A]n acknowledgment which a reasonable offeror helieves closes the deal does not necessarily indicate the offeree's intent to accept *all* of the offeror's terms. The offeree simply may have chosen a form method, such as a conditional assent clause, to object to the offeror's nondickered terms, rather than objection on a costly, term-by-term basis.[137]

This criticism suggests that the offeree requires an *efficient* method of objecting to the terms of the offer.[138] The efficient method involves two types of counter-offers.

The first counter-offer would be the true, real, or genuine counter-offer stated so clearly that an offeror reasonably would understand it as a counter-offer.[139] If a response were a real counter-offer, subsequent performance would bind the offeror to the terms of the counter-offer. The offeror should have understood that the offeree shipped the goods exclusively on his own terms and that

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position that even a genuine counter-offer, understood as such by the offeror, may not be accepted by the buyer's action in accepting the goods.

134. *See* Travalio, *supra* note 5, at 352 ("Dean Murray's approach is symmetrical and uncomplicated to apply. Its touchstone is a single, uncomplicated factual inquiry, from which all else flows with compelling logic."); *see also* Murray, *Incipient Unconscionability, supra* note 5.

135. Travalio, *supra* note 5, at 352. The author's term "principled analysis" for referring to Dean Murray's analysis in *Incipient Unconscionability, supra* note 5, is adopted for the comparison of analyses that follow.

136. Travalio, *supra* note 5, at 354.

137. *Id.* (emphasis in original).

138. *Id.* at 356.

139. *Id.* at 361.

the offeror's acceptance of the goods would constitute acceptance of the real counter-offer. If the response to the offer were not sufficiently clear to be a real counter-offer, the response would be a definite expression of acceptance. This view is in accord with this Article's earlier suggestion concerning a fundamental change in classical contract doctrine effected by 2-207.[140] Prior to the Code, different or additional terms in a response would be construed as converting the response into a counter-offer, notwithstanding other language in the response that a reasonable businessman would regard as an acceptance. Under 2-207, if an offeree desires to make a counter-offer, he must say so in no uncertain terms. The presumption is that the response is an acceptance unless the offeree clearly manifests an intention to make a counter-offer.

The suggested method adds the second type of counter-offer, which may be called the statutory language, constructed, or "fake" counter-offer, to the sound analysis regarding the real counter-offer. Consider the following scenario: An offeror receives a response that appears to be a definite expression of acceptance even though it contains different or additional terms. Because it does not clearly reveal an intention to create a counter-offer, it is an acceptance. The expression of acceptance, however, contains an "expressly conditional" clause that sufficiently tracks the statutory proviso of 2-207(1). The author recognizes that the offeror would be "unaware of the existence or the legal effect of the clause" and would assume "that a contract existed."[141] A contract, however, would not exist.[142] The "fake" counter-offer would be effective to protect the offeree against the terms in the offeror's form, but, unlike the real counter-offer situation, subsequent performance would not bind the offeror to the terms of the fake counter-offer. The effect of this method would be to permit the offeree to object *efficiently* to the terms of the offer. The "fake" counter-offer provides effective protection to the offeree who sends what appears to be a definite expression of acceptance by providing a technical device to avoid the assumption that the offeree intends to accept *all* of the offeror's terms.

Understanding why the author chose this particular analysis to deal with the counter-offer riddle created by the case law is difficult. He suggests that the solution is reconcilable with the extant

140. *See supra* text accompanying notes 78-80.

141. Travalio, *supra* note 5, at 364.

142. The curiosity is a simultaneous definite and seasonable expression of acceptance *and* a counter-offer, through the use of the statutory proviso analysis.

case law.[143] The author's analysis, however, differs markedly from the case law. The case law does not seem to recognize, as the author clearly does, that the threshold test of whether the response is a definite expression of acceptance should be determined by the reasonable understanding of the offeror. The cases do not address this question.[144] Nor do the cases suggest the possibility of two types of counter-offers with different effects. Although the author suggests that some of the drafting history of 2-207 supports his analysis, in the end he recognizes that his interpretation of an earlier draft of 2-207 "is of little relevance to an interpretation of section 2-207 today."[145] We have seen, however, an analysis of 2-207's drafting history that is clear and convincing evidence of the single counter-offer understanding.[146] Neither the drafters, their advisors, nor the courts have ever hinted at the possibility of two types of counter-offers. The author relies most heavily upon the "fairness, predictability and efficiency" of his formalistic approach,[147] although he recognizes the "bias"[148] of the Code against formalism. Examining the "fairness, predictability and efficiency" of the suggested double counter-offer approach as contrasted with the principled approach,[149] provides important insights into the counter-offer riddle.

If an offeror receives a response he should reasonably understand as an acceptance, is it fair to surprise the offeror by the insertion of an "expressly conditional" clause that precludes the formation of a contract and defeats the offeror's expectations? If no contract is formed, and the offeree's intention not to be bound by the terms of the offer is allegedly protected, the result is unfair to the offeror who reasonably believes a contract exists. Under this approach, if the purchase order is silent as to warranties, remedies, and arbitration, the inclusion of warranty disclaimers, remedy limitations or exclusions, and an arbitration clause in a response containing the 2-207 proviso will not cause these terms to be part of the contract unless the offeror expressly assents to the different or additional terms. He will not assent, because he thought the re-

143. Travalio, *supra* note 5, at 366.

144. For a case that expressly disregards the reasonable understanding of the offeror, see Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440 (9th Cir. 1986), discussed in note 133, *supra*.

145. *Id.* at 369.

146. *See supra* text accompanying notes 68-80.

147. Travalio, *supra* note 5, at 370.

148. *Id.* at 364; *see supra* notes 16-42 and accompanying text.

149. *See supra* note 135.

sponse was an acceptance. He would have no reason to assent expressly to the different or additional terms. The author recognizes this problem, but clings to the view that, even though the offeree will have to surrender his terms absent express assent by the offeror, the offeree is protected against the offeror's terms.[150] Yet, if the seller chooses to perform after the exchange of an offer and "fake" counter-offer, the buyer's acceptance of the goods will result in a 2-207(3) contract that includes only matching terms and permits U.C.C. supplementary terms. The result is a contract containing the usual warranties and remedies, and excluding arbitration. The question arises whether the offeree, by inserting the "expressly conditional" clause to avoid manifesting acceptance of the offeror's terms, intended to jettison all of his terms in the acknowledgment and to be bound to a contract containing all of the terms he was attempting to avoid by inserting the "expressly conditional" clause? How does the suggested analysis promote "fairness" to either the offeror or the offeree?

One of the criticisms of the principled analysis is that it requires a factual inquiry to determine whether the offeror reasonably would understand the response as an acceptance or as a counter-offer, and that this inquiry is unpredictable and promotes uncertainty.[151] Under the suggested modification allowing "fake" counter-offers, this question would remain and allegedly would be resolved by insisting that only those responses that *clearly* manifest counter-offers to reasonable offers would be counter-offers.[152] The author recognizes that some uncertainty will remain under this test, but assumes that the level of uncertainty will be tolerable. The suggested and principled analyses differ little, if at all, on this point. With respect to the "fake" counter-offer, the author apparently believes that it will be relatively simple for courts to determine whether particular "expressly conditional" clauses are sufficiently similar to the statutory proviso. This view ignores the problems in the extant case law regarding the proper interpretation of particular responses and their similarity to the statutory language.[153] In *Dorton* the court held that the language, "subject to

150. Travalio, *supra* note 5, at 370.

151. *Id.* at 356-57.

152. *Id.* at 361.

153. In Boese-Hilburn Co. v. Dean Mach. Co., 616 S.W.2d 520, (Mo. Ct. App. 1981), the court recognized that "[j]udicial interpretation of the language 'expressly made conditional' contained in U.C.C. § 2-207(1) ranges across a broad spectrum." *Id.* at 525. *See also* Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569 (10th Cir. 1984).

all of the terms and conditions on the face and reverse side

In addition to the examples in notes 154-56 *infra*, consider the following: Acceptance "predicated on the following clarifications, additions or modifications to the order" held expressly conditional in Construction Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505, 509 (7th Cir. 1968); "acceptance of this order shall be deemed to constitute an agreement . . . to the conditions named hereon and supersedes all previous agreements" held not expressly conditional in Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924, 925, 927 (9th Cir. 1979). "Acceptance of this order is expressly limited to the conditions of purchase printed on the reverse side" was first held to be sufficiently similar to the "expressly conditional" language of 2-207(1) in Reaction Molding Technologies, Inc., v. General Elec. Co., 585 F. Supp. 1097, 1108 (E.D. Pa. 1984) (denial of partial summary judgment, decision on merits reported at 588 F. Supp. 1280). Upon reconsideration, however, the trial judge decided the quoted language was not sufficiently similar to the statutory proviso's language:

> The clause in the present case states that acceptance is expressly limited to the conditions printed on the reverse side. Although at first blush the clause appears to fit within the proviso, upon closer examination of the wording of the clause and the commercial context in this case, I conclude that the proviso does not apply. First, the clause states that acceptance is "expressly limited" rather than "expressly conditional." More importantly, the clause states that acceptance is limited to the different terms and conditions on the reverse side, rather than stating that acceptance is conditional on the offeror's "assent" to the different or additional terms. Furthermore, the clause was preprinted on a form contract, rather than typed or written into the contract. This same clause appeared in the purchase orders for the 1980 contracts between plaintiff and defendant. . . . Thus, plaintiff must have reasonably believed in 1982, that defendant intended to proceed with the transaction in spite of the language in the clause.

Reaction Molding Technologies, Inc. v. General Elec. Co., 588 F. Supp. 1280, 1288 (E.D. Pa. 1984) (decision on merits; denial of summary judgment reported at 585 F. Supp. 1097). This recent illustration of a dedicated trial judge struggling with the question of the proper interpretation of a printed clause in comparison with the statutory proviso of 2-207(1) takes on an almost Jarndysian character. Between the two opinions, the judge read *Dorton*, 453 F.2d 1161 (6th Cir. 1972), and became terribly confused. His struggle to justify his reversal begins with the rather pathetic suggestion that there is a considerable distinction between "expressly limited" and "expressly conditional." 588 F. Supp. at 1288. The influence of *Dorton* then becomes overbearing because the clause at issue in *Reaction Molding* did not state that acceptance was conditioned upon the offeror's *assent* to the different or additional terms. If an offeror understands that the offeree is conditioning or limiting acceptance to the terms of his form, should that offeror not also understand that the offeree does not want to deal on any other terms and, unless the offeror assents to the terms on the offeree's form, the offeree does not intend to close the deal? The *Dorton* notion that acceptance must be conditioned expressly on the offeror's assent to the different or additional terms in the offeree's response has never made any sense. Llewellyn would put the question very simply: Did the response tell the offeror that the offeree intended to say, "This is an acceptance only if the additional terms that I state are taken by you"? *See supra* text accompanying note 70.

Beyond these formalistic notions, the judge then attempts to inject some rationality into the interpretation process. Was the clause on a printed form rather than handwritten or typewritten? If the clause at issue had been handwritten or typewritten rather than printed, would that change require a different result? Certainly the court does not suggest that only handwritten or typewritten clauses can be effective to create counter-offers. Because the same printed clause appeared in prior deals and the parties performed notwithstanding the clause, did they intend to have a closed deal this time, regardless of the clause? Suppose the clause had been printed, but replicated the language of the 2-207(1) proviso. Would the appearance of the same tracking clause in earlier documents evidencing deals that the parties had performed make the clause in the current form inoperative? These

hereof,"[154] was not sufficiently similar to the statutory proviso. By contrast, *Uniroyal* found that the phrase, "Our acceptance of the order is conditional on the buyer's acceptance of the conditions of sale printed on the reverse side hereof,"[155] was sufficiently similar. A typical merchant-offeror cannot make this distinction. Moreover, other cases have implied the "expressly conditional" clause simply because the response contained different or additional terms.[156] Thus, the suggestion that the author's analysis provides greater predictability is more than questionable.

Regarding the value of providing the offeree with an *efficient* means of avoiding the terms of the offer, the author views as a problem any judicial insistence that a *printed* form contain sufficiently clear language to indicate that the response is a counter-offer.[157] He admits that offerees *could* send a counter-offer clearly stating that goods will be shipped as an accommodation on the offeree's terms. He concludes, however, that "[t]his is unlikely to occur. . . for efficiency reasons."[158] This view lacks support. An offeree easily could replace an ambiguous statutory proviso clause with a conspicuous clause on a printed form that *clearly* indicates that offeree's intention to make a counter-offer and an accommodation shipment of goods that may be accepted only on the terms of the counter-offer. Whether the latter clause would be sufficiently clear represents no higher level of uncertainty than the author is willing to tolerate. Moreover, the author's analysis fails to consider why offerees prefer an ambiguous response over a clear counter-offer that would be reasonably understood and fairly interpreted by the offeror as a counter-offer. The drafters of ambiguous responses often may be attempting to deceive the offeror. By presenting a response that reasonably appears to be an acceptance,

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suggestions are not submitted to criticize the struggling trial judge. Rather, they illustrate the considerable prohlems that any reasonable judge may discover in attempting to unscramble the chaotic precedent in this area.

154. 453 F.2d at 1164.

155. 380 N.E.2d at 577.

156. The much-criticized *Roto-Lith* case adopted this position. *See supra* notes 91-94 and accompanying text. In a later case, a federal district court in Massachusetts felt compelled to follow the holding of *Roto-Lith* even though it recognized the case law criticisms of *Roto-Lith.* The court suggested that "[i]n the event that the First Circuit overrules *Roto-Lith,* this Court will determine whether the [equipment] sold by Westinghouse . . . was in breach of either an implied warranty of merchantability or of fitness for a particular use." Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp., 445 F. Supp. 537, 547 (D. Mass. 1977) (footnotes omitted).

157. Travalio, *supra* note 5, at 357.

158. *Id.* at 358.

the offeree may believe that the offeror will conclude that the deal is "closed" and will expect shipment of the goods. The seller-offeree will ship the goods, and, in the overwhelming majority of instances, the buyer will accept the goods, pay for them, and use them without difficulty. Only in the rare situation when something goes awry will the seller resort to the ambiguous clause in the acknowledgment form in hopes of avoiding warranty liability, liability for consequential damages, or other unfavorable outcomes. By contrast, if a clear response indicated that no deal was closed, a seller would have no assurance that the buyer would not regard the deal as open and maybe go elsewhere to purchase the goods. Is it better to *appear* to be accepting the offer while actually inserting an ambiguous clause that will permit a subsequent technical argument to avoid unfortunate ramifications? This technical defense is an abomination of the good faith and conscionability standards of Article 2,[159] undermines the underlying philosophy of Article 2 by emasculating the factual bargain of the parties in favor of a technical construct resulting from surreptitious efforts by the offeree, and perverts the essential purpose of 2-207.

According to some commentators, the principled analysis erroneously promotes a contract based on the terms of a clear counteroffer. Likewise, if the offeror reasonably should have understood the response to the offer as an acceptance, the contract will reflect the offeror's terms. Commentators have said this "winner-takes-all" approach ignores the realities of business because "each party knows that its form's nondickered terms differ from those on most of the forms it receives. Moreover, each party is aware that its form contains a formal objection to the terms on the other party's form."[160] The approach is criticized as "inappropriate when the

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159. Under the merchant's standard of good faith in 2-103(1)(b), inserting a clause designed to take advantage of technical arguments rather than to communicate clearly the true intention of the party inserting the clause is neither "honest in fact" nor commercially reasonable. Therefore, it violates hoth of the standards of merchant good faith under Article 2. Because a surreptitious clause may well result in oppression and unfair surprise, it also violates the basic principle of the unconscionability section, 2-302. Official comment 1 to 2-302 reads in part:

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable . . . . The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise.

U.C.C. § 2-302 comment 1.

160. Travalio, *supra* note 5, at 355. Professor Travalio relies, to some extent, on the

parties typically pay little attention to the boilerplate on either form and consequently do not expect their boilerplate to become part of the contract."[161]

This criticism of the principled analysis is inconsistent. How does each party "know" that its form differs from the other's and contains a formal objection to the terms on the other form when the parties "pay little attention to the boilerplate on either form?" The latter assumption reflects reality. The typical merchant is unaware of the legal effect of the form he uses to make offers or to respond to offers. In fact, the typical purchasing agent or sales representative does not know whether he is sending an offer, an acceptance, or a confirmation.[162] Drafters of printed forms go well beyond the desires of their merchant-clients in drafting "to the edge of the possible."[163] It is more than doubtful that an offeree

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suggestions of Professor Taylor. Taylor, *supra* note 5, at 443-44. Taylor's suggestions are difficult to follow. In dealing with the principled analysis, he suggests that it promotes a theory allowing a "mechanistic" view of "intent." Yet he recognizes the fundamental test of the principled analysis: "[T]he important question is what the reasonable buyer should understand from the seller's response under all surrounding circumstances." *Id.* at 444.

161. Travalio, *supra* note 5, at 355.

162. Thousands of purchasing agents with whom I have dealt have no idea that they use purchase order forms in a chameleonic fashion. The form is used as an offer when it is the document initiating the potential transaction, it is used as an unwitting acceptance if the initial "quote" or "bid" from the vendor later is construed to be the offer, and it is used as a confirmation of a prior oral contract with the vendor. Purchase order forms often are put to one further use. If prior documentation evidences a contract, a purchase order will sometimes be used as a delivery order. The terms of the purchase order properly are deemed inoperative under these circumstances. *See, e.g.,* Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971). Although I have dealt with a much smaller number of vendors' representatives, their appreciation of the legal effect of their forms appears to rise no higher than the understanding of purchasing agents. *See supra* note 47.

163. In his testimony before the Law Revision Commission, Llewellyn stated:

> Business lawyers tend to draft to the edge of the possible. Any engineer makes his construction within a margin of safety, and a wide margin of safety, so that he knows for sure that he is getting what he is gunning for. The practice of business lawyers has been . . . to draft . . . to the edge of the possible. . . . I do not find that this is desired by the business lawyers' clients . . . [L]awyers insist on having all kinds of things that their clients don't want at all.

1954 Law Revision Commission Hearings, *supra* note 16, at 113 (177). This view is shared by others:

> [T]he form document is not the direct product of the businessman's knowledge. Rather, it is the product of the draftsman's art. Between the drafting party and the actual draftsman, much knowledge, and much of the sense of fairness, may be lost. More importantly, the professional draftsman's goal is to protect his client as fully as possible from legally enforceable obligations, including some relating to risks that the businessman might be willing to accept. In this process, the temptation, and indeed the art, is to draft up to the limit allowed by law, rather than to change only those features of the background law that must be altered for the trade reasonably to proceed.

Rakoff, *supra* note 42, at 1205 (footnotes omitted). As early as 1937 Llewellyn said:

who sends a form containing the "expressly conditional" language of 2-207(1) intends to make a "fake" counter-offer. In the case of the unusual offeree who is completely aware of the current case law interpretations and intends to "inject ambiguity"[164] in the acceptance for his own protection, how should a court interpret his response to an offer. Whose meaning should prevail? The *Restatement (Second) of Contracts* provides a clear and convincing answer: the interpretation of the innocent party prevails.[165]

A reasonable offeror who fairly interprets a response as an acceptance should be able to rely upon that understanding with the additional or different terms in the response dealt with under 2-207(2). If the response is interpreted fairly as a counter-offer because it is sufficiently clear, the offeror must then understand that any subsequent shipment of the goods is based on those terms. It is not unfair to insist that offerees will be deemed to have accepted offers unless they clearly indicate that they are not accepting or that they are making counter-offers. By refusing to give effect to technical, ambiguous responses, courts promote the underlying

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> In the first place, good drafting calls for good lawyers and *decent* drafting calls for representation of both or all interests by good lawyers. It is an unfortunate situation which limits the availability of respectable law or legally effective regulation to persons, especially to corporations who bave managed to accumulate experience enough to learn tbat the "general" rules are unsatisfactory, *and* who have money enough to bire skilled counsel, and sense enough to find such. It is an unfortunate legal situation which puts it into the hands of any outfit that can get the jump on its customer (as, for instance, by "our standard form") or which can get tbe jump on whole categories of customers (as by an automobile manufacturers' association standard form or a seed dealers' standard form) to twist tbe neck of commercial decency at any legal time or in any legal manner it may choose. For it is the societal function of private law, as of public law, to provide ring, referee and rules. Let tbe best outfit win, indeed let ring-strategy and careful training count. But are feather-weights to be matched against unlimited heavies, and is the use, by one party, of the knee or foot to be allowable with no fouls called? New York, in 1820, gives one, on the *civil* side, and on quality a pre-ring, pre-matchmaker, pre-Marquis of Queensbury picture. Catch-weights, all comers, no holds barred. 1900-1910 (the Sales Act being adopted in the last year mentioned) represents a movement in tbe direction of a Boxing Commission. There is said to be dirty work and manipulating in tbe fight game; I do not know. What is certain is that tbe spreading vogue of draftsmanship has carried lopsided manipulation into the game of Sales Law. I hold the draftsman's to be a noble art . . . . Form-contracts can do, in tbe legal and marketing phases, almost as useful work as the conveyor-belt. The draftsman's art can be dastardly as well as noble . . . .

Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341, 393-94 (1937) (emphasis in original).

164. *Itoh*, 552 F.2d at 1238.

165. *See* RESTATEMENT (SECOND) OF CONTRACTS, §§ 20, 57; and 61; *see also supra* note 114. For an analysis of the RESTATEMENT (SECOND) concept of standardized agreements with particular reference to 2-207, see Murray, *The Standardized Agreement*, *supra* note 9, at 744-61.

philosophy of Article 2, serve the essential purpose of 2-207, and maintain absolute fidelity to the overriding standards of good faith and conscionability. In sum, the courts effect the factual bargain of the parties as reasonably understood and fairly interpreted by merchants.

D. A Current Example

Lest any doubt remain concerning the pervasive confusion in current judicial thinking about the counter-offer riddle, a recent example provides ample support for this assertion. In *Salt River Project Agricultural Improvement and Power District v. Westinghouse Electric Corp.*[166] the utility buyer (SRP) sent a purchase order to Westinghouse containing the following provision, which was the first paragraph in its "Terms and Conditions":

> This Purchase Order becomes a binding contract, subject to the terms and conditions hereof, upon receipt by Buyer and its Purchasing Department of the acknowledgment copy hereof, signed by Seller, or upon commencement of performance by Seller, whichever occurs first. *Acceptance of this Purchase Order must be made on its exact terms and if additional or different terms are proposed by Seller such response will constitute a counter-offer*, and no contract shall come into existence without Buyer's written assent to the counter-offer. Buyer's acceptance of or payment for material shipped shall constitute acceptance of such material subject to the provisions herein, only, and shall not constitute acceptance of any counter-offer by Seller not assented to in writing.[167]

The drafter of this provision apparently made every effort to win the battle of the forms. Westinghouse could exercise the power of acceptance in one of two ways: by signing the acknowledgment form drafted by the purchaser or by starting performance. If the seller returns acknowledgment with different or additional terms, the response will not constitute an acceptance—it will be a counter-offer. Even if the buyer accepts a shipment of goods, the acceptance of goods will not accept any counter-offer from the vendor because only a written assent by the purchaser can bind him to the vendor's counter-offer. As is often true, the seller in this case ignored the acknowledgment form sent by the buyer with the purchase order. Instead, the seller sent its own printed acknowledgment form, which indicated that the purchase order *"[h]ad been entered."*[168] The acknowledgment contained the usual direc-

166. 143 Ariz. 437, 694 P.2d 267 (Ct. App. 1983) *modified en banc*, 143 Ariz. 368, 694 P.2d 198 (1984).

167. *Id.* at 440, 694 P.2d at 270.

168. *Id.*

tive: "SEE REVERSE SIDE FOR TERMS AND CONDITIONS." The Westinghouse "Terms and Conditions" began with a preamble indicating that the seller's conditions "shall take precedence over any conditions which may appear on your standard form, and no provisions or condition of such form except as expressly stated herein, shall be binding on Westinghouse."[169] While it is possible to find some precedent that would characterize this clause as sufficiently indicating an expressly conditional acceptance, the clause is hardly similar to the statutory proviso language required by *Itoh*, *Uniroyal*, or *Dorton*.[170] If the *Dorton-Itoh-Uniroyal* precedent controlled, the clause would not create a statutory counter-offer. The usual warranty disclaimers and limitations of liability followed the preamble in the Westinghouse form. The dickered terms were identical on the purchaser's and seller's forms. Westinghouse shipped the equipment ordered, and the buyer used it. Later, the buyer alleged that the equipment malfunctioned and caused considerable damage. The buyer alleged breaches of warranties, and Westinghouse relied on the warranty disclaimers in its acknowledgment form as a defense.

The court interpreted the purchase order as requiring an acceptance that exactly matched the terms of the offer. Because the Westinghouse response failed to match all terms, it was not an acceptance. Rather, it was a counter-offer. Having characterized the Westinghouse response as a counter-offer, the court rejected the argument that the purchase order terms concerning the manner of accepting the counter-offer could control, because the counter-offer necessarily rejected that term of the offer. Yet Westinghouse's response was not a counter-offer because it expressly conditioned acceptance on assent to the terms of the response. According to the court, this case did not even fall within 2-207 because "[t]he SRP order distinctly stated that a responsive document containing any different or additional terms would operate as a counter-offer and could not be an acceptance of the SRP offer."[171] The court held the SRP offer to be the rare offer unambiguously requiring an exclusive manner of acceptance under 2-206 of the Code, thereby restricting the manner of acceptance to terms exactly matching the terms of the offer. Thus, the printed clause in the purchase order precluded a definite and seasonable expression of acceptance with

169. *Id.*
170. For an analysis of these cases, see *supra* text accompanying notes 95-132.
171. 143 Ariz. at 444, 694 P.2d at 274.

different or additional terms. By accepting the goods, the buyer had accepted the counter-offer.[172]

The first reaction to this bizarre situation may be to regard the buyer's draftsman as a classic illustration of one who, in Llewellyn's words, tried to "draft to the edge of the possible"[173] and was hoisted on his own excessively drafted petard. Further reflection, however, reveals a more troubling analysis. If the purchase order had contained no such printed clause or one that merely sought to take advantage of 2-207(2)(a), the court may well have characterized the seller's response as a definite and seasonable expression of acceptance forming a contract on the buyer's terms with variant terms excised under 2-207(2). If the seller had used a statutory counter-offer clause tracking the statutory proviso of 2-207(1), the resulting contract by conduct would have included terms favorable to the buyer under 2-207(3). In *Salt River* the seller's form is not a counter-offer by its own language. Instead, it becomes a counter-offer by *unread* language in the buyer's purchase order. Section 2-207 has no application. *Salt River* thus provides the most recent example of the "last shot" principle. The seller won the battle of the forms without assistance from 2-207. Viewing the court as untutored and unwise in its failure to analyze the situation more effectively under the current, disparate case law is too facile. Instead, this kind of analysis may appear at any time because of chaotic judicial interpretations in this area. *Salt River* may even be an example of a court making valiant efforts to avoid 2-207 applications. At this judicial moment in the land of 2-207, that motivation would not be remarkable.

V. THE "DIFFERENT" VS. "ADDITIONAL" PUZZLE

Section 2-207(1) permits an operative acceptance that contains *different* or *additional* terms.[174] If the response to an offer is such an acceptance, what should be the effect of the additional or different terms? The drafters clearly designed subsection (2) exclusively to deal with a situation in which an offeree sends a definite and seasonable expression of acceptance and forms a contract although the acceptance contained terms not found in the offer. This radical departure from pre-Code contract law demanded statutory guid-

172. The court held that "[w]here, as here, an offeree uses a seller's goods for his own purposes, that action will be deemed to constitute an acceptance of the terms of the counter-offer." *Id.*

173. *See supra* note 163 and accompanying text.

174. For text of 2-207(1) see *supra* note 2.

ance in dealing with nonmatching terms in the acceptance. The statutory guidance, however, has caused consternation. While subsection (2) includes the word "additional," it fails to include the word "different."[175] What should be done with "different" terms? To have statutory guidance concerning one kind of nonmatching term but not the other is particularly odd. Did the drafters intend subsection (2) to apply only to additional terms and therefore deliberately avoid any mention of different terms? The Comments to 2-207 answer these and other perplexing questions emanating from the failure to mention "different."

Comment 3 is particularly helpful in solving the puzzle. It states: "Whether or not additional or different terms will become part of the agreement depends upon the provisions of Subsection (2)."[176] This introductory sentence to Comment 3 argues mightily for the explanation, suggested by some commentators and courts, that the failure to include "different" along with "additional" in subsection (2) is an inadvertent drafting or printing error.[177] The appearance of Comment 3 at a particular time in the statutory history supports this view,[178] and other drafting history also suggests this resolution.[179] Contrary suggestions, however, are also found in

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175. For text of 2-207(2) see *supra* note 2.

176. U.C.C. § 2-207 comment 3 (1977).

177. *See, e.g.*, Steiner v. Mobil Oil Corp., 141 Cal. Rptr. 157, 569 P.2d 751 (1977); Murray, *Incipient Unconscionability, supra* note 5, at 619; Utz, *More on the Battle of the Forms: The Treatment of "Different" Terms Under the Uniform Commercial Code*, 16 U.C.C. L.J. 103, 105 (1983).

178. Utz, *supra* note 1775, at 111-12. Comment 3, which assumes that both "different" and "additional" appear in 2-207(2), first appeared in the Final Text edition of November 1951. That same edition dropped the reference to "different" in 2-207(2), but retained it in 2-207(1). "Different" had first appeared in the June 1951 redraft in both subsections (1) and (2), which reflected changes made by the Joint Meeting of the Institute and the Commissioners in May 1951.

179. In a May 1951 meeting of the American Law Institute in Joint Session with the National Conference of Commissioners on Uniform State Laws, it was proposed that "different" be added to both subsections (1) and (2) of 2-207. *See* Transcript of Proceedings of the Annual Meeting of the American Law Institute in Joint Session with the National Conference of Commissioners on Uniform State Laws 27-28 (May 16-18, 1951). Llewellyn noted that change during the meeting with an indication that the change had been adopted. *See* The Karl Llewellyn Papers, J.XIII. l.a (available in University of Chicago Law Library); *see also*, The American Law Institute & National Conference of Commissioners on Uniform State Laws, UNIFORM COMMERCIAL CODE, May Meeting Revisions to Proposed Final Draft No. 2, at 6 (June, 1951) (containing the amendment to both subsections (1) and (2), *reprinted in* XII UNIFORM COMMERCIAL CODE DRAFTS 323, 328 (E. Kelley compiler 1984). For suggested analyses of why the November, 1951 Final Text Edition and the 1952 Official Draft did not include "different" in subsection (2), see *supra* notes 174-78 and accompanying text.

the drafting history.[180] Although the arguments in favor of the inadvertent error seem more plausible, the drafting history is not dispositive. Because Comment 3 is not statutory language, it has been ignored by some courts and commentators.[181] Professors White and Summers have influenced some courts to adopt the view that subsection (2) does not apply to "different" terms.[182] White and Summers, however, disagree on the proper treatment of "different" terms in an otherwise definite and seasonable expression of acceptance. White argues that a term in the offer cancels any different term in the acceptance: a view that has been christened the "knockout" view.[183] Summers contends that different terms in the acceptance simply "fall out."[184] The inclusion of an arbitration term in the offer and an anti-arbitration term in the acceptance illustrates the difference in these views. Under the White "knockout" view, the contract would contain no arbitration clause because the different express terms eliminate each other. Under the Summers "fall out" view, the contract *would* contain an arbitration clause because the different term in the acceptance

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180. Professors Baird and Weisberg recognize the drafting history suggested *supra* note 179, but point to a statement from Karl Llewellyn opposing the addition of "different" terms in subsection (2), which he withdrew after remarks hy Soia Mentschikoff. *See* Transcript of Proceedings of the Annual Meeting of the American Law Institute in Joint Session with the National Conference of Commissioners on Uniform State Laws 27-28 (May 16-18, 1951). Notwithstanding Dean Mentschikoff's suggestion that "different" may be included in subsection (2) without difficulty, Professors Baird and Weisberg suggest that her remarks:

> only argne for including "different" in subsection (1), not for including them in subsection (2), in which they would be "proposals". She seems to suggest that when there is no agreement on a particular term, neither party's term controls. It is possible that the drafters recognized this between the May meeting and the November draft and took "different" out of subsection (2) for this reason.

BAIRD & WEISBERG, *supra* note 5, at 1241 n.61.

181. *See, e.g.*, Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569 (10th Cir. 1984); Duesenberg, *supra* note 5, at 1485, 1488.

182. *See, e.g., Daitom*, 741 F.2d at 1579 (reflecting White view that conflicting terms cancel each other out); Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924 (9th Cir. 1979) (White view); Reaction Molding Technologies, Inc. v. General Elec. Co., 588 F. Supp. 1280 (E.D. Pa. 1984) (reflecting Summers' view that different terms in the acceptance fall out); Owens-Corning Fiberglas Corp. v. Sonic Dev. Corp., 546 F. Supp. 533 (D. Kan. 1982) (White view); Lea Tal Textile Co. v. Manning Fabrics, Inc., 411 F. Supp. 1404 (S.D.N.Y. 1975) (White view); Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977), *cert. denied*, 434 U.S. 1056 (1978) (White view); Challenge Mach. Co. v. Mattison Mach. Works, 138 Mich. App. 15, 359 N.W.2d 232, 39 U.C.C. Rep. Serv. (Callaghan) 157 (Ct. App. 1984) (White view); Hartwig Farms, Inc. v. Pacific Gamble Robinson Co., 28 Wash. App. 539, 625 P.2d 171 (Ct. App. 1981) (in dictum); S.C. Gray, Inc. v. Ford Motor Co., 92 Mich. App. 789, 286 N.W.2d 34 (Ct. App. 1979) (White View).

183. J. WHITE & R. SUMMERS, *supra* note 6, at 29.

184. *Id.*

simply falls out.

Professor White relies on Comment 6 to 2-207 to support the "knockout" view,[185] but his coauthor reminds him that Comment 6 deals only with "confirming forms."[186] Because White ignores the clear inclusion of "different" along with "additional" in Comment 3, his reliance on Comment 6, which expressly is limited to a situation different from the illustration, is problematic. Although the "knockout" view has found judicial support,[187] scholars have recognized the difficulty in relying on Comment 6.[188] Under Summers' "fall out" view, the offeror wins the battle of the forms concerning arbitration.[189] White complains that this view gives the offeror an "unearned advantage."[190] Summers responds that the advantage is not entirely unearned because the offeree did have the benefit of perusing the offeror's terms and could have refused to contract absent express assent to his no arbitration term.[191] Summers, however, is discontent with his own "fall out" view any time the offer includes implied terms, as he suspects it often does. If an offer contains implied terms, any expressly different term in the acceptance, under his prescription, simply will "fall out," and the offeror invariably will win the battle of the forms. In some frustration,

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185. U.C.C. § 2-207 comment 6 reads:

If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection (2). The written confirmation is also subject to Section 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement.

186. J. WHITE & R. SUMMERS, *supra* note 6, at 29.

187. *See supra* note 180.

188. *See* Duesenberg, *supra* note 5, at 1485.

That comment purports to explain subsection (2), not subsection (3). In this effort, it lacks desired clarity. It starts by saying that failure to answer an additional term results in its being assented to—which is not true except as to immaterial additional terms, and even then, not always. Next, it says that conflicting terms in written confirmations are stricken, with the Code filling the gaps—which also is not true under subsection (2), but may be true under subsection (3). As a comment on the section, this is a poor one.

Id.

189. J. WHITE & R. SUMMERS, *supra* note 6, at 29. For a case adopting the Summers "fall-out" view, see *Reaction Molding*, 588 F. Supp. at 1289.

190. J. WHITE & R. SUMMERS, *supra* note 6, at 29.

191. *Id.*

Summers suggests his only solution to this dilemma—redraft the statute.[192] The problem of implied terms in the offer is overcome under the "knockout" view because neither conflicting term becomes part of the contract.

Professor White, however, is uncomfortable with his "knockout" view as applied to another situation: one in which the offer contains an arbitration term, but the acceptance is silent. In this situation Summers happily finds an arbitration term in the resulting contract, this time more easily because the acceptance did not conflict expressly with the term in the offer. Both authors suggest that, despite the argument that this result gives the offeror an unearned advantage, the resulting contract should include the arbitration term because "[t]erms contained in his [offeror's/buyer's] document which are not contradicted by the acceptance become part of the contract."[193] Presumably, the authors believe that the lack of an express anti-arbitration clause in the acceptance suggests that the acceptance does not "contradict" the terms of the offer. The next sentence in their text, however, is paradoxical: "If White were more bold, he would find that seller's [offeree's] document is only an 'acceptance' of those terms on which both documents agree."[194] If both documents do not agree, do they not contain a "contradiction"? Are White and Summers suggesting that the acceptance does not "contradict" the offer because it does not contradict the offer *expressly*? We are told that White is not "more bold" because nothing in the Code or the statutory history supports the position that the resulting contract in this illustration should not contain an arbitration clause.[195] Nonetheless, White "would write the law differently if he could do so."[196] The authors of an otherwise helpful text seem terribly confused in this area.

No basis exists for suggesting that the Code drafters deliberately avoided the use of "different" in subsection (2) or anywhere else in 2-207. Suggestions that the statutory language requires the exclusion of "different" terms from the operation of subsection (2) are less than plausible. For example, Professor Summers believes that 2-207(2)(c) "confirms that the drafters did not envision the possibility that a contract could include 'different' terms on the

192. *Id.* at 30.
193. *Id.* at 31.
194. *Id.*
195. *Id.*
196. *Id.*

same matter."[197] Subsections 2-207(2) and (2)(c) provide:

> The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:. . .(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.[198]

Summers concludes that 2-207(2)(c) "would automatically eject the different term in the acceptance, since 'notification of objection' would already have been given when the offeror included the contrary term initially."[199] Section 2-207(2)(c), however, envisions *either* prior notification of objection to nonmatching terms *or* subsequent notification of objection within a reasonable time after the response containing nonmatching terms is received. If Summers' view were followed, the language after the disjunctive in 2-207(2)(c) would be useless because the offer always would constitute a notification of objection to any nonmatching term in the acceptance.

The purpose of 2-207(2) must be examined to determine the section's potential applicability to "different" as well as "additional" terms. Subsection (2) begins with the innocuous statement: "The additional terms are to be construed as proposals for addition to the contract."[200] Without the next sentence, no additional term would become part of the contract unless the offeror assented to that term. If the additional term occurs in a contract between merchants, the angular phraseology of subsection (2) suggests that the additional terms become part of the contract, *unless*: (1) the offer expressly limits acceptance to the terms of the offer; (2) the additional terms materially alter the contract; or (3) notification of objection to the additional terms has already been given or is given within a reasonable time after notice of them is received.[201] These mutually exclusive exceptions clearly tend to swallow the general rule of subsection (2) that "between merchants such terms become part of the contract. . . ." If the variant term materially alters a term of the offer, 2-207(2)(b) applies and subsections 2(a) or 2(c) are not needed. If the offeror has taken advantage of subsection 2(a) by inserting an express limitation to the terms of the offer, the limitation is superfluous if the additional term is "material" as a matter of law. Because several 2-207 cases deal with the question

197. *Id.* at 27 n.7.
198. U.C.C. § 2-207(2), (2)(c) (1977).
199. J. WHITE & R. SUMMERS, *supra* note 6, at 27 n.7.
200. U.C.C. § 2-207(2) (1977).
201. U.C.C. § 2-207(2)(a)-(c) (1977).

of materiality,[202] however, controversy over materiality can be avoided by including a clause meeting the requirements of 2-207(2)(a). Subsection (2)(a) precludes any additional term regardless of materiality. Similarly, including a notice of objection in the offer under 2-207(2)(c) effectively precludes any additional term regardless of materiality. Absent these clauses in the offer and absent a material additional term, the offeror still may avoid an additional term by notifying the offeree of objection within a reasonable time after receipt of the acceptance containing the immaterial, additional term. Section 2-207(2) may be redundant to some extent,[203] but its operation can be made effective. Yet the technical application of subsection (2) does not reveal its underlying philosophy, which is simply a specification of the underlying philosophy of 2-207 and all of Article 2.

The primary purpose of 2-207 is avoiding oppression and unfair surprise.[204] To avoid imposing on an offeror a term in a printed form that would unfairly surprise or oppress the offeror, one should be concerned only with terms that will affect the offer substantially—terms that will "materially alter" the deal proposed by the offeror.[205] True to the Code's emphasis on the offeror as master

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202. *See* Twin Disc, Inc. v. Big Bud Tractor, 772 F.2d 1329, 1334 (7th Cir. 1985) (warranty disclaimer constitutes material alteration); Luedtke Eng'g Co. v. Indiana Limestone Co., 740 F.2d 598, 600-01 (7th Cir. 1984) (delivery term considered material alteration); Western Indus., Inc. v. Newcor Canada, Ltd., 739 F.2d 1198, 1205 (7th Cir. 1984) (deletion of major remedy such as consequential damages constitutes material alteration); Frances Hosiery Mills Inc. v. Burlington Indus., Inc., 285 N.C. 344, 356-57, 204 S.E.2d 834, 842 (1974) (arbitration term constitutes material alteration). *But see* Kathenes v. Quick Chek Food Stores, 596 F. Supp. 713, 718 (D.N.J. 1984) (exclusion of consequential damages not a material alteration).

203. If an offer expressly limited acceptance to the terms of the offer and also included notification of objection to any variant terms in the acceptance, the offer would seek to take advantage of both 2-207(2)(a) and 2-207(2)(c). The express limitation, however, could be considered a notification of objection to variant terms and the ratification of objection could be construed as an express limitation to the terms of the offer.

204. Comment 4 to 2-207 suggests that the test for a material alteration is whether the variant term in the acceptance would "result in surprise or hardship if incorporated without express awareness by the other party . . . ." comment 5, dealing with immaterial alterations, suggests the converse, *i.e.*, "clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is reasonably given . . . ."

Cases testing the materiality of the alteration in terms of unreasonable surprise or hardship include Luedtke Eng'g Co. v. Indiana Limestone Co., 740 F.2d 598, 600 (7th Cir. 1984) and Ebasco Servs., Inc., v. Pennsylvania Power & Light Co., 402 F. Supp. 421, 442 (E.D. Pa. 1975). *Cf.* U. C. C. § 2-302 comment 1 (1977) (suggesting that the principle of unconscionability "is one of the prevention of oppression and unfair surprise . . . ."; *see* Murray, *Incipient Unconscionability, supra* note 5.

205. For cases using the standard of oppression and unfair surprise as test of material-

of the offer,[206] the offeror may avoid even immaterial additional terms by inserting in the offer limitations on the offeree's power of acceptance in the form of either an express limitation to the terms of the offer under 2-207(2)(a) or notification of objection under (2)(c). If a *material* term became part of the contract, however, it would interfere substantially with the offeror's reasonable expectations. Moreover, if a material term became part of the contract contrary to the reasonable understanding of the offeror, the result would be oppression, hardship, or unfair surprise to the offeror—the essential evil to be avoided.[207] Comments 3, 4, and 5 to 2-207 emphasize the concept of materiality and suggest as illustrations clauses that normally would be thought materially to alter the terms of the offer and clauses that would be viewed as immaterial additions to the contract. Binding the offeror to a contract containing a material term not found in the offer would bind him to a bargain he never made, rather than to the factual bargain he thought he was initiating when he created the power of acceptance.

Considering the illustrations in Comments 4 and 5 to 2-207 that suggest material versus immaterial alterations is particularly interesting. Comment 4's first illustration of a material alteration is "a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches."[208] That, absent trade usage or prior course of dealing, the warranty of merchantability[209] always attaches is a normative assumption of Article 2. Because the warranty is implied, is an express disclaimer in an otherwise definite expression of acceptance an "additional" or "different" term? Unless the implied warranty is excluded from the offer, the

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ity, see *supra*, note 200.

206. The original *Restatement of Contracts* contained one exception to the general rule that the offeror is master of the offer. Under the *Restatement (Second) of Contracts*, the rule is absolute. *See supra* note 82 and accompanying text.

207. Comment 4 is particularly clear about the essential evil to be avoided, *i.e.*, material alterations would "result in surprise or hardship if incorporated without express awareness by the other party . . . ." U.C.C. § 2-207 comment 4 (1977).

208. U.C.C. § 2-207 comment 4 (1977).

209. Under § 2-316(3)(c), the implied warranty of merchantability may be excluded or modified by course of dealing, course of performance, or usage of trade. Course of performance would exclude or modify the implied warranty only because the parties acted as if there were no implied warranty in their initial performance of the contract. Trade usage or prior course of dealing effectively could exclude the implied warranty at the moment the contract was formed. It is of critical importance to include trade usage, course of dealing, or course of performance as part of the factual bargain constituting the "agreement" of the parties under § 1-201(3).

disclaimer must be a "different" term, which the Comment assumes to be within the scope of 2-207(2).[210] This result is not remarkable because the previous Comment assumes that subsection (2) applies to different as well as additional terms. If subsection (2) does not apply to "different" terms like warranty disclaimers, remedy limitations, or other terms that materially alter the terms of the offer, a great deal of case law is removed from the scope of subsection (2). The remaining illustrations of material alterations in Comment 4 deal with terms in the acceptance that are different from terms implied in the offer through trade usage or prior course of dealing. Again, they are *all* "different" terms. Comment 4 provides no illustration of a term that is both additional and *not* different.

Comment 5 to 2-207 contains examples of clauses involving no element of unreasonable surprise or hardship; they are immaterial terms in the acceptance. The first example is a clause enlarging slightly upon those situations that allow a seller to claim an exemption for commercial impracticability and that are "similar to those covered by"[211] the Code section on impracticability.[212] If this illustration suggests that a term in an acceptance may expand impracticability beyond the terms of the offer, it may be nothing more than a suggestion that the seller does not lose the Code standard of impracticability unless the offer clearly reduces that standard. In that sense, the clause is neither an additional nor a different term. "[A] clause fixing a reasonable time for complaints within customary limits"[213] may be thought to be an additional term only in the sense that it specifies a period within the scope of the period authorized by the offer. Certainly, it is not a "different" term, although it may be characterized as "additional." In the case of a purchase for subsale, a term providing for inspection by a subpurchaser would not be a "different" term, although it may be an additional term of insignificance to the offeror, who may have expected the inspection. Added terms within the range of trade practice are certainly not "different" terms, nor is a "clause limiting the right of rejection for defects" within trade usage a "different" term.

Comment 5's only illustration of immaterial terms that is troubling deals with "limiting remedy in a reasonable manner"

210. U.C.C. § 2-207 comment 4 (1977).
211. U.C.C. § 2-207 comment 5 (1977).
212. U.C.C. § 2-615 (1977).
213. U.C.C. § 2-207 comment 5 (1977).

with reference to sections 2-718 and 2-719.[214] Absent trade usage or prior course of dealing permitting the limitation of remedy, the inclusion of a liquidated damages clause in an acceptance typically would alter the terms of the offer materially. If the Comment's phrase, "in a reasonable manner," is interpreted as a clause that specifies liquidated damages within a range contemplated in the offer, the term is immaterially additional and not different. Similarly, a limitation of remedy consonant with trade usage or prior course of dealing would not be a "different" term though it may be additional. On the other hand, any substantial change in the normal remedies an offeror would expect in the event of a breach would be a materially different term notwithstanding some recent dreadful judicial analysis.[215]

Courts and scholars have recognized the difficulty in distin-

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214. *Id.* Section 2-718 deals with liquidation or limitation of damages and section 2-719 deals with contractual modification or limitation of remedy.

215. An opinion holding a consequential damage clause in the seller's form to he an immaterial alteration that hecomes part of the contract signals an unfortunate development. In Hydraform Prods. Corp. v. American Steel & Aluminum Corp., 41 U.C.C. Rep. Serv. (Callaghan) 1201 (N.H. 1985), the New Hampshire Supreme Court held the exclusionary clause enforceable because it appeared in a delivery receipt signed by the buyer's agents. The opinion relies upon language in comment 5 that suggests that "a remedy may be limited in a reasonable manner (see Sections 2-718 and 2-719)." U.C.C. § 2-207 comment 5. The court quoted section 2-719 and suggested that subsection (3) provides that an exclusion of a consequential damages term is enforceable unless unconscionable. Hydraform Prods. Corp., 41 U.C.C. Rep. Serv. at 1205. Because the clause was not unconscionable in this merchant transaction, the court somehow concluded that it was an immaterial alteration. The court ignored the threshold question of whether the parties agreed to the exclusion of consequential damages. Rather, simply because 2-719(3) permits parties to *agree* to exclude consequential damages, the court found the allowed exclusion to constitute an immaterial alteration, a non sequitur. Sellers in New Hampshire now may insert exclusionary clauses in all delivery receipts and hope that they are signed by an employee of the buyer who may be totally unaware of the significance of the form that he is signing and who certainly is unaware of the consequences of this surreptitious clause. Another curiosity in this opinion is the suggestion that the parties previously had formed a contract, but that the clause was enforceable as part of the contract in the subsequent delivery receipt. If the contract was formed by shipment of the goods under section 2-206(2), the delivery order should have been viewed as superfluous to the terms of the contract. It is difficult to view the delivery receipt as a document manifesting a good faith modification of the contract under section 2-209(1). Finally, even if it were viewed as a confirmation of the existing contract, such a different term in the delivery order should not become part of the contract unless it is an immaterial alteration. *See* Transamerica Oil Corp. v. Lynes, Inc., 723 F.2d 758 (10th Cir. 1983). In *Transamerica Oil* the court, relying upon Album Graphics, Inc. v. Beatrice Foods Co., 87 Ill. App. 3d 338, 408 N.E.2d 1041, 30 U.C.C. Rep. Serv. (Callaghan) 53 (1980), held that, although a particular limitation of remedy clause was not unconscionable, a limitation of remedy generally constitutes a material alteration unless the buyer expressly agrees to the limitation.

guishing additional from different terms.[216] Some also have recognized that the elimination of "different" terms from subsection (2) emasculates that subsection, because so many terms in responses to offers are necessarily different.[217] If the typical offer from a buyer contains implied terms, the comprehensive nature of these terms may not be recognized fully. Although everyone may recognize a disclaimer of warranty or an exclusion of consequential damages as different terms in the response to the offer, some may not recognize an arbitration clause in the response as a different rather than additional term. The Code is silent on arbitration. It is not silent, however, on the available judicial remedies in the event of breach. An arbitration clause in the response changes the offer. Absent trade usage or prior course of dealing that would include arbitration in the offer, it is difficult to conceive of a more material change in the response than a clause that would remove the judicial remedies normally included in a contract for the sale of goods. The extreme limitation upon the operation of subsection (2) that would result from the elimination of "different" terms is the basis of a persuasive argument for the inclusion of "different" terms in the operation of the subsection. The emphasis on the materiality of nonmatching terms in the acceptance, however, provides the basis for a more startling and conclusive argument for the inclusion of "different" terms in subsection (2).

An additional term does not change the offer in the sense of altering it. If the additional term becomes part of the contract, it typically will delineate the terms originally proposed by the offeror. Suggesting a thesis that allows for no exception is always dangerous. On the basis of extant case law and innumerable hypotheticals, however, it is appropriate to suggest that no illustration of a nonmatching term in an acceptance is both material and additional without being different. If a so-called additional term is also material in that it creates hardship and unfair surprise to the offeror, it is by definition different. The heart of subsection (2) is subsection (2)(b). Subsection (2)(b) would excise terms that materially alter the offer absent any clause in the offer limiting acceptance to the terms of the offer or anticipatorily objecting to variant

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216. *See Daitom*, 741 F.2d at 1578-79, 39 U.C.C. Rep. at 1217 (10th Cir. 1984); *Steiner*, 569 P.2d at 759-60 n.5; Boise-Hilburn Co. v. Dean Mach. Co., 616 S.W.2d 520, 527 (Mo. Ct. App. 1981); *see also* R. ALDERMAN, *supra* note 93, at 21 n.54; Murray, *Incipient Unconscionability*, *supra* note 5, at 618-20 n.57; Utz, *supra* note 175, at 115; Duesenberg, *supra* note 5, at 1483-88.

217. *See* Utz, *supra* note 175, at 116.

terms. A material alteration cannot be imposed on an offeror who would be unfairly surprised and oppressed. A common definition of "alter" is "to change, to make different."[218] Because the term "alter" is part of the statutory language, exclusive reliance upon the Comments to include "different" terms in 2-207(2) is no longer necessary. Moreover, even if "alter" were not part of the statutory language, the dominant intention to exclude material changes in the acceptance cannot be emphasized too strongly. Any material change necessarily would be a different term in the acceptance. This analysis suggests the concomitant analysis concerning additional terms. If a term in the acceptance properly is characterized as additional and not different, this additional term necessarily is an immaterial term that, between merchants, would become part of the contract.[219] While the statutory language of subsection (2) is neither clear nor, to use a computerism, "user friendly," the underlying philosophy of 2-207 leads us to conclude without hesitation that the failure to include "different" terms in subsection (2) would emasculate the subsection's purpose—the avoidance of hardship and unfair surprise. The failure to include "different" terms would permit enforcement of technical bargains differing substantially from the factual bargains intended by the parties.

If "different" terms are included in subsection (2), they will be excised from the definite and seasonable expression of acceptance. This consequence is another evil that has been recognized in both case law and legal commentaries—the offeror always wins. It is particularly important to confront this final enigma of 2-207: How can we prevent a result conditioned on the accident of which party happened to be the offeror?

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218. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 63 (1965).

219. Support for this analysis comes from Karl Llewellyn:

> Some improvement is to he hoped for from the provision of Sec. 2-207(2) which allows minor additional terms to enter into the contract without that express consent which (more frequently than not) never occurs. What terms will be construed as "materially" altering the contract is . . . a question for the courts' determination.

1954 Law Revision Commission Hearings, *supra* note 16, at 56 (120). With respect to terms tbat "materially alter" the offer, Llewellyn not only felt that they sbould not enter the resulting contract; he also insisted, like his insistence that unconscionability question be judicially determined (§ 2-302(1)), that the court determine whether an "alteration" is material. The result will be "precedent"—a judicial elaboration to guide merchants. *See supra* note 64. Presumably, Llewellyn not only knew that "alter" meant "different"; he suggested the distinction made in this Article's text between immaterial *additional* terms and material *altering*, and hence different, terms.

VI. THE FINAL ENIGMA

Even among commentators who believe that they have unraveled the mysteries of 2-207, there remains a sense of uneasiness.[220] If this Article's suggestions to this point are accepted as solving the "counter-offer riddle" and the " 'different' vs. 'additional' puzzle," we still are left with the discomforting fact that an otherwise sound analysis of 2-207 always seems to protect the offeror—a result that is somewhat uncomfortable for Professor Summers and distressing to Professor White. Consider the following possibilities:

(1) A purchase order is construed as an offer. It is silent concerning warranties, remedies, and arbitration. The response to the offer is the seller's typical acknowledgment containing a disclaimer of implied warranties, an exclusion of consequential damages, and an arbitration clause. The acknowledgment, however, contains no counter-offer language—neither a clear and understandable statement of counter-offer nor the ambiguous statutory proviso language expressly conditioning acceptance on the buyer's assent to the seller's terms. The dickered terms in the forms are identical. The response is a definite and seasonable expression of acceptance. The additional or different terms in the response are either material alterations, which are excised between merchants under 2-207(2)(b), or they are subject to the "knockout"[221] or "fall out"[222] views, which preclude application of 2-207(2) to "different" terms. In any event, the additional or different terms in the response do not become part of the contract.

(2) The same buyer sends the same purchase order with respect to the same deal. In this case, however, the seller sent his form first, a "quotation" construed to be an offer. Although purchase orders appear to be offers, courts will construe them as acceptances if the parties "intended" that effect.[223] The seller's clauses are printed on the "quotation" form exactly as they ap-

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220. The most candid recognition of analytical difficulties with respect to 2-207 is found in J. WHITE & R. SUMMERS, *supra* note 6, at 24-39. *See supra* text accompanying notes 183-92.

221. *See supra* text accompanying note 183.

222. *See supra* text accompanying note 184.

223. *See, e.g., Daitom*, 741 F.2d at 1575-76; Mead Corp. v. McNally-Pittsburg Mfg. Corp., 654 F.2d 1197 (6th Cir. 1981); Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924 (9th Cir. 1979); Earl M. Jorgenson Co. v. Mark Const., Inc., 56 Hawaii 466, 540 P.2d 978 (1975). In particular, see Phillips Petroleum Co., Norway v. Bucyrus-Erie Co., 125 Wis. 2d 418, 373 N.W.2d 65, 41 U.C.C. Rep. Serv. (Callaghan) 1192 (Ct. App. 1985), *rev'd on other grounds*, 1 U.C.C. Rep. Serv. 2d (Callaghan) 667 (Wis. Sup. Ct. 1986), discussed *infra* note 225.

peared on the acknowledgment in situation (1). Now, however, the quotation form is an offer, which has been accepted by the purchase order .If the purchase order is construed as containing the usual implied terms that it clearly would have been said to contain as an offer, the purchase order contains "different" terms—implied warranties, an implication of normal Code remedies including consequential damages, and a consequent negation of arbitration. The purchase order will be construed as a definite and seasonable expression of acceptance. Current case law will find a contract on the seller's terms because the seller happened to be the offeror.[224] If "different" terms are considered within the scope of 2-207(2), any implied "different" terms contained in the purchase order will be excised under 2-207(2)(b). An interpretation of subsection (2) that precludes its application to "different" terms produces three possible results: (a) the different implied terms in the purchase order acceptance merely "fall out" and the terms of the offer prevail—Professor Summers' position; (b) the silent purchase order does not *contradict* the terms of the offer and the terms of the offer prevail—the timid Professor White view; or (c) the implied terms of the purchase order acceptance *are* different from the terms of the offer, and different terms simply cancel each other out. The last result reflects the literal "knockout" view that a "more bold" Professor White should apply, but does not, allegedly because nothing in the statute or the statutory history permits this result. If the purchase order acceptance *expressly* included Code warranties, a consequential damages clause, and an anti-arbitration clause, White would insist on applying his "knockout" view. What would be the result, however, if the purchase order had included an express but general statement of the retention of Code warranties and remedies?

A recent case may reflect more closely the "more bold" position from which Professor White retreated. In *Daitom, Inc. v. Pennwalt Corporation*[225] the Tenth Circuit Court of Appeals con-

224. *See, e.g., Daitom*, 741 F.2d at 1575-76 (seller submitted proposal, which court deemed to be offer, and buyer's purchase order constituted acceptance); *Mead Corp.*, 654 F.2d at 1202-04 (bid proposal from seller construed to be offer and purchase order construed as acceptance because purchase order clearly indicated an assent to terms as specified on face of form); *Idaho Power*, 596 F.2d at 925-26 (price quotation was offer and purchase order was acceptance although it limited acceptance to terms of purchase order; the seller's terms in the offer prevailed); *Jorgenson*, 540 P.2d at 981-82 (purchase order sent in response to two written quotations deemed to be manifestation of intent to accept seller's offer in all its essential terms). In particular, see *Phillips Petroleum*, discussed *infra* note 225.

225. 741 F.2d 1569 (10th Cir. 1984).

strued the seller's proposal, which contained a one year statute of limitations provision, as an offer and the buyer's purchase order as an acceptance. The purchase order acceptance contained a general statement reserving all rights and remedies available at law. The court held that this general reservation impliedly reserved the Code's limitation period of four years. General statements reserving U.C.C. protection, however, typically are inserted in printed forms to avoid interpretations of express clauses that otherwise may diminish unwittingly the protection buyers automatically enjoy under the Code. If the purchase order had contained no express statement concerning warranties or remedies, would not these terms be implied in it? Certainly, the purchase order functioning as an *offer* would be said to contain these terms. As the *Daitom* opinion recognizes, the purchase order in that case, like purchase orders generally, was "drafted principally as an *offer* inviting acceptance."[226] Why should a form impliedly contain the usual U.C.C. warranty, remedy, and other buyer protection terms when it is characterized as an offer, but not contain the identical implied terms when it is characterized as an acceptance?[227] In

226. *Id.* at 1576 (emphasis in original).

227. In *Jorgenson*, 540 P.2d at 981-82, provisions in the seller's form limiting remedies and warranties were held to have been accepted by the silent buyer's form. While *Jorgenson* simply assumes that when a purchase order is construed as an acceptance it contains no implied terms, Phillips Petroleum Co., Norway v. Bucyrus-Erie Co., 125 Wis. 2d 418, 373 N.W.2d 65, 41 U.C.C. Rep. Serv. (Callaghan) 1192 (Ct. App. 1985), at the time it was decided, apparently removed any doubt that the *Jorgenson* assumption will be followed. Proposals from the seller in *Phillips Petroleum* were deemed to be offers. The buyer sent purchase orders containing conspicuous statements that read, "This order expressly limits acceptance to the terms stated herein. Purchaser objects to any additional or different terms of the seller." It is clear that the buyer sought to take advantage of 2-207(2)(a) and (c) by limiting acceptance to the terms of the purchase order and notifying the vendor of objections to any different or additional terms in the vendor's form. Had the purchase order been construed as an offer, the notations on the forms would have been sufficient to give the buyer the protection afforded by 2-207(a) and (c). Because the purchase orders were construed as acceptances, however, these limitations were not sufficient to convert the purchase order-acceptance into a counter-offer because the court held the notations insufficient to meet the "expressly conditional" proviso language of 2-207(1). With respect to the incorporation of implied terms, the court was particularly clear that the purchase order included no such implied terms:

> We begin with a determination of whether Phillips' purchase order set forth additional or different terms. The language of the stamped portion stated that "[t]his order expressly limits acceptance to the terms stated herein." The purchase order nowhere mentions warranty or liability terms. The purchase order at best is silent as to warranty and liability. The trial court erred in reading these terms into the purchase order. A court cannot deduce from a party's silence that certain terms are implied. Silence is not an effective rejection or counteroffer (citing *Jorgensen* at 983). Where a crucial term is found in the offer and the acceptance is silent on that term, the terms of the

Comment 4 to 2-207, heading the list of clauses illustrating material alterations is "a clause negating such *standard* warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches."[228] This language contemplates the inclusion of the usual implied warranties in an offer from a buyer and the express disclaimer of such warranties in the acknowledgment, which, nonetheless, is a definite expression of acceptance. To pursue their "knockout" and "fall out" views, White and Summers must ignore Comment 4.

Whether one agrees with White, Summers, or those who would include "different" along with "additional" in 2-207(2), it is absurd to include implied terms in a purchase order functioning as an offer and to exclude the same terms in the same purchase order when it is construed as an acceptance. Characterizing a purchase order as an offer or an acceptance has little or nothing to do with a

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offer control (citing *Jorgenson* and J. WHITE & R. SUMMERS, *supra* note 6, at 31). The purchase order merely attempted to limit the contract solely to the terms of the purchase order. Such an attempt would be effective in an offer but has no effect in an acceptance.

Phillips, 373 N.W.2d at 69. This case is the clearest illustration of a court implying standardized Code terms in a purchase order form when it is characterized as an offer, but expressly refusing to imply the same terms in the identical form when it is characterized as an acceptance. In an opinion rendered on June 23, 1986, however, the Wisconsin Supreme Court reversed the court of appeal's decision because it found that the contract had been modified, creating an express warranty that a certain grade of steel would be used in manufacturing crane adapters. The court avoided any discussion by the § 2-207 analysis:

> We conclude, whatever Byzantine complexities the original exchange of contract documents might pose, that a rather simple straight-forward modified contract arose during the course of negotiations that specifically detailed the obligations of the seller to conform to exact specifications set by the buyer. . . . [W]hatever the prior state of the contract may have been, . . . the contract after September 27, 1971, contained, as a modification of the original contract, an express warranty. . . ."

Phillips Petroleum Co., Norway v. Bucyrus-Erie Co., 1 U.C.C. Rep. 2d 667, 673, 674 (Wis. Sup. Ct. 1986).

In Idaho Power Co. v. Westinghouse Elec. Corp., 569 F.2d 924, 925 (9th Cir. 1979), a seller's quotation contained a limitation of liability. The buyer's purchase order did not deal witb liability expressly, but did contain the following clause: "acceptance of this order shall be deemed to constitute an agreement upon the part of the seller to the conditions named hereon and supersedes all previous agreements." The court held that this statement in the purchase order was not sufficient to make the acceptance expressly conditional on assent to additional terms. The court also held tbat the purchase order did not contest the seller's disclaimer of liability. The purchase order was a definite and seasonable expression of acceptance and tbe limitation of liability in the seller's form was a term of the contract. If the purchase order had been an offer, it impliedly would have contained the normal remedies pursuant to the standardized provisions of Article 2. The limitation of liability in the seller's form would have been excised as a material alteration under 2-207(2)(b). *See supra* text accompanying notes 192-96.

228. U.C.C. § 2-207 comment 4 (1977).

merchant-buyer's conscious use of that form. Rather, the characterization is a judicial afterthought,[229] which hardly explains why

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229. In Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply Inc., 98 Idaho 495, 567 P.2d 1246, 1253-54, 22 U.C.C. Rep. Serv. (Callaghan) 25, 30 (1977), *appeal dismissed*, 434 U.S. 105 (1978), The court stated:

> Cal-Cut makes the argument that since its document was the offer, Southern Idaho's expression of acceptance was an acceptance of all the terms on this form, including the October 15th delivery date. *Under this argument, the first party to a sales transaction will always get his own terms. In most commercial transactions, which party processes its form first is purely fortuitous. To allow the contents of a contract to be determined on this basis runs contrary to the underlying purposes of the Uniform Commercial Code of modernizing the law governing commercial transactions. . . . We cannot accept such an arbitrary solution.*" (emphasis added).

See also McCarty v. Verson Allsteel Press Co., 89 Ill. App. 3d 498, 411 N.E.2d 936, 30 U.C.C. Rep. Serv. (Callaghan) 440 (1980).

This analysis has been criticized:

> What is this gibberish about the "fortuity" of being first which is anathema "to the underlying purposes of the Uniform Commercial Code of modernizing the law governing commercial transactions?" The Code would not have stood the chance for passage of the proverbial snowball in hell had the legal profession been instructed that it was intended to jettison so fundamental a legal principle as that which for centuries has given to offerors the right to fashion the basis of their sanctionable bargains.

Duesenberg, *supra* note 5, at 1485. This criticism seems to be so preoccupied with the vested notion that the offeror is master of his offer that it fails to respond to the court's assertion that, in an exchange of printed forms, which party processes its form first is purely fortuitous. Mr. Duesenberg is content to label this assertion, "gibberish." Is it "gibberish," however, to consider scores of cases that deal with the fundamental question of whether a price quotation from a seller, which typically includes terms favorable to a seller, is an offer rather than a mere preliminary negotiation? Moreover, is it "gibberish" to point to cases that have held the seller's quotation controlling simply because it was the first *operative* document exchanged, thereby making the same disclaimers and exclusions operative that would have been inoperative had the form been viewed as a preliminary statement of terms? The typical professional buyer has no understanding of the difference between quotations that are offers and quotations that are not offers and proceeds to use the only piece of paper available to him or her—the purchase order—in the same fashion regardless of prior quotations. *See supra* notes 47 and 162. Furthermore, the *vendor* has no understanding of whether his quotation amounts to an offer. A sophisticated understanding of the current 2-207 case law would suggest that a printed vendor's form should be framed in terms of an offer. Yet many seller's forms list all the usual terms favorable to the vendor, but then include a clause indicating that acceptance must be approved at the vendor's office, thereby permitting the purchase order sent in response to the quotation to be the offer—the controlling document. *See also* Baird & Weisberg, *supra* note 5, at 1221, 1246, who suggest that:

> [T]he drafters [of the Code] sought to break dramatically with traditional formal rules of offer and acceptance. . . . [However], it appears that 2-207 has substituted a first-shot rule for the common law's last shot rule. . . . [S]uch an approach is inconsistent with the idea that battles of the forms should be treated like cases in which parties have agreed in principle to do business with one another, but have remained silent as to some of the terms of the transaction.

Baird and Weisberg later argue that courts have not succumbed to the first-shot rule suggested by the language of 2-207. *Id.* at 1247. They suggest that courts avoid the evil of the first-shot approach in two ways as follows: (a) by the insertion of "expressly conditional" language in the acceptance, and (b) absent expressly conditional language, they suggest that

the buyer's terms should prevail in one case, when the purchase order is deemed an offer, and the seller's terms should prevail in the case when the same purchase order is characterized as an acceptance. To overcome this obstacle, drafters of printed forms will do what they always do. They will add more protective clauses to reflect any advantage they discern from the confusing case law, although neither buyer nor seller will have the foggiest notion of the purpose or effect of these clauses.[230] Eventually, drafters of purchase order forms may arrive at the "winning form." Consider a purchase order that contains the following clause:

> This purchase order may be construed as an offer, an acceptance of an offer, or a confirmation of a contract. In the event this purchase order is construed as an offer, the offer expressly limits acceptance to the terms of the offer and constitutes notice of objection to any additional or different terms in the acceptance so as to preclude the inclusion of any different or additional terms in any resulting contract. If this purchase order is construed as an acceptance, this acceptance expressly conditions such acceptance on the seller's assent to any additional or different terms contained herein. If this purchase order is construed as a confirmation of an existing contract, such confirmation is expressly conditioned on seller's assent to any additional or different terms contained herein. All sections of the Uniform Commercial Code which expressly or impliedly protect the buyer are hereby incorporated by reference in this form whether it be construed as an offer, an acceptance, or a

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the buyer's form is typically first and, therefore, is the offer which controls. If the response to the offer contains a statutory proviso clause from 2-207(1), it is a counter-offer (to the surprise of the buyer-offeror), and, for reasons suggested in the analysis of the counter-offer riddle, the acceptance of the goods will not be an acceptance of the counter-offer. *See supra* notes 101-16 and accompanying text. A contract, however, will be formed by conduct under 2-207(3) and will include Code terms favorable to the buyer. Baird & Weisberg, *supra* note 5, at 1247-48. This rationale limps badly because it is predicated upon a totally unsound analysis of what constitutes a counter-offer. Moreover, with respect to the situation in which the acceptance does not contain expressly conditional language, the authors are content to find no cause for concern because the purchase order is typically the offer. Suppose it is not the offer, however, but is construed as an acceptance? The authors do note at least one exception, Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Hawaii 466, 468-70, 540 P.2d 978, 981 (1975), in which the seller won the battle of the forms under the first-shot principle. The case law reaching similar results continues to grow. *See supra* note 227.

If the seller's form containing the usual disclaimers and exclusions is the offer and the typical purchase order sent in response is silent, even Professors White *and* Summers agree that the terms of the offer control. *See supra* note 193 and accompanying text. Professor White would pursue the "more bold" "knockout" view only if the purchase order contained expressly "different" terms. The only extant case taking that position is *Daitom*, 741 F.2d at 1569 (10th Cir. 1984), which construed the purchase order as an acceptance and found expressly different terms in the purchase order's general reservation of Code rights. That analysis, however, suffers from the fundamental error of insisting that 2-207(2) should not include "different" terms. *See supra* text accompanying notes 200-219. In those courts that insist upon "different" being read into 2-207(2), the different terms in the purchase order-acceptance, even if implied, would be excised as material alterations under 2-207(2)(b).

230. *See supra* notes 162-63 and accompanying text.

confirmation.

As an offer, this purchase order would take advantage of 2-207(2)(a) and (2)(c) by eliminating immaterial, as well as material, terms in the response that are different or additional terms. As an acceptance, it would take advantage of the statutory proviso counter-offer with the hope that the seller would ship the goods, causing a contract favoring the buyer pursuant to existing case law to be formed under 2-207(3). Using the form as a confirmation also would take advantage of the statutory proviso language because confirmations typically are treated as acceptances for the purpose of analysis under 2-207.[231] In the current 2-207 environment, we can only speculate whether courts would view this purchase order language as the doomsday weapon or "the form that always wins" in the battle of the forms. Current case law suggests it has at least a chance to be the form that always wins. That this scenario is plausible is itself a travesty. It is the consummate elevation of form over substance and, in terms of the purpose of 2-207, stands that section on its head. A radical transformation of 2-207 is essential if we are to avoid the apotheosis of form and the consequent possibility that the offeror always wins.

VII. DENOUEMENT

To achieve some resolution of the puzzles surrounding 2-207, it is important to return to the underlying philosophy of Article 2 and, in particular, 2-207.[232] We should also be mindful of the troubled Professor White, who suggests that applying his "knock-out" view and then implying terms under 2-207(3) that favor the buyer may result in a "hard" case, which he nonetheless accepts because at least it has the merit of being fair.[233] In examining the underlying philosophy of Article 2 in the context of 2-207, we may discover serendipitously what is actually bothering Professor White.

Recall that the simple purpose of 2-207, in its primitive state, was to change the assumption that variant terms in the response to an offer necessarily constitute a counter-offer to the assumption that a response to an offer is an acceptance unless a reasonable offeror would understand it to be a counter-offer.[234] This purpose

231. *See* Murray, *Incipient Unconscionability*, *supra* note 5.

232. *See supra* notes 52-67 and accompanying text.

233. *See supra* text accompanying notes 193-96.

234. Undoubtedly, the insertion of a statutory proviso clause tracking 2-207(1) in the

is noble and clearly consistent with the underlying philosophy of Article 2. Using traditional offer and acceptance mechanisms in pursuit of this purpose, however, precludes ultimate fidelity to the identification of the parties' factual bargain as the recognized contract under Article 2. The expulsion of technical constraints throughout Article 2 to arrive at the factual bargain suggests a design that is wary of any constraint that could interfere with this fundamental purpose. A specific assumption in 2-207 is that the parties do not read, much less understand, the printed terms of their exchanged writings. These writings typically are designed by their drafters to use the latest weaponry in a surreptitious fashion to win the battle of the forms.[235] An arms buildup in 2-207 already has resulted in great harm to the social institution of contract. Because innumerable contracts now are formed only by conduct, notwithstanding the prior exchange of printed forms, we may have taken the first, retrogressive step toward a primitive barter society. Unfortunately, it now appears too late to expect a change to occur in the common-law tradition by radically new and different interpretations and applications of the statutory language. The unwieldy precedent contains too many shackles. Even without the precedent, however, because 2-207 is framed in terms of offer and acceptance and because we now insist that the section do more than Karl Llewellyn ever contemplated, revising the statutory langauge appears to be the only solution. Suggesting particular statutory language would be premature. Instead, we must begin to emphasize the underlying philosophy of Article 2 before it will be possible to recast the language of 2-207 in a form that is totally consistent with that underlying philosophy.

We must first consider the normative assumptions of Article 2. It is anything but novel to suggest that broad assumptions like good faith[236] and conscionability[237] pervade Article 2. Perceiving the more specific normative assumptions, however, is unusual.

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response to an offer is not intended to communicate effectively an intention to make a counter-offer. Rather, it clearly illustrates the draftsman inserting a clause that his own client will not understand and that his client will rely on only if the circumstances require that weapon to be used. As suggested earlier in this Article, courts have recognized that the clause "injects amhiguity" into the response to the offer. *See supra* text accompanying note 125.

235. U.C.C. § 2-207 comment 1 (1977). "Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond . . . [n]evertheless, the parties proceed with the transaction." *Id.*

236. U.C.C. §§ 1-201(19), and 2-103(1)(b) (1977).

237. U.C.C. § 2-302 (1977).

They are so obvious that they tend to be ignored. The normal contract or deal under Article 2 includes express and implied warranties and all judicial remedies to protect the fundamental expectation interests of the parties. In effect, Article 2 provides the normal, *standardized* agreement between the parties. Article 2 "is in large part a catalogue of the implied terms of contracts of sale."[238] The parties need only to manifest an intent to be bound and to include sufficient detail to permit a court to afford a remedy in the event of a breach.[239] With an intent to be bound, if the parties can be identified and a quantity term found, all other terms will be the standardized terms of Article 2.[240] In requirements or output contracts, even the quantity term need not be ascertained at the moment of formation, if it is ascertainable.[241]

"[T]he parties' contractual power is now exercised primarily in specifying deviation from the standardized plan rather than in defining the obligation ab initio."[242] Parties may deviate from the normative assumptions of Article 2, but deviations from the parties' normal expectations are frowned upon.[243] Article 2 specifies

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238. *See* Rakoff, *supra* note 42, at 1182.

239. U.C.C. § 2-204(3) (1977).

240. The concept that "standardized" terms should be the terms provided by Article 2 is found in the earliest drafts of commentary supporting the Code or its particular sections. In a report accompanying the 1941 Mimeo Draft Section 1-C, which was to become section 2-302 on unconscionability, a portion of the report was captioned "The Problem of a Semi-Permanent Code of a Whole Field." Llewellyn suggested two kinds of statutory framework. The first was an "iron and unyielding" framework to which the parties must adapt. He used the statute of frauds as an example of this kind of framework. The report continues:

> The second kind of framework is a sort of standardized contract, serving wherever the parties have not particularized their bargain. It fills in and it fills out. Its office is to provide not only reasonable and fair solutions for particular matters, but, no less, a whole background of solutions for *any* matter, which, *as a whole* is sufficiently reasonable and fair not to *need* to be bargained about.

Report accompanying 1941 Proposed Report (Mimeo Draft), at 21.

241. U.C.C. § 2-306(1) (1977).

242. *See* Rakoff, *supra* note 42, at 1182.

243. The original draft dealing with unconscionability is clear on this point. 1941 Proposed Report § 1-C(1)(e) at 16 (Mimeo Draft) states:

> The policy of the legislature is also to avoid any seeming portion of a bargain which does not truly represent bargaining, but under which one party seeks to displace the rules of this Act, without particular deliberation and bargaining over each clause, in favor of a set of provisions which lack reasonable balance and fairness in their allocation of rights and obligations.

A comment to the section is even more persuasive:

> *The principle of freedom of bargain* is a principle of freedom of *intended* bargain. It requires what the parties' [*sic*] have bargained out to stand as the parties have shaped it, subject only to certain overriding rules of public policy. . . . *Displacement of these balanced backgrounds is not to be assumed as intended unless deliberate intent is shown that they shall be displaced; and deliberate intent is not shown by a lopsided*

certain formalistic requirements for deviations that are especially dangerous because they may result in unfair surprise or oppression. A formal method of disclaiming the implied warranty of merchantability requires that the written disclaimer use the term "merchantability" and be conspicuous.[244] This threshold safeguard helps insure against a court providing operative effect to a surprising and oppressive term. In keeping with the spirit of Article 2, some courts have required clauses excluding consequential damages to be conspicuous.[245]

The norm is a contract containing all the implied terms of Article 2. If a party seeks to deviate from these normative assumptions because that party views the "general" rules as unsatisfac-

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form whose very content suggests that it has not been carefully read, and the circumstances of whose execution suggest that the matters under discussion and consideration were only the matters written or typed in.

1941 Proposed Report § 1-C comment A(3) at 18-19. (Mimeo Draft) (last emphasis added). *See also infra* notes 252-53.

"The code does not imply disclaimers; in fact, disclaimers are not favored by the law. Thus, [2-207] should not be used to supply the negotiated agreement required for an effective disclaimer." Hartwig Farms, Inc. v. Pacific Gamble Robinson Co., 28 Wash. App. 539, 544, 625 P.2d 171, 174 (1981).

244. U.C.C. § 2-316(2) (1977).

245. In Avenell v. Westinghouse Elec. Corp., 41 Ohio App.2d 150, 324 N.E.2d 583, 16 U.C.C. Rep. Serv. (Callaghan) 671 (1974), and Insurance Corp. of North America v. Automatic Sprinkler Corp. of America, 67 Ohio 2d 91, 423 N.E.2d 151, 31 U.C.C. Rep. Serv. (Callaghan) 1595 (1981), the court required a clause excluding consequential damages to be "conspicuous" as defined in U.C.C. § 1-201(10), notwithstanding the lack of any express requirement of conspicuousness in § 2-719(3) or § 2-316(4). Both cases rely upon the scholarship of Professor Nordstrom, who emphasizes the factual bargain of the parties:

> The requirement that the agreement contain the alteration of basic Code remedies brings into play those ideas discussed in the prior section of this text. The limitations must be a part of the parties' bargain in fact. If it is contained in a printed clause which was not conspicuous or brought to the buyer's attention, the seller had no reasonable expectation that the buyer understood that his remedies were being restricted to repair and replacement. As such, the clause cannot be said to be a part of the bargain (or agreement) of the parties.

R. NORDSTROM, LAW OF SALES 376 (1970); *see also* Seibel v. Layne & Bowler, Inc., 56 Or. App. 387, 641 P.2d 668 (1982).

In Schroeder v. Faegol Motors, Inc., 86 Wash.2d 256, 544 P.2d 20, 23-24 18 U.C.C. Rep. Serv. (Callaghan) 584 (1975), the court considered conspicuousness as a factor in determining the conscionability of an exclusionary clause. Moreover, the court applied this concept in a merchant-to-merchant transaction. *Cf.* Jensen v. Seigel Mobile Homes Group, 105 Idaho 189, 668 P.2d 65, 35 U.C.C. Rep. Serv. (Callaghan) 804 (1983) (emphasizing the importance of bargaining over a limitation of remedy). Several courts have read § 2-719(3) literally, with no requirement of conspicuousness. *See, e.g.*, Hahn v. Ford Motor Co., 434 N.E.2d 943, 948 n. 2, 33 U.C.C. Rep. Serv. (Callaghan) 1277 (Ind. Ct. App. 1982); Xerox Corp. v. Hawkes, 124 N.H. 610, 475 A.2d 7, 11 (1984); Flintkote Co. v. W. W. Wilkinson, Inc., 220 Va. 571, 260 S.E.2d 229 (1979); Collins Radio Co. of Dallas, Texas v. Bell, 623 P.2d 1039 (Olka. Ct. App. 1980).

tory,[246] that party should have the burden of showing that the other party to the contract had a reasonable opportunity to understand that any deviant term was proffered as a part of the factual bargain. Moreover, whether the party who must sustain that burden is the offeror or offeree should make no difference. This suggestion is a substantial extrapolation of the burden on an offeree to convince the trier of fact that the offeror should have understood the response to the offer as a counter-offer. It is, however, in the same tradition of avoiding technical and formalistic constraints that interfere with and, in some cases, destroy the factual bargain of the parties. The argument that parties who use standardized printed forms to manifest their factual bargain should be bound only by that which they reasonably expect to discover in the unread forms regardless of their contents[247] is more than merely plausible. Notwithstanding criticisms of Llewellyn's views on conscious assent to "dickered" terms and "blanket" assent to "decent" undickered terms,[248] the underlying concept appears clearly throughout Article 2. If a disclaimer of warranty or exclusion of remedy clause is not part of the factual bargain, giving the clause operative effect is "indecent" because it oppresses and unfairly surprises the party against whom it operates.

An important consideration is whether deviant terms, albeit meeting the formalistic safeguards of Article 2, become part of the contract *ab initio*. If a disclaimer of warranty provision meets the safeguard requirements of 2-316(2), it is operative *if that term is part of the contract*. If no "battle of the forms" occurred because, for example, the buyer signed the seller's form, the disclaimer would become part of the contract between merchants absent a successful attack on unconscionability grounds, which the courts have been notoriously unwilling to apply in merchant transactions.[249] Likewise, the acceptance of a clear counter-offer contain-

246. *See supra* note 161.

247. *See* Murray, *Standardized Agreement*, *supra* note 9, at 776-77.

248. *See*, Rakoff, *supra* note 42, at 1199; *see also* Slawson, *The New Meaning of Contracts: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 32-37 (1984).

249. *See, e.g.*, Geldermann and Co. v. Lane Processing, Inc., 527 F.2d 571 (8th Cir. 1975); Royal Indemnity Co. v. Westinghouse Elec. Corp., 385 F. Supp. 520 (S.D.N.Y. 1974); W.L. May Co. v. Philco-Ford Corp., 273 Or. 701, 543 P.2d 283 (1975); K & C, Inc. v. Westinghouse Elec. Corp., 437 Pa. 303, 263 A.2d 390 (1970).

Unconscionability, however, has been successfully used in certain retail dealer contracts between oil companies and filling station operators. *See* Johnson v. Mobil Oil Corp., 415 F. Supp. 264 (E.D. Mich. 1976); Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974); Ashland Oil, Inc. v. Donahue, 159 W.Va. 463, 223 S.E.2d

ing a disclaimer of warranty would suggest the inclusion of the disclaimer in the resulting contract. If the disclaimer clause in the counter-offer failed to meet the safeguard requirements of 2-316(2), however, this failure alone would prevent its being an enforceable term of the contract. If the clause did meet the safeguard requirements, it still would not become part of the contract if the response to the offer should not have been reasonably understood as a counter-offer. If the response containing the disclaimer was reasonably understood as an acceptance, the deviant disclaimer of warranty clause would not be part of the contract *ab initio*. A disclaimer is a deviation from the normative assumption of Article 2 that buyers are entitled to implied warranty protection. If a purchase order form contained a clause negating the normal seller's right to cure a nonconformity after the buyer has rejected the goods or a clause substantially limiting normal sellers' remedies under Article 2, these clauses would be deviations from the normative assumptions of Article 2 concerning sellers' rights. Whether deviant terms become part of the contract should not depend upon whether they appear in the offer or the acceptance.

Absent contrary trade usage or prior course of dealing, which both necessarily affect the factual bargain of the parties,[250] the normal deal between merchants must be based on the assumptions of Article 2—express and implied warranties, buyer and seller remedies, statute of limitations, reasonable time, place, and manner of performance, and other normative assumptions. The resulting contract is the normal factual bargain. A cogent example of the emphasis upon the factual bargain is found in the new express warranty concept that eschews a reliance requirement[251] and assumes that the seller has the burden of showing that a particular statement did not become an express warranty. Comment 8 to 2-313 expresses this new concept. "What statements of the seller have in the circumstances and in objective judgment become part of the

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433 (1976); Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971). Professors White and Summers suggest that cases such as *Johnson* may not "signify a trend. . . . Nonetheless, one moral of these cases is that when a businessman is poorly educated, 'over a barrel', or is the victim of fine print, a court may invalidate a clause that otherwise would stand up between ordinary businessmen." J. WHITE & R. SUMMERS, *supra* note 6, at 171-72.

250. U.C.C. § 1-201(3) (1977) defines agreement as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance."

251. *See* U.C.C. § 2-313 (1977) comment 3 ("No particular reliance on such statements need be shown in order to weave them into the fabric of the agreement."); *see also* Murray, *Basis of the Bargain: Transcending Classical Concepts*, 66 MINN. L. REV. 283, 284 (1982).

basis of the bargain? As indicated above, all of the statements of the seller do so *unless good reason is shown to the contrary.*"[252]

In essence, Comment 8 asks: What assumptions of Article 2 should become part of the basis of the bargain? All assumptions should become part of the basis of the bargain *unless good reason is shown to the contrary.* This analysis also suggests what in fact bothers Professor White. Professor White is willing to apply the "knockout" view to conflicting express terms and to insert terms implied under Article 2 because the implied terms exude fairness. On the other hand, he is troubled by a conclusion he feels is inescapable: an "unfair" term will be included in the contract if it appears in what is later judicially determined to have been the offer, rather than in an acceptance that does not expressly contradict the parallel term in the offer. Professor White discovers no statutory or other basis for overcoming this inconsistency, but the inconsistency sticks in his craw as being unfair.[253] It should stick, because it is unfair. Professor White has no escape because the statutory language is framed in terms of offer and acceptance. Escaping this unfair inconsistency requires more than an artistic reading of the existing language; it requires substantial statutory revision. The language of offer and acceptance in 2-207 must be eliminated.[254]

The new language of 2-207 must reflect the following principle: The burden of establishing the inclusion of a term that deviates from a normative assumption of Article 2 must be placed upon the party whose document seeks to impose the deviant term on a party against whom the term will operate if it becomes part of the contract. That burden should include a clear demonstration that the other party should have reasonably understood the deviation from normative assumptions as becoming part of the contract.[255] A

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252. U.C.C. § 2-313 comment 8 (1977) (emphasis added).

253. J. WHITE & R. SUMMERS, *supra* note 6, at 31.

254. The only extant opinion manifesting a clear understanding of this concept is Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 141 Cal. Rptr. 157, 569 P.2d 751, 758, 22 U.C.C. Rep. Serv. (Callaghan) 865 (1977). In *Steiner* the court stated:

> Instead of fastening upon abstract doctrinal concepts like offer and acceptance, section 2-207 looks to the actual dealings of the parties and gives legal effect to that conduct. . . . Section 2-207 requires courts to put aside the formal and academic stereotypes of traditional doctrine [sic] of offer and acceptance and to analyze instead what really happens.

255. The original draft of what was to become the section on unconscionability, § 2-302, was unusually long (ninety-nine lines) and was accompanied by five pages of commentary and a report that devoted another four pages to explicating the section, then numbered section 1-C. 1941 Proposed Report § 1-C (Mimeo Draft). Two parts of this draft provide ample support for this Article's concept concerning the burden of establishing

party who succeeds in this demonstration would convince a court to change the normal Code standard because the party has shown a "good reason to the contrary."[256] In the normal situation involving a purchase order offer, the offeror would have to communicate any deviant terms in the offer in such clear fashion that a reasonable offeree would understand the deviation as part of the offer. Under this analysis, a typical printed clause containing an arbitration term or any other material change in normal sellers' rights under Article 2 would be inoperative. The identical analysis would apply to a seller's printed "quotation" that is deemed to be an of-

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deviation. Section 1-C(1)(b) emphasized that any deviation from the terms of the Code must be desired by both parties.

> When both of the parties have so directed their attention to a particular point that . . . variance from this Act may fairly be regarded as the deliberate desire of both, and as reflecting a considered bargain on that particular point . . . the legislature recognizes that policy in general requires the parties' particular bargain to control.

Id.; *see also*, § 1-C Comment A(3) (quoted *supra* in note 243. In addition to showing that both parties deliberately desired the deviation, the party seeking to enforce a particular deviation must establish that the deviations have been understood and agreed to. Section 1-C(2)(a)(i) leaves no doubt as to which party has this burden:

> If the bloc [of form clauses] as a whole is shown affirmatively to work a displacement or modification of the provisions of this Act in an unfair and unbalanced fashion not required by the circumstances of the trade, *then the party claiming application of any particular provision in such bloc must show that the other party, with due knowledge of the contents of that particular provision, intended that provision to displace or modify the relevant provision of this Act in regard to the particular transaction* (emphasis added).

The private law that a contract creates will be recognized as legally binding only if it conforms to some rational standard. The classic standard of contract enforceability is the manifestation of volition or free choice—the essence of agreement. As Professor Slawson suggests, "the 'government' it creates is by its nature 'government by and with the consent of the governed.' " Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971). Equally important is the necessity for a society espousing freedom of contract to insist upon communication of the terms of the contract. " '[A] regime of contract could hardly function if the terms of an agreement were affected by an uncommunicated intention of one of the parties.' The exercise of individual choice is necessary to maintain one of the critical foundations of social order: organization by reciprocity. It is essential that courts establish effective rules for the operation of a society with divergent objectives." Murray, *Standardized Agreement*, *supra* note 9, at 741 (quoting Fuller, *The Forms and Limits of Adjudication* (November 19, 1957) (unpublished paper), *reprinted in* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 421, 424 (1958) (unpublished manuscript)).

256. *See supra* note 234. A comment to the original draft on unconscionability (now § 2-302, but then numbered § 1-C) is instructive:

> *The true principle is clear enough:* the expression of a body of fair and balanced usage is a great convenience, a gain in clarity and certainty, an overcoming of the difficulty faced by the law in regulating the multitude of different trades; on the other hand, the substitution of private rule-making by the party, in his own interest, for the balance provided by the law is not to be recognized *without strong reason shown.*

1941 Proposed Report § 1-C comment A(5), at 19 (Mimeo Draft) (last emphasis added).

fer. The seller would have the burden of establishing that the buyer-offeree reasonably understood the deviant terms. A seller's acknowledgment form containing the printed disclaimers of warranties, exclusions of normal Article 2 remedies, arbitration terms, or other material deviations would also be subject to an identical analysis. In that case, the result coincidentally would be identical to the results obtained under current interpretations of 2-207 regarding sellers' acknowledgments.

Thus, the new analysis simply would apply the same assumptions concerning unread, printed, deviant clauses to offers as well as acceptances. That the current interpretation of 2-207 assumes no duty to read or understand deviant terms in the response to an offer, but blithely assumes a duty to read and understand deviant terms in the offer bears emphasis. If an offeror has no duty to read or understand deviant terms in the response, why does he have a duty to read and understand the same deviant terms when a court deems him to be an offeree? This indefensible posture is the unwitting product of the vested notion that a party has a duty to read and understand any document to which he may be said to have manifested agreement. Yet "[t]his 'duty' can just as well be viewed as a refusal to impose any duty on the drafting party to ascertain whether form terms are known and understood."[257]

The new analysis would refuse operative effect to any printed clause that a reasonable merchant would not read or understand as part of the deal. Neither party would be surprised unfairly or oppressed. Printed clauses that seek to take advantage of certain statutory language with no regard for the other party's reasonable understanding, like the "form that always wins" or a statutory proviso counter-offer, would be inoperative. Not only are these clauses unlikely to be read or understood by a reasonable merchant; they are obviously designed to win the battle of the forms surrepetitiously. Their purpose is not to establish a clear understanding of the terms upon which either party seeks to contract, but to insure that one party prevails in any dispute over terms. This perspective serves to illuminate further the appropriate test. A court should consider whether the party seeking to insert deviant terms apparently intended the other party to understand them, rather than cleverly having included the terms to win the battle. This inquiry would assist the court to determine whether the deviant terms were communicated so clearly that a manifestation of assent

257. Rakoff, *supra* note 42, at 1187.

should make them operative.

The proposed analysis accurately reflects the underlying philosophy of Article 2. It is the only analysis that is faithful to the factual bargain of the parties, thereby negating oppression and unfair surprise. Recent scholarship that suggests a rejection of that underlying philosophy and the substitution of a more formalistic approach does not argue with the "principled analysis." Presumably, the scholarship would not argue with an extrapolation of that analysis that would espouse even greater fidelity to the factual bargain.[258] The scholarship rejecting the principled analysis reflects

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258. Baird and Weisberg distinguish the two following approaches to the problems of 2-207 and other Article 2 questions: (a) the "Open Standards" approach and (b) the "Formal Rules" approach. The "Open Standards" approach is characterized as one in which "[c]ourts and legislatures . . . create very general criteria that leave judges broad power to examine the circumstances of particular cases—to see whether the parties indeed struck a bargain and to identify the terms on which the parties' minds met." Baird & Weisberg, *supra* note 5, at 1227. The "Formal Rules" approach seeks to avoid the "uncertainty ahout the likely outcome of contract cases [which might] discourage people from entering into transactions. Lawmakers therefore might prefer to create formal rules of contract formation, and the courts might enforce these rules rigidly." *Id.* The authors admit that 2-207 and Article 2 generally adopt the "Open Standards" approach. "The drafters sought to treat the battle of the forms with an open-textured 'standard' similar to the one they applied to another recurrent problem in contract formation—the case where the parties have unquestionably contracted but have left some of the terms of their agreement incomplete." *Id.* at 1221. The authors describe my analysis as follows:

> Dean Murray has been perhaps the most ardent proponent of the view that Article 2 generally favors the "standards" approach. The Code, he stresses, eschews formal rules that focus on the precise language of the parties' documents. Instead, it invites and requires courts to look to all available evidence of the parties' intent, including their course of dealing and the customs of their trade, to cover the essential bargain-in-fact: "The *true* bargain in fact must be laid bare because it is deserving of the legally recognized status of a 'contract' between the parties—only the bargain-in-fact should be made operative by the courts." The true agreement, in this view, is a living organism subject to growth through modifications of the parties' expression and conduct. The formal writings are but one stage in the life of the agreement and offer only a partial description of it: "All of these . . . manifestations of the underlying philosophy of Article 2 (and attendant sections of Article 1) manifest the same goal: a more precise and fair identification of the actual or presumed intent of the parties. Any other goal is hostile to the nature of intention, bargain and assent. The only other possible route to fairness is the government administered contract which not only strips the 'agreement' of individual freedom of choice but well may prove to be unworkable and, therefore, ultimately fair."

Id. at 1228-29 (quoting Murray, *Incipient Unconscionability*, *supra* note 5, at 647, 648-49).

The authors suggest that they agree that the "principled" or, in their terminology, the "standards" approach is clearly the design of Article 2. "Our point of difference with Dean Murray is not that the inquiry he thinks courts should engage in is necessarily the wrong one, but rather that it is a necessarily imprecise one." Baird and Weisberg, *supra* note 5, at 1219 n.4. They suggest a return to the mirror iinage rule, which they suggest has been misunderstood, and a general return to a more formalistic structure. It is appropriate to consider reactions to this position.

despair in the analysis' application. In effect, this scholarship reflects the belief that the great hope of Karl Llewellyn—that the contract law of Article 2 should eschew technical constraints and formalism to emphasize the best approximation of the "true understanding"[259] of the parties—is simply unworkable because our legislatures and particularly our courts are incapable of achieving that goal. Adopting formalistic suggestions would not only spell the end of the purposes of 2-207; it would initiate a severe retrogression in the judicial progress attained elsewhere in the new contract law of Article 2.[260] It would begin to establish another form of mo-

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Professor Travalio offers a comprehensive criticism of the Baird and Weisberg analysis. *See* Travalio, *supra* note 5, at 373-78. He summarizes the analysis as follows:

> [T]he mirror image rule will cause offerors to read the fine print on responses received from offerees, since they are aware that these terms might become part of the contract if ignored. Knowing offerors will read the fine print on their forms, offerees will not include one-sided terms for fear of losing the offeror's business. As a result, the terms actually included on the offerees' forms will generally be fair and acceptable to offerors. Suitable terms will become part of the contract without a significant increase in negotiation costs.

Id. at 373-74. Professor Travalio emphasizes Baird's and Weisberg's assumption that modern buyers are generally aware of the fine print terms of sellers' forms. If that assumption is true, Travalio suggests, sellers' forms are probably already as mutually advantageous as they are likely to become. Yet, sellers' forms are filled with provisions favoring the seller. If modern buyers are even more sophisticiated, and not only are aware of the seller's favorable terms, but are also aware that existing case law will excise those favorable seller's terms and result in a contract by conduct, sellers have no incentive to include the favorable terms. The terms will be excised under 2-207(3). Travalio asserts that Baird and Weisberg may be incorrect in their assumptions that buyers typically are aware of the fine print terms on sellers' forms. He casts doubt on the authors sole empirical study, a British study conducted when the applicable law was the mirror image rule. *See supra* note 47. Moreover, he suggests that the premise of 2-207 is that businessmen do *not* read the fine print on the other party's form.

Professor Slawson takes issue with a fundamental tenet of the Baird and Weisberg analysis that suggests that the Code's "gap filler" terms are likely to provide contract terms that are not in the parties' interest because they will not be the terms chosen by the parties. Professor Slawson calls this implication false because the Code's "gap fillers" generally *are* the terms that the parties have chosen, albeit implicitly." Slawson, *supra* note 246, at 45.

259. U.C.C. § 2-202 comment 2 (1977).

260. One of the better illustrations of a sophisticated judicial understanding of the major modifications of contract law appears in Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971). The opinion evidences a clear understanding of the importance of trade usage and prior course of dealing in effecting the parties' factual bargain. It suggests a precocious understanding of the Code parol evidence rule and the necessity of repudiating the "plain meaning" rule of interpretation. The court is well aware of the anti-technical nature of Article 2, *see supra* note 18, and even displays an early sophistication with respect to 2-207. *See also* Jones v. Star Credit Corp., 59 Misc. 2d 189, 191, 298 N.Y.2d 264, 266 (1969). In *Star Credit Corp.*, the court held that section 2-302, which is designed to prevent oppression and unfair surprise, "permits a court to accomplish directly what heretofore was often accomplished by construction of langnage, manipulations of fiuid rules of contract law and determinations based upon a presumed public policy." *Id.*

nistic contract law in which parties are bound by what they sign regardless of their reasonable understanding of the printed clauses in the document. It would unearth the "flagellant" theory[261] that, once burned by not reading or understanding the document, the merchant soon would learn not to be burned again. But unlike a child and a hot stove, a merchant who once finds himself bound to a clause that any reasonable merchant would not understand still will not read or understand the thousands of clauses in myriad printed forms that allegedly reflect the substance of the innumerable deals he makes.

It cannot be gainsaid that the new analysis, which seeks even greater fidelity to the factual bargain, will continue to require courts to decide some difficult questions of fact concerning the reasonable understanding of the party receiving a printed form. Judicial empathy for the particular surrounding circumstances is essential.[262] There must be a continual progression of the understanding of the relational context between contracting merchants to which contract law is inexorably moving.[263] Courts must observe these

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261. The "flagellant" theory of statutory interpretation suggests that a court has the duty:

> to discipline the legislature by taking it literally whenever it forgets to deal with special cases or otherwise fails to speak clearly. The notion is that if the legislature is firmly and unvaryingly punished in this way for permitting uncertainty to creep into its enactments, pretty soon it will start writing laws which are clear and certain, and the courts and the people will then be spared the pain of having to think for themselves about what the laws mean. Almost every law student finds himself attracted to this view at some stage in his education. Some lawyers, and even judges, never get over the attraction.

H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 99-100 (1958) (unpublished manuscript).

262. *See* Murray, *The Realism of Behaviorism Under the Uniform Commercial Code*, 51 OR. L. REV. 269 (1972).

263. Professor Ian R. Macneil has developed a theory of "relational" contracts which is not served particularly well by either traditional or even neoclassical contract law. Traditional contract law was designed to establish, as far as possible, the entire relation between the parties at the time the contract was formed. Macneil refers to this traditional contract concept as "total presentation;" bringing the future into the present through virtually perfect predictability. The dominant characteristic of the typical contract system is to force the content of the relation between the parties into a pattern of mutual assent expressed at a particular, instantaneous point in time; the acceptance of the offer. This contract system may operate effectively with respect to the "discrete transaction"—the contract of short duration, with limited personal interactions, and with easily measurable objects of exchange—goods for money. Macneil, however, believes that few economic exchanges occur in the discrete transactional pattern. Rather, he believes that virtually all economic exchanges occur in circumstances involving one or more of the following elements: significant duration (e.g., franchising), whole person relations (e.g., employment contracts), difficult to measure objects of exchange (e.g., the projection of personality by an airline stewardess), considerable anticipated future cooperative behavior (e.g., the players and management of a profes-

standards not only because of the overriding importance of fairness, but because the governing statute, Article 2, commands it. To those critics who would suggest that the new analysis would be unworkable because it would preclude the use of printed forms, the answer is balderdash. We need not return to the days of the green shade, quill pen, the scroll, and scrivener. Any contracts lawyer must know that most of the typical printed form is unnecessary or unfair.[264] An effective counter-offer and deviant terms may be communicated clearly in a printed form. If both sides submit deviant terms communicated in such a fashion that the other merchant should reasonably understand them, no contract is formed by the exchanged forms. A subsequent contract by conduct should incorporate the normative assumptions of Article 2, because neither party will have succeeded in showing good reason why it should not. Again, the terms of the contract by conduct will be fair.

Tinkering with some of the language in 2-207 to avoid further problems with the counter-offer riddle or the different vs. additional puzzle will not be sufficient. We must also do something about the offer-acceptance mechanism that pervades 2-207. We must scrap 2-207 and begin anew to reflect Article 2's underlying philosophy so that the new 2-207 may effectively apply to the complex transactions that the great Karl Llewellyn had insufficient time to envision. The probabilities are overwhelming that Llewellyn would agree. For him, the apotheosis of any statute was its purpose.[265] It is time to remember the evils that Article 2 sought to

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sional football team), and many other circumstances forming a "relational web." Although he believes that most contracts should be called "relational," he suggests a spectrum ranging from the highly discrete transaction to the highly relational contract. *See* I. MACNEIL, THE NEW SOCIAL CONTRACT (1979); Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589 (1974); Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

264. At some point, the firm's interest in freeing itself from external constraints begins to merge with the professional ethos of the legal draftsman. The lawyer drafts to protect the client from every imaginable contingency. The real needs of the business are left behind; the standard applied is the latitude permitted by the law. Ultimately, the document becomes unintelligible even to the normal businessman.

Rakoff, *supra* note 42, at 1222.

265. "A piece of legislation, like any other rule of law, is, of course, meaningless without reason and purpose." K. LLEWELLYN, JURISPRUDENCE 228 (1962); *see also supra* note 4.

avoid[266] and to provide effective, rather than covert, tools to remedy those evils in the battle of the forms.

266. The theory of purposive statutory interpretation can be traced to Heydon's Case, Exchequer, 1584. 30 Co. 7a, 76 Eng. Rep. 637. The "true interpretation" of a statute was to be discerned by considering the following four elements: (1) the commou law before the statute; (2) the "mischief" and "defect" not provided for in tbe common law; (3) the remedy devised by the legislature to "cure the disease," and (4) the "true reason of the remedy." The case then directs judges to construe the statute to "suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*." *Reprinted in* H. HART & A. SACKS, *supra* note 259, at 1144.