BEAUTY AND UGLINESS IN OFFER AND ACCEPTANCE

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> Is it not fair to conclude, then, there can be no part of our institution of law which may not yield fresh light, if one knocks at it asking, there also, after beauty?
>
> K.N. Llewellyn[1]

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I. INTRODUCTION

Contract law can be understood, analyzed, and improved based on the criteria of classical aesthetics. Scholars have considered aesthetics and the law, yet none have considered the relationship between classical aesthetics and contracts.[2] This essay argues that the traditional doctrine

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1. K.N. Llewellyn, *On the Good, the True, and the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 250 (1941).

2. *See* Heather Hughes, *Aesthetics of Commercial Law—Domestic and International Implications*, 67 LA. L. REV. 689, 691 n.7 (2007).

of offer and acceptance is beautiful because of its proportion, integrity, and clarity. Based on the same criteria, this essay also argues that U.C.C. § 2-207 is ugly and fails to improve upon traditional offer and acceptance.

Why should we care whether contract law is beautiful? First, beauty is inherently desirable, and we should seek and experience it wherever we can.[3] Ugly contract law denies us of "something of the joy that rightfully belongs in human life," and we should promote aesthetic excellence in all our surroundings.[4] Second, the criteria of beauty will help us identify good contract law, for that which is beautiful is also good.[5] Beauty is how goodness manifests itself to our intellect.[6] It has been described as a symbol of morality.[7] Seeking beauty and avoiding ugliness in contracts should help us improve contract law. Third, classical aesthetics has substantial explanatory power when applied to contracts.

Part II of this essay describes three criteria of beauty: proportion, integrity, and clarity. Based on these criteria, Part III argues that the traditional doctrine of offer and acceptance is beautiful, and Part IV argues that U.C.C. § 2-207 is ugly and suggests improvements.

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3. *Cf.* UMBERTO ECO, THE AESTHETICS OF THOMAS AQUINAS 17 (1988) ("The apprehension of beauty is disinterested pleasure. It is not connected with animal needs or utility. In other words, the apprehension of beauty is its own end, its own justification."); Hannah Ginsborg, *Kant's Aesthetics and Teleology*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.1 (Edward N. Zalta ed., 2014) ("Judgments of beauty are based on feeling, in particular feelings of pleasure. The pleasure, however, is of a distinctive kind: it is disinterested, which means that it does not depend on the subject's having a desire for the object, nor does it generate such a desire."); NICHOLAS WOLTERSTORFF, ART IN ACTION 169 (1980) ("Aesthetic delight is a component within and a species of that joy which belongs to the shalom God has ordained as the goal of human existence, and which here already, in this broken and fallen world of ours, is to be sought and experienced.").

4. *See* WOLTERSTORFF, *supra* note 3, at 170 ("There is no such thing as a *good* artifact . . . which is aesthetically poor . . . . If an artifact occupies a significant place in our perceptual field . . . it is a better artifact if it is an *aesthetically* better artifact.").

5. ECO, *supra* note 3, at 30; MONROE C. BEARDSLEY, AESTHETICS FROM CLASSICAL GREECE TO PRESENT 101 (1966).

6. *Cf.* ECO, *supra* note 3, at 32, 36 ("Good and beautiful have the same reference but differ in meaning. For the good, being what all things want, is that in which the appetite comes to rest; whereas the beautiful is that in which the appetite comes to rest through contemplation or knowledge . . . . Beautiful therefore adds to good a reference to the cognitive powers; good refers simply to that in which the appetite takes pleasure, but beautiful refers to something the mere apprehension of which gives pleasure.") (internal quotation marks omitted); ECO, *supra* note 3, at 56–57 ("Beauty . . . has to do with knowledge").

7. Ginsborg, *supra* note 3, § 2.8.

II. THREE ELEMENTS OF BEAUTY

Beauty is caused by form, which is the arrangement of a thing's parts.[8] Form is the structural principle in an object.[9] It is the pattern which makes an object into a particular type of object.[10] Form is what gives a thing its essence or nature.[11] "[A]esthetic experience of a thing is regulated by the concept of the thing; it involves a judgment regarding the degree of conformity between thing and concept."[12] Form determines a thing's "organic wholeness."[13] So, for example, the form of a bicycle requires it to have two wheels. If an object has three wheels, it is not a bicycle, or it is a deformed bicycle. If a bicycle has one wheel, it is lacking wholeness, and for a bicycle to have one wheel or three is an aesthetic defect, a defect in form.

Beauty has three criteria: proportion, integrity, and clarity.[14] However, the cause of beauty is form, and each of the three criteria is a way of considering form.[15]

A. Proportion

The first criterion of beauty is proportion. Proportion refers to the relationship between the parts of an object.[16] Proportion involves the

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8. ECO, *supra* note 3, at 43, 56–57, 119.

9. *Id.* at 69.

10. *Cf. id.* (Form "does not signify an object which has a structure, but is rather what combines with matter to produce an object. Form in this sense, then, means the actuality, perfection, or determinacy of a thing . . . . [F]orm means essence.") (internal quotation marks omitted).

11. *Cf. id.* at 115 ("Particulars are beautiful because of their own nature, that is, because of their form.").

12. *Id.* at 101 ("Everything is said to be true in the absolute sense because of its relation to a mind on which it depends . . . . A house, for instance, is true if it turns out like the plan in the architect's mind.").

13. *Id.* at 87.

14. *Id.* at 65; *see* WOLTERSTORFF, *supra* note 3, at 162 (" [C]orrespondingly, an ugly object is (1) dissonant, (2) dull, (3) imperfect, and (4) unpleasant . . . ."); *cf.* BEARDSLEY *supra* note 5, at 93 ("The key concepts in Augustine's theory of beauty are unity, number, equality, proportion, and order.").

15. ECO, *supra* note 3, at 121.

16. *Cf.* KEVIN WALL, A CLASSICAL PHILOSOPHY OF ART 23 (1982) ("The property of harmony means that the parts genuinely relate to each other through the whole, i.e., that they are truly parts of the given whole—not extraneous to it or without relation to it—and that they therefore have an aesthetic relation one to the other through this fact.").

consonance of an object's parts.[17] We "delight in rightly proportioned things . . . ."[18] Among other things, proportion can refer to

> [A] purely rational fit between things: logical relations, or the harmony of a sequence of thought . . . . There is also moral proportion. This might be found in a sequence of action, or of thoughts, when they are ordered in accordance with the moral laws, or in the relation of actions and thoughts to the practical dictates of natural reason . . . .[19]

Proportion is the adequacy of a thing to itself.[20] In other words, is the thing what it is supposed to be? If a bicycle has one wheel, there is disproportion between the thing and the idea of the thing.

Proportion can also refer to the fit between a thing and its function.[21] Llewellyn thought that the primary test of legal beauty was functionality.[22] If a thing has a purpose, then it can be proportionate or

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17. WOLTERSTORFF, *supra* note 3, at 162 (citing Wladyslaw Tatarkiewicz, *The Great Theory of Beauty and Its Decline*, J. OF AESTHETICS & ART CRITICISM, 165–80 (1972)).

18. *Cf.* ECO, *supra* note 3, at 56–57, 85–87 ("Aquinas' discussion of beauty often seems to refer to art or the perception of sensible phenomena. However, beauty is not limited to sensible relations and is ultimately rooted in reason; therefore, in Aquinas, beauty may be at its purest when it is not sensible, but rather perceived only by reason.") (citations omitted).

19. *Id.* at 85. For Augustine, the judgment of beauty involved the grasping of order, and "reason is involved in the cognition of order in the pleasure it affords." BEARDSLEY, *supra* note 5, at 95. Order is also a chief cause or form of beauty for Aristotle. Aristotle, *Beauty (Selections from Metaphysics, Rhetoric)* (W.D. Ross & W. Rhys Roberts trans.), *in* PHILOSOPHIES OF ART AND BEAUTY: SELECTED READINGS IN AESTHETICS FROM PLATO TO HEIDEGGER 96 (Albert Hofstadter & Richard Kuhns eds., 1964).

20. ECO, *supra* note 3, at 88. Augustine conceived of beauty as caused by the fittingness of the parts of a thing or mathematical proportion. *See* AUGUSTINE, DE ORDINE (Robert P. Russell trans.), *reprinted in* PHILOSOPHIES OF ART AND BEAUTY, *supra* note 19, at 172, 174. ("Thus when we behold something formed with well-fitting parts, not absurdly do we say that it appears reasonably [fashioned]. In like manner, when we hear a melody harmonize well, we do not hesitate to say that it sounds reasonably [harmonized].").

21. ECO, *supra* note 3, at 88. For Augustine, "[t]he grasp of order is normative: the orderly object is perceived and understood as being what it ought to be, and the disordered object as falling short, in some way, of what it ought to be." BEARDSLEY, *supra* note 5, at 95.

22. Llewellyn, *supra* note 1, at 229.

disproportionate to that purpose.[23] A bicycle's purpose is to be ridden, and a bicycle that rides well is proportionate to its purpose.[24]

Thus, proportion can be perfected in two ways: (1) when a thing has everything that makes up its substance, and (2) when a thing achieves its purpose, which is usually an activity or something to be achieved through an activity.[25]

Proportion "has an infinity of analogues" and everything that exists "can present us with new and unsuspected types of proportion."[26] Proportion is the principle that, aesthetically speaking, things must be measured; however, there "could be an infinity of ways of making and doing things in accordance with proportion."[27]

B. Integrity

The second criterion of beauty is integrity. Integrity is wholeness. A thing that is broken lacks integrity.[28] Ugliness "points to something nonexistent, to a void . . . ."[29] A thing has integrity when "none of it is missing . . . . Things that are lacking in something . . . are for this reason ugly . . . ."[30] "[F]or any object whatsoever which lacks unity to a significant degree, its lack of unity is for everyone an aesthetic defect in that thing. None of us finds a thing's disunity in character either a matter

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23. *Cf.* Ginsborg, *supra* note 3, § 3.1 ("A purpose is the object of a concept, in so far as the concept as seen as the cause of the object, and the purposiveness is the causality of a concept with respect to its object.").

24. *Cf. id.* § 3.1 ("[T]he paradigm of a purpose is a human artifact, since this typically comes into being as a result of the artisan's having a concept of the object he or she plans to produce, a concept which is thus causally efficacious in producing its object.").

25. The first type determines the second because "form is the source of activity." ECO, *supra* note 3, at 89. The first type of perfection can be thought of as an object's "essence." The second type is an object's "end." *See* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 114 (1991) (For Aristotle, "[t]he consequences of a contract were thought to follow from its essence, either because they were included in its definition or because they were a means to the end in terms of which the contract was defined.").

26. ECO, *supra* note 3, at 97; *cf.* WOLTERSTORFF, *supra* note 3, at 164 ("[U]nity can be secured in countless different ways.").

27. ECO, *supra* note 3, at 81.

28. BEARDSLEY, *supra* note 5, at 103; WALL, *supra* note 16, at 23 ("The property of integrity means that the work of art contains all the essential parts which it should. An aesthetic whole, lacking in such a part, is essentially therefore defective.").

29. ECO, *supra* note 3, at 100.

30. *Id.* at 99. Augustine noted that "[w]herefore, considering carefully the parts of this very building, we cannot but be displeased because we see one doorway towards the side and another situated almost, but not exactly, in the middle. In things constructed, a proportion of parts that is faulty, without any compelling necessity, unquestionably seems to inflict, as it were, a kind of injury upon one's gaze." AUGUSTINE, *supra* note 20, at 175.

of indifference or a ground of satisfaction upon contemplation . . . ."[31] There is a close relationship between integrity and proportion, for proportion is necessary for integrity, and integrity guarantees proportion.[32] If a bicycle has only a front wheel, it is lacking both proportion and integrity; if a bicycle is whole, has integrity, its front and back wheels will be in proportion to one another. In fact, integrity is a type of proportion, but a type important enough to single out.[33]

Further, "parts are related to one another by the law of the wholes to which they belong."[34] The idea of a whole bicycle governs the proportion between its wheels. If my vehicle has two wheels, its wheels will be proportionate to one another if the governing idea is that of a bicycle, but not if the governing idea is a tricycle.

C. Clarity

The third criterion of beauty is clarity. Llewellyn writes that "right law must be intelligible, intellectually accessible . . . ."[35] Clarity obtains when one can see clearly a thing's wholeness and its essential parts.[36] Clarity requires that a thing's "structural principle clearly manifests itself and shows itself by extending its rule over the whole."[37] "Clarity is the fundamental communicability of form . . . ."[38] "[C]larity is the shining forth of the universal in the particular . . . ."[39] It "is a pleasure for the intellect just as clear seeing is a pleasure for the eye."[40]

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31. WOLTERSTORFF, *supra* note 3, at 164.

32. WALL, *supra* note 16, at 28 ("[I]integrity necessarily brings harmony. If all the parts are truly parts of the given aesthetic whole, then they will necessarily aesthetically relate one to the other. In this relationship they will find unity in their diversity, i.e., intelligibility. They will be perceived so to relate and they will be perceived to relate in completeness. That this should be called their harmony is easily understood.").

33. ECO, *supra* note 3, at 99.

34. *Id.* at 91.

35. Llewellyn, *supra* note 1, at 249.

36. WALL, *supra* note 16, at 23 ("The property of clarity means that when this situation holds, the work of art is intelligible—clear, radiant—aesthetically. One sees clearly the whole and the essential parts. One takes joy in the vision.").

37. ECO, *supra* note 3, at 116.

38. *Id.* at 119.

39. *Id.* at 120; *cf.* Ginsborg, *supra* note 3, § 1 ("Kant's account of aesthetics and teleology is ostensibly part of a broader discussion of the faculty or power of judgment [*Urteilskraft*], which is the faculty 'for thinking the particular under the universal . . . .'").

40. WALL, *supra* note 16, at 29.

III. BEAUTY IN OFFER AND ACCEPTANCE

A. Proportion, Integrity, and Clarity in Offer and Acceptance

The doctrine of offer and acceptance arose in the common law in the early nineteenth century, although suggestions of the doctrine can be identified from the sixteenth century onward.[41] It signified that contract formation was based on whether the parties had a "concurrence of intention."[42]

Once offer and acceptance had settled into the common law, "it assumed universal ascendancy" and was hailed as an "analytical universal truth about life."[43] "Every expression of common intention arrived at by two parties is ultimately reducible to question and answer . . . for the purpose of creating obligations it may be represent[ed] as, 'Will you do so and so?' 'I will.'"[44] Prominent legal writers have agreed that typically "contract formation is analyzed in terms of a proposal by one party, termed the offer, and the unconditional adherence to that proposal by the other party, termed the acceptance."[45]

Perhaps one of the reasons for the widespread approval of offer and acceptance is its beauty. Consider the doctrine's proportion and integrity. The "whole" we are looking for is "concurrence of intention," or agreement.[46] Offer and acceptance seem especially fit for the task of demonstrating agreement: if there is an offer and an acceptance, how can there fail to be agreement? Offer and acceptance are consonantly related parts of an agreement; their particular relationship to one another creates agreement. Further, an agreement without something at least resembling offer or acceptance has an essential void; it lacks the wholeness or integrity.

Moreover, consider the clarity—the intelligibility—of the doctrine. One commentator writes that "*[o]bviously*, in a simple exchange of promises, the respective propositions of the parties, whether expressed by word or inferred from act or conduct, are easily reducible to an offer

41. KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT, 177–78 n.30 (1990); *see also* Parviz Owsia, *The Notion and Function of Offer and Acceptance Under French and English Law*, 66 TUL. L. REV. 871, 873 (1992).

42. TEEVEN, *supra* note 41, at 179 (citing Alan B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L.Q. REV. 247, 258–59, 265–66 (1975)).

43. Owsia, *supra* note 41, at 877 (citing Simpson, *supra* note 42, at 258).

44. *Id.* (citing Simpson, *supra* note 42, at 258) (quoting SIR WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT 15 (2d ed. 1882)).

45. *Id.* at 890–91 (citations omitted).

46. TEEVEN, *supra* note 41, at 179.

followed by an acceptance."[47] In considering the beauty of offer and acceptance the obviousness of the doctrine is a virtue. We can see the whole clearly: it is agreement. We can see the distinct parts clearly: offer and acceptance. We know where the parts go, even chronologically: offer precedes acceptance.[48] There are "slots" in which the parts of an agreement are designed to fit.[49] The structural principle of the doctrine manifests itself and extends its rule over the whole of the agreement such that "[t]he mechanism helps the development and compartmentalization of sub-rules determining the positions of the contracting parties with respect to such matters as certainty, communication, revocation, correspondence, and others."[50] Offer and acceptance is highly intelligible, and that intelligibility gives aesthetic pleasure.

B. Criticism of Offer and Acceptance

It has been argued that some contracts cannot be understood in terms of offer and acceptance.[51] "It would be a mistake to think that *all* contracts . . . can be analysed into the form of offer and acceptance,"

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47. Owsia, *supra* note 41, at 890; *cf.* Alfred S. Konefsky, *Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. CIN. L. REV. 1169, 1179 (1997) ("The assumptions underlying the traditional rules of offer and acceptance seem to stem from a design for a simple, rather than a complex, world-a universe composed of face-to-face transactions in which people deal with one another on an individual basis rather than engaging in impersonal communication. It is a bipolar world-offer and acceptance, or offer and counter-offer, or offeror and offeree.").

48. *Cf.* Owsia, *supra* note 41, at 890 ("The classical approach to offer and acceptance focuses on the chronological sequence of expressions of the parties' contractual intention as objectively construed.").

49. Lord Wilberforce criticized those who would force facts to fit uneasily into "the marked slots of offer, acceptance and consideration." New Zealand Shipping Co. v. A.M. Satterthwaite & Co., [1974] UKPC 1, [1975] A.C. 154, 167. But this is not a criticism of those times when the facts do fit easily into such "slots." The point is not that offer and acceptance are a necessary mechanism for identifying agreement, but rather how clear the agreement is when offer and acceptance are present. Owsia notes that many cases do not discuss offer and acceptance, suggesting that the doctrine may be unnecessary, but it seems just as likely that the reason for the doctrine going unmentioned is due to its great clarity. It may often be so obvious that agreement is present that analysis seems pedantic. *See* Owsia, *supra* note 41, at 896–97.

50. Owsia, *supra* note 41, at 890.

51. P.S. Atiyah argues that simultaneous exchanges are difficult to analyze in terms of offer and acceptance and to do so may "land one in sheer fiction." P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 59, 61 (1989); *see also* Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 644 (2002) ("[F]ormal offer and acceptance is only one way of manifesting assent.").

writes Anson.[52] And yet, even Anson goes on to say that in "doubtful cases" the offer and acceptance "analysis may be usefully retained."[53] When in doubt, the doctrine remains attractive.[54] One explanation for the persistent usefulness of offer and acceptance is its beauty; the doctrine has proportion, integrity, and clarity.

Yet in some contracts offer and acceptance may be difficult to identify precisely. So, while offer and acceptance is "rightly acclaimed and employed as the general method in normal situations for analyzing and determining the process of contract formation," in other situations "[n]either offer nor acceptance could with any precision be determined."[55]

One example is the so-called simultaneous exchange, in which it may be unclear who offered and who accepted.[56] But this seems like a theoretical red herring: "The offer and acceptance can never be precisely simultaneous."[57] One does not spontaneously produce three dollars at the exact moment the grocer spontaneously produces a gallon of milk. Or consider the situation in which the parties to a contract both sign a prepared document.[58] First, contract formation does not necessarily occur when a writing is signed.[59] Second, in such a situation, the parties will have signed the same document, so it is unnecessary to use the tools of offer and acceptance to identify the contract's terms; this does not mean there was no offer and acceptance.

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52. ANSON, *supra* note 44, at 22.

53. *Id.*

54. Even Atiyah, who says "that to insist on the presence of a genuine offer and acceptance in every case is likely to land one in sheer fiction," says that "it may be convenient to postulate the existence of an offer and acceptance for some purposes." ATIYAH, *supra* note 51, at 61.

55. Owsia, *supra* note 41, at 909, 912.

56. Melvin A. Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1794–95 (2000) ("[M]ost contracts are not formed by an offer-and-acceptance sequence. Instead, most contracts are probably formed by simultaneous actions, like signing, shaking hands, concurring that 'It's a deal,' or the like."); *see also* Julie M. Philippe, *French and American Approaches to Contract Formation and Enforceability: A Comparative Perspective*, 12 TULSA J. COMP. & INT'L L. 357, 365 (2005).

57. George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 547 n.61 (1987).

58. *See* Eisenberg, *supra* note 56, at 1794–95.

59. *E.g.*, Allen v. Ford Motor Co., 8 F. Supp. 2d 702, 705 (N.D. Ohio 1998), *aff'd*, 188 F.3d 506 (6th Cir. 1999) ("A contract may be effective even though the written instrument evidencing its terms has not been executed. Indeed, '[s]ignature spaces in the form contract do not in and of themselves require that signatures of the parties are a condition precedent to the agreement's enforceability.'") (alteration in original) (citation omitted).

Another example is a complex negotiation.[60] Atiyah has said that "the parties may slide imperceptibly into a contract as a result of a sequence of steps, even though they may not have gone through *anything resembling the making of an offer and acceptance.*"[61] But this is an overstatement. It is difficult to imagine a contract, no matter how complex, in which the parties did nothing "resembling the making of an offer and acceptance."[62] Even in a contract negotiated in many stages, proposals must be exchanged, and one proposal must come first and one must come last. Something resembling offer and acceptance has occurred.

Another example is a qualified acceptance in which the offeree purports to accept the terms in the offer but adds varying terms; traditionally such acceptances are deemed rejections and counteroffers.[63] But "[w]here an offeree responds by using the words 'I accept' . . . the offeror is likely to understand that the offeree wants to close the deal, or at least work out the last few details, not to take the offer off the table."[64]

Battles of the forms are prime examples of this situation.[65] An offer is made and accepted. But the acceptance contains varying terms. Traditionally, such an acceptance would not be acceptance, but a counteroffer, and if the contract is formed at that point, the offerree's terms would control.[66] These Mirror Image and Last Shot Rules seem to

60. Philippe, *supra* note 56, at 365.

61. ATIYAH, *supra* note 51, at 60 (emphasis added).

62. *See id.*; Mark E. Roszkowski & John D. Wladis, *Revised U.C.C. Section 2-207: Analysis and Recommendations*, 49 BUS. LAW. 1065, 1071 (1994) ("Normally there will be no agreement without matching offer and acceptance.").

63. Melvin A. Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127, 1161 (1994).

64. *Id.*; *see also* Corneil A. Stephens, *Escape From the Battle of the Forms: Keep It Simple, Stupid*, 11 LEWIS & CLARK L. REV. 233, 239 (2007) ("[T]he mirror image rule makes no allowance for insignificant, immaterial, or irrelevant differences in the parties' forms. If the parties intend to enter into and be bound by a contract, the formation of the contract should not be frustrated by the addition of a term that the parties, at best, would have agreed to, had they known about it, or at worst, would have considered inconsequential."). *But see* John E. Murray, Jr., *The Chaos of the 'Battle of the Forms': Solutions*, 39 VAND. L. REV. 1307, 1328 (1986) ("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.'") (citation omitted).

65. Colin P. Marks, *Not What, but When Is an Offer: Rehabilitating the Rolling Contract*, 46 CONN. L. REV. 73, 86 (2013).

66. *Id.*

assume that the initial offeror must have read and assented to the varying terms in the counteroffer,[67] but

> [I]n real life, buyers and sellers frequently exchanged forms with boilerplate terms that no one read, to apply the common law would mean that the party that sent the last form would have the contract on his or her terms. The drafters of the U.C.C., heavily influenced by the legal realism movement, saw this as an absurdity. Therefore, to avoid application of this "last shot" doctrine whereby the last form won, the U.C.C. permits an acceptance that varies or adds terms to the offer to still act as an acceptance so long as the acceptance is "definite and seasonable."[68]

So, although some of the criticisms of traditional offer and acceptance are overblown, the point is that in some exchanges it will be unclear who technically gave the offer and who gave the acceptance, and to force the facts into the slots of offer and acceptance may be artificial and even unjust.[69]

In aesthetic terms, how may we characterize these alleged defects in traditional offer and acceptance? Nicholas Wolterstorff has suggested that aesthetic excellence is due, in part, to a thing "being internally rich, varied, complex—of its having a variety of significantly differentiated parts."[70] Lack of such internal richness is an aesthetic defect.[71] So, although the relentless beat of a metronome may have perfect proportion and integrity, it lacks internal richness and thus aesthetic excellence.[72]

Perhaps when confronted with certain factual scenarios, offer and acceptance lacks internal richness. It is too monotone. It lacks

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67. *See* Stephens, *supra* note 64, at 238 ("[T]hese doctrines arose in a simpler time—a time when farmers met face to face to dicker over the terms of the sale of a horse, or cow, or pig, or a bale of hay. As a result, the assumption on which these doctrines are based is that both parties are aware, not only of each and every term in the other party's document, but also of each and every term in its own as well. While that may have been true at a time when commercial contracts were personally negotiated and original documents were created for each transaction, that is not true for today's commercial transactions.") (footnotes omitted).

68. Marks, *supra* note 65, at 86.

69. *Cf.* Murray, *supra* note 64, at 1331 ("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.") (citation omitted).

70. WOLTERSTORFF, *supra* note 3, at 165.

71. *Id.*

72. *Id.*

"significantly differentiated parts."[73] In simple exchanges it does well at categorizing manifestations of assent, but in murkier situations it lacks nuance, and this leads to a lack of clarity: Who made the offer? Who made the acceptance? Whose terms control? We cannot see the offer or the acceptance clearly. Perhaps it leads to disproportion in certain agreements, as when an acceptance contains varying terms and is transformed into a rejection or counteroffer, the offeror performs having failed to read the counteroffer, and is later surprised to find that he is stuck with the varying terms in the "acceptance." Or perhaps the alleged defects in traditional offer and acceptance have been overstated and are difficult to improve upon.

IV. UGLINESS IN U.C.C. § 2-207

To rescue us from offer and acceptance's lack of internal richness, the Uniform Commercial Code provides us §§ 2-204 and 2-207. Section 2-204 notes that "[a] contract for sale of goods may be made in any manner sufficient to show agreement . . . . An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."[74] Section 2-204 eliminates any notion that we need to precisely determine who offered and who accepted, especially in a chronological sense. All we really need to know is that the parties agreed.

And yet an important question remains: what are the terms of such a contract? And so § 2-207 attempts to give us an internally rich answer that meets the murky realities of real life, the paradigmatic example being the battle of the forms.

U.C.C. § 2-207 was specifically meant to remedy certain defects in traditional offer and acceptance, such as the Mirror Image and Last Shot Rules when applied to commercial transactions.[75] The drafters of that section

> recognized the reality of modern commercial transactions for the sales of goods. They recognized that in the typical transaction, the seller's standard form response (acknowledgement) to the buyer's offer contained different terms, which under the mirror image rule resulted in no contract being formed. They also recognized that notwithstanding the absence of a contract, the

73. *See id.*

74. U.C.C. § 2-204 (2013).

75. Stephens, *supra* note 64, at 240; John E. Murray, Jr., *The Definitive "Battle of the Forms": Chaos Revisited*, 20 J.L. & COM. 1, 2–3 (2000).

> seller then ships the goods and the buyer thereafter accepts the goods. Despite the buyer's reasonable assumption that seller's response was an acceptance, the buyer later finds out to his surprise that the seller's response is a counteroffer and that he has unwittingly accepted the counteroffer by accepting the goods, the counteroffer being the last shot fired between the parties.[76]

The principal drafter of the Code, Karl Llewellyn, even had the aesthetic in mind: "In the Code he sought to draft 'that rightest and most beautiful type of legal rule, the singing rule with purpose and with reason clear.'"[77] Yet it seems that § 2-207 did not realize Llewellyn's ambitions for it:

> Despite the best intentions of the drafters, it became clear almost immediately that § 2-207 was a "puzzling," "enigmatic," "murky bit of prose" that was a "statutory disaster whose every word invites problems in construction" and was "incapable of generating consistently defensible interpretations and results." It has even been compared to "an amphibious tank that was originally designed to fight in the swamps, but was sent to fight in the desert." Others have characterized it as being "shrouded in uncertainty." Rather than fairly resolving the battle of the forms, § 2-207 has proved to be "a defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair."[78]

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76. Stephens, *supra* note 64, at 240.

77. In Llewellyn's aesthetics, functionality was the primary criteria of beauty. John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 345, n.322 (2000) (citations omitted).

78. Stephens, *supra* note 64, at 241 (quoting Charles M. Thatcher, *Sales Contract Formation and Content—An Annotated Apology for a Proposed Revision of Uniform Commercial Code § 2-207*, 32 S.D. L. REV. 181, 183 (1987); Ebasco Servs., Inc. v. Pa. Power & Light Co., 460 F. Supp. 163, 205 (E.D. Pa. 1978); Sw. Eng'g Co. v. Martin Tractor Co., 473 P.2d 18, 25 (Kan. 1970); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1224 (1982); Letter from Professor Grant Gilmore to Professor Robert Summers (Sept. 10, 1980), *in* COMMERCIAL AND CONSUMER LAW: TEACHING MATERIALS 54–55 (Richard E. Speidel, Robert S. Summers & James J. White eds., 3d ed. 1981); Corneill A. Stephens, *On Ending the Battle of the Forms: Problems with Solutions*, 80 KY. L.J. 815, 822 (1991); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3, at 30 (5th ed. 2000); Gregory M. 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, 328 (1983); Reaction Molding Techs., Inc. v. Gen. Elec. Co., 585 F. Supp. 1097, 1104 (E.D. Pa. 1984), *amended by* 588 F. Supp. 1280 (E.D. Pa. 1984).

Let's consider some of the aesthetic defects in § 2-207.

A. Lack of Clarity and Proportion in § 2-207's "Definite Expression of Acceptance"

Section 2-207(1) reads, "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 . . . ."[79] Section 2-207 rejects the Mirror Image Rule.[80] No longer will a contract be prevented from forming because of different or additional terms in the acceptance. Instead, what is required is a "definite expression of acceptance."[81]

But what is a definite expression of acceptance? Unfortunately, the Code fails to clearly define it, and to the extent it does so by implication, it loses intelligibility.[82] In aesthetic terms, it lacks clarity.

For example, § 2-207 contemplates a "definite expression of acceptance" that materially alters the contract.[83] The meaning of this is unclear. "If an offeree's response to an offer is materially different from the offer . . . then it defies logic and common sense to view that response as a definite expression of acceptance."[84] The official comments to § 2-207 describe materiality in terms of "surprise or hardship."[85] So how can there be a definite expression of agreement when the acceptance would have worked surprise and hardship on the offeror? Why should the offeree be deemed to have accepted when material terms he provided will have to be set aside pursuant to § 2-207(2) in order to form an agreement?[86] This is unintelligible. Courts cannot agree about what to do with it.[87] It injures the intellect to contemplate.

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79. U.C.C. § 2-207(1) (2013).

80. *See id.*

81. *Id.*

82. Stephens, *supra* note 64, at 242.

83. *See* U.C.C. § 2-207(2) (2013).

84. Stephens, *supra* note 64, at 243 (internal quotation marks omitted).

85. *Cf.* U.C.C. § 2-207, cmt. 4 (2013).

86. *See* U.C.C. § 2-207(2) (2013) (stating that terms materially altering the contract will be set aside as proposals).

87. Stephens, *supra* note 64, at 244 ("Some courts hold that an acceptance that states a term that materially alters an offer to the disadvantage of the offeror is an acceptance expressly conditional on assent to the additional or different terms. Other courts hold that in order for the 'expressly conditional' language to apply, the acceptance must be expressly conditional on the offeror's assent to the additional or different terms, and the offeror's assent must be directly and distinctly expressed rather than implied. Other courts fall between these two extremes and provide that whether or not an acceptance is 'expressly conditional' may be implied from the language of the acceptance, whether or not it is a material alteration." (citing Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497

Moreover, this is not an improvement on the traditional rules of offer and acceptance. Recall the Mirror Image Rule, which § 2-207 is trying to fix:

> To be effective, an acceptance must be definite and unequivocal. An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent. The acceptance may not impose additional conditions on the offer, nor may it add limitations. An acceptance which is equivocal or upon condition or with a limitation is a counteroffer and requires acceptance by the original offeror before a contractual relationship can exist.[88]

One concern about this rule is that it unduly takes an offer off the table when inconsequential terms have been added even if the offeree clearly meant to accept.[89] This seems to prematurely generate a counteroffer, creating the danger of a contract being formed based on the Last Shot Rule, but is this what the Mirror Image Rule required? No.

> [A]n acceptance may be valid despite conditional language if the acceptance is clearly independent of the condition. Many cases have so held. Williston states the rule as follows: "Frequently an offeree, while making a positive acceptance of the offer, also makes a request or suggestion that some addition or modification be made. So long as it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer whether such request is granted or not, a contract is formed." Corbin is in agreement with the above view. Thus our task is to decide whether plaintiff's letter is more reasonably interpreted as a qualified acceptance or as an absolute acceptance together with a mere inquiry concerning a collateral matter.[90]

(1st Cir. 1962); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972); Constr. Aggregates Corp. v. Hewitt-Robbins, Inc., 404 F.2d 505 (7th Cir. 1968))).

88. Ardente v. Horan, 366 A.2d 162, 165 (R.I. 1976) (citations and internal quotation marks omitted).

89. Eisenberg, *supra* note 63, at 1161; *see also* Stephens, *supra* note 64, at 239 ("[T]he mirror image rule makes no allowance for insignificant, immaterial, or irrelevant differences in the parties' forms. If the parties intend to enter into and be bound by a contract, the formation of the contract should not be frustrated by the addition of a term that the parties, at best, would have agreed to, had they known about it, or at worst, would have considered inconsequential.").

90. *Ardente*, 366 A.2d at 165–66 (citations omitted).

Perhaps the traditional doctrine is more internally rich than it's been given credit for. It does not necessarily take a deal off the table or determine that there is no agreement simply because the acceptance is accompanied by varying terms. The Mirror Image Rule does not preclude a contract from forming based on varying terms in the acceptance if the acceptance was independent of those terms. And if the acceptance does depend on the varying terms, there is disproportion between the offer and the acceptance. There isn't the definite expression of acceptance § 2-207 requires. It makes sense to call it, as the common law did, a counteroffer.

Now, the rules of counteroffer should be altered when parties are exchanging unread, undickered boilerplate. In such situations, we should avoid the Last Shot Rule. Yet the common law approach seems adequate for dealing with such situations. If a boilerplate acceptance includes varying terms that nobody read or meant,[91] courts should be able to determine whether the acceptance was independent of the varying terms. Courts frequently make similar determinations.[92] And if the court determines the acceptance was dependent on the varying terms, then there is no definite expression of agreement. This approach would "'eliminate the focus on the parties' forms in resolving formation issues"[93] and enhance clarity and proportion in contract formation. Acceptance should be deemed to have occurred when an offeree assents to an offer's terms and any varying terms were independent of the acceptance. Section 2-207(1) actually reduces clarity by allowing an acceptance to occur even when it materially alters the contract.

Section 2-207(1)'s approach also lacks proportion. If we are looking for agreement based on acceptance, then offer has logical priority. There can be no definite expression of acceptance if there is no offer. Thus,

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91. Murray, *supra* note 64, at 1331 (noting that parties often ignore the printed forms used in their exchanges).

92. Inquiries into substantial performance, material breach, and conditions require courts to determine whether terms are essential or not. The analysis would probably look much like Cardozo's approach to separating promises from conditions precedent:

> The distinction is akin to that between dependent and independent promises, or between promises and conditions. Some promises are so plainly independent that they can never by fair construction be conditions of one another. Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant. Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another.

Jacob & Youngs v. Kent, 129 N.E. 889, 890 (N.Y. 1921) (citations omitted).

93. Roszkowski & Wladis, *supra* note 62, at 1067.

once an offer is made, to form an agreement, an acceptance should be proportionate to the offer. Allowing the offeror to be the master of his offer preserves this proportion. Section 2-207's approach of allowing the offeree to accept with terms that materially alter the contract creates disproportion between the parties' manifestations of assent.

What if the boilerplate *offer* contains unread, undickered terms that no one really meant? The analysis should be largely the same. If the offer contains independent terms that do not match the acceptance, for purposes of determining whether agreement exists, they should be set aside. If parties exchange undickered boilerplate, there is no reason to prioritize the offeror's independent terms over the offeree's.[94] In such a case, a court should be permitted to identify whether the parties have agreement on dependent terms (which should include material terms) and set aside independent terms in both forms. For guidance in identifying agreement on material terms, proportion between the offer and acceptance should be sought, especially economic proportion.[95]

Section 2-207(1)'s "definite expression of acceptance" lacks clarity and proportion. Courts should require agreement on dependent terms and allow acceptance to occur only when varying terms are independent of such agreement.

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94. *Cf.* Kaia Wildner, *Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002*, 20 PACE INT'L L. REV. 1, 9 (2008) ("The main argument for the Knock Out Rule is that it renders a more practical as well as a more balanced solution because it does not place one party in an unprivileged position. It also makes the sometimes very difficult determination of the last submitted offer superfluous because, for the conclusion of a contract, there need not be an agreement about all the terms of the contract, but only about the "essentialia negotii.") (footnote omitted); Roszkowski & Wladis, *supra* note 62, at 1067–68 ("If a party desires its contract form to be the contract which governs the transaction, then that party should go to the trouble of having its form agreed to and executed by the other side. If that party is not willing to sacrifice the time and effort this requires, then it should be willing to abide by the rules of Article 2. It is neither reasonable to the parties, nor worthy of our legal system, that such great importance is attached to acts (i.e., when the printed form is delivered) to which the parties attach no significance and which would have no legal consequence but for section 2-207(2).").

95. *Cf.* Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 871 (1999) ("Aristotle's overarching concern was the preservation of proportion in interactions.") (citations and internal quotation marks omitted); Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 488 (1986) ("[E]very person has an equal right not to have his own welfare reduced for the sole purpose of increasing someone else's.") (footnote omitted); GORDLEY, *supra* note 25, at 208 (1991) ("Had one party wished to enrich the other at his own expense, he would have chosen not to exchange but to make a gift.").

B. Lack of Proportion, Integrity, and Clarity in § 2-207(2)

Assuming that we can make it past § 2-207(1) with an agreement, we must ask, "What are the terms of the agreement?" This brings us to § 2-207(2), which unfortunately "answers that question in an inartful, confusing, and perhaps even incomprehensible manner."[96] Section 2-207(2) says:

> 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.[97]

First, § 2-207(2) distinguishes between merchants and non-merchants.[98] If a non-merchant receives an offer and accepts with varying terms, those terms are set aside and considered proposals.[99] Already there's a problem. Instead of the Last Shot Rule, we now have a First Shot Rule.[100] Aesthetically speaking, this rule lacks proportion, integrity, and clarity. A First Shot Rule allows the offeror to control the terms of the agreement based on an "acceptance" which did not necessarily express assent to the offered terms.[101] It varied the terms. So the relationship between the offer and acceptance may be dissonant. The purpose of looking at offer and acceptance is to find agreement. But when we look at an offer and an acceptance with varying terms, how can we be sure the parties agree? Further, it is unclear why the varying terms should be set aside: the First Shot Rule seems arbitrary, and no rationale

96. Stephens, *supra* note 64, at 245 (internal quotation marks omitted).
97. U.C.C. § 2-207(2) (2013).
98. Stephens, *supra* note 64, at 245.
99. *Id.*
100. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. TECH. L. REV. 235 n.472 (2009); Stephens, *supra* note 64, at 245.
101. *See* Stephens, *supra* note 64, at 245.

for it seems forthcoming.[102] Section 2-207(2)'s rule for non-merchants is ugly.

A solution that restores proportion, integrity, and clarity was already described above: to form a contract, the acceptance must be of the dependent terms in the offer, and the varying terms must be independent of that acceptance. If acceptance depended on the varying terms, then we do not have agreement. If the parties perform despite the lack of agreement based on the forms, the contract should be deemed formed based on the conduct of the parties and the terms on which the writings agree, with other terms supplied by gap fillers.[103]

Another aesthetic problem arises if the parties *are* merchants. Now, additional terms do become part of the contract, which brings us back to a version of the Last Shot Rule.[104] The aesthetic problem here is the reverse of the First Shot Rule. The offer and acceptance are disproportionate; they don't match. The agreement lacks integrity; it is missing agreement. The principle of the rule is unclear: why should the offeror be stuck with the offeree's additional terms, even if he does perform after receiving the purported acceptance? It is not because he read the additional terms and assented; we are assuming the offeror doesn't read the boilerplate acceptance. So his performance or silence can't be taken to mean that he has assented to the additional terms. It doesn't make sense to allow additional terms to become part of the contract without ratification of those terms by the offeror, even if the parties are merchants.[105] If such additional terms are economically significant, they create disproportion between the offer and the acceptance, and there is no agreement. If such terms are economically insignificant, they can safely be set aside as independent of the offeree's acceptance of the material terms of the offer. Additional terms, if independent of the acceptance, should be knocked out and, if necessary, replaced with gap fillers.

Section 2-207(2) tries to restore some balance to merchant boilerplate exchanges. First, the additional terms will not become part of the agreement if the other merchant objects to them.[106] But we're

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102. *See* Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11, 50 (2007); Stephens, *supra* note 64, at 239, 245.

103. Roszkowski & Wladis, *supra* note 62, at 1066 (arguing that the formula in § 2-207(3), which bases the contract on the conduct of the parties, the terms upon which the writings agree, and gap fillers, should be emphasized).

104. Stephens, *supra* note 64, at 246.

105. *Cf.* Roszkowski & Wladis, *supra* note 62, at 1067 (arguing that revised § 2-207 should have provided that additional terms are not part of the transaction).

106. U.C.C. § 2-207(2)(c) (2013).

assuming the merchant doesn't read the forms, so how will he know to object? This rule is unlikely to restore proportion to a contract or help us identify whether the offeror assented to the additional terms. Second, if the varying terms materially alter the agreement, they are set aside.[107] This helps the offeror but hurts the offeree because now he is stuck with a contract which he had only accepted on materially different terms. Third, the offer may also prevent varying terms from becoming part of the contract by limiting itself to its own terms.[108] But if the offer limited itself to its terms and the "acceptance" included varying terms, isn't there a good argument to be made that we do not have an agreement?[109] In all of these situations, the manifestations of assent are likely to disagree with each other and give us an ugly contract.

Proportion, integrity, and clarity suggest some solutions. An acceptance which contains *dependent* varying terms should be deemed a rejection or counteroffer; its terms should be specifically ratified before being enforced.[110] If the offeror receives dependent varying terms, does not ratify them, but performs anyway, and the offeree accepts performance, the varying terms in both forms should be knocked out and replaced with U.C.C. gap fillers, which will preserve the proportion and the integrity of the agreement.[111]

When using U.C.C. gap fillers, courts should place particular emphasis on course of performance, course of dealing, and usage of trade.[112] These sources will tend to reflect exchanges at market price.[113]

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107. U.C.C. § 2-207(2)(b) (2013).

108. U.C.C. § 2-207(2)(a) (2013).

109. *See* Murray, *supra* note 64, at 1329–30 ("[T]he drafters may have intended to continue the power of an offer limiting acceptance to the terms of the offer to preclude *any* acceptance if additional or different terms appear in the response to the offer.").

110. *Cf.* Roszkowski & Wladis, *supra* note 62, at 1072, 1077 ("Absent such mutual conduct, mutual expressions of assent are necessary. Generally, this requires an offer and a response that states it is an acceptance . . . . [T]he terms should be those to which the parties in their language or other conduct in fact agreed.").

111. *Cf. id.* at 1072 (The U.C.C. "should provide that mutual conduct recognizing the agreement after the exchange of nonmatching forms is the primary basis for finding an agreement in fact. Absent such mutual conduct, mutual expressions of assent are necessary. Generally, this requires an offer and a response that states it is an acceptance."); Wildner, *supra* note 94, at 11 ("The performance of both parties is interpreted, according to § 154(1) German Civil Code, as an agreement to all 'essentialia negotii,' or dickered terms that the parties considered necessary for a contract formation. It is assumed that a contract is formed with all the terms the parties agreed upon. The conflicting terms, however, are replaced by statutory provisions.").

112. *Cf.* Roszkowski & Wladis, *supra* note 62, at 1074 (arguing that Revised § 2-207 should emphasize course of performance, course of dealing, and usage of trade as an important source of U.C.C. gap fillers).

And market price will tend to facilitate equal exchanges between parties.[114] This will generally lead to economically proportionate contracts when parties have performed but not demonstrated agreement in their writings.

An offeree should not get to take advantage of an offeror by imposing varying terms through unread, undickered forms. (The situation is different if the varying terms were made clear to the offeror.[115]) But neither should the offeror be allowed to impose his boilerplate terms, as the acceptance rejected them if it included dependent varying terms.[116] To do otherwise causes contracts to depend on "[f]ortuities of timing in the use of standard forms."[117] Assuming the parties are generally not reading each other's forms, yet are establishing the existence of a

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113. *See* Morrissey v. Comm'r of Internal Revenue, 243 F.3d 1145, 1147–48 (9th Cir. 2001) ("Fair market value is 'the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.'") (citation omitted); *cf.* U.C.C. § 2-723(2) (2013) (allowing usage of trade as reasonable substitute for prevailing price); Sandeep Vaheesan, *Reviving an Epithet: A New Way Forward for the Essential Facilities Doctrine*, 2010 UTAH L. REV. 911, 955 ("[C]ourts could look to a prior course of dealing to find a market price for the same or similar asset . . . ."); Robert A. Hillman, *Court Adjustment of Long-Term Contract: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 22 n.106 (noting that when courts fill price gaps they turn to both market price, course of dealing, and usage of trade); Eric G. Orlinsky, *Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability*, 24 DEL. J. CORP. L. 451, 516 (1999) ("[C]ourse of dealing—or process—is a key component to a 'fairness' determination . . . .") (footnote omitted); H.W. Chaplin, *The Law of Dedication in Its Relation to Trust Legislation*, 16 HARV. L. REV. 329, 338 (1903) ("And finally, if the public might possess by express dedication a right to have coal mined and sold to them at fair prices, why might not the dedication of such a right be implied from a course of dealing between owner and public exactly along those lines?").

114. *See* James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1611–12 (1981); *cf.* Dimatteo, *supra* note 95, at 844 (noting that because the right to contract is God-given, a contract must occur at a just price).

115. Murray, *supra* note 64, at 1335 ("[I]f 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."); Rozskowski & Wladis, *supra* note 62, at 1075 ("When the buyer is aware that goods are tendered subject to known terms, it should not be able to take the goods and avoid those terms.").

116. *Cf.* Stephens, *supra* note 64, at 263. In proposing a revised § 2-207, Stephens notes that the Knock Out Rule should be applied neutrally so that neither party is favored and neither party is stuck with the other's boilerplate. *Id.*

117. *See* Roszkowski & Wladis, *supra* note 62, at 1066 (citing Task Force of the A.B.A. Subcomm. on General Provisions, Sales, Bulk Transfers, and Documents of Title, Comm. on the Uniform Commercial Code, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Essay 2 Study Group*, 16 DEL. J. CORP. L. 981, 1056 (1991)).

contract by their performances, emphasis should be taken off those forms and placed instead on creating proportion in the contract via gap fillers.

C. Lack of Integrity in § 2-207(2)

Another prominent defect in § 2-207(2) is that it fails to address "different terms."[118] Section 2-207(1) states that the inclusion of different terms in an acceptance does not prevent a contract from forming, and § 2-207(2) is supposed to tell us what to do with different terms, but it fails to even mention them.[119]

Some courts believe that this was simply a drafting error; they believe § 2-207(2) does apply to different terms, but the drafters forgot to add the necessary language.[120] If this is correct, there is a crude aesthetic defect in the Code. Section 2-207(2) is literally missing something: the word "different." This is a defect in integrity; § 2-207 is not whole.

Other courts believe § 2-207(2) does not accidentally omit the word "different," which means only additional terms can become part of the contract.[121] But this leads to the issue of determining the difference between different and additional terms. Every additional term could be called a different term, but if that were the case then no varying terms would ever make it into the contract, a result not contemplated by § 2-207. So some have said that an additional term is one not alluded to in the offer, and a different term is one that conflicts with a term in the offer.[122] But the question remains: what to do with the different terms? Section 2-207 does not say. Again, something is missing.

Some courts have applied the Knockout Rule, in which the different terms are eliminated and replaced by default terms.[123] But this raises a problem of disproportion between offer and acceptance and a lack of integrity in the agreement: how did the offeree agree to these terms, especially given that he made his disagreement with the terms of the offer explicit?

The Code should tell us what to do with different terms. In the interest of proportion and integrity, different terms, which are independent of the acceptance of offers terms, should be set aside as

118. U.C.C. § 2-207 (2013).

119. *See id.*

120. Gregory E. Maggs, *Patterns of Drafting Errors in the Uniform Commercial Code and How Courts Should Respond to Them*, 2002 U. ILL. L. REV. 81, 90 (2002); Henry D. Gabriel, David W. Gruning & Linda J. Rusch, *General Provisions and Sales*, 50 BUS. LAW. 1461, 1465 n.29 (1995).

121. Stephens, *supra* note 64, at 248–49.

122. *Id.* at 249.

123. *Id.*

proposals to be specifically ratified or replaced with gap fillers.[124] If the different terms were independent, we can find a consonant relationship between the offer and the acceptance because the parties do have an agreement; although the acceptance contains different terms, the offeree's acceptance does not depend on them. This creates integrity in the agreement. If the acceptance depends on the different terms, the acceptance should be deemed a counteroffer. If the offeror performs but does not specifically assent to the different terms, the different terms in both forms should be knocked out and replaced with gap fillers like course of performance, course of dealing, and usage of trade, which will tend to reflect exchanges at market prices.[125]

D. The Beauty of § 2-207(3)

Section 2-207 isn't entirely ugly. Readers will have likely noticed that the solutions to the defects in § 2-207 proposed here bear substantial similarities to the rule in § 2-207(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.[126]

In a world in which parties to contracts are increasingly not reading the words in boilerplate forms, more contracts should be interpreted according to the principles of § 2-207(3). Section 2-207(3) creates proportion and clarity in the parties' manifestations of assent by making the terms of the contract those upon which the writings agree and

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124. *See id.*

125. *See supra* note 113; *cf.* Murray, *supra* note 64, at 1338 ("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) [in which a contract forms based on conduct] as a result of the parties' conduct is held not to include those additional terms." (quoting C. Itoh & Co. (America) Inc. v. Jordan Int'l Co., 552 F.2d 1228, 1238 (1977))). The German Federal Supreme Court has reasoned that parties' conflicting standard terms do not prevent a contract from forming when the parties have indicated by their performance that they considered the lack of agreement about all the parties' terms not essential. *See* Wildner, *supra* note 94, at 17.

126. U.C.C. § 2-207(3) (2013).

supplying other terms using gap fillers.[127] It makes little sense to treat written terms as sacred when they are undickered boilerplate (in offer or acceptance) just because they appear in a writing. The governing idea is agreement, and if no one is reading the boilerplate, the writings don't represent agreement, and there is little reason to enforce those terms *just because* they appear in a boilerplate writing.

Perhaps such boilerplate terms were inserted for good reasons like economic efficiency. But to the extent such terms promote economic efficiency or the reasonable interests of the parties, courts replacing them based on course of performance, course of dealing, and usage of trade will tend to promote exchanges at fair, market prices.[128]

V. CONCLUSION

This essay has applied criteria of beauty to the traditional doctrine of offer and acceptance as well as U.C.C. § 2-207, which tries and largely fails to improve upon traditional offer and acceptance. It has been argued that offer and acceptance is beautiful, as it contains proportion, integrity, and clarity. It has been argued that criticism of the doctrine is overstated. It has also been argued that the well-known defects in § 2-207 can be understood in aesthetic terms and that § 2-207 can be improved based on the aesthetic criteria of proportion, integrity, and clarity. This essay also means to suggest that aesthetic criteria may provide understanding, analysis, and improvement in other areas of contract law.

127. *See id.*
128. *Cf. supra* note 113.