DRAFT

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In this original and engaging piece, Professor Richard Hyland reflects on the nature of drafts—both in his own writing and in the proposed revisions to Article 2 of the Uniform Commercial Code. His exploration of the drafting process suggests that revision is not always synonymous with improvement.

Professor Hyland focuses on a classic "battle of the forms" scenario. He examines the way the drafters have addressed the problem and concludes that their proposed solution is misguided. After presenting solutions from international commercial law and other national codifications, Professor Hyland recommends that § 2-207 be deleted. The determination of the terms in battle-of-the-forms cases should be left to the courts. Professor Hyland closes by relating his discussion to the Legal Realist insight that judges, not rules, decide cases.

This is a draft. If you encounter this piece years from now printed in a law review, you will probably give little thought to how it might have been altered. But for me, at this moment, as I begin to write, these sentences are still tentative. I am aware of this as I move my pen to the beginning of each line and let it write what it will. As a draft, its survival is in question. As long as it remains a draft, I may decide to revise or rewrite it, to submit it for publication, and eventually to read and reread the proofs until an editor compels me to disengage. I may also decide to discard it, to drop it in the trash as I have so many drafts before. A draft is an experiment—a wager really—though I often learn as much from those I never complete as I do from the drafts that end up in print. For the writer there is suspense in a draft, and I know, though I do not ordinarily admit it, that this thrill is the principal reason I write.

I am sitting cross-legged on a plastic picnic mat in one of the wide expanses of soft, close-cropped grass dispersed throughout Shinjuku Park. My wife, my twenty-one-month-old daughter, and I have come here every weekend for several months. I look up as I complete each sentence to reassure myself that my daughter is still chasing a small yellow ball with a couple of slightly older Japanese children. Though she is not far away, in her gray sweatshirt she resembles a medium-sized pigeon. My wife will be back shortly. She decided to take a walk to the convenience store to buy cans of hot tea and a plastic tray of inari for an afternoon snack. It is a freshly pressed autumn noontide. Though the sun is low to the south, it heats enough to warm my shoulder. In the crystalline clarity of its light,
every tree leaf seems to flutter by itself. The cherry trees have turned rusty orange and the Japanese maples cordovan red. The fallen leaves, tumbling across the grass before a gusty breeze, resemble a herd of stampeding bison seen from a great and silent distance. On dozens of mats like ours spread out across the grass, Japanese families are sitting quietly and enjoying the day. The silvery blue windows of the Shinjuku skyscrapers catch a glint of the sun and cast it back at me. A pale half moon hangs high in the eastern sky, though it is not much past noon.

The latest revisions to Article 2 of the Uniform Commercial Code, Council Draft No. 2, arrived today in the mailbox. These of course are much more than suggested revisions. This is the second version that the Drafting Committee will attempt to defend before what may be the most exclusive company in American law, the governing body — the Council — of the American Law Institute, when that august assembly convenes next month in executive session. Since we were already downstairs, I stuffed the booklet into the backpack and brought it along. I managed to read as far as Draft § 2-207, not even thirty pages into it, before I found I could read no more. Though I know I will never read it to the end, I have worked long enough in the law to know that, as unlikely as it now seems, I may one day wish to know exactly where I stopped, so I have marked the place with the ticket stub I had in my pocket from last week's matinee at Kabuki-za.

Council Draft No. 2 is also a draft. If the appellation is true, there should be some suspense about its fate—either it will mature into a satisfying product or it will end in the waste basket. Yet everyone knows it is not a draft in this sense. In fact, there is no suspense. The Council Draft has never known the threat to its existence that a lack of quality usually poses to a draft. It has become plump and sedate from the security that, though there will be a little more tinkering, in some form or another it will survive. It will never experience an existential crisis. It is a sure thing.

Since I am living in Tokyo for the year, I will not attend the American Law Institute Members Consultative Group meeting in Tampa next week, nor will I be able to make the next session of the Drafting Committee in Salt Lake City. I am out of range of the revision process. Perhaps it is the perspective that such distance affords, or perhaps it is the crisp air and the fine light, but whatever it is, I now see clearly what I had occasionally suspected but never mentioned, not even to myself. These revisions are a mistake. There must be something like a Gresham's law of code revision — bad ideas inevitably drive out good ones. Each draft is worse than the one that preceded it.

For some reason, it gives me pleasure to imagine the colloquy at the annual meeting of the American Law Institute when the revisions to the Sales Article come up for discussion. It will all take place in a swank hotel ballroom that comfortably seats three thousand. A couple of senior members will be recognized at the microphones and will point out, cor-
rectly, that a word has been misused or is ambiguous. They will propose alternative language, and their suggestions will be gratefully accepted and duly noted by the Reporter. A few younger members will rise to point out, again correctly, that the Draft would permit the gougers to take egregious advantage of consumers in several situations. There will be support for an amendment, but the Reporter will mention that the idea was considered and rejected in committee, and the amendment will fail on a voice vote. The revisions will be approved, and The ALI Newsletter will congratulate all concerned on the progress that has been made in the commercial law.

What makes this scene particularly piquant is that there is no longer anything that can be done to change it. Nothing I write — nothing anyone may write — can alter in any way the inevitability of this result. What it would take to save Article 2 is an immediate and widespread realization that its current Official Text is better than we deserve — because, if it were to vanish, we would not be able to recreate it. Of course our age, like any other, deserves the opportunity to dress its own monument in the bimillennial history of the law of commercial obligation. Our vision of the world, as it relates to the sale of goods, will thenceforth be available for the examination and evaluation of the ages. Yet there is nonetheless reason to write. In fifty years — or, if what we call change continues to accelerate its pace, perhaps thirty (or even another ten) years from now — our successors will again consider revising Article 2. Perhaps someone will then ask whether it might not simply be better to return to Article 2 as it was before it was revised. At that moment, that someone may discover these sentences, and point to them as a warning that revision is not always synonymous with improvement.

I look out across the grass as the dozen members of an extended family begin to stand and shake out their picnic mats and discuss where they will spend the remainder of the afternoon. I wonder whether there is any way to present the difficulty with the Council Draft and the revision process. My immediate thought is that it is not worth it. There will be several more drafts before anything I might write could be in print, and certainly at least one more Council Draft before the process is completed. But it takes time to publish an article, and if I await the final product the process will escape critical appraisal. Moreover, impermanence, as I have recently learned by reading Kenko, is an essential quality of human experience. The world derives much of its beauty for us from the fact that it, and we, are transitory. That is the reason for all the fuss in this country about the cherry blossoms and the fall leaves. A moment’s concentration on a Council Draft of fleeting currency strikes me as the proper tribute to this gorgeous autumn afternoon. I reopen the Draft to my marker and I am glad I left it there, for it reminds me why I felt compelled to close the book after I read Draft § 2-207. Perhaps that is the place to start.

I suspect that many of us who teach the battle of the forms teach it in the same way. We begin with a hypothetical that I will call the First Case.
Seller sends a catalogue to prospective customers. Buyer, on its standard form purchase order, orders ten dozen widgets at the catalogue price. Seller, eager to close the deal, immediately ships the widgets and encloses Seller's standard form invoice in an envelope affixed to the packing box. The box is unpacked on Buyer's loading dock. The widgets are sent into the factory to be used in production. The invoice is routed to the accounting office and is paid in due course. A couple of months later, Buyer learns that its customers are having problems with the goods into which the widgets have been incorporated. Buyer examines the remaining widgets and discovers they are defective. As soon as Buyer calls to report the problem, Seller offers a substantial rebate. But Buyer's losses are mounting, and even after high-level conversations the parties remain too far apart for the matter to settle quickly.

So lawyers are called in and the documents are examined. According to language on the front of Buyer's purchase order, Seller represents and warrants to Buyer, in addition to all warranties implied by law, that each item of merchandise described on the face hereof, together with all related packaging and labeling, shall be free from defects in design, workmanship or materials. The front of Seller's invoice, on the other hand, states in capitalized bold type: There are no understandings, representations, or warranties of any kind, express, implied, statutory or otherwise, including, but without limitation, the implied warranties of merchantability and fitness for a particular purpose, not expressly set forth herein and Seller specifically disclaims the implied warranties of merchantability and fitness for a particular purpose. In another passage, entitled Disclaimer of Consequential Damages, Seller's invoice states: Seller in no event shall be liable for consequential damages arising out of or in connection with this agreement.

We might wonder why Seller has chosen to disclaim the implied warranties and to exclude liability for consequential damages. Perhaps Seller is an irresponsible merchant who does not deserve the Code's protection. But there are other possible explanations. The widgets may be experimental. Though Seller has not yet had the opportunity to test them thoroughly, Buyer believes they may do the job more efficiently than anything else on the market. For purposes of a discussion of the battle of the forms, this hypothetical may at first appear of only marginal utility, but it begins to look more relevant when we are reminded that, due to the pace of technological innovation, many products become obsolete before they can be thoroughly tested. Much of what is on the market today is in some sense experimental—new and improved, as the labels announce, but also unproved and to some extent even untested. Another possibility is that the widgets are destined for use in a field of production that involves so many variables that the difficulties are less likely to result from a defect than from the inappropriateness of their application in the particular process involved. One celebrated American decision concerning the battle of the forms involved an emulsion used in sealing wet pack spinach bags under precisely such variable conditions. Seller prefers not to be
involved in the game of chance that a lawsuit under those circumstances might involve. The justification for excluding consequential damages is much more universal. They can be so wildly disproportionate to the economy of the contract that it would be irrational to place that risk on a seller without a price adjustment. That is why every seller's form that I have ever encountered has excluded liability for consequential damages—though of course some sellers would be willing to bargain about it.

The first question the lawyers ask themselves is whether a contract has been concluded. To create an offer, there must be a communication that manifests a willingness to enter into a bargain on sufficiently definite terms. In American law, Seller's catalogue is usually thought to be indefinite as to quantity, so Buyer's purchase order was the offer. As far as acceptance is concerned, the mirror-image rule, which continues to govern contracts under the common law, provides that a communication may not conclude a contract if it varies the terms of the offer. If we were to apply this rule, Seller's invoice would not constitute an acceptance. But that does not mean that no contract was formed. Seller's invoice would serve as a rejection and a counter-offer. Buyer's use of the widgets and payment of the price would probably be considered to operate as acceptance by conduct. The terms would be those of Seller's invoice. The effect of the mirror-image rule is better understood by thinking of it as the last-shot rule—the party sending the last communication wins. In American law, that is usually the seller.

When he drafted the project that ultimately became § 2-207, Karl Llewellyn wished to displace the mirror-image rule and its consequences. Under this provision—which governs our hypothetical—the analysis is different. We first ask whether Seller's invoice may accurately be characterized as a definite and seasonable expression of acceptance of Buyer's offer. Since the standard terms do not coincide, there might be some question about this, yet the courts seem to have had an easy time resolving the issue. If the forms agree on the dickered terms—usually the description of the goods, the quantity, and the price—then, the courts hold, reasonable merchants would understand that a deal has been concluded. That is enough for there to be acceptance, and therefore contract.

We need only be concerned with the contract's terms. Since Seller's disclaimer contradicts Buyer's purchase order, it is considered to be a "different" term. Though there are various ways to reach the result, everyone agrees that the disclaimer does not become part of the bargain. The limitation of remedy is another matter. Since the limitation does not directly contradict the terms of the offer, it will probably be considered to be an "additional" term. If it would not materially alter the bargain, it automatically becomes part of the contract; otherwise, it operates as Seller's proposal for modification. Many courts, perhaps the majority, hold that an exclusion of consequential damages is material as a matter of law. In those jurisdictions, Buyer would always win. But it is worth
noting that there are other approaches that point to a different understanding of § 2-207. Some courts hold that the exclusion materially alters the contract only if the buyer demonstrates that it was surprised by the exclusion, or that the exclusion would cause the buyer substantial economic hardship. Those courts look to all the facts and circumstances of the case, including not only what the buyer knew or had reason to know, but also whether the limitation represents a reasonable allocation of risk and whether, when all is said and done, excluding consequential damages would not be unfair.

However, even if the damage limitation does not automatically become part of the contract, it nonetheless operates as Seller’s proposal to modify its terms. At this point, it might be suggested that Seller’s proposal was accepted by conduct—Buyer used and paid for the widgets. Seller would win. But since such a holding would revive the last-shot rule, which it was the provision’s purpose to abrogate, we typically conclude that acceptance of the proposal to modify the contract must be express—and comment 3 to § 2-207 explicitly confirms our intuition: The modifications Seller proposed will not be included unless expressly agreed to by the other party. Therefore, since in our case Buyer never accepted the proposed modification, the terms of the contract remain those of Buyer’s invoice. Section 2-207 may be considered to be a first-shot rule—in the typical case, Buyer always wins.

Everyone agrees that this conclusion cannot be the end of the story—the commercial law must provide Seller with a means to limit exposure from the sale of experimental widgets. To test the flexibility of § 2-207, let us imagine additional facts—our Second Case. Seller attempts to limit its liability by stamping the following message across the top of the invoice in big block letters: Every agreement of sale is subject solely to Seller’s standard conditions as contained in this invoice. If Buyer does not wish to abide by them, Buyer must notify Seller immediately and may then return the merchandise for a full refund. And let us further assume that Buyer does not protest Seller’s insistence on its own terms but instead uses the widgets and pays for them.

Those as yet uninitiated into the arcane reaches of American commercial law may assume that Seller, having given clear expression of its contractual intent, has successfully disclaimed warranties and excluded its exposure to consequential damages. Since Seller clearly insisted on its own terms, Seller argues that the invoice is not an acceptance but rather a counter-offer, which Buyer accepted by using the widgets and paying for them. But virtually no one agrees with Seller. Since the policy of § 2-207 is to do away with the last-shot rule in all cases, it is generally agreed that Seller should not be permitted to triumph merely by adding a sentence to a standard form. Instead, the courts hold that Buyer is bound to Seller’s terms only if Buyer expressly agreed to them. In our Second Case, Buyer never expressly agreed. So a contract is formed under § 2-207(3): the conduct of both parties clearly reveals their intent to enter into contrac-
tual relations—otherwise Seller's shipment of the widgets and Buyer's payment for them would make no sense. In this situation, § 2-207(3) provides that the terms of their contract are those upon which the writings agree, together with the supplementary terms provided by the Code. The Code's default regime includes the warranty of merchantability and also holds Seller liable for consequential damages. Buyer wins again.

After having lost both lawsuits and paid the damages, Seller's officers meet over lunch with their transactions counsel. They ask whether there is any certain way under the UCC to disclaim warranties and avoid exposure to consequential damages for the sale of their widgets. The company's lawyer explains the idea behind the provision—Seller cannot pretend to negotiate with the clerk on Buyer's loading dock. If Seller wants to limit its exposure, it has to get actual agreement from the representative of Buyer's enterprise who has the authority to provide it. Since Buyer's invoice requests full warranty protection, Seller should not send the widgets until Seller has called Buyer's purchasing agent and reached agreement on the disclaimer and damage limitation provisions.

Seller's officers listen in amazement. What happens if Buyer's purchasing agent is on vacation? one of them asks. Then you have to wait, counsel replies. Or you can write a letter explaining the situation and delay shipment until you receive a response. The marketing manager cannot repress a smile. Do you know how many orders we get every week? Are you telling me I have to read every one of those forms and call up every purchasing agent, explain about the warranties and get them to agree? And how do I prove that we spoke? Do I have to get them to write me a notarized letter? Besides, none of us has gone to law school. How am I going to negotiate warranties and limitations on damages with purchasing agents who also have no legal training? Isn't that why we hired you? We want you to draft the terms and conditions. We don't want to have to worry about them any more.

There is silence.

I have a different idea, one of them says to the lawyer. You say whoever takes the first shot wins. So let's take the first shot! The lawyer explains that the only sure way to take the first shot is to respond to every order with a rejection and then follow up with a brand new offer. You mean, someone asks, every time a customer wants to do business with us, we first have to refuse? If that is unacceptable, the lawyer continues, the only other solution is to turn the catalogue into a valid offer, and that requires overcoming the uncertainty of the quantity term. The company would have to state that it is willing to fill all orders of whatever quantity, or it would have to indicate that the catalogue is good only as long as current inventory lasts. The officers consult with each other and seem ready to pay that price, if it permits them always to win on the liability issue. The lawyer tells them that there would still be problems. The courts may balk at a seller's manipulation of the law of offer and acceptance to defeat buyers on the warranty issues. On top of that, the lawyer
says, if the courts start deciding cases that way, you'll soon invite me to lunch to figure out how to get around those rules for the contracts you enter into as buyers.

Everyone who has been through these conversations recognizes there is something wrong with § 2-207. There has to be a way for Seller to make its terms the basis of the bargain without compromising the speed and efficiency necessary for modern commercial transactions. The preliminary studies and reports that were prepared to evaluate the wisdom of revising Article 2 all clearly noted this difficulty and the need to resolve it.

As a whole, Article 2 is not broke—I know no one who thinks it is. After a little use, all codes reveal a few unfortunate turns of phrase, structural inconsistencies, overly idealistic assumptions, and gaps that cannot reasonably be closed by the statutory language. Blemishes of that sort never justify revision—because similar problems inevitably show up in the revisions themselves not long after enactment. This is the case especially in the law of obligations, which is not as susceptible to obsolescence as are, for example, some topics in family law. The role of a code of obligations is to establish a framework for analysis. It leaves to the courts and the commentators the creative task of refining the vision and debating how best to resolve the difficulties. The sales law in the French Civil Code has witnessed an eventful period since it was promulgated in 1804, yet it has survived largely untouched—and I cannot ever remember hearing a French jurist suggest that it should be rewritten.

As far as the UCC is concerned, it is not much of an exaggeration, if it is one at all, to suggest that without the discomfort occasioned by § 2-207, the Official Text of Article 2 might have survived for at least another generation before the surgeons would have been authorized to take the scalpel to it. There was really nothing else serious enough to justify the time and expense of revising a sales law that is legitimately regarded throughout the world as a model for the modern law of commercial transactions. Plenty of time has already been invested—work on this project will soon have taken more than a decade. There is a cast of thousands, and no expense has been spared. It is perhaps therefore not unfair to evaluate the entire project in terms of its success at resolving the problems presented by the battle of the forms. If Council Draft No. 2 has not found the solution to these problems, then all the rest of the tinkering is not only suspect, it is simply unnecessary. If that proves to be the case, then perhaps it would be time to remind ourselves that Council Draft No. 2, after all, is really just a draft.

How does Council Draft No. 2 resolve our two hypotheticals? In the First Case, Buyer's purchase order requested a full warranty package, while Seller's invoice not only disclaimed the warranties but also excluded liability for consequential damages. In such a case, the solution depends on two separate inquiries. The first question is whether a purported acceptance may conclude the contract despite the fact that it proposes terms that vary from those contained in the offer. For our First
Case, Draft § 2-205(a)(1), like § 2-207, tells us that it can. Then the only open question is the second one, namely the terms of the contract. For the answer, we turn to Draft § 2-207(a)(2): *If the parties exchange standard forms that contain varying terms and neither party signs the standard form of the other, the varying terms do not become part of the agreement unless the party claiming inclusion establishes that the other party expressly agreed to them . . . .* If, under this provision, the varying terms fail to become part of the agreement, Draft § 2-207(b)(3) incorporates into the contract the warranties and consequential damages that the Draft includes in its default regime. In our First Case, the parties exchanged standard forms, the forms contained varying terms, neither party signed the form of the other, and neither party expressly agreed to the other’s terms. The default provisions of the Code apply. Buyer wins again.

Well, that is disappointing. Such a large elephant, such a small mouse. None of the problems has been confronted, let alone resolved. At this point, I am about to close the book when I notice a final provision at the bottom of the page, Draft § 2-207(d): *In this section, "expressly agreed to" means affirmative conduct with knowledge or reason to know of the particular term in a standard form and that the drafter of the form intended the term to be part of the agreement.*

One thing is immediately clear to any reader whose eye dwells even briefly on this definition. It is truly odd. The concept of agreement in the common law has always included, without preference, both those agreements that are express as well as those that are implied. For that reason, the distinction often is without importance. To the extent it matters, we typically define express agreement as accord arising from the parties’ language, while implied agreement comes from conduct and the surrounding circumstances. That is why the Code explicitly lists both aspects when it defines the concept of agreement in § 1-201(3): *“Agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances . . . .* I thumb through the Council Draft and note that it preserves this same distinction between express and implied warranties and between express terms of a contract and those implied from course of performance. And, of course, that is also the message of comment 3 to § 2-207, which prevents Buyer’s mere use of and payment for the widgets from constituting acceptance of the terms in Seller’s invoice. I suspect that no other legal system in the history of the universe has ever suggested that “expressly agreed” means conduct with knowledge or reason to know. The provision so calls attention to itself that I pause to ascertain what it is designed to accomplish. Perhaps it is there to provide room for the courts to hold that in an appropriate case, a particular term has become part of the agreement despite a discrepancy between the forms. But then, I ask further, why isn’t the rule simply that the facts and circumstances of the case will determine whether the varying terms become part of the agreement.
I am compelled to re-examine the question of whether Buyer "expressly agreed." In our First Case, there was affirmative conduct on Buyer's part—Buyer used the widgets and paid for them. Did Buyer have knowledge or reason to know of the disclaimer and damage limitation clauses and that Seller intended them to be part of the agreement? I need first to remind myself of exactly what occurred at Buyer's plant on the day the widgets arrived. Seller's truck backed up to Buyer's loading dock. The driver hopped out of the cab and climbed onto the bed of the truck, slipped a dolly under the heavy box that contained the widgets, rocked it back, rolled it around and eased it onto Buyer's platform. Buyer's dock clerk had been told to expect the widgets and informed what to do with them when they arrived. The dock clerk was a college student on a summer job and followed instructions impeccably. The clerk initialed the driver's delivery manifest and the truck was gone. The box was unpacked, the widgets uncrated and counted, and then wheeled into the factory and placed in the proper position to be incorporated into the assembly operation. The envelope was stripped off the box before it was collapsed and sent to recycling. Seller's invoice was removed from the envelope, unfolded and flattened. The dock clerk circled the quantity term on the invoice and initialed it before putting it in the routing basket. The mail clerk came by later in the afternoon and took the invoice to accounting. An accounting clerk later checked the invoice against the purchase order and confirmed that the price was accurate. The clerk filed the purchase order and the invoice together and then cut a check, which was signed by the head of accounting, inserted it in a window envelope so the address showed through, and put the envelope in outgoing mail.

The Draft now asks me to determine whether Buyer had knowledge of Seller's disclaimer and exclusion of liability for consequential damages. In § 1-201(25), the Code defines knowledge as actual knowledge. No one in Buyer's employ actually knew of Seller's terms. But the question is more complicated when an organization is involved. Section 1-201 (27) tells us that an organization is deemed to have knowledge from the moment knowledge would have been brought to the attention of the individual conducting the transaction if the organization had exercised due diligence. The question then is whether someone, perhaps the accounting clerk, should have compared the fine print on Seller's invoice with the fine print on Buyer's purchase order, noticed the discrepancy and sent the documents to the purchasing agent for approval before cutting the check. Perhaps all invoices should be routinely sent to the purchasing agent before they are paid. But then what to do with the widgets? Because it has become so expensive to carry inventory, everything is ordered to arrive no more than a day or so before it will be needed. If the widgets had not arrived when they did, there would have been delays on the line. Perhaps Buyer should arrange for earlier deliv-
ery and build a shed to house parts and raw materials while the purchasing agents compare the terms on the standard forms.

But wait a minute. I am a sales lawyer and have thought about these questions for twenty years. It is generally easy for me—though not always—to determine whether two sales documents conflict. But my upper-level sales students have problems with this, even on the final exam. The standard forms are drafted by experienced lawyers to be read by other experienced lawyers. As far as warranties and remedies are concerned, the individual conducting the transaction for Buyer is Buyer's lawyer. The real question is whether, as part of its due diligence, Buyer must get a lawyer to read the forms and sign off on the transaction before the invoices can be paid and the goods unpacked. Now I suppose I should confess that I like the idea of legal fees. I enjoy earning them, and I especially like to spend them. I believe lawyers should be involved in drafting the standard forms. But, in good conscience, I do not believe that a lawyer should be involved in the formation of every commercial sales contract.

Did Buyer have reason to know of Seller's terms? "Reason to know" is defined in passing in § 1-201(25)(c) by reference to all the facts and circumstances known at the time. If Buyer had been aware of the experimental nature of the widgets, for example, we might conclude that Buyer must be expecting a disclaimer and a damage limitation. There were no facts like that in our hypothetical. Buyer may not have known much about the recent developments in the production of widgets. Or perhaps Buyer believed that Seller's claims of difficulty were exaggerated. Nonetheless, the "reason to know" language is valuable, for it breaks with the drafters' strategy of wanting everything clear in advance. It permits the courts to evaluate at least some of the circumstances. Though the "expressly agreed" provision is not the answer, it points the way. In the First Case, the answer depends on Buyer's reason to know.

In the Second Case, Seller wanted to be confident about the result and therefore conspicuously indicated on the invoice that Seller was willing to contract only on the basis of the terms in the invoice. Under § 2-207, that notice would change nothing. Is that also the case under the Draft?

I look up for a second as I try to remember where in the Council Draft I just read something about that. My wife is about a hundred yards away, sauntering contentedly towards me on a slow afternoon stroll with a white plastic bag in her hand, attempting, as I often do myself, to experience the beauty of this park at this season with every one of her senses. My daughter, who I did not know was capable of visual recognition at such a distance, has stopped playing with her new friends and is staring in the direction of my wife. Though I can tell from the concentration on her face that she is not yet certain, she recognizes this as a Mommy Alert. Then two things happen at once—a grin flashes across her face and she takes off at full gallop through the park. Evidently, at that age formalities...
are not necessary when parting. It also does not occur to her to look to me for permission. I am reminded of the way Yeats (I think it was) once described a friend: *He had the instant decision of the eagle, between the perception of whose eyes and the movement of whose wings no time passes capable of division.* That then is a childhood blessing. I only hope I will not needlessly tarnish it for her.

I flip back through the Council Draft and find the page I was seeking. This is a new provision. Draft § 2-203(d) provides that *Language in a standard form record expressly conditioning the intention of the drafter to be bound to a contract upon agreement by the other party to terms in the standard form must be conspicuous.* The justification is provided in note 3: *Under basic contract law, either party can condition the formation of a contract upon agreement by the other party to terms proposed.* This obviously is the provision by which the drafters intend to resolve the ambiguity in the operation of § 2-207 and affirm Seller's right not to enter into a contract except on its own terms. I cannot yet tell whether Seller is going to be satisfied.

For the moment, no more work can be done. My wife has just announced that she was able to purchase the last five *inari* sushi available in this part of Tokyo. She is not excited for herself or for me, but rather because this provides her with another opportunity to try to feed our daughter, who, despite the fact she is happy and healthy, generally refuses to eat anything but crackers. *My wife unwraps the cellophane from the small Styrofoam tray, then removes the chopsticks from their crisp paper wrapper and cracks them in two. The *inari* consist of thumb-sized rice balls that have been stuffed into an envelope of thinly sliced and gently fried tofu.* My wife deftly divides one of the sushi, picks up one half with the sticks, and holds it up to my daughter's lips. I believe she is encouraging her to open her mouth, though, since the two of them speak a language I do not understand, I cannot be certain what exactly is being said. To everyone's surprise, my daughter opens wide, leans forward, engulfs the morsel, and begins to chew. Her mouth is so filled with the foodstuff that it cannot really be said that she is eating. It reminds me rather of an industrial procedure. She is processing. Her eyes stare blankly ahead. As her jaw moves in rhythmic mastication, *inari* juice dribbles down her chin and is promptly captured by my wife in the napkin provided by the convenience store. I know I am not yet permitted to select a sushi for myself. Though four of them are left—the Japanese prepare things in sets of three and five since one of their words for four is a homonym for their word for death—and though my daughter, even if famished, would never be able to process more than one more *inari*, I know that should I reach now for a sushi, my wife would glare at me as though I had just misappropriated my daughter's dowry. Maybe the difference is that I was not the source of the breast milk. My wife was the one who had the anxious responsibility of assuring that enough milk got into that little girl. She once said that she understands why Portnoy's mother threatened to stab him with a bread knife if he refused to eat.
I reread Draft § 2-203 and reflect. In the Draft, the general rule is that Buyer always wins. What exceptions there are to this rule remain a mystery. Despite decades of patient critical scholarship and a month of Sundays in drafting committee meetings, it is impossible to ascertain from the text of the Draft how Seller might contract on terms of its own choosing. Perhaps the allusion to freedom of contract in the note to Draft § 2-203 is designed to overrule the case law consensus that, under § 2-207, Seller’s insistence on its own terms is meaningless unless Buyer expressly consents. Perhaps. But no one can know for sure. This is maddening. This is the only truly vexed question in all of Article 2, yet all we learn from the Draft about the answer is that it is either possible for Seller to guarantee victory by inserting a single sentence that insists on its own terms—or not. No one knows. In order to proceed, I will simply assume that the drafters have at least attempted to solve Seller’s dilemma. But if this is their answer, it is not a very good one. For every seller will take advantage of it, not just those who are selling experimental widgets. All sellers’ lawyers will include the necessary language in their standard forms in order to reap a possible windfall for their clients.

What happens if Buyer’s lawyer includes the same insistence in Buyer’s purchase order? Draft § 2-205, note 2, Example 4 considers the case explicitly. If both parties insist on their own terms, the documents cannot form a contract. Yet under Draft § 2-203(a), a contract may still be formed by conduct. I assume that the terms will then be the default provisions of Article 2—Buyer’s insistence on its own terms should preclude a finding that Buyer “expressly agreed” to the terms in Seller’s invoice. In other words, in this case too Buyer always wins. In some cases, that is also the right result. If Buyer really needs warranties, cannot accept the risk of consequential damages and says so on the purchase order, Seller should not be able to circumvent that language by sleight of hand and form a contract without the protection Buyer requested. But Buyer’s lawyer also knows that sellers are always trying to find a way to escape warranty liability. If Buyer is going to have just one standard purchase order, Buyer’s lawyer is going to include in it language insisting on Buyer’s terms. The most prevalent case will be the one in which both parties conspicuously indicate on their forms that they are willing to form a contract only on their own terms. In that most typical situation, Buyer will always win.

The system the drafters have created is so absurd that I ask myself whether I have misconstrued it. As I understand it, they have provided the battle of the forms with a two-pronged solution. In general, Buyer always wins. Seller may win if Buyer knows or has reason to know of Seller’s terms. The only other possibility for Seller to win may be the case in which Seller knows the secret handshake and Buyer does not. If I put it boldly—and I see no other way to put it—the drafters have reworked the most vehemently criticized provision in Article 2 and succeeded in making it even worse. They have largely retained the mindless rigidity.
that in practice prohibits upstanding sellers from specifying the terms of the sale, yet they may now have provided unscrupulous sellers with a means to triumph over unsuspecting buyers.

My daughter needs to be changed. I have learned to detect it within five minutes, at up to ten feet. Perhaps activity at the front opening forced movement at the rear. Since this is my job, I begin to negotiate with my daughter about the matter. She looks at me, shakes her head vigorously, and says something that is perhaps most accurately transcribed as No. As my wife knows, for some time I have been trying to write an article that, like a work of calligraphy, is completed in one sitting and published without emendation. I tell her that I doubt whether this one is going to be the one. Nonetheless, she says she will accompany my daughter to the restroom near the lake. They set off. After a few yards, my daughter bolts back to collect her bear. Then I watch the three of them, holding hands in decreasing size, disappear into the declining sunlight.

I am unable to understand why the drafters are making this so hard. In fact, very little in the law is truly difficult—we are not engaged in nuclear physics or the quest for the cure of a dread disease. Virtually every problem in the law solves itself as soon as it is separated into its component parts. Difficulties generally arise only when we accept that two things that happen to occur together necessarily belong together. In situations in which it proves difficult to distinguish the individual elements, I have often found it useful to examine how problems are resolved in other legal systems. It is not a question of borrowing. It is just that in other systems the same two things often do not stick together quite so tightly. That was one of the reasons I came to Japan. This park is just a bonus.

When I see how frequently three solutions to battle-of-the-forms problems are repeated—last-shot rule, first-shot rule, knock-out doctrine—I wonder why it took me so long to realize there must be some other answer. At the end of the class in which I taught the battle of the forms this year, I turned to the Japanese colleague who so generously attended the sessions and asked how the battle of the forms is resolved in Japanese law. He said there are no cases on point and there is no provision in the code. Japanese law is very flexible as far as contract formation is concerned. Once the contract is formed, interpretation is left to the courts. I am surprised that you so insist on certainty in this question, he said, considering the great flexibility available to American courts in contract interpretation.

At that moment, I became aware that in my thinking about the battle of the forms, two matters had always stuck together. One was the principle that an acceptance that varies the terms of the offer may nonetheless operate to conclude a contract. The other was the apparent need, in such a case, to determine in advance what the terms of the contract will be. These two ideas were stuck together in my mind solely because they appear together in § 2-207. Once they reveal themselves to be two separate questions, everything falls into place.
With regard to the first question, the answer is already in § 2-207, and Draft § 2-203(b) maintains the needed flexibility—a contract may be concluded despite a discrepancy in the standard terms—but then again, it may not be. It is up to the court.

Once a court finds that a contract has been concluded, it must determine the terms of that contract. But this is no longer difficult. Once we agree to permit the courts to decide the question of whether a contract was formed, there is no reason to take from them the question of the content of the parties' obligations. That is what courts do every day in commercial cases—they interpret confusing or even conflicting provisions in the contract. There is no real difference between the interpretation question raised by the battle of the forms and that involved whenever two contractual provisions conflict, or even when parties in litigation base competing claims on the same provision. In every contracts dispute on which I have ever been consulted, each party was able to point to something in the contract that legitimated its position.

In the end, whether the issue involves choosing between or reconciling conflicting contractual provisions or assessing whether a disclaimer and damage limitation clause became part of the contract—or even deciding whether a term is unconscionable—contract interpretation always involves the same analysis. In each case, the question is whether the clause makes sense in light of the actual bargain and the total economy of the transaction. The judge looks to all the facts and circumstances to make sense of the deal. If the case involves a dispute about whether disclaimer and damage limitation clauses have become incorporated into the contract, far more is involved than just the buyer's knowledge or reason to know of the terms in the seller's form. The judge would consider whether one or both of the parties reasonably insisted that it would contract only on the basis of its own terms. The court might inquire how much Buyer knew or should have known, or how much Seller communicated, about any special difficulties with the particular goods involved in the sale. The contents of similar contracts the parties had entered into with other merchants might be relevant, as would be the terms generally included in such contracts in the trade, and whether a discounted price or other favorable term suggests additional grounds for limiting Seller's exposure. Of course, in the case of disclaimer and damage limitation clauses, the inquiry takes place against the background of the Code's default regime. The court will privilege that regime—will favor implied warranties and liability for foreseeable consequentials—unless there is good reason to exclude it.

There is an hour here between the dark and the daylight that we call the Photographers' Hour. As the sun turns the color of apricot jam and is sufficiently filtered through the atmosphere to permit our eyes to gaze upon it, photographers set up around us to catch the lighted disk as it entangles itself in the autumnal branches. The cameras the photographers carry are mounted on lightweight aluminum tripods. Foot-long
telephoto lenses are locked into the apertures. Working alone, the photographers have the patience to wait as the sun slips into perfect conjunction with a slightly curled sycamore leaf. On several occasions, I have noticed that while waiting they have surreptitiously snapped photos of my daughter. The pile of honey-colored curls on her head is too much for them—since I continue to marvel at them, I must admit they are very nearly too much for me as well. Once, a girls’ lacrosse team sweetly asked to include her in their team photo. I am aware that the arrival of the photographers signals the end of the afternoon. Now that the sun has begun to think about setting, my wife will soon commence our weekly ritual. She knows I cannot bear to leave this park, so she slowly prepares me by asking whether I feel the chill. We both know we will not leave until the music begins to play, but she wants to assure herself I will not dawdle. She is already focused on the evening’s activities. As the arc lights come on along the street, we will walk from the park to the new Takashimaya Times Square department store, take the elevator to the twelfth floor, and wait in line briefly at an Italian restaurant that serves the best pizza we have had outside the piazza Navona. What most interests my wife about the pizza is that in contrast to my daughter’s usual behavior, she often is willing to do us the favor of processing a small, thin-crusted slice or two. That relaxes my wife enough for us to proceed to the lacquerware department, where we examine the silky-smooth brick-colored trays and bowls that have been crafted by artisans and that sell for prices no one we know could afford.

If battle-of-the-forms questions were left to the courts, Seller would immediately ask counsel how to assure that it would prevail on its disclaimer and limitation of remedy clauses should a dispute go to trial. I would hope the lawyer consulted would say that in American law, certainty is never a product of what is written into a contractual document—even when both parties agree to the terms. If there is a dispute, each party will have to provide a good reason as to why the court should accept its interpretation of the disputed clause. Any party that can do no more than point to the language of the contract is almost surely going to lose. Certainty in the battle of the forms could be created in the same way it is managed throughout the law of contracts—by creating facts, circumstances and justifications that will make a particular position seem reasonable if a dispute arises. Under the regime I am suggesting, a seller who wants to assure the enforceability of the disclaimer and damage clauses will have to work at it—before the contract is concluded. In addition to insisting on its terms in its form, I would counsel Seller to communicate the justifications for its terms to potential buyers. If it is true, the catalogue should describe the widgets as experimental, and explain that they have not been fully tested and that Seller cannot guarantee performance. Those in Seller’s employ who answer correspondence and phone inquiries should be instructed to convey the same message. The price list should emphasize that prices are calculated on the basis of the disclaimer.
and damage limitation. Seller should also try to use the same terms every time it sells the widgets. Nonetheless, Seller will have to accept that not all the factors are in Seller’s control. Much will depend on whether Seller’s terms correspond to those in general use in the trade, as well as whether the deal as a whole is fair. Whatever Seller can do to assure that Buyer is getting full value for its money will help the court to decide the case in Seller’s favor.

Seller may complain that a buyer might refuse to purchase once the limits of Seller’s liability are understood. But the most the Code can achieve is to permit the parties to make informed decisions about the risks involved. The Code is not there to make it easier for sellers to hide things in the fine print, but it is also not there to place more of a burden on them than they wish to bear.

After these reflections, it is time to suggest what the drafters might do with Draft § 2-207. The answer is embarrassing because it is so obvious. Leave it out. Yes, exactly. Just leave it out. Delete Draft § 2-207; remove it; abandon the project of dictating the results in these exceedingly fact-sensitive cases to the courts. The battle of the forms, however, has become such a topos that the celebrated legislative solution cannot be laid to rest without a headstone. If the Draft survives, as I have no doubt it will, it will hopefully preserve the principle that when the forms vary, it is up to the courts to decide whether a contract has been concluded. In order to provide the courts with the flexibility necessary to determine the terms as well, all that is needed is to replace Draft § 2-207 with the following provision:

§ 2-207. ADDITIONAL TERMS IN ACCEPTANCE OR CONFIRMATION.

[repealed]

OFFICIAL COMMENT

CHANGES: Transferred in part to other Sections; remainder deleted.

PURPOSES OF CHANGES:

1. Section 2-207 (1) previously provided that an acceptance may conclude a sales contract despite the fact that it contains terms that vary from those in the offer. That principle is now stated in Sections 2-203 and 2-205.

2. The final two subsections of Section 2-207 specified the terms of a contract concluded on the basis of varying communications. When deciding the parties’ obligations in such situations, however, the case law often found it useful to consider factors not indicated in the Section. In order to permit—and encourage—an examination of all the facts and circumstances of the transaction, the determination of the terms of the contract has now been left entirely to the courts.
Section 2-207 has been on the books now for over thirty years. Had its drafters not been so categorical about things, American courts by now would have isolated many of the relevant factors—which, if we wanted, could be enumerated in the statute, if only to improve business planning. But masking the decision processes of the courts has been only one of the disadvantages of § 2-207. A far more serious one has been to suggest that the battle of the forms is a problem in need of a statutory solution. In all the time since Llewellyn first isolated the issue, no one has produced a satisfactory legislative answer, either in this country or in any other. Our best sales lawyers have repeatedly made suggestions to resolve the conundrum, yet no one is very taken with the proposals. I have given up counting the number of entirely new variations on the theme that the Drafting Committee has sent to those on its mailing list over the past several years. For a while we were receiving drafts with several alternative parallel texts, as though we were working on the critical apparatus for a scholarly edition of the works of a Latin orator.

The few relevant provisions in international and foreign law are either quite timid or when they are bolder, just as disappointing as § 2-207 and the Draft revisions. CISG, the Vienna Sales Convention, includes a modest provision on varying terms in article 19, together with a provision for acceptance by conduct in article 18 (1). CISG has adopted a flexible version of the mirror-image rule, making it more difficult for an offeree to escape from a deal on the basis of minor discrepancies between offer and acceptance. Yet it provides no solution to the other problems commonly associated with the battle of the forms—if applied to our two hypotheticals, Seller would always win. UNIDROIT’s Principles of International Commercial Contracts article 2.22 provides that when parties exchanging standard forms reach agreement on the dickered terms, any varying terms are knocked out and the contract includes the dickered terms as well as the terms on which the parties’ standard forms are in substantial agreement. If this provision were applied to our First Case, Buyer would always win. Though warranty protection and Seller’s liability for consequential damages are not common to both forms, the knock-out doctrine substitutes the system’s default regime for the conflicting terms. Seller always wins the Second Case, but resolution of it requires a further step. Article 2.22 provides an exception when one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract. (The drafters of the Principles wisely decided to leave to the courts the case in which both parties insist on their own terms.) In our Second Case, since no contract is formed under article 2.22, article 2.11, the Principles’s version of the mirror-image rule, continues to apply. Article 2.209 of the Principles of European Contract Law would produce the same result as the UNIDROIT Principles. Under article 225(3) of the new Dutch Civil Code’s law of obligations, when a contract is concluded on the basis of differing standard forms, the offeror’s form prevails—in our First Case, Buyer would always win. However, if the
offeree's form explicitly rejects the offeror's terms, the mirror-image rule applies. In our Second Case, Seller would always win. Few other codifications include a provision designed to resolve the battle of the forms. By and large, they live without one. We can too.

Whenever I get this far in my thinking about these issues, I hear the whisper of one final question: What has happened in American law that lends itself to this kind of confusion? Of course I am aware that it would be improper to insist on the question and impolite to propose to answer it, even if I were able to do so. Now, because of the hour, I will circumvent it here as well. If however, I wished to pursue the question, I would seek the answer in the way we have chosen to honor our Realist heritage. The Realists found that the law's resources are insufficient to resolve the cases. They concluded that decisions in the law are based on a widely ranging canvas of our beliefs, including what we hold to be proper in morality, politics, social organization, cultural mores, religion and the like. Those sitting around the table at the drafting sessions show their respect for this conclusion by struggling to lock into the Code the solutions each of them finds from individual reflection to be the most appealing. But their attempt to do so will be undermined by another lesson of Realism, namely this: rules do not decide cases, judges do. There is simply no way to constrain a judge to decide a dispute in a way the judge believes to be improper. If against fairness, we require a judge to include warranties in a contract, the judge will restrict their content. If the structure of the Code imposes liability for consequential damages, an unwilling court will find that very little is included within the realm of foreseeable harm. If we were fully to accept this second element of our Realist heritage—no less fundamental than the first—we would not continually strive to take cases away from the judiciary. Happily, the system of adjudication our tradition has produced is infinitely more enduring than are our momentary impulses. There is little, if anything, we can do to impose ourselves on it. When we are stubborn and attempt to force the matter, as was the case with § 2-207, the cases inevitably rub our faces in it. Whatever the instructions we provide, if they lead to the wrong result, common law courts will continue to ignore them.

The last sliver of sun has just vanished behind the clouds that have piled up on the horizon for the night, and the music has begun to play. The temperature has dropped enough that I need my jacket. My wife has for some time now been quietly packing up balls, the Frisbee and the surprising quantity of rubbish that accumulates after a day of eating and playing. Normally that is my job, but today she understands. The music that wafts through the vast park, always the same, is an orchestrated version of *Auld Lang Syne*. It plays only at closing time, and since the speakers are invisible, it seems to issue from the flowers, the lakes, and the trees. The music envelops the place in a mournful, though by no means desperate, beauty, reminding those who have lingered that a day in the park inevitably ends with sunset, and, perhaps by extension, that if life is
properly lived, there is no reason to fear death. To listen to this message, conveyed in this way, is one of the reasons I come to this park, and my wife realizes that no convincing could induce me to part without it. My daughter is also unusually patient. She is pushing the stroller around the grass in a wobbly circle. Despite my wife’s infinite kindness, she now signals to me that the time has come to fold the picnic mat and pack it into the backpack.

This draft too has come to an end. I am aware as I finish it—how could it be otherwise—that though I have always struggled to find new and intriguing ways to state the proposition, I have made exactly the same point in each of the dozen articles I have published in the past ten years in the law reviews. The point is this: The law is not a tool. We do not speak through it—if anything, it speaks through us. As I stand here, scribbling on my legal pad in the near darkness and the near emptiness of this amazing space, as my wife and daughter and the stroller move erratically toward the exit, I resolve not to write about this again. I would like to spend the next weekends differently—kicking the yellow ball with my daughter and tossing the Frisbee across the peaceful lawn to my wife.

A park police officer cycles slowly by. As he glances at me, he realizes that I must have a very good reason for standing here in the twilight, writing on a pad held in the air, and realizes too that a puff on the whistle is not needed to insist on the closing hour. He makes his point with a smile and a nod and cycles on. I am not the last one. On the far edge of the grass, a young couple has begun the long walk to the gate. They giggle and shuffle forward, leaning together, each with an arm stretched across the shoulders of the other.

I will now snap the cap on my blue felt-tip pen.
This one then, for old times’ sake.