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STOCK EQUIPMENT FOR THE BARGAIN IN FACT: TRADE USAGE, "EXPRESS TERMS," AND CONSISTENCY UNDER SECTION 1-205 OF THE UNIFORM COMMERCIAL CODE†

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The Uniform Commercial Code (Code) treats trade usage as an essential element of agreements, reflecting the true understanding of the parties. Section 1-205(4) of the Code requires that trade usage and the express terms of an agreement be construed as consistent whenever reasonable, but when such a construction is unreasonable, express terms control usages of trade. In this Article, Professor Kastely examines and evaluates the various approaches courts have adopted in interpreting section 1-205(4). After reviewing the policies underlying the Code’s treatment of trade usage, Professor Kastely suggests an interpretive approach to section 1-205(4) that would further the intent of the Code’s drafters to make trade usage binding in most cases. Under Professor Kastely’s proposal, courts construing agreements containing written terms in conflict with trade usage would be required to give effect to the usage unless the parties expressly agreed not to follow it. The Article concludes with a response to two major criticisms of the Code’s treatment of trade usage and a defense of section 1-205(4).

The Uniform Commercial Code has reformed the law governing commercial transactions in numerous ways. Some changes were obvious and immediate,1 while others were more subtle and have been slower to take effect. Numerous provisions in Articles 1 and 2 made fundamental changes merely by reformulating or refining traditional doctrine concerning the creation and content of contractual obligations.2 As these provisions structure debate within spe-

† “The point is this, too trite to be remembered: Unless the stock intellectual equipment is apt, it takes extra art or intuition to get proper results with it. Whereas if the stock intellectual equipment is apt, it takes extra ineptitude to get sad results with it.” Llewellyn, The First Struggle to Unhorse Sales, 52 HARV. L. REV. 873, 876 (1939) (emphasis omitted).
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1. Upon adoption of the Code, for example, each state established a unified system for registering security interests in personal property, and firm offers between merchants became binding without consideration. See U.C.C. §§ 9-401, 2-205 (1978). See generally Mentschikoff, Highlights of the Uniform Commercial Code, 27 MOD. L. REV. 167 (1964) (discussing important innovations in the Code).

2. Numerous articles have explored this aspect of the Code. Three that are particularly helpful are Casebeer, Escape from Liberalism: Fact and Value in Karl Llewellyn, 1977 DUKE L.J. 671;
pecific disputes, they reorient the way we think and talk about contractual obligations.

One of the most significant changes effected by the Code is the treatment of trade usage as an actual part of agreements. Under pre-Code doctrine, the common practices of a particular trade were used primarily to define specific technical terms or to fill in "gaps" left by the parties' agreement. If the parties had failed to agree on a particular matter, courts would use trade usage to sup-


3. U.C.C. § 1-205(3) (1978) provides: "[A]ny usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give[s] particular meaning to and supplement[s] or qualify[es] terms of an agreement." For discussion of the importance of this section, see Carroll, supra note 2, at 155-77; Corbin, The Uniform Commercial Code—Sales: Should It Be Enacted?, 59 Yale L.J. 822, 827-29 (1950); Furnish, Custom as a Source of Law, 30 Am. J. Comp. L. 31, 38-42 (Supp. 1982); Kirst, Usage of Trade and Course of Dealing: Subversion of the UCC Theory, 1977 U. Ill. L.F. 811; Leve, Trade Usage and Custom Under the Common Law and the Uniform Commercial Code, 40 N.Y.U. L. Rev. 1101 (1965); Mentschikoff, supra note 1, at 168-70; and Mooney, supra note 2, at 250-53.

4. See, e.g., Hurst v. W.J. Lake & Co., 141 Or. 306, 310-11, 16 P.2d 627, 629 (1932) ("Thus one is justified in saying that the language of the dictionaries is not the only language spoken in America."); Distillers Distrib. Corp. v. Sherwood Distilling Co., 180 F.2d 800 (4th Cir. 1950); Denker v. Mid-Continent Petroleum Corp., 56 F.2d 725 (10th Cir. 1932); Gumbinsky Bros. v. Smalley, 203 A.D. 661, 197 N.Y.S. 530 (1922), aff'd, 235 N.Y. 619, 139 N.E. 758 (1923); Restatement of Contracts §§ 235(b), 246 comment a (1932); 3 A. Corbin, Contracts § 555, at 228-39 (1960); 3 S. Williston, Contracts § 650 (rev. ed. 1936).

5. See, e.g., California Lettuce Growers, Inc. v. Union Sugar Co., 45 Cal. 2d 474, 482, 289 P.2d 785, 790 (1955) ("It is the general rule that . . . evidence of usage is always admissible to supply a deficiency. . . .''); Dant & Russell, Inc. v. Grays Harbor Exportation Co., 106 F.2d 911 (9th Cir. 1939); J.B. Lyon & Co. v. Culbertson, Blair & Co., 83 Ill. 33 (1876); Homix Prods., Inc. v. Henry Paps, Inc., 274 A.D. 648, 86 N.Y.S.2d 648, aff'd, 299 N.Y. 773, 87 N.E.2d 687 (1949); see also Backus & Harfield, Custom and Letters of Credit: The Dixon, Irmaos Case, 52 Colum. L. Rev. 589, 602 (1952) ("It is the function of custom to fill in the interstices of an agreement, to reduce with the burden of written memoranda of agreement, and to substitute for agreement with respect to matters overlooked or not expressly foreseen."). As one student commentator observed:

Courts may . . . permit the introduction of evidence demonstrating that the parties attached a meaning to the terms of their contract dissimilar to that generally attributable to such phrases or symbols. Alternatively proof of usage may be admitted to serve an interstitial function in order to complete the terms of an agreement intended by the parties but not fully articulated on the face of the contract.

plement the contract. Although courts justified this practice on the theory that "the parties knew of the usage and contracted with reference to it," they nonetheless treated trade usage as extrinsic to the agreement itself. Under this pre-Code practice, courts viewed the parties' language and conduct as the essence of their agreement and relied on trade usage only if the actual agreement lacked clarity or specificity.

The Code changed this approach by treating trade usage as an essential part of the "agreement." Section 1-205 provides that the "true understanding" of the parties is reflected in trade usage, as well as in the parties' lan-

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6. The Uniform Sales Act included the following provision:
   
   Variation of Implied Obligations. Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

7. The current language was adopted in 1956 with the explanation that "[t]he changes leave the effect of course of dealing and the like to other provisions such as Section 1-205."

8. Under U.C.C. § 1-201(3) (1978), "'[a]greement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208)."

9. "Usage of trade" is defined by U.C.C. § 1-205(2) (1978):

   A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts.

10. Under U.C.C. § 1-201(3) (1978), "'[a]greement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208)."

11. See U.C.C. § 2-202 comment 2 (1978) ("Paragraph (a) makes admissible evidence of . . . usage of trade . . . in order that the true understanding of the parties as to the agreement may be reached."); cf. American Mach. & Tool Co. v. Strite-Anderson Mfg. Co., 353 N.W.2d 592, 597 (Minn. App. 1984) ("The trend has been for judges, looking beyond written contract terms to reach
guage and conduct. This "true understanding" or "expectation" is the primary source of contractual obligation under Article 2.

This conception of trade usage reinforces other Code provisions that interpret contract obligations by reference to commercial practices and standards. The Code embodies the beliefs that the reasonable practices and standards of the commercial community are an appropriate source of legal obligation and that these practices create actual expectations which should be given full effect in the law. The treatment of trade usage as a part of the agreement in section 1-205 provides a foundation for these principles.

The shift from viewing trade usage as a point of reference in filling gaps to regarding it as part of the agreement itself is not problematic. Contract doctrine has long held that liability may be based on something other than an express promise. Courts and commentators have traditionally spoken of "intentions"

the "true understanding" of the parties to extend themselves to reconcile trade usage and course of dealing with seemingly contradictory express terms.

12. U.C.C. § 1-205(3) (1978); see supra note 3 (text of provision); see also U.C.C. § 1-205 comment 4 (1978) ("Part of the agreement of the parties . . . is to be sought for in the usages of trade which furnish the background and give particular meaning to the language used, and are the framework of common understanding."). See generally Hawklund, Sales Contract Terms Under the UCC, 17 U.C.C. L.J. 195, 198 (1985) (trade usage is part of the agreement itself under the Code); Murray, Philosophy of Article 2, supra note 2, at 14-15 (trade usage is one important "non-language manifestation" of agreement under the Code).

13. To accept this conception is not to deny the argument, made by several scholars, that using trade usage to define contractual obligations undermines the notion that such obligations are purely private. See P. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 182 (3d ed. 1981); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 188-201 (1977); Farnsworth, Disputes over Omission in Contracts, 68 COLUM. L. REV. 860 (1968); cf. 3 A. CORBIN, supra note 4, § 556, at 243-44 (trade usage is used both for interpretation and construction of contracts). This conception does, however, lead one to conclude that trade usage cannot be viewed as a solely external source of obligation and that the relationship between public and private sources of obligation is more complex than some have suggested. See infra notes 224-41 and accompanying text.

14. Under the Code, the initial basis for contractual obligation is "agreement," and "agreement" includes both explicit and implicit expectations of the parties. See U.C.C. §§ 1-201(3), 2-301 (1978); authorities cited supra note 10.

15. See, e.g., U.C.C. §§ 2-103(1)(b) (1978) ("good faith"); id. § 1-204(2) ("reasonable time"); id. § 2-305(1) ("reasonable price"); id. § 2-311(1) (specification "within limits set by commercial reasonableness").

16. Section 1-205 indicates that only "reasonable" trade usages are binding. For a discussion of this issue, see infra notes 242-51 and accompanying text.

17. See Carroll, supra note 2, at 156-67; Danzig, supra note 2, at 627-31; Mooney, supra note 2, at 224-29, 250-53; Murray, Philosophy of Article 2, supra note 2, at 14-16; cf. Farnsworth, Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code, 30 U. CHI. L. REV. 666, 671-78 (1963) (discussing the commercial reasonableness of good faith under the Code).

18. Section 1-205 also governs the effect of course of dealing, but this Article will focus exclusively on trade usage because of its key role in the jurisprudence of the Code and contract law. See generally Danzig, supra note 2, at 629-31 (discussing the importance of commercial practice in the Code); Mooney, supra note 2, at 250-53 (emphasizing the role of § 1-205 in Code jurisprudence); Murray, Philosophy of Article 2, supra note 2, at 14-16 (discussing trade usage in the Code). Courts generally have treated course of dealing and trade usage cases similarly under § 1-205. See, e.g., Budget Sys. v. Seifert Pontiac, Inc., 40 Colo. App. 406, 579 P.2d 87 (1978).

19. See generally P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 149-51, 483-84 (1979) (discussing 18th and 19th century ideas regarding implied promises); E. FARNSWORTH, CONTRACTS, § 3.10, at 124 (1982) ("Conduct that would lead a reasonable person in the other party's position to infer a promise in return for performance or promise may amount to an offer."); M. HORWITZ, supra note 13, at 170-73 (discussing 18th century views of express and implied con-
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and "expectations" as sources for defining the obligations imposed by a contract. Although it would be hard to say that a specific buyer or seller actually promised to comply with trade usage—if by "promise" we mean the communication of a binding intention to do a certain act—it is quite easy to conceive that both parties expected that the normal practice would be followed. The reasoning behind section 1-205 is straightforward: if a contract can be defined by shared expectations, and if those expectations were created by trade usage, then the contract should be defined by trade usage.

This new conception of trade usage, however, makes it more difficult to determine the content of any particular agreement. If trade usage is treated as direct evidence of the parties' agreement, how should it be weighed against other evidence of shared expectations, such as the parties' words or conduct? This question becomes more pointed when the parties' oral or written communications suggest that they did not intend to follow a particular trade usage. Under pre-Code doctrine, resolving this problem was simple: trade usage was significant only if there was a gap in the parties' explicit communications. If the language appeared to cover a particular issue, there was no need to consider trade usage in connection with that issue.

Under the Code, however, trade usage cannot be so easily dismissed. Sec-

tracts); cf. C. Fried, CONTRACT AS PROMISE (1981) (exploring the breadth and limits of the promise principle).

20. See, e.g., J. Chitty, THE LAW OF CONTRACTS 73-74 (1851); 3 A. Corbin, supra note 4, § 534; 4 W. Page, THE LAW OF CONTRACTS § 2022 (2d ed. 1920); Reiter & Swan, Contracts and the Protection of Reasonable Expectations, in STUDIES IN CONTRACT LAW 1, 6-8 (B. Reiter & J. Swan eds. 1980).

21. See generally C. Fried, supra note 19, at 7-17 (discussing the meaning of "promise").

22. Those who urged adoption of the Code emphasized the idea that the law should give effect to the parties' expectations. See, e.g., Davenport, The Code Approach and Sources of Law, 44 Neb. L. Rev. 362, 375 (1965) ("The result in pre-Code sales law was more frequently to defeat the reasonable expectations of businessmen than it was to fulfill those expectations. So the draftsmen of the Code proceeded on the premise that Article 2 should fulfill those reasonable expectations, not defeat them."). See generally Murray, Philosophy of Article 2, supra note 2, at 17 (the Code's definition of "bargain" includes all reasonable expectations, even as to matters not consciously considered at the time of the initial agreement).


24. U.C.C. § 2-202 (1978) provides:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Under the Code, evidence of trade usage is admissible even if the parties intended to have a fully integrated writing. See, e.g., Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 805 (9th
tion 1-205(4) requires the trier of fact in a contract dispute to analyze conflicts between trade usage and other types of evidence in accordance with the following standard: "The express terms of an agreement and an applicable . . . usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control . . . usage of trade." This provision introduces new concepts and formulations without much explanation or explicit guidance and has proved troublesome. Indeed, courts have interpreted this section in conflicting ways, disagreeing about its basic meaning and function.

This Article explains the difficulty courts have had in interpreting section 1-205(4) and develops an alternative interpretive approach that gives effect to the Code's doctrinal changes and orientation toward commercial practice. Part I of the Article reviews judicial interpretations of section 1-205(4) and focuses on the influence of the parol evidence rule. Part II evaluates these interpretations and suggests an alternative view of section 1-205(4). The Article then discusses two major criticisms of the Code's treatment of trade usage and offers a partial defense of section 1-205.

I. JUDICIAL INTERPRETATIONS OF SECTION 1-205(4)

In numerous cases, courts have relied on section 1-205(4) to evaluate the scope and meaning of contract terms and to resolve apparent conflicts between the parties' language and normal trade practices. In several early cases, courts sought to determine the parties' actual expectations without regard to whether those expectations were created by language or by trade practice. Although no consistent interpretation emerged from these early cases, the courts' flexible approach was in keeping with the statutory purpose of section 1-205(4). More recent decisions, because of the influence of the parol evidence rule, have given undue priority to written terms, and this trend has confused the basic meaning and function of section 1-205(4).

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26. See infra notes 29-48 and accompanying text.
27. See infra notes 49-70 and accompanying text.
28. See infra notes 71-117 and accompanying text.
A. Flexibility in Several Early Cases

As the drafters of the Code observed, "[t]he principle of freedom of bargain is a principle of freedom of intended bargain. It requires what the parties' [sic] have bargained out to stand as the parties shaped it, subject only to certain overriding rules of public policy." How, then, can trade usage, which the parties have not shaped by themselves, ever be given greater weight than the parties' own language? In several early cases, courts found that even though the parties had adopted a written term that appeared to conflict with particular trade practices, they actually expected to comply with the trade usage. Assuming these decisions were correct, there are two possible reasons that the courts gave priority to trade usage over the language of the parties. First, the parties might not have actually agreed to the written term, even though it was included in the documents. Second, the parties might have understood the written term to mean something quite different from its ordinary usage. In either of these situations, the trade usage would be a more accurate reflection of the parties' actual expectations than the written term.

In Provident Tradesmens Bank & Trust Co. v. Pemberton, the first major case decided under section 1-205(4), a bank sued an automobile dealer, Prusky, for enforcement of a surety agreement executed in connection with an auto loan to one of Prusky's customers, Ms. Pemberton. As part of the arrangement, Ms. Pemberton had purchased insurance on the automobile for fire, theft, and collision. When the insurance policy was cancelled, only the bank was notified, and it did not inform Prusky, the surety, of the cancellation. After the car was severely damaged in an accident, Ms. Pemberton defaulted on the loan, and the bank sought payment from Prusky. In defense, Prusky argued that the bank had violated its obligation, based on trade usage, to notify him that the insurance policy had been cancelled. The bank responded by citing a term in the surety agreement that purported to waive "all notices whatsoever in respect to this Agreement."

29. REPORT AND SECOND DRAFT, THE REVISED SALES ACT 52 (1941) (Comment 3 to § 1-C), reprinted in 1 UNIFORM COMMERCIAL CODE DRAFTS, supra note 10, at 269, 332 [hereinafter cited as REVISED SALES ACT, SECOND DRAFT]. This draft, including the comments, was approved by the Conference of Commissioners on Uniform State Laws in September 1941. Id. at 281.

30. This proposition might also be true of an oral term because spoken words may carry a special meaning to one in the trade. The discussion in this Article focuses on apparent conflicts between trade usage and written terms because the most difficult questions arise in this area. Section 1-205(4), however, applies equally to oral and written terms.


32. The Bank alleged (1) that an unusual procedure was used because Ms. Pemberton was a bad credit risk, (2) that Prusky's guarantee was given in his individual capacity, and (3) that the trade usage applicable to "dealer transactions" therefore did not apply. The trial court rejected these arguments. Provident Tradesmens Bank & Trust Co. v. Pemberton, 24 Pa. D. & C.2d 720, 723, 173 A.2d 780, 783 (1961).

33. The policy apparently was cancelled for nonpayment of a premium. The Bank received notice because it was named as the "loss payee" in the policy. Id. at 722, 728, 173 A.2d at 782, 784.

34. Prusky argued that if he had been notified of the cancellation, he could have arranged alternative protection for himself. Id. at 723, 173 A.2d at 781.

35. Id. at 728, 173 A.2d at 782.
The Pennsylvania Superior Court held that the bank was obligated to give notice, despite the written term, in accordance with the normal trade practice. Relying on sections 1-205(2) and 2-202(a), the court evaluated all the evidence to determine the parties' actual understandings and expectations. The court concluded that the trade usage justified Prusky's expectation that the bank would notify him of any cancellation of the insurance and that the "no notice" term in the surety agreement did not in itself change that expectation. The court noted that the written term was merely part of a standard printed form and that it did not even refer to the normal notification practice.

The Pemberton decision thus recognized the actual expectations of the parties, without concern for whether those expectations were more accurately reflected by the trade usage or by the written agreement. The court either believed that the parties did not actually intend to follow the "no notice" clause or that they did not mean for the clause to refer to the kind of notice at issue in the case.

The Law Division of the New Jersey Superior Court adopted a similar approach in Gindy Manufacturing Corp. v. Cardinale Trucking Corp. Cardinale purchased twenty-five new semi-trailers from Gindy. After delivery, Cardinale claimed that there were defects in the equipment. In response to Cardinale's claim, Gindy cited clauses in the standard form contract providing that the buyer took each vehicle "as is" and that the agreement included no warranties. Cardinale alleged, however, that the normal practice in the industry was for the seller of new vehicles to repair or to compensate for all manufacturing defects. Relying on section 1-205, the court held that trade usage could be used to determine the actual agreement of the parties. The court indicated that the trier of fact should consider how the "as is" clause was normally used and understood by those in the trade. In this way the trier could focus directly on the normal expectations created by the specific terms of the form contract. The court concluded that a reasonable member of the trade could have understood the "no warranties" clause to apply only to the sale of used vehicles. Furthermore, in the court's view, a reasonable member of the trade might not have viewed the
"as is" clause as relieving the seller of its obligation to deliver the trailers in good condition. The court found that if these constructions reflected the actual meaning of the clauses, there would be no inconsistency between the express terms and the trade usage under section 1-205(4).\textsuperscript{45}

In another relatively early case, \textit{Michael Schiavone & Sons v. Securalloy Co.},\textsuperscript{46} the contract in dispute called for delivery of "500 Gross Tons" of stainless steel solids. The defendant delivered only 210 tons. Despite the written term, the court allowed the jury to determine whether the parties had actually expected to follow the normal trade practice of allowing the seller to deliver less than the specified amount.\textsuperscript{47}

In these early decisions\textsuperscript{48} the courts focused on the parties' actual expectations as reflected by trade usage, but also gave appropriate weight to the parties' language and to their actual understanding of written terms. These courts accepted the idea that trade usage is normally a significant part of an agreement, and they were willing to critically examine written terms that appeared to modify trade usages.

B. \textit{The Influence of the Parol Evidence Rule}

The flexible approach of the early cases was all but lost in later decisions as courts turned to the parol evidence rule for guidance in interpreting section 1-205(4). At common law, evidence of trade usage generally was treated like any other extrinsic evidence excludable under the parol evidence rule.\textsuperscript{49} It is not surprising, therefore, that courts eventually used the parol evidence rule for guidance in interpreting section 1-205(4).\textsuperscript{50} Unfortunately, reliance on the parol evidence rule brought confusion and complication rather than clarity. In effect, this analytical approach re instituted the pre-Code conception of trade usage as extrinsic to agreements and thereby undermined much of the innovation of section 1-205.

The first case\textsuperscript{51} directly linking section 1-205(4) to the parol evidence rule was \textit{Division of Triple T Service, Inc. v. Mobil Oil Corp.}.\textsuperscript{52} Mobil terminated
Triple T’s service station franchise\textsuperscript{53} pursuant to a term in the written contract that allowed either party to terminate upon ninety days’ notice. Triple T argued that the trade practice under contracts with similar language allowed termination only if the franchisee seriously failed in its duties. Triple T further alleged that both parties had expected such a limitation to apply to the contract at issue in the case.\textsuperscript{54}

The trial court rejected Triple T’s argument and held that evidence of the alleged trade usage would not be admissible at trial:

[T]he Code itself codifies the well established rule in the law of contracts that evidence of custom or usage in the trade is not admissible where inconsistent with the express terms of the contract (Uniform Commercial Code Sec. 1-205(4). . .). At bar the express terms of the contract cover the entire area of termination and negate plaintiff’s argument that the custom or usage in the trade implicitly adds the words “with cause” in the termination clause. . . . The contracts are unambiguous and no sufficient basis appears for a construction which would insert words to limit the effect of the termination clause. Only language \textit{consistent} with the tenor of the otherwise complete agreement is admissible under the guise of “custom and usage” and the Code effects no change in that doctrine.\textsuperscript{55}

The court equated section 1-205(4) with the parol evidence rule and implicitly assumed that admissibility under section 1-205 would depend on the same test of “consistency” that is used to evaluate evidence of explicit communications between the parties under the parol evidence rule.\textsuperscript{56}

The analogy between section 1-205(4) and the parol evidence rule gained the influential approval of the United States Court of Appeals for the Fourth Circuit in \textit{Columbia Nitrogen Corp. v. Royster Co.}\textsuperscript{57} The court of appeals interpreted section 1-205(4) as follows: “There can be no doubt that the Uniform Commercial Code restates the well established rule that evidence of usage of trade . . . should be excluded whenever it cannot be reasonably construed as consistent with the terms of the contract.”\textsuperscript{58} Although concluding that section 1-205(4) restates the parol evidence rule concerning trade usage,\textsuperscript{59} the court broadly defined the term “consistency”\textsuperscript{60} and held that the evidence of trade usage in the case should have been admitted.\textsuperscript{61} Nevertheless, by endorsing the analogy between section 1-205(4) and the parol evidence rule, the \textit{Columbia Nitro-}

\textsuperscript{53} Mobil apparently wanted to use the land occupied by the Triple T franchise for a different purpose. \textit{Id.} at 722, 304 N.Y.S.2d at 194.
\textsuperscript{54} \textit{Id.} at 730-31, 304 N.Y.S.2d at 202.
\textsuperscript{55} \textit{Id.} at 731, 304 N.Y.S.2d at 203.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} 451 F.2d 3 (4th Cir. 1971). The written term in dispute in \textit{Columbia Nitrogen} stated that the buyer would purchase at least 31,000 tons of phosphate during each of three years. The alleged trade usage treated such terms as mere estimates, not binding on either side. \textit{Id.} at 6-7.
\textsuperscript{58} \textit{Id.} at 9 (citing \textit{Division of Triple T Serv.}, 60 Misc. 2d 720, 304 N.Y.S. 2d 191 (Sup. Ct. 1969)).
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 9-10.
\textsuperscript{61} \textit{Id.} at 11.
trogen decision considerably skewed the function of section 1-205(4).62

It is regrettable that this interpretation of section 1-205(4) has been widely followed. Section 1-205(4) is not written as a parol evidence rule. It does not purport to require the exclusion of evidence, and unlike the parol evidence rule, section 1-205(4) does not require a final writing as a prerequisite to its application.63 Moreover, the purpose of section 1-205(4) differs greatly from that of the parol evidence rule. Doctrine developed under the parol evidence rule is designed to give priority to written terms and to devalue other evidence of the parties’ intentions.64 Section 1-205, in contrast, is designed to give full effect to trade usage as a reflection of the “true understanding” of the parties.65

The mistaken analogy between section 1-205(4) and the parol evidence rule has confused interpretation of section 1-205(4) in three significant ways. First, it has led courts to exclude evidence of trade usage, rather than to evaluate it along with other evidence.66 Second, it has suggested to courts that section 1-205(4) was designed to protect written documents against evidence that does not appear in those documents.67 Last, it has encouraged courts to analyze written terms separately from other evidence, as if written terms should be interpreted first in isolation and then compared to nonwritten evidence.68 The result of this confusion has been a failure to give sufficient weight to trade usage in interpreting many contracts.

Following Columbia Nitrogen, most courts have viewed section 1-205(4) as a “quasi parol evidence rule” that requires the exclusion of trade usage evidence if it is “inconsistent” with written terms.69 This view has focused doctrinal debate on the definition of “consistency.” Although a few courts have been willing

62. See Kirst, supra note 3, at 843-56. But see J. WHITE & R. SUMMERS, supra note 24, at 85 (concluding that § 1-205(4) requires the exclusion of inconsistent evidence).
63. Compare U.C.C. § 1-205(4) (1978) (“express terms of an agreement”) with id. § 2-202 (“Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein. . . .”) (emphasis added).
64. See generally E. FARNSWORTH, supra note 19, § 7.2, at 447-51 (discussing the rationale of the parol evidence rule); Wallach, supra note 24, at 653-54 (discussing policies behind U.C.C. § 2-202).
65. In effect, the Code gives priority to written terms with respect to evidence of prior negotiations or agreements but not with respect to evidence of trade usage. This distinction makes good sense. When parties adopt a final writing they most often intend it to be “the last word” on their negotiations, but they do not normally intend to renounce all accepted trade practices. See U.C.C. § 1-205 comment 1 (1978) (“The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.”). Moreover, evidence of prior negotiations and oral agreements is often unreliable; evidence of trade usage, in contrast, is objectively verifiable. See Kirst, supra note 3, at 838-39; cf. 5 S. WILLISTON, supra note 4, § 654 (written documents may be contradicted more extensively by trade usage than by parol agreements).
66. See generally Kirst, supra note 3, at 869 (characterizing this interpretation as the “false parol evidence rule” of § 1-205(4)).
67. See infra notes 147-71 and accompanying text.
68. See infra notes 172-89 and accompanying text.
69. See, e.g., Brunswick Box Co. v. Coutinho, Caro & Co., 617 F.2d 355, 359 (4th Cir. 1980); Carter Baron Drilling v. Badger Oil Corp., 581 F. Supp. 592, 595 (D. Colo. 1984) (“Thus § 4-1205(4) has assumed the role of a quasi-parol evidence rule for evidence of usage of trade. . . .”); see also infra notes 71-117 and accompanying text (discussing cases decided under the “quasi-parol evidence rule” interpretation of § 1-205(4)).
to treat section 1-205(4) as a rule of construction and not a rule excluding evidence, even these courts have been influenced by the parol evidence rule to give undue deference to written terms.  

1. An Expansive Definition of Consistency: "Total Negation"

Treating section 1-205(4) as a "quasi parol evidence rule" clearly conflicts with the drafters' intent to give "full scope" to trade usage. One way to lessen this conflict is to admit trade usage as "consistent" with written terms under a very expansive definition of consistency. A line of cases adopting this approach has found a trade usage to be "consistent" with a written term so long as it does not "totally negate" the written term.

A leading case adopting the "total negation" standard is Nanakuli Paving & Rock Co. v. Shell Oil Co., in which the United States Court of Appeals for the Ninth Circuit upheld a finding that the written price term in an asphalt supply contract was qualified by a trade practice requiring suppliers to delay price increases for jobs on which the paving company had already bid. Following a scholarly review of cases and other authorities, the court correctly concluded that section 1-205(4) did not preclude the jury from giving effect to the trade practice, even though it contradicted an explicit price term. The court's rationale supporting this conclusion, however, is strained and unpersuasive:

Here, the express price term was "Shell's Posted Price at time of delivery." A total negation of that term would be that the buyer was to set the price. It is a less than complete negation of the term that an unstated exception exists at times of price increases, at which times the old price is to be charged, for a certain period or for a specified tonnage, on work already committed at the lower price on nonescalating contracts. Such a usage forms a broad and important exception to the

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70. See infra notes 118-24 and accompanying text.

71. See REVISED SALES ACT, SECOND DRAFT, supra note 29, at 335 (comment on section 1-D) ("[T]he policy . . . of giving to usage as full a scope as reason will permit, is the only sound policy.").


73. Nanakuli Paving, 664 F.2d at 779-80. The court explained this practice of "price protection" as follows:

Price protection was practiced in the asphaltic paving trade by either extending the old price for a period of time after a new one went into effect or charging the old price for a specified tonnage, which represented work committed at the old price. In addition, several months' advance notice was given of price increases.

Id. at 778 n.4.

74. Id. at 805. In the alternative, the court held that Shell's failure to follow the practice of price protection might have constituted a breach of its obligation to set its price in good faith under U.C.C. §§ 2-305(2), 2-103(1)(b) (1978). Nanakuli Paving, 664 F.2d at 805-06. The court of appeals reversed the district court's order granting judgment notwithstanding the verdict and directed that judgment be entered in accordance with the jury's verdict for Nanakuli. Id. at 806.
express term, but does not swallow it entirely.\(^7\)

In other words, under the reasoning of *Nanakuli Paving*, trade usage may qualify an express term so long as it does not totally negate that term. Following this analysis, the court in *Nanakuli Paving* found that the term “Shell’s posted price” could be qualified by any trade usage except one that allowed Nanakuli to set the price. Because the trade usage of price protection did not permit the buyer to set the price, the court held that the trade usage could modify the written price term.

Although the court in *Nanakuli Paving* was certainly correct in admitting the evidence of trade usage and although the jury may have been right in its interpretation of the parties’ expectations, the case failed to provide a logical approach for analyzing problems that arise under section 1-205(4). The total negation standard the court adopted is essentially a meaningless test. In the *Nanakuli Paving* dispute, it is obvious that trade usage would not permit the buyer to set the price; such an arrangement would be practically senseless. Yet, if the test for inconsistency under section 1-205(4) is total negation, as the *Nanakuli Paving* court suggested, then it is no real test at all because a trade usage will almost never constitute a *total* negation of a written term.

The artificiality of the total negation test is also apparent in *Carter Baron Drilling v. Badger Oil Corp.*,\(^7\) in which a written term of the contract in dispute stated that the “operator [would] pay contractor” specified amounts for work done on an oil well.\(^7\) The working interest in the well was owned by a third party, Knee Hill Energy, Inc., which had hired Badger Oil to operate the well. Carter Baron, the contractor, was aware of this arrangement. Knee Hill failed to pay Badger, Badger withheld payment from Carter Baron, and Carter Baron sued Badger, claiming that Badger was obligated to pay under the express term of the contract.\(^7\) In defense, Badger presented evidence that the normal practice in the oil and gas industry was for the owner of the working interest to be primarily responsible for payment of operating debts, even if the operator had signed a service or supplies agreement.\(^7\)

The court examined the conflict between the express term and the alleged trade usage and concluded that the trade usage did not entirely negate the express term: “A complete negation of this term ["operator shall pay contractor"] is 'operator shall not pay contractor.' It is merely a qualification of the term to say 'operator shall pay contractor unless operator is not himself paid by the working interest owners.'”\(^8\) As in *Nanakuli Paving*, this rationale simply is not adequate to justify the conclusion that the written term should not control over the trade usage. It may be that the parties in *Carter Baron* expected to follow

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75. *Nanakuli Paving*, 664 F.2d at 805 (emphasis added).
77. The contract identified Badger Oil as the “operator” and Carter Baron as the “contractor.” *Id.* at 593.
78. *Id.* at 593-94.
79. *Id.* at 599.
80. *Id.* The court cited *Nanakuli Paving* as authority for the total negation test. *Carter Baron*, 581 F. Supp. at 599.
the trade practice and that the writing did not alter this expectation, but the court's analysis did not reach those issues. Instead, the court purported to determine whether the trade usage was "consistent" with the written term. Because the trade usage did not provide that the operator would never pay the contractor, the Carter Baron court held that the trade usage could modify the written term. The court's reasoning that trade usage is relevant to understanding the terms of the contract solely because it fails to totally negate the express terms of the contract is unconvincing.

The doctrine is inadequate when courts are forced to justify good results with artificial analysis. An analysis such as the total negation test adopted in Nanakuli Paving and Carter Baron makes the law appear arbitrary; and because the law finally is not arbitrary, some courts will refuse to adopt the analysis and consequently will fail to accord trade usage the significant role it should play in defining the terms of agreements.

The notion of total negation derives from two separate doctrinal sources. One is a line of cases that broadly construes the requirement of consistency under the parol evidence rule. In the leading case, Hunt Foods & Industries, Inc. v. Dolimer, the court held that an additional oral term is consistent within the meaning of the parol evidence rule unless it completely negates the written terms: "To be inconsistent the term must contradict or negate a term of the writing. A term or condition which has a lesser effect is provable." In Hunt Foods the written terms provided an option to buy, and an alleged oral agreement specified the conditions under which the option could be exercised. The court held that the alleged oral agreement did not "negate" the written term and therefore that the evidence of its existence was admissible. Regardless of the value of the Hunt Foods test under the parol evidence rule, it is totally inappropriate for the evaluation of trade usage. The total negation test inverts the correct relationship between trade usage and express terms under section 1-205(4). The crucial issue in determining whether trade

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85. The broad definition of consistency in Hunt Foods may be justifiable under the parol evidence rule because the purposes of that rule arguably are served so long as the writing has some binding effect. If parties can rely on a writing to some extent, then their relationship will have an anchor of certainty, and the writing will be viewed as the primary statement of their agreement. Notwithstanding this rationale, several recent cases have rejected the Hunt Foods test of consistency under the parol evidence rule on the ground that the test undermines the rule itself and leads to a very strained definition of consistency. See, e.g., Luria Bros. v. Pielot Bros. Scrap Iron & Metal, 600 F.2d 103, 111 (7th Cir. 1979); Alaska N. Dev. v. Alyeska Pipeline Serv. Co., 666 F.2d 33, 40 (Alaska 1982), cert. denied, 464 U.S. 1041 (1984); Synder v. Herbert Greenbaum & Assoc., 38 Md. App. 144, 152, 380 A.2d 618, 623 (1977).
usage defines a term of an agreement is whether the parties have agreed to change the normal practice. Therefore, the appropriate question is whether the express agreement negates the trade usage, not whether the trade usage negates the express term. Because the parol evidence rule is designed to give priority to a final written statement, its test for consistency appropriately begins with the assumption that the written term governs. Section 1-205, in contrast, is based on the assumption that people expect to follow trade practices. 86 Doctrine developed under the parol evidence rule, including the Hunt Foods test for consistency, merely confuses, rather than clarifies, the proper function of section 1-205(4).

The court in Nanakuli Paving relied on official comment 2 to section 2-202 as a second source of the total negation idea: 87 "Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used." 88 The court's reliance on this comment, however, was misplaced; the comment's discussion of careful negation does not justify a test of total negation. Comment 2 focuses on the parties' actual expectations and asks whether the parties intended to negate the trade usage. This approach reaffirms the underlying assumption that people generally expect to follow trade practices and that their expectations will change only if they actually agree to modify the normal practice. 89

Thus, comment 2 to section 2-202 indicates that the total negation approach is misguided. In cases involving conflicts between trade usage and express terms, comment 2 suggests that the appropriate inquiry is, "Did the parties agree to negate the trade practice?" By asking this question, courts can both recognize the significance of trade usage and give effect to the parties' actual understandings and expectations. Properly interpreted, section 1-205 requires courts to evaluate the evidence in this way.

2. A Restrictive Definition of Consistency

Although there is a superficial clarity to the total negation test, it often appears strained and artificial. Because of these defects, several courts have rejected the test in favor of a much narrower definition of consistency. Under this approach, a trade usage is said to be consistent with a written term only if it is in "reasonable harmony" 90 with the general meaning or "tenor" 91 of the term. If the trade usage and the written term do not have the same general effect, the courts adopting this narrow view of consistency will find that the written term

86. See infra notes 114-17 and accompanying text.
87. Nanakuli Paving, 664 F.2d at 795-96.
89. See supra notes 9-18 and accompanying text; infra notes 114-17 and accompanying text.
controls under section 1-205(4). This approach avoids the artificiality of the total negation test, but it errs by giving undue weight to written terms.

In *General Plumbing & Heating, Inc. v. American Air Filter Co.*, for example, the contract included a boilerplate clause stating that the shipper, American Air Filter, did not guarantee shipment on any particular date. General Plumbing argued that the parties actually expected that American Air Filter would be bound by a trade practice requiring the shipper to deliver all equipment in time for the subcontractor to meet its own deadlines. The United States Court of Appeals for the Fifth Circuit upheld the exclusion of all evidence relating to the alleged trade usage, reasoning that because the trade usage would impose liability and the written term would prevent liability, the trade usage and the written term were “contradictory” and the written term must control.

Similarly, in *New Mexico ex rel. Conley Lott Nichols Machinery Co. v. Safeco Insurance Co.* the court excluded evidence of a trade usage that did not totally negate the written term. The equipment lease at issue in *Nichols* specified a “rental period of 8 months.” The lessee returned the equipment early and refused to pay rent for the remainder of the eight month period. The lessee argued that, under the prevailing trade practice, it was not liable for the remaining rent. The court upheld the exclusion of this evidence on the ground that the trade usage changed the “basic meaning” of the written term and therefore was “inconsistent.”

In *Kologel Co. v. Down in the Village, Inc.* Kologel brought suit against Northwest Airlines, alleging that Northwest had misdelivered a shipment of garments. The airway bill of lading specified that “delivery will be made to, or in accordance with the instructions of the consignee.” The trade practice under such documents also allowed delivery to the party specified as the “notify

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92. 696 F.2d 375 (5th Cir. 1983).
93. The clause read as follows: “Any shipping date stated in this quotation or any acknowledgement is [American’s] best estimate but [American] makes no guarantee of shipment by any such date and shall have no liability or other obligation for failure to ship on such date, regardless of cause, unless expressly stated otherwise herein.” Id. at 377 n.2. The contract also included a standard integration clause: “There shall be no understandings, agreements, or obligations (outside of this quotation) unless specifically set forth in writing . . . .” Id.
94. Id. at 377-78. General Plumbing also alleged that the parties had made an oral agreement conforming to the trade practice. Id.
96. General Plumbing, 696 F.2d at 378.
98. The court held that the transaction was covered by Article 2 of the Code because the lease agreement was accompanied by a “privilege of purchase” contract that incorporated the terms of the lease. Nichols, 100 N.M. at 444, 671 P.2d at 1155 (adopting the reasoning of Walter Heller & Co. v. Convalescent Home, 49 Ill. App. 3d 213, 365 N.E.2d 1285 (1977)).
99. Nichols, 100 N.M. at 444, 671 P.2d at 1155.
100. Id.
102. Id. at 728.
party." Rejecting Northwest's argument that the trade usage merely qualified the written term, the court held that the trade usage and the written term were inconsistent and that the written term therefore controlled:

If a trade custom . . . contrary to the plain terms of trade documents, were given the effect contended for by [the carrier], the ability of such a distant person to engage in foreign trade . . . would be severely and unduly handicapped. Allowance of such a practice is certainly destructive of the integrity of documents used in international trade.

The courts have given two justifications for a restrictive definition of the term "consistency." The first justification is mentioned in Kologel: the need to protect the integrity of documents. This rationale proceeds from the assumption that people rely on written documents to define their contractual obligations. Courts adopting this view are reluctant to define contract terms with reference to trade usage on the ground that it is unjust to allow trade usage to change the meaning and effect of written terms.

Although this view appears reasonable, the drafters of section 1-205(4) believed that the factual presumptions underlying this traditional doctrine were inaccurate. Based on their own experience and that of many others, Karl Kologel was the cosignee, and Down in the Village, Inc. was the notify party. Northwest delivered the shipment to Down in the Village, which then failed to pay Kologel. Id.

103. Kologel, 539 F. Supp. at 729; see also Southern Concrete Servs., Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581, 584 (N.D. Ga. 1975) (If trade usage were allowed to alter the meaning of written terms "then contracts would lose their utility as a means of assigning the risks of the market.").

104. Compare Backus & Harfield, supra note 5, at 601-02 (arguing that it is a violation of freedom of contract to allow trade usage to vary written terms of a contract) with Honnold, Letters of Credit, Custom, Missing Documents and the Dixon Case: A Reply to Backus and Harfield, 53 COLUM. L. REV. 504, 508-09 (1953) (responding that trade usage may accurately reflect the parties' agreement).


Some commentators have suggested that the drafting materials should not be used as interpretive guides to the Code, at least not without apology to the legal community. See, e.g., R. SPEIDEL, R. SUMMERS & J. WHITE, TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW 41 (3d ed. 1981). Indeed, at the suggestion of an American Bar Association Committee, one draft of the
Llewellyn and his colleagues concluded that business people often either ignore the boilerplate terms of a written document or interpret such terms differently than lay persons would. Business people use paper to record “dickered
terms" such as price, quantity, or description, but they expect that other aspects of the transaction will be governed by normal trade practices.\textsuperscript{112} As a result of this insight, the drafters were reluctant to give much weight to boilerplate terms that purport to vary a recognized trade practice.\textsuperscript{113}

The second reason given by some courts to justify a restrictive interpretation of section 1-205(4) is that evidence of trade usage can be misleading or difficult to evaluate.\textsuperscript{114} To give weight to something so ill-defined, these courts claim, is to compound the risk of uncertainty and injustice.\textsuperscript{115} Although this concern is valid, it is not a good reason to discount well-proved trade usages. It may be prudent to require clear proof of trade usages,\textsuperscript{116} but once proved, such usages should be given full weight as evidence of the parties' actual expectations.\textsuperscript{117}

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the introduction of usage to resolve an "ambiguity" patent even to an outsider, such as whether "ton" means 2000 or 2240 pounds. It may mean that a quantity term refers to a measure which a layman would not see it as even suggesting. . . . It may incorporate a meaning seemingly contradictory of the language used.

Id. at 4.

112. See authorities cited supra note 110.


114. See, e.g., Carl Weissman & Sons v. Pepper, 480 F. Supp. 1364, 1368 (D. Mont. 1979) (parties would have followed custom in their contract if it was widespread in their trade); Southern Concrete Servs., Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581, 584 (N.D. Ga. 1975) (parties should not be subjected to "an evidentiary free-for-all"), aff'd mem., 569 F.2d 1154 (5th Cir. 1978); cf. K. LLEWELLYN, supra note 113, at 327-32 (discussing the difficulties in proving the existence of a trade usage).

115. See, e.g., Southern Concrete Servs., Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581, 584 (N.D. Ga. 1975) ("To allow such specific contracts to be challenged by extrinsic evidence might jeopardize the certainty of the contractual duties which parties have a right to rely on."); aff'd mem., 569 F.2d 1154 (5th Cir. 1978).

116. The rule at common law was that trade usage must be "clearly proved." J. LAWSON, THE LAW OF USAGES AND CUSTOMS § 52, at 97 (1881) (citing Adams v. Pittsburgh Ins. Co., 76 Pa. 411, 414 (1874) ("Doubt must be wholly eliminated from the evidence adduced, or the usage is not well proved."). Although there is some indication that this requirement was founded on a mistranslation of the Latin phrase "stricti juris," see C. ALLEN, LAW IN THE MAKING 132 & n.2 (7th ed. 1964), it still may be a sensible rule. Cf. Gord Indus. Plastics, Inc. v. Aubrey Mfg., Inc., 127 Ill. App. 3d 389, 391-92, 469 N.E.2d 389, 392 (1984) (dicta that trade usage "must be established by several witnesses"); Beachcomber Coins, Inc. v. Bosket, 166 N.J. Super. 442, 447, 400 A.2d 78, 80 (App. Div. 1979) (testimony concerning "normal policy" was not sufficient); Mountain Fuel Supply Co. v. Central Eng'g & Equip. Co., 611 P.2d 865, 869 (Wyo. 1980) (the mere testimony of two witnesses that the usage existed was not sufficient to establish "regularity of observance" under § 1-205(2)). But cf. Western Indus. Inc. v Newcor Canada, Ltd., 739 F.2d 1198, 1203 (7th Cir. 1984) (there is no requirement of clear and explicit proof of usage under the Code); Levie, supra note 3 (arguing that there should be no heightened standard for proof of trade usage).

117. Early drafts of the Code included a procedure for empanelling merchant juries to make recommendations concerning the existence and content of usages and other "merchantile facts," following the practice of Lord Mansfield. See REVISED SALES ACT, SECOND DRAFT, supra note 29, at 531-37 (§§ 59 to 59-D and Comments). These provisions were omitted from the 1944 version of the Code. The Committee of the Whole had previously questioned the constitutionality and political acceptability of merchant juries and had discussed numerous practical problems associated with them. See Minutes of 1942 Annual Meeting of the National Conference of Commissioners on Uniform State Laws, Committee of the Whole, 126-45; Llewellyn Papers, supra note 108, at J.IV.2.f. (unpublished minutes also available in the office of the National Conference in Chicago, Illinois).

Although the merchant jury idea is intriguing, there is no reason to think that lay juries cannot make accurate determinations about trade usage. Evidence of trade usage may consist of expert opinion, specific instances of the usage, or both. See, e.g., Posttape Assocs. v. Eastman Kodak Co.,
3. A Rule of Construction

Nothing in section 1-205(4) states that evidence may be excluded, and the best interpretation of section 2-202 allows the admission of trade usage evidence so long as it is relevant.\footnote{118} Consequently, some courts have suggested that relevant trade usage evidence is always admissible\footnote{119} and that section 1-205(4) is merely a rule of construction which assigns weight to different kinds of evidence. Similarly, in Modine Manufacturing Co. v. North East Independent School District,\footnote{120} the court observed that section 1-205(4) "does not result in the exclusion of evidence of usage of trade from the agreement, but merely permits inconsistent express terms thereof to control."\footnote{121}

The rationale for this approach is straightforward: evidence of trade usage always should be admissible because it is a crucial element of the parties' expectations and therefore of the agreement itself.\footnote{122} This approach is clearly correct. Section 1-205(4) is not drafted as a rule of exclusion, and there is no reason to make it into one.\footnote{123} If section 1-205(4) is treated as a mere rule of construction, however, courts must determine when it requires written terms to be given priority over trade practice. The most pressing questions remain: What is an express term, and when can it be construed to alter a trade practice? Even those courts that have refused to exclude trade usage evidence have been misled by the analogy between section 1-205(4) and the parol evidence rule into giving undue priority to some written terms and into assuming that written terms can be understood in isolation.\footnote{124}

II. Section 1-205(4) Reconsidered

The interpretations of section 1-205(4) that are grounded in an analogy to the parol evidence rule are not entirely satisfactory because all such interpretations focus on the question of consistency and on a comparison between written terms and separate trade usages. This approach is problematic because it assumes that written terms have meanings independent of their significance in the

trade and that trade practices can be evaluated apart from the contractual context in which they appear. This understanding of business practice is inconsistent with that of the Code.

Moreover, the "total negation" test, used either as a test for admission of evidence or as a rule of construction, depends on a strained definition of consistency. The test is so broad that it is hard to imagine a situation in which trade usage could be found to negate a written term totally. One danger of the total negation approach is that courts rightly will be reluctant to engage in the necessarily strained reading of the statute, even when it would lead to a correct result. A second, equally serious problem is that the test does not give parties enough power to agree to change trade usage. By allowing trade usage to govern unless it totally negates a written term, the total negation doctrine renders an agreement to change a trade usage ineffective unless it is phrased as a total negation of the usage. This obviously is an inadequate way to resolve conflicts between trade usage and written terms.

The restrictive approach of *General Plumbing & Heating, Inc. v. American Air Filter Co.*, allowing written terms to control over any apparently conflicting trade usage, is equally flawed. In some cases, the parties' actual expectations are reflected more accurately in the trade usage than in a written term. The principle of freedom of contract is violated as much by a failure to recognize the trade usage in such cases as by a refusal to enforce an explicit agreement.

The cases interpreting section 1-205(4) are thus at an impasse: one group of cases too readily allows trade usage to modify agreed terms, and the other too easily permits written terms to override recognized trade practices. The unresolved conflict between these approaches demonstrates the need to take a fresh look at the meaning and function of section 1-205(4). A reconsideration of the key words and concepts used in this provision results in an interpretation that is independent of the parol evidence rule and harmonious with the Code's orientation toward commercial practices.

A. The Purpose of Section 1-205(4)

The Code relies heavily on commercial practice to define rights and obligations within commercial transactions. This reliance is embodied in the Code in three ways. First, section 1-103 expressly provides that the law merchant shall supplement provisions of the Code. Second, numerous provisions incorporate commercial practice to give content to general standards such as

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125. See supra notes 72-80 and accompanying text.
126. 696 F.2d 375 (5th Cir. 1983).
127. See supra notes 92-96 and accompanying text.
128. See Danzig, supra note 2, at 629-31; Mooney, supra note 2, at 250-53; Murray, *The Realism of Behaviorism*, supra note 2, at 299.
"merchantability," 131 "good faith," 132 "materiality," 133 and the like. 134 Last, section 1-205 provides that trade usage should be considered as the background of shared expectations that are incorporated into specific agreements. 135

These three aspects of the Code's reliance on commercial practice may be viewed as a continuum: the law merchant operates as a purely external source of law, outside the parties' own agreement; commercial meanings of general standards provide "objective" definitions for obligations that may be created either by the parties' agreement or by the Code; and, in section 1-205, trade usage is treated as evidence of the parties' actual expectations, 136 rather than as an external source of obligation. 137 How section 1-205 works and how trade usage is thought to reflect the parties' expectations is explained by the official comment:

This Act rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by [the parties] and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context . . . . 138

Under section 1-205, then, trade usage is treated as an element of the parties' actual agreement and as part of the parties' voluntarily assumed obligations. 139 The presumption 140 underlying this section is that parties to a commercial contract use words as they are defined in the trade and that they


132. U.C.C. §§ 1-203, 2-103(1)(b) (1978) (obligation of good faith in Article 2 includes "observance of reasonable commercial standards"); see also First Fed. Sav. & Loan Ass'n v. Union Bank & Trust, 291 N.W.2d 282, 286 (S.D. 1980) ("reasonable commercial standards" must be determined according to trade usage).

133. U.C.C. § 2-207 comments 4, 5 (1978) (examples of material variation involve change from trade usage; examples of no material variation involve conformity with trade usage).


136. See supra notes 9-18 and accompanying text. Trade usage is evidence of the parties' expectations even though § 1-205(3) provides that trade usage is binding without proof of a party's actual knowledge of the practice. See U.C.C. § 1-205(3) (1978); authorities cited infra note 145. Contracting parties may expect that trade usages generally will be followed without consciously considering each specific practice. Cf. Murray, Philosophy of Article 2, supra note 2, at 4-5 (discussing the broad concept of "agreement" in the Code).

137. This conception of trade usage does not mean that contractual obligations based on expectations concerning trade usage are purely private. What it does suggest is that the relationship between "public" and "private" in contract law is more complicated than it might at first appear. See supra note 13; infra notes 224-41 and accompanying text.


139. Cf. Urbana Farmers Union Elevator Co. v. Schock, 351 N.W.2d 88, 92 (N.D. 1984) ("In cases governed by the Uniform Commercial Code, the courts have regarded the established practices
intend the consequences of their words and conduct to be those generally understood in the trade. Indeed, this section assumes that in many instances the parties' actual expectations may be based more on trade practices than on the standard form contracts they sign.\textsuperscript{141}

The primary purpose of section 1-205 is to give effect to the parties' actual expectations, regardless of whether those expectations are reflected in writing, trade usage, or both:

This Act rests on the principle that commercial agreements are to be given in law the same reasonable and commercial meaning which they have in the circumstances for commercial men, and that action under them which is commercially reasonable is to be given recognition and protection. The elimination of technical traps and of surprise, and the recognition of such leeways as are in fact commercially reasonable are taken by the Act to be consistent with clarity of obligation and with speed and effectiveness of remedy.\textsuperscript{142}

and usages within a particular trade or industry as a more reliable indicator of the true intentions of the parties than the sometimes imperfect and often incomplete language of the written contract."\textsuperscript{143}

140. Important doctrinal consequences flow from the treatment of this presumption as essentially factual because such treatment renders the presumption rebuttable by other evidence of the parties' understanding. It is a separate question whether the presumption itself is based on fact, policy, or both. Most of the written justifications of § 1-205 focus on the factual basis for the presumption; they emphasize that parties expect to follow trade usages in most cases. \textit{See, e.g., U.C.C. §§ 1-205 comment 4, 2-202 comment 2 (1978); Comment to Section 21, Commercial Law Materials 44-46 (Harvard Law School 1948), Llewellyn Papers, supra note 108, at J.IX.2.a.} \textit{[hereinafter cited as Llewellyn Papers, Comment to §21, 1948]. Yet, the drafters argued in addition that trade usages may represent fair and efficient ways to deal with particular problems. \textit{See, e.g., REVISED SALES ACT, SECOND DRAFT, supra note 29, at 333; K. LLEWELLYN, supra note 113, at 363; cf. Murphy, supra note 2, at 639 (describing § 1-205 as "a recognition of both the legitimacy and desirability of adapting commercial law to the needs, desires and practices of the business community").}

141. Section 1-205(4) thus has significance to the ongoing search for a theory of standard form contracts. \textit{Cf. Llewellyn, Book Review, 52 HARV. L. REV. 700, 704 (1939) (reviewing O. PRAUNNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)) (trade practice provides a beginning for the interpretation of standard form contracts) \textit{[hereinafter cited as Llewellyn, Book Review]. Section 1-205(4) provides that when a trade usage exists, a boilerplate term should not be binding unless there is evidence of actual conscious agreement to the term. \textit{See supra text accompanying note 25. Without such actual agreement, it is presumed that the parties expected to follow the trade usage. \textit{Cf. Falcon Tankers, Inc. v. Litton Sys., Inc., 355 A.2d 898, 906 (Del. Super. Ct. 1976) (boilerplate term not binding if the parties reached no actual agreement on the term and did not reasonably expect the term to govern).}}


142. Llewellyn Papers, Introductory Comment, 1945, supra note 110, at 1. As Professor Llewellyn observed:

\textit{[T]o the extent of such divergence between non-legal obligation and the legal obligation officially recognized on the same facts, the legal obligation ceases to function merely as an extra insurance that engagements will be performed. That role, in essence, it need not lose. But it acquires another. It comes to function also as a source of risk. If the other party appeals to law, then to the extent that the obligation is viewed by laymen and by law-men}
Full effect should be given to trade usage because in the business world, people expect to comply with normal practices. Moreover, trade practices, if fair and reasonable, frequently represent efficient ways to handle specific or local problems, and they often accurately reflect the shared values of a community. For these reasons, the Code consistently provides that trade practices are binding on members of the trade who do not actually agree to vary their normal obligations.

The principle of freedom of contract, however, requires that if the parties agree to change trade usage, the agreement must be given legal effect so long as there is no external reason to override the agreement. If parties agree to vary normal trade usage, then section 1-205(4) provides that their explicit agreement controls; otherwise, trade usage controls. The purpose of section 1-205(4) is to allow parties to alter trade usage voluntarily, while maintaining the presumption that parties normally will not choose to do so.

Accordingly, when a written term appears to conflict with a trade practice, two questions must be asked: (1) Did the parties agree to the written term? (Is it an “express term of [their] agreement”? and (2) What does the written term mean in its commercial context? In particular, does the written term mean that trade practice will not be followed? If these questions are answered affirmatively, then trade usage is not binding. Otherwise, it is.

This understanding of the relationship between trade usage and express language involves a subtle, yet significant, shift in emphasis from doctrine developed under the parol evidence rule. The parol evidence rule gives prominence to written terms and focuses on whether extrinsic evidence is inconsistent with the writing. In contrast, section 1-205(4) gives prominence to trade usage and asks differently, I shall either get less, or be held to more, than the customary understanding calls for.


143. Cf. Revised Sales Act, Second Draft, supra note 29, at 333 (comment to § 1-0) ("expression of a body of fair and balanced usage is a great convenience, a gain in clarity and certainty, an overcoming of the difficulty faced by the law in regulating the multitude of different trades").

144. Cf. K. LLEWELLYN, supra note 113, at 330 (arguing that the failure to recognize the trade usage in Dixon, Irmaos & CIA v. Chase Nat'l Bank, 144 F.2d 759 (2d Cir. 1944), cert. denied, 324 U.S. 850 (1945), "would have amounted to the court's sanctioning of irresponsible banking").

145. See U.C.C. § 1-205(3) (1978). This section makes trade usage binding on members of the trade, regardless of their actual knowledge of the usage. See, e.g., Foxco Indus., Ltd. v. Fabric World, Inc., 595 F.2d 976, 985 (5th Cir. 1979); Marion Coal Co. v. Marc Rich & Co. Int'l, 539 F. Supp. 903, 906 (S.D.N.Y. 1982); Hegblade-Margules-Tenneco, Inc. v. Sunshine Biscuit, Inc., 39 Cal. App. 3d 948, 956-57, 131 Cal. Rptr. 183, 188 (1976); Bord Indus. Plastics, Inc. v. Aubrey Mfg. Inc., 127 Ill. App. 3d 589, 592, 469 N.E.2d 389, 392 (1984). The rule of § 1-205(3) may be justified on several grounds: (1) it is very unlikely that a trade's members are ignorant of its usages; (2) one can expect to follow all accepted practices without knowing the content of each one; and (3) the law should encourage business people to learn the usages of their trade. See Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515 (1981).

One difficulty in applying § 1-205(3) lies in determining who is a member of the trade. Making such a determination may require a court to consider whether a party has actually had an opportunity to learn the trade practices. At least one court has held that newcomers to a trade should not be bound by its usages. See Union Bldg. Materials Corp. v. Haas & Haynie Corp., 577 F.2d 568 (9th Cir. 1978) (newcomer to the trade was not bound by usages of which it was unaware); cf. Flower City Painting Contractors, Inc. v. Gumina Constr., 591 F.2d 162 (2d Cir. 1979) (newly formed, minority-owned business was not bound by trade usages).

146. U.C.C. § 1-205(4) (1978).
whether the parties agreed to change it. The purpose of section 1-205(4) is quite different from that of the parol evidence rule. Recognition of this difference requires a significant change in the way section 1-205(4) is interpreted.

B. "Express Terms"

The parol evidence rule is concerned with written contract terms.\textsuperscript{147} Under its influence, courts have assumed that the phrase "express terms of the agreement" in section 1-205(4) means the same thing as "final written terms" under section 2-202. The problem with this view is that a written term can be "final" under the parol evidence rule and related doctrines\textsuperscript{148} if it appears in a signed or otherwise formalized document regardless of whether both parties actually considered and agreed to the term.\textsuperscript{149} Although this approach may be useful in other contexts,\textsuperscript{150} it is not appropriate under section 1-205(4).

When there is a trade usage covering a particular matter, members of the trade expect it to be followed, unless they have actually agreed to change it.\textsuperscript{151} It makes no sense to say there can be a blanket assent to negate trade practices.\textsuperscript{152} Under section 1-205(4), therefore, it is crucial to determine whether the

\begin{itemize}
\item \textsuperscript{147} See generally E. FARNSWORTH, supra note 19, § 7.2, at 447-51 (discussing the parol evidence rule); Wallach, supra note 24 (discussing § 2-202).
\item \textsuperscript{148} Two additional doctrines lead courts to find written terms to be final: the "duty to read rule," see J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 9-42, at 328-29 (1977), and the closely related notion that the signing of a document necessarily constitutes a "manifestation of assent" to the terms contained therein, see RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1981). Both doctrines are closely tied to the parol evidence rule, inasmuch as they justify the conclusion that written terms are final despite a lack of actual agreement. These doctrines are not logically necessary under the parol evidence rule, but they flow concurrently from its premises.
\item \textsuperscript{149} Although the parol evidence rule requires an intention that the writing be the final statement of the agreement, this intention is often presumed from the formal writing itself. See RESTATEMENT (SECOND) OF CONTRACTS § 209(3) (1981) ("Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression."). Section 2-202 requires a specific determination by the court before a writing is treated as "complete," but such a determination is not required for a finding of finality. See U.C.C. § 2-202 (1978); Wallach, supra note 24, at 665-68.
\item \textsuperscript{150} The duty to read rule and the presumption of assent to a signed writing have been seriously questioned, and several exceptions or qualifications have been found by courts and commentators, especially in connection with adhesion contracts. See, e.g., E. FARNSWORTH, supra note 19, § 4.26, at 293-302; Rakoff, supra note 141, at 1183-97; Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 HARV. L. REV. 529, 539-45 (1971). The duty to read rule and the presumption of assent may be justified, however, when there is no trade usage, course of dealing, or other actual agreement. In such cases, it may be appropriate to use written terms on which there was no actual agreement as gap-fillers, so long as the terms are not unduly burdensome. Professor Llewellyn would argue that parties do expect to be bound by such terms because, by signing an agreement, they give a "blanket assent" to all reasonable terms contained in it. See K. LLEWELLYN, supra note 113, at 370; see also infra note 152 (discussing Professor Llewellyn's notion of blanket assent).

\item \textsuperscript{151} See supra notes 136-45 and accompanying text.
\item \textsuperscript{152} Professor Llewellyn's notion of blanket assent provides a persuasive argument in favor of enforcing most boilerplate terms:

The answer, I suggest, is this: Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine
parties actually agreed to change the trade usage.\textsuperscript{153} If they did not, the trade usage should be followed.

In accordance with this view, the court in \textit{Gindy Manufacturing Corp. v. Cardinale Trucking}\textsuperscript{154} was willing to enforce a trade practice imposing liability for defects on the seller, even though the written agreement included a clause stating that the vehicle was sold "as is," without warranties. Under section 1-205(4), the appropriate question was whether the parties had agreed to change the normal practice. The court concluded that the "as is" clause did not constitute such an agreement.\textsuperscript{155} In the court's view, the "as is" clause was not a part of the parties' actual understanding. It was not a "term of [their] agreement"\textsuperscript{156} and therefore did not control the contrary usage of trade.\textsuperscript{157}

As the \textit{Gindy} case suggests, to be an "express term" under section 1-205(4), a written term must have been considered and agreed to by both parties. Although the Code does not define the phrase "express terms," the modifying word "express" suggests a requirement of conscious communication beyond that included in the Code's definition of "term."\textsuperscript{158} Moreover, earlier drafts of the Code and comments clearly indicate that the phrase "express terms" was meant
to refer only to terms on which the parties actually agreed. One of the earliest drafts of section 1-205(4) read as follows: "The terms of the agreement and any . . . usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable specific terms shall control . . . usage of trade."159 The concept of "specific terms" came from earlier draft provisions in which the phrases "express words"160 or "special bargain"161 were used to signify terms that were actually contemplated and agreed to by the parties.162

The phrase "express terms" was first used in the Third Draft of the Revised Uniform Sales Act.163 There is nothing to indicate that the change in terminology from "specific terms" to "express terms" represented any change in conception. Indeed, the original comment to section 1-205, which was written after the phrase "express terms" was inserted, reiterated that trade usage could be overcome only by an actual, conscious agreement:

[A]ttention must be called to a desire to contract at material variance from the accepted commercial pattern of contract. . . .

Where . . . the background of trade or circumstances does not make it entirely clear to both parties that performance above and beyond the usual commercial pattern will be necessary, attention must be called to this fact.164

159. American Law Institute, Code of Commercial Law—Sales Act, Preliminary Draft No. 8, First Installment, Section 18 (May, 1943), Llewellyn Papers, supra note 108, at J.V.2.a. (markings omitted, emphasis added).

160. See REVISED SALES ACT, SECOND DRAFT, supra note 29, at 334-35 ("[E]xpress words are to be construed, where that is reasonable, as consistent with, rather than as a displacement of, such usage. . . .").

161. The term "special bargain" was defined as follows:

Special bargain means a term or provision of such character that both parties must be taken to have actually and consciously had its concrete content in mind when bargaining and concluding their agreement. Factors of weight in establishing a term or provision as being a special bargain are:

(a) that it is a term or provision which is commonly the subject-matter of conscious attention, such as price, quantity, description, time of delivery, and the like;

(b) that it is a term or provision particularly written into the documents, as contrasted with a printed form provision;

(c) that it is so conspicuous as to force attention to (the detail of its) content and effect.

Section 1-CC Special Bargain Displacing Provisions on Usage (handwritten draft in Karl Llewellyn's personal copy of the Revised Uniform Sales Act, Second Draft (1941)). Llewellyn Papers, supra note 108, at J.III.2.b. [hereinafter cited as Llewellyn Papers, Draft Section 1-CC].

162. See also National Conference of Commissioners on Uniform State Laws, Report on a Revised Uniform Sales Act, § 1-C(1)(b) (1941), Llewellyn Papers, supra note 108, at J.IV.2.b (dealing with the displacement of provisions of the Act).

When both of the parties have so directed their attention to a particular point that the coverage of that point . . . may fairly be regarded as the deliberate desire of both, and as reflecting a considered bargain on that particular point, the provision of the contract on that point is called in this Act a "particularized term" of the bargain.

Id.

163. Uniform Commercial Code, Revised Uniform Sales Act, Third Draft, § 22(4)(b) (1943), Llewellyn Papers, supra note 108, at J.V.2.b. ("The express terms of the agreement and any . . . usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms shall control . . . usage of trade.") (emphasis added).

164. Llewellyn Papers, Selected Comments, supra note 110, at 9, 13.
"Express terms," then, are those terms that are actually contemplated and agreed to by both parties. Not all written terms are "express terms," and the mere inclusion of a term purporting to vary normal practice in a printed form is not enough to prove that both parties agreed to it. Something more is necessary to show that the parties actually expected that trade usage would not be followed in a particular transaction.

Inquiry into whether there was actual agreement to a particular term does not, however, require courts to delve into subjective intent and other such quandaries. The question is what the parties' probable intention was. The relevant inquiry is whether both parties had actual knowledge of the term and manifested assent to it. Because the Code assumes that parties normally expect to follow trade practices, it is appropriate to put the burden of showing probable agreement on the party seeking to change a trade practice. Similarly, there should be a presumption against probable agreement when, for example, a disputed term is inconspicuous or unclear. Such rules would further

165. Thus, although a written term may be binding under the duty to read rule, it will not control over a contrary trade usage. Similarly, a written term may be "final" for purposes of the parol evidence rule but not an "express term" under § 1-205(4). See supra notes 156-57 and accompanying text. This result accords with the presumption that parties normally expect a formal writing to be the "last word" on their negotiations, but do not expect to negate trade usages. See supra note 65. This distinction is reflected in the willingness of some courts to give less weight to written terms when contrary trade usages are presented than when inconsistent prior agreements are alleged. See, e.g., Action Time Carpets, Inc. v. Midwest Carpet Brokers, Inc., 271 N.W.2d 36, 39 (Minn. 1978) (evidence of oral agreements should be excluded, but evidence of trade usage could be admitted).

166. See supra note 152.

167. Certainly, the objective theory of contract interpretation does not now mean that actual understandings are irrelevant, if it ever did. Compare Judge Hand's famous dicta in Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract has, strictly speaking, nothing to do with the personal, or individual intent of the parties."), aff'd, 201 F. 664 (2d Cir. 1912), aff'd, 231 U.S. 50 (1913) with Judge Frank's dissenting view in Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 764 (2d Cir. 1946) ("Fortunately, most judges are too common-sensible to allow, for long, a passion for aesthetic elegance, or for the appearance of an abstract consistency, to bring about obviously unjust results."). See generally Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 935, 942-52 (1967) (observing that actual understandings are relevant to contract interpretation); Sharp, Mr. Justice Holmes: Some Modern Views: Contracts, 31 U. CHI. L. REV. 268 (1964) (arguing that Holmes' defense of the objective theory was inconsistent with his belief in freedom of contract).

168. I am indebted to Professor John Honnold for the term "probable" as used in the text. This term acknowledges that purely subjective intention is unascertainable while maintaining the Code's focus on the parties' actual expectations. See also Levi, supra note 3, at 1106-07 ("The Code views trade usage as a way of determining the parties probable intent."). Professor Honnold also raised the question whether the issue of probable intention should be decided by the judge or the jury. This is a difficult and important question that should be the subject of another article. My preliminary view is that the existence of agreement on a particular term is ultimately a factual question, but perhaps it is one that should be decided by the court because of the complexity of the issue and in order to promote consistent and articulate decisions. See generally E. FARNSWORTH, supra note 19, § 7.14, at 515-17 (discussing the role of court and jury in the interpretation of contracts); C. WRIGHT, LAW OF FEDERAL COURTS § 92, at 614-16 (4th ed. 1983) (discussing the possibility of a complexity exception to the constitutional right to jury trial).

169. See the factors mentioned in Llewellyn Papers, Draft Section 1-CC, supra note 161.

170. This allocation of the evidentiary burden would be consistent with the presumption that tradespeople normally expect trade practices to be followed. See supra notes 140-45 and accompanying text.

171. Cf. Kenneth Reed Constr. Corp. v. United States, 475 F.2d 583, 588 (Cl. Ct. 1973) ("If it was the intention of defendant to alter existing trade practices . . . it had the obligation to so state in clear and unambiguous language."); Tufano Contracting Corp. v. United States, 356 F.2d 535, 539 (Cl. Ct. 1966) ("Because use of such blocking was not customary in the trade, it was incumbent upon
the guiding principle of section 1-205(4) that unless a term is specifically agreed upon, it does not change the normal expectation that trade practices will be followed.

C. The Meaning of Express Terms

Once the court has determined that the parties agreed to a term that purports to vary trade usage, the next step must be to determine the meaning of that term. The analogy between section 1-205(4) and the parol evidence rule is particularly harmful here. Under the parol evidence rule and the related plain meaning rule,172 many courts treat written terms as if they had a meaning apart from their commercial context.173 This approach is a consequence of the parol evidence rule's focus on consistency. Because it appears circular to say that parol evidence can be considered to determine whether a writing is consistent with the parol evidence, courts tend to define the meaning of a writing without reference to extrinsic evidence. Although some courts do not follow this path,174 the tendency to disregard commercial context is strong whenever the inquiry centers on a question of consistency, as it does under the "quasi parol evidence rule" interpretation of section 1-205(4).175

If, however, one focuses on the commercial meaning of express terms rather than on the question of consistency, analysis is directed in a more productive way. Instead of comparing "extrinsic" evidence of a trade usage on the one side with the "plain meaning" of an express term on the other, one may look to commercial practice to see what the express term means. In particular, one may ask whether the express term is understood to modify or negate the trade prac-
practice. This is the crucial question under section 1-205(4).176

Two recent cases demonstrate contrasting analytic approaches to determining the meaning of express terms under section 1-205(4). The dispute in Advance Process Supply Co. v. Litton Industries Credit Corp.177 arose because Litton, the assignee, with recourse, of a sales contract under which money was owed to Advance Process, failed to file financing statements necessary to perfect a security interest. Under normal trade usage, Advance Process would not have been liable for losses resulting from Litton's failure to perfect the security interest.178

The United States Court of Appeals for the Seventh Circuit held that the trade practice did not apply because, under an express term179 of the contract, Advance Process warranted that all required statements "have been correctly filed."180 The court held that the plain meaning of this term was inconsistent with the trade usage; therefore, the express term controlled, and Litton was not liable for the improper filing.181

Although the lay meaning of the disputed term may have appeared "plain on its face,"182 it is not clear that the meaning assigned by the court was the meaning actually understood by the parties. Advance Process argued that the term under which it warranted the proper filing of financing statements did not change the normal expectation that Litton would be liable for its own mistakes. Indeed, it is possible that the commercial meaning of the term was that Advance Process warranted all filings for which it was responsible but not those for which Litton was responsible.183 The Advance Process decision demonstrates that even when parties have actually agreed to a term that appears inconsistent with a trade practice, a court must determine the commercial meaning of the term before it can resolve the question of consistency under section 1-205(4).

The decision of the United States District Court for the Eastern District of Arkansas in Dreyfus Co. v. Royster Co.184 contrasts sharply with the Seventh

176. Indeed, this is the question raised in the official comment: Does the writing "carefully negate" the trade usage? See U.C.C. § 2-202 comment 2 (1978); supra text accompanying notes 88-89.

177. 745 F.2d 1076 (7th Cir. 1984).

178. Id. at 1079.

179. The court made no finding as to whether there had been actual agreement on the written term. If there were no actual agreement, the term would not have been an "express term," and the trade usage should have governed. See supra notes 147-71 and accompanying text. For the purposes of this discussion, it is assumed that there was actual agreement on the term at issue.

180. Advance Process, 745 F.2d at 1079 & n.4.


182. Advance Process, 745 F.2d at 1079.

183. Indeed, Litton originally purchased the secured debt without recourse to Advance. The written term in which Advance guaranteed all proper filings was adopted in connection with that transaction; at that time, there was no reason to include a clause making Litton responsible for its own filings. The parties later agreed that the sale would be with recourse to Advance, but no change was made in this written term. Id. at 1077-78.

184. 501 F. Supp. 1169 (E.D. Ark. 1980). For other cases rejecting the plain meaning approach, see cases cited supra note 174.
Circuit's analysis in *Advance Process*. The dispute in *Dreyfus* involved the sale of soybean seeds. The buyer claimed that the seller had failed to notify him that the soybeans were available for delivery. The seller responded that the normal trade practice in such transactions gave the buyer the right to pick up the goods at his convenience and did not require the seller to give notice of availability.\textsuperscript{185} The buyer moved for summary judgment, arguing that the trade usage was overcome by an express term of the contract calling for a "March delivery."\textsuperscript{186}

Although the express term\textsuperscript{187} appeared to require the seller to make the soybeans available at a certain time, the court acknowledged the potential significance of trade usage and held that there was a genuine issue of fact concerning the parties' actual intent to change the normal practice. The court ruled that the trier of fact must evaluate the commercial meaning of "March delivery" and decide whether that term required the seller to give notice of availability or delay.\textsuperscript{188} Although the delivery term had a clear meaning on its face, the court recognized that it could have a totally different significance to those in the trade.\textsuperscript{189}

The recognition that members of a commercial community may use common words in special ways or that they may assign added significance to common forms of communication is fundamental to applying section 1-205. Because contractual obligations are based primarily on individual volition, the law must interpret contractual relationships as they are understood by the parties to the contract. If the parties are members of a trade community, their understanding will be formed by their experience in the community. In recognition of this commercial reality, section 1-205 compels courts to interpret contracts according to their commercial meanings.

D. "Consistency"

When the phrase "express terms" in section 1-205(4) is correctly found to include only those terms actually agreed to by the parties, interpreted as those in the trade would understand them, the notion of consistency acquires a significance different from its import under the parol evidence rule. Neither the expansive total negation test nor a restrictive test of consistency provides a proper focus. The crucial goal under section 1-205(4) should be to determine what effect the express term has on the trade practice. Did the parties expect that the normal trade practice would be followed despite the clause, or did they believe that the clause required a different procedure? The best way to answer this ques-
tion is to determine whether, in the trade, the presence of similar express terms causes parties to vary the normal practice. If it does, the express term is inconsistent with the trade practice; if it does not, the express term is consistent.

In Dreyfus, for example, the court correctly recognized the need to determine the effect of the "March delivery" term on the trade practice permitting buyers to choose when to pick up their goods. As the court noted, the crucial question was "whether or not the usage of trade . . . recognize[d] the existence of the 'March delivery' term." If the trade usage was observed in transactions involving similar delivery terms, then the "March delivery" term should impose no additional obligation on the seller. If the trade usage was not followed in transactions involving similar terms, however, then the express term and the trade usage would be inconsistent, and the express term should control.

Under this approach, the issue of consistency turns primarily on a determination of the commercial meaning of the express term. As the original comment to section 1-205(4) explained:

When the express language used in the agreement seems to conflict with the applicable usage of trade . . . a vital question is raised by [section 1-205(4)]. . . . The question becomes . . . in the first instance: What does the explicit language, read commercially, mean? . . . The question is, second, how far does the language, read commercially, even purport to negate or modify an otherwise clear . . . usage of trade?

For inconsistency of language and background exists merely because the words used mean something different to an outsider than they do to the merchants who used that language in the light of the commercial background against which they contracted.191

If merchants actually agree to a term but continue to follow a related trade practice, then they probably do not believe that the term is inconsistent with the usage, regardless of the lay meaning of their words. Inconsistency occurs only when the trade usage and the express term do not coexist in practice. If, after agreeing to a term, merchants do not continue to follow a related trade practice, then the term and the trade practice are inconsistent.

The drafters' views on the question of consistency are reflected in their approval of Dixon, Irmaos & CIA v. Chase National Bank,192 which was decided by the United States Court of Appeals for the Second Circuit in 1944 when the initial drafts of the Uniform Commercial Code were being written.193 The dis-

190. Dreyfus, 501 F. Supp. at 1172-73; see supra notes 184-89 and accompanying text for a discussion of this case.

191. Llewellyn Papers, General Comment, 1948, supra note 110, at 21 (emphasis added). For a discussion of the background of this General Comment, see supra note 110.

192. 144 F.2d 759 (2d Cir. 1944), cert. denied, 324 U.S. 850 (1945).

193. The Introductory Comment was presented and approved by the Joint Advisory Committee in 1945. Llewellyn Papers, Introductory Comment, 1945, supra note 110. Dixon, Irmaos became the focus of disagreement between Backus & Harfield, supra note 5, and Honnold, supra note 107. For other discussions of Dixon, Irmaos, see H. Hart & A. Sacks, supra note 5, at 437-48; Honnold, A
pute involved an apparent conflict between the written terms of a letter of credit and a trade practice in the New York banking industry.

Dixon, Irmaos, an exporter of cotton, sought payment under two letters of credit issued by Chase National Bank. The bank refused payment on the ground that Dixon, Irmaos had failed to submit a "full set" of the bills of lading, as required by one clause of the letters. The trial court found that under a well-recognized trade practice, New York banks routinely accepted partial sets of bills of lading if the documents were accompanied by indemnity agreements or guarantees against loss resulting from the absent documents. The court specifically found that this practice was followed even when a letter of credit called for a "full set of bills of lading."

As the trial court in Dixon, Irmaos concluded, among New York bankers, the express term requiring a full set of bills of lading did not mean that a full set had to be tendered, but only that a partial set had to be accompanied by a reliable indemnity, as the trade practice required. The written term, therefore, was consistent with the trade usage. The United States Court of Appeals for the Second Circuit agreed with this conclusion, holding that Dixon, Irmaos had complied with the letters of credit by tendering a partial set of bills and a guarantee against any resulting loss. The court observed: "In our opinion, the custom under consideration explains the meaning of the technical phrase 'full set of bills of lading' and is incorporated by implication into the terms of the defendant's letters of credit."

The drafters of the Code cited Dixon, Irmaos to demonstrate that a usage

Footnote to the Controversy Over the Dixon Case, Custom and Letters of Credit: The Position of the Uniform Commercial Code, 53 COLUM. L. REV. 973 (1953); Kirst, supra note 3, at 828-32.

194. The apparent reason for Chase Bank's refusal was that its client was a Belgian bank, and the German invasion of Belgium made payment unlikely. As the court of appeals observed: "It is clear that the Chase Bank would in this very case have honored the drafts, had they been presented before the German invasion of Belgium." Dixon, Irmaos, 144 F.2d at 762.

195. Id. at 760 n.1. The full set included two bills of lading; the normal practice was to send one by air and one by water, to insure against the loss of either. See id. at 762; Honnold, supra note 107, at 506.

196. Dixon, Irmaos, 144 F.2d at 761. The trial court also found that this practice was within the discretion of each bank. The court of appeals disregarded this finding of discretion as inconsistent with the conclusion that the usage existed and with the evidentiary record, which disclosed no instance in which a bank had refused to follow the practice. Id. at 761-62.

The original comment on §21, the predecessor to § 1-205, endorsed the appellate court's view. The bank in Dixon, Irmaos had argued that a mere series of favors should not be construed as creating an obligation for the bank to accept partial sets of bills of lading. The comment responded to this argument by observing, in essence, that when a trade usage is established, the practice is "beyond doubt" obligatory and is not merely a multitude of coincidental favors. Llewellyn Papers, Comment to § 21, 1948, supra note 140, at 46. But cf. Cornsnet, Inc. v. Amana Refrigerator, Inc., 594 F.2d 129, 136 (5th Cir.) ("We can find no justification, except in cases of conduct of the sort giving rise to promissory estoppel, for holding that a contractually reserved power, however distasteful, may be lost through nonuse." This case involved the practices of only one company, however, which presumably did not constitute a trade usage.), cert. denied, 444 U.S. 938 (1979); AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc., 448 F. Supp. 222 (D. Ariz. 1978) (recognizing a written trade code granting banks discretion to refuse to amend delivery address in letters of credit).

197. Dixon, Irmaos, 144 F.2d at 761.

198. Dixon, Irmaos tendered one of the two bills of lading and an indemnity agreement. Id.

199. Id. at 762.
“may incorporate a meaning seemingly contradictory of the language used.” 200 Although a usage may contradict the language used, it is not inconsistent with an express term unless the commercial meaning negates the practice so that the express term and the trade practice do not coexist in fact. 201

This notion of consistency focuses attention on the meaning and significance given to express terms by members of the trade and on the contractual context of a trade usage. The question is simple: Does the term coexist with the trade practice in the real world? If so, there is no inconsistency, regardless of the “plain meaning” of the express term. Once freed of the influence of the parol evidence rule, section 1-205(4) directs courts to resolve issues of consistency according to the shared expectations and understanding of the commercial communities to which parties belong. Section 1-205(3) provides that trade usages should be incorporated into contracts between members of the trade or others who are aware of the trade’s practices, and section 1-205(4) effectively requires that trade usage and written terms be integrated in accordance with their commercial meanings. This approach gives priority to the parties’ actual understanding; any more formal system of integration would risk imposing unexpected and unwarranted obligations on the parties.

E. Section 1-205(4) Applied

Section 1-205(4) embodies the insights that trade usage is often more reliable evidence of the parties’ actual expectations than are the terms of a printed document and that the trade meaning of written words may be totally different from their significance to a lay person. This provision gives full recognition to trade usage in defining both the content and consequences of an agreement.

The first step for a court 202 in analyzing an apparent conflict between a written term and a trade usage under section 1-205(4) is to determine whether a

200. Llewellyn Papers, Introductory Comment, 1945, supra note 110, at 4. An early draft of the official comment to § 1-205, which was very similar to the current comment, included a cross-reference to this part of the Introductory or General Comment. See Llewellyn Papers, Comment to Section 21, 1948, supra note 140, at 49 (“The problem of Subsection (4)(b) on the reading together of express terms and usage is fully developed in the General Comment to Part II, paragraphs 6 to 9.”).

201. Professor Llewellyn offered a slightly different explanation of Dixon, Irmaos in THE COMMON LAW TRADITION. He noted that the requirement of a full set of bills of lading was originally used in letters of credit contemplating export shipments. This requirement was necessary because overseas shippers issue two original bills. The requirement presents no significant obstacle to American-based seller-beneficiaries who simply receive the bills and tender them to New York banks. Import shipments are treated differently because overseas shippers often send their bills of lading to agents in New York for collection. To assure prompt payment, the set of bills is separated and sent by different modes of transportation. In such cases the seller’s representative will have a good chance of receiving at least one of the bills of lading in time to tender it for payment. The problem in Dixon, Irmaos, Professor Llewellyn argued, was that “the protective condition calling for a ‘full set of bills of lading’ was carried over from the export letters of credit, where the clause makes sense, into the import letters, where in its literal form it makes no sense at all.” K. LLEWELLYN, supra note 113, at 328-29. This explanation may be consistent with the court of appeals’ conclusion in Dixon, Irmaos that the clause requiring a full set of bills of lading was understood to allow for substitute documentation. Alternatively, it may suggest that the clause was mistakenly inserted without any actual agreement and, therefore, was not an express term under § 1-205(4). See supra notes 147-71 and accompanying text.

202. This approach may also be followed by a jury if these are deemed to be jury questions. For further discussion of this issue, see supra note 168 and the authorities cited therein.
trade practice relevant to the dispute exists.\textsuperscript{203} Next, the court must determine whether the written term qualifies as an express term.\textsuperscript{204} Finally, the commercial meaning of the express term must be established; in particular, the court must decide whether the express term requires that the normal trade practice not be followed.\textsuperscript{205} This approach requires clear proof of the existence of a trade usage, but also gives full effect to the parties' actual intentions or expectations concerning the usage.

The approach developed above avoids the problems of the total negation test\textsuperscript{206} because it gives effect to express terms by which the parties actually intended to vary or negate trade usage. In \textit{Carter Baron Drilling v. Badger Oil Corp.},\textsuperscript{207} for example, the clause "operator shall pay contractor" might have been an unusual term, inserted purely to reflect an agreement to change the normal practice. The total negation test diverted the court from evaluating whether the express term and the trade usage normally coexisted, yet such an evaluation is crucial in determining the parties' expectations.\textsuperscript{208}

In addition, the interpretive approach outlined in this Article avoids the problems posed by a restrictive interpretation of section 1-205(4)\textsuperscript{209} because it allows a written term to control only if it was actually agreed upon and if the commercial effect of the term is to negate the trade practice. As this approach suggests, the court in \textit{General Plumbing & Heating v. American Air Filter Co.}\textsuperscript{210} should have considered whether the printed term providing no guarantee of shipment on any particular date was actually contemplated and agreed to by the parties.\textsuperscript{211} If the parties did not actually agree on the term and expect it to vary the normal practice, the court should have permitted them to follow the trade practice.

If the term in \textit{General Plumbing} was agreed on, then the court should have determined that term's commercial meaning. In particular, the court should have ascertained whether the trade practice requiring suppliers to deliver in time for buyers to complete their subcontracts was followed under contracts containing similar "no guarantee of shipment" clauses. A continuance of the trade practice in such cases would have indicated that the "no guarantee" term was not understood to negate the trade practice.\textsuperscript{212}

\begin{itemize}
\item \textsuperscript{203} See supra notes 114-17 and accompanying text.
\item \textsuperscript{204} See supra notes 147-71 and accompanying text.
\item \textsuperscript{205} See supra notes 172-89 and accompanying text.
\item \textsuperscript{206} See supra notes 71-89 and accompanying text.
\item \textsuperscript{207} 581 F. Supp. 592 (D. Colo. 1984); see supra notes 76-80 and accompanying text for a discussion of this case.
\item \textsuperscript{208} Cf. Federal Express Corp. v. Pan Am. World Airways, Inc., 623 F.2d 1297 (8th Cir. 1980) (noting that trade usage was followed in transactions in which virtually identical express terms were used); Carl Wagner & Sons v. Appendagez, Inc., 485 F. Supp. 762 (S.D.N.Y. 1980) (finding that trade practice was followed only when express terms required it).
\item \textsuperscript{209} See supra notes 90-117 and accompanying text.
\item \textsuperscript{210} 696 F.2d 375 (5th Cir. 1983); see supra notes 92-96 and accompanying text for a discussion of this case.
\item \textsuperscript{211} First the court would have needed to determine if the alleged trade practice actually existed. See supra notes 114-17 and accompanying text.
\item \textsuperscript{212} In Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981), for example,
\end{itemize}
Under the analysis advanced in this Article, the court in *Gindy Manufacturing Corp. v. Cardinale Trucking Corp.* 213 should have considered directly whether the parties actually agreed to the “as is” clause in Gindy’s standard form contract. 214 If they did not, the “as is” clause was not an express term under section 1-205(4) and should not have been given priority. Instead, the trier of fact should have been required to give effect to the trade usage as the more accurate reflection of the parties’ intentions and expectations.

Finally, in *Advance Process Supply Co. v. Litton Industries Credit Corp.* 215 the correct analysis based on principles formulated in this Article would have consisted of the following inquiries: (1) Was there a trade practice making a creditor responsible for improper filing of a security interest? (2) Did the parties actually agree to a term whereby the seller/guarantor warranted that all necessary notices and statements were properly filed? and (3) Did this express term mean that the trade practice would not be followed and that the creditor would not be responsible for improper filing?

The court in *Advance Process* ended its analysis after the second step. The court looked merely at the “plain meaning” of the express term and held that it superseded the alleged trade practice. 216 This analysis omitted the crucial step of determining what the express term actually meant to the parties.

It may be that the warranty of filing term in *Advance Process* meant that the trade practice would not be followed. If so, the court’s conclusion was correct. 217 If, however, such clauses are routinely ignored in practice or are understood to apply only when the seller is the original creditor, 218 then the court erred in concluding that the express term negated the trade practice. If the court erred in enforcing the term’s “plain meaning,” it imposed an obligation on *Advance Process* that neither party expected, that was not recognized by the trade community, and that was not justifiable on any other ground.

The analysis proposed in this Article would allow courts to enforce the clear purpose of section 1-205: to give full effect to trade usage as a source and reflection of the shared expectations of those in the trade, while recognizing the power of individuals to change the normal practices by agreement.
III. Conclusion

The doctrinal shift toward trade usage as a primary element in contractual obligation was heralded by Karl Llewellyn and others as a way to make the law responsive to the problems and values of the commercial community. Professor Llewellyn believed that the common law is best when it is molded by judges who are steeped in the particulars of each dispute and sensitive to the shared values of the community. Emphasis on trade usage in the interpretation of commercial contracts reinforces both of these elements: information about trade usage helps judges to understand the context in which contracts are made, and it expresses the shared values and expectations of the commercial community. Trade usage is thus a key element in a "realistic" interpretation of contracts.

Two major criticisms, however, have been leveled against the view that trade usage should be treated as a primary element in a contractual obligation. The first criticism is that it is anomalous, in this age of the socialization of contract, to treat trade usage as an element of the parties' actual expectations. Courts in the nineteenth century, it is argued, justified resort to trade usage under the guise of implied terms or presumed intentions in order to maintain the will theory of contract.

This theory was consistent with the then-
dominant ideology of laissez-faire economics and individualism.\textsuperscript{227} In the twenty-first century, however, regulation and intervention by the state are thought to be acceptable and desirable,\textsuperscript{228} and contract law frankly admits of numerous areas in which the rights and obligations of contracting parties are determined by external authorities.\textsuperscript{229} Because of this change in contract theory, some commentators argue that it is no longer necessary to treat trade usage as a part of the parties' expectations\textsuperscript{230} and that trade usage should instead be viewed as an external source of law.\textsuperscript{231}

Although provocative, this critique oversimplifies the communal character of trade usage and overlooks a fundamental innovation in section 1-205.\textsuperscript{232} Although section 1-205 employs the language of individualism, including such key terms as expectation and agreement,\textsuperscript{233} it envisions actors and activity in a way profoundly different from the individualistic model of contract. Under section 1-205, parties are formed by their experiences in a community. They define their rights and obligations according to relationships that transcend particular contracts and that exist as complex social institutions.\textsuperscript{234} The "individual will"

\textsuperscript{227} See P. Atiyah, supra note 13, at 4-5; L. Friedman, supra note 225, at 20-22; M. Horwitz, supra note 13, at 173-88; Gabel & Feinman, supra note 225, at 175-78. The complex ways in which contract law was influenced by these political and economic theories is explored in P. Atiyah, supra note 19, at 219-568.

\textsuperscript{228} See P. Atiyah, supra note 19, at 571-779; F. Kessler & G. Gilmore, supra note 224, at 9-12; see also Klare, Contracts Jurisprudence and the First-Year Casebook (Book Review), 54 N.Y.U. L. Rev. 876, 876-95 (1979) (discussing the development of modern contract theory).

\textsuperscript{229} As Professors Kessler and Gilmore observed, modern contract law includes both legislative controls, such as statutes governing labor relations or consumer protection, and judicial controls, such as the doctrines of unconscionability, good faith, promissory estoppel, and the like. See G. Gilmore, supra note 224, at 55-84; F. Kessler & G. Gilmore, supra note 224, at 1-14, 1118.

Some legal commentators, noting the decline in laissez-faire economics and the increase in various forms of social regulation, suggest that individualism is no longer a prevalent ideology. See, e.g., P. Atiyah, supra note 19, at 627-31; Gabel & Feinman, supra note 225, at 178-81. Yet a recent study of American values demonstrates how the powerful grip of individualism and relativism continues to dominate American thought. R. Bellah, R. Madsen, W. Sullivan, A. Swidler & S. Tipton, Habits of the Heart: Individualism and Commitment in American Life (1985) [hereinafter cited as INDIVIDUALISM AND COMMITMENT]; see also Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1717 (1976) ("[T]he rhetoric of individualism so thoroughly dominates legal discourse at present that it is difficult even to identify a counter-ethnic.").

230. These critics generally do not question the assumption that parties expect to follow trade usage. But see Williams, supra note 117 (arguing that trade usages do not exist). The critics argue instead that it is difficult to determine actual expectations and that actual expectations are ultimately irrelevant, because gaps in the parties' expectations should be filled by trade usage, to the extent that it is fair and reasonable. See, e.g., P. Atiyah, supra note 13, at 176-83; Farnsworth, supra note 13, at 876-78.

\textsuperscript{231} See, e.g., P. Atiyah, supra note 13, at 182 (The incorporation of trade customs "is usually done under the guise of an implied term, but it is in truth simply a rule of law that parties must perform their contracts in conformity with relevant customs and usages.").

\textsuperscript{232} This Article, including the discussion that follows, consists of doctrinal analysis. Such analysis is worthwhile, because how we think about the world affects what world we live in, and legal doctrine affects how we think about the world. Doctrinal debate often engages genuine moral concern, and the results of such debate define the character of our society in significant ways. Thus, I part company with many in the ever-growing Critical Legal Studies movement, but I am grateful to them for an engagement on first principles. See generally Kennedy & Klare, A Bibliography of Critical Legal Studies, 94 Yale L.J. 461 (1984) (listing publications of scholars associated with the Critical Legal Studies movement).

\textsuperscript{233} See, e.g., U.C.C. §§ 1-205(2)-(4) (1978).

\textsuperscript{234} In this sense § 1-205 is consistent with Professor Macneil's theory of relational contract law. See, e.g., I. Macneil, THE NEW SOCIAL CONTRACT (1980); Macneil, Value in Contract: In-
of such actors is a social product, unique in its particular needs and desires, but fundamentally constituted according to communal norms. Unlike the actors in an individualistic model, the parties envisioned by section 1-205 usually wish neither to invent wholly new relationships nor to quibble over the smaller details of their obligations. It is not that these actors are munificent or selfless, but merely that they operate in a world defined largely by their trade community and that they willingly accept the normal obligations attendant upon their roles within that community.

In some trades, sellers are expected to give buyers advance notice of price increases, or to repair any defects in goods delivered, or to deliver goods in time for their subsequent use by buyers. In some trades, it is understood that buyers will not reject nonconforming goods unless they are totally useless or that buyers will pay for goods prior to delivery. Because individual buyers and sellers accept numerous obligations such as these, they are indeed formed by the community in which they function. Because section 1-205 recognizes this communal element in human character, it acknowledges the inevitably public nature of contract law.

Although the first criticism of the primacy of trade usage may be dismissed for its failure to take account of complexities in the Code's conception of trade usage, the second major criticism of section 1-205 is not so easily quieted. In an important article exploring the jurisprudence of the Code, Professor Danzig charged that the Code uncritically accepts the morality of the marketplace.

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ternal and External, 78 NW. U.L. REV. 340 (1983). Professor Macneil is overly pessimistic in his assessment of relational principles in the Uniform Commercial Code. See e.g., I. MACNEIL, supra, at 72-77. Professor Macneil's conclusion that "[t]he gap-filling rules of the UCC, the common law, and equity are far more rigid than the principles businessmen normally apply to each other when difficulties arise," id. at 73-74, does not give adequate consideration to the role of § 1-205.

235. See generally J. DEWEY, HUMAN NATURE AND CONDUCT 63 (1922) ("The problem of social psychology is not how either individual or collective mind forms social groups and customs, but how different customs, established interacting arrangements, form and nurture different minds"); E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 350 n.16 (Free Press 1933) ("[A]lthough society may be nothing without individuals, each of them is much more a product of society than he is its maker."); G. MEAD, MIND, SELF, AND SOCIETY (1934) (exploring the development of individual mind and consciousness as a function of social experience).

236. In classical contract law, parties were viewed as "individual economic units which in theory, enjoyed complete mobi lity and freedom of decision." L. FRIEDMAN, supra note 225, at 21; see P. ATTIAH, supra note 19, at 260-63; G. GILMORE, supra note 224, at 6-7, 94-95.

237. See, e.g., Nanakuli Paving & Rock Co. v. Shell Oil Corp., 664 F.2d 772 (9th Cir. 1981).


240. See, e.g., Urbana Farmers Union Elevator Co. v. Shock, 351 N.W.2d 88 (N.D. 1984); cf. Sunbury Textile Mills, Inc. v. Commissioner, 585 F.2d 1190 (3d Cir. 1978) (recognizing trade usage that buyer may cancel only if the first installment does not meet his or her needs).


242. Danzig, supra note 2, at 627-31. As Professor Danzig noted, the allegation that the Code is indifferent to moral content echoes a recurring criticism of legal realism. Id. at 627; see, e.g., Fuller, American Legal Realism, 82 U. PA. L. REV. 429 (1934); Kantorowicz, Some Rationalism About Realism, 43 YALE L.J. 1240 (1934); Verdun-Jones, The Jurisprudence of Karl Llewellyn, 1 DALHOUSIE L.J. 441 (1974); cf. Left, Unconscionability and the Code—The Emperor's New Clause, 115 U. PA.
Danzig noted that although the Code raises ethical concerns, it directs courts to rely on the accepted beliefs and practices of a community in ascertaining ethical values. He observed: "The premise appears to be that values have an objectively ascertainable existence and a near universal acceptance and thus can be judicially discovered just as a 'reasonable price' can be ascertained by reference to a market."243 The problem with this approach, Professor Danzig argued, is that the Code does not provide any standard by which the moral worth of trade practices can be judged.244 Although the official comment to section 1-205 indicates that trade usage must be "decent" and "reasonable" to be binding,245 the Code does not define these standards: "The presumption appears to be that what is 'commercially decent'... will be self-evident to one who carefully studies the situation."246

Rejecting the presumption that community ethical values are somehow self-evident, Professor Danzig concluded that the Code provides no way to judge the moral worth of trade practices beyond the subjective values of judges or the individual interests of the parties involved. In Danzig's view, without a legitimate legislative choice between competing values,247 the Code's moral content is confined either to the morals of the marketplace or to the individual preferences.

L. Rev. 485 (1967) (criticizing § 2-302 of the Code). But see Casebeer, supra note 2 (arguing that Llewellyn's conception of law rests on the unification of fact and value).

According to Danzig, Professor Llewellyn's insistence that legal realism should put first things first deferred and ultimately precluded a consideration of moral choices. Danzig, supra note 2, at 631 (Danzig quotes Llewellyn's admission in the preface to his casebook: "[T]he book errs, I think, in too happily assuming the needs of buyers and sellers to be the needs of the community, and in rarely reaching beyond business practice in evaluation of legal rules." K. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES at xv n.3 (1930)).

243. Danzig, supra note 2, at 629.

244. Id. at 622-27.

245. U.C.C. § 1-205 comment 5 (1978) ("[f]ull recognition is thus available... for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree"); id. comment 6 ("The policy of this Act controlling explicit unconscionable contracts and clauses... applies to implicit clauses which rest on usages of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be 'reasonable'."); cf. Hawkland, supra note 12, at 202 (arguing that trade usage must be reasonable to be binding under § 1-205); Murray, Philosophy of Article 2, supra note 2, at 19-20 (arguing that the Code empowers courts to reject trade practices they find unfair, inequitable, or unjust); Patterson, supra note 8, at 850-51 (the Code includes the requirement that trade usages be reasonable); Llewellyn, Book Review, supra note 141, at 704 ("The background of trade practice gives a first indication; the line of authority rejecting unreasonable practice offers the needed corrective.").

246. Danzig, supra note 2, at 629.

247. Danzig agreed with the view of Professors Hart and Sacks that the evaluation of trade usages involves policy choices that should be made by legislatures: These thinkers [Hart and Sacks] reason from the premise that there is no self-evidently right answer to an ethical question. From this they infer that the resolution of such questions requires choice, and to them choice ought, whenever feasible, to be made in a self-conscious, visible way by those sensitive to the majority's validation or repudiation of their choices through the electoral process: that is, by legislators.

Id. at 630. As Danzig noted, Llewellyn's views on the institutional roles of the legislature and the judiciary were not articulated as a fully developed theory. Id. at 624 n.10. It is clear, however, that Llewellyn believed that the law must be found, not in legislated policy, but in exploration of the "fact-pattern of common life," and that courts are best equipped to articulate the law. See generally K. LLEWELLYN, supra note 113, at 122, 121-57, 256-398 (Professor Llewellyn's views on the nature of law and the judicial function); Casebeer, supra note 2 (examining Llewellyn's conception of the unification of fact and value).
Professor Danzig’s criticism identifies an undeniable shortcoming of section 1-205. The Code strongly suggests that some moral critique of trade usage is necessary, but it neither explains why such a critique is appropriate nor defines explicitly the standards to be applied. What the Code does, however, is recognize the inescapable role of the community in the agreements of individual actors. The conception of trade usages as communal norms suggests that a moral critique of trade usages is appropriate, and it provides a direction for developing criteria by which to evaluate trade usage.

Professor Danzig too easily dismissed the role that the Code’s commitment to communal norms can play in a moral inquiry. If trade usages operate as communal norms, then the value of a trade usage can be determined by the quality of the community it helps to create. To recognize our communal character is to recognize the diversity of the communities that form us and to acknowledge the possibility of communities formed by exploitation, racism, slavery, greed, and the like. Bad communities may create bad characters, and enforcement of the common expectations of such characters may make bad law. What is needed, here as elsewhere, is a language of communal value: terms and concepts that can equip courts to consider the quality of communities.

Although section 1-205 does not itself provide such a language, it does open an avenue for moral discussion, and it provides a starting point from which to generate a moral critique of trade usage. Although such a critique is beyond the scope of the Article, this Article has demonstrated that section 1-205 can be defended as a skillfully crafted innovation. The application of section 1-205 requires care and deliberation by the courts, but if properly interpreted, this provision can significantly enrich the intellectual equipment available in commercial law.

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248. Danzig, supra note 2, at 630. See generally M. Horwitz, supra note 13, at 190-96 (trade usage reflects the values of those with market power); Mensch, The History of Mainstream Legal Thought, in THE POLITICS OF LAW 18, 34 (D. Kairys ed. 1982) (“Without standards of reasonableness outside existing practice, singing reason is simply ratification of the status quo . . . .”).

249. See authorities cited supra note 242. The question whether trade usage is subject to ethical standards has arisen repeatedly in the law of trade usage. Both before and after the Code, courts have held that trade usages must be “reasonable,” see, e.g., Gravenhorst v. Zimmerman, 236 N.Y. 22, 139 N.E. 766 (1923) (unreasonable usage of bankers to delay transmission of money when new currency was inflating); Fuller v. Robinson, 86 N.Y. 306 (1881) (practice of tobacco brokers in falsifying credit standing of buyers not reasonable); “moral,” see, e.g., Jones v. West Side Buick Auto Co., 231 Mo. App. 187, 93 S.W.2d 1083 (1936) (usages of used car dealers in turning back speedometers were deceptive and contrary to public good); “fair,” see, e.g., Albert v. R.P. Farnsworth & Co., 176 F.2d 198 (5th Cir. 1949) (trade usage binding subcontractor but not general contractor would not be enforced); Steel & Wire Corp. v. Thyssen, Inc., 20 U.C.C. Rep. Serv. (Callaghan) 892 (R.D. Mich. 1976) (trade usage imposed by dominant buyer unfair); or “efficient,” see, e.g., Western Indus., Inc. v. Newcor Canada Ltd., 739 F.2d 1198 (7th Cir. 1984) (Posner, J.) (alleged trade usage limiting consequential damages may be efficient).

250. See generally J. Dewey, LIBERALISM AND SOCIAL ACTION (1935) (suggesting an important connection between communal and individual character); A. DE TOQUEVILLE, DEMOCRACY IN AMERICA (G. Lawrence trans. 1966) (1st ed. Paris 1835) (exploring the relationship between communal norms and individual character); INDIVIDUALISM AND COMMITMENT, supra note 229 (studying the effect of communal norms on individual character).

251. Cf. INDIVIDUALISM AND COMMITMENT, supra note 229 (suggesting the need for a language of communal value).