UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 64 | Number 4 Article 2

4-1-1986

Stock Equipment for the Bargain in Fact: Trade Usage, Express Terms and Consistency under Section 1-205 of the Uniform Commercial Code

Amy H. Kastely

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

AMY H. KASTELY††

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).

†† Assistant Professor of Law, William S. Richardson School of Law, University of Hawaii. B.A. 1973, University of Chicago; J.D. 1977, University of Chicago. I am grateful for support on this project from the University of Hawaii Research Council and the William S. Richardson School of Law. I thank John Honnold and Addison Bowman for their helpful comments, Jane Takata for her skillful secretarial work, and, especially, Joyce McCarty for her excellent assistance and sustaining friendship. Finally, I thank J. Kastely, whose ideas and insights have enriched every aspect of my work.

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;

cific 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.[3] Under pre-Code doctrine, the common practices of a particular trade were used primarily to define specific technical terms[4] or to fill in "gaps" left by the parties' agreement.[5] If the parties had failed to agree on a particular matter, courts would use trade usage to sup-

---

Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); and Murray, *The Realism of Behaviorism Under the Uniform Commercial Code*, 51 OR. L. REV. 269 (1972) [hereinafter cited as Murray, *The Realism of Behaviorism*]. Other interesting articles on this general topic include Carroll, *Harpooning Whales, of which Karl N. Llewellyn is the Hero of the Piece; or Searching for More Expansive Joints in Karl's Crumbling Cathedral Indus.*, 12 B.C. INDUS. & COM. L. REV. 139 (1970); Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330 (1951); Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291; King, *The New Conceptualism of the Uniform Commercial Code*, 10 ST. LOUIS U.L.J. 30 (1965); McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978); Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213 (1966); Murphy, *Facilitation and Regulation in the Uniform Commercial Code*, 41 NOTRE DAME LAW. 625 (1966); Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1 (1981) [hereinafter cited as Murray, *Philosophy of Article 2*]; Speidel, *Contract Law: Some Reflections Upon Commercial Context and the Judicial Process*, 1967 WIS. L. REV. 822; and Warren, *Formal and Operative Rules Under Common Law and Code*, 30 UCLA L. REV. 898 (1983).

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 qualif[ies] 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; Levie, *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 Pape, 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 the burdens of making 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.

Note, *Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 COLUM. L. REV. 1192, 1195 (1955); *cf.* H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 445-48 (1958) (unpublished manuscript available at the Harvard Law School) (discussing custom as filling gaps in the general law).

plement the contract.[6] Although courts justified this practice on the theory that "the parties knew of the usage and contracted with reference to it,"[7] they nonetheless treated trade usage as extrinsic to the agreement itself.[8] 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[9] as an essential part of the "agreement."[10] Section 1-205 provides that the "true understanding"[11] of the parties is reflected in trade usage,[12] as well as in the parties' lan-

---

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.

UNIF. SALES ACT § 71 (1906). This section was interpreted to allow trade usage to supplement a contract when the parties' language did not address a particular matter. *See, e.g.*, La Nasa v. Russell Packing Co., 198 F.2d 992 (7th Cir. 1952).

7. Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 390 (1871); *see* Hostetter v. Park, 137 U.S. 30 (1890); Nicoll v. Pittsvein Coal Co., 269 F. 968, 971 (2d Cir. 1920); Shipley v. Pittsburgh & L.E.R. Co., 83 F. Supp. 722 (W.D. Pa. 1949); Fisher v. Congregation B'nai Yitzhok, 177 Pa. Super. 359, 110 A.2d 881 (1955); 1 W. STORY, A TREATISE ON THE LAW OF CONTRACTS § 17, at 9-10 (M. Bigelow 5th ed. 1874).

8. *See* Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 848-52 (1964); *infra* note 23 and accompanying text.

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.

It is significant that this definition speaks of "any practice or method of dealing" and not merely of a trade meaning for specific words.

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)." An earlier version of this section provided: " 'Agreed' or 'Agreement' means the bargain [of the parties] in fact as found in the language of the parties or in course of dealing or usage of trade or course of performance or by implication from other circumstances." U.C.C. § 1-201(2) (1949), *reprinted in* 6 UNIFORM COMMERCIAL CODE DRAFTS 32 (E. Kelly comp. 1984).

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." AMERICAN LAW INST. & NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 13, *reprinted in* 18 UNIFORM COMMERCIAL CODE DRAFTS, *supra*, at 37 [hereinafter cited as 1956 RECOMMENDATIONS]. It is clear that no substantive change was intended. Although the New York Law Revision Commission commented that the original version might have been too broad in its definition of "agreement," this criticism was directed primarily at U.C.C. § 1-205 (1952). NEW YORK STATE LAW REVISION COMM'N, STUDY OF UNIFORM COMMERCIAL CODE, Legis. Doc. No. 65(B), at 84-86 (1955). The Editorial Board apparently did not accept the view of the New York State Law Revision Commission because no change was made to § 1-205, and no reference was made to the New York Commission Report. 1956 RECOMMENDATIONS, *supra*, at 13. *See* Mooney, *supra* note 2, at 228; *cf.* Luedtke Eng'g Co. v. Indiana Limestone Co., 592 F. Supp. 75, 79 (S.D. Ind. 1983) ("Thus, the Code supplies a sales agreement with much that is not made express by the parties."), *aff'd*, 740 F.2d 598 (7th Cir. 1984); Personal Fin. Co. v. Meredith, 39 Ill. App. 3d 695, 702, 350 N.E.2d 781, 789 (1976) ("[T]he language of the contract is not controlling as to the parties' 'agreement.' ").

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.[13] This "true understanding" or "expectation" is the primary source of contractual obligation under Article 2.[14]

This conception of trade usage reinforces other Code provisions that interpret contract obligations by reference to commercial practices and standards.[15] The Code embodies the beliefs that the reasonable[16] 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.[17] The treatment of trade usage as a part of the agreement in section 1-205 provides a foundation for these principles.[18]

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.[19] 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* Hawkland, *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-

and "expectations" as sources for defining the obligations imposed by a contract.[20] 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[21]–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,[22] 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.[23]

Under the Code, however, trade usage cannot be so easily dismissed.[24] 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).

23. Indeed, many courts held that trade usage was subject to exclusion as extrinsic evidence under the common-law parol evidence rule. *See, e.g.*, Chase Manhattan Bank v. May, 311 F.2d 117, 119 (3d Cir. 1962), *cert. denied*, 372 U.S. 930 (1963); Ehlinger v. Washburn-Wilson Seed Co., 51 Idaho 17, 19-20, 1 P.2d 188, 189 (1931); Booher v. Williams, 341 Ill. App. 504, 511, 95 N.E.2d 518, 521 (1950); *cf.* R.L. Rothstein Corp. v. Kerr S.S. Co., 21 A.D.2d 463, 467, 251 N.Y.S.2d 81, 84 (1964) (existence of a written term makes evidence of trade usage immaterial), *aff'd*, 15 N.Y.2d 897, 206 N.E.2d 360, 258 N.Y.S.2d 427 (1965).

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."[25] 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.[26] 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,[27] and this trend has confused the basic meaning and function of section 1-205(4).[28]

Cir. 1981); Peoples Bank & Trust v. Reiff, 256 N.W.2d 336, 341 (N.D. 1977); Raney v. Uvalde Producers Wool & Mohair Co., 571 S.W.2d 199, 200 (Tex. Civ. App. 1978). *But see* Morgan v. Stokely-Van Camp, Inc., 34 Wash. App. 801, 808, 663 P.2d 1384, 1388-89 (1983) (dicta suggesting that trade usage is not admissible to supplement a fully integrated writing); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 85 (2d ed. 1980) (trade usage evidence is excludable under § 2-202 if it contradicts written terms); Hawkland, *supra* note 12, at 208-14 (§ 2-202 excludes some trade usage evidence). *See generally* Kirst, *supra* note 3, at 832-36 (arguing that trade usage evidence is not subject to exclusion under § 2-202); Murray, *Philosophy of Article 2*, *supra* note 2, at 16 ("No matter how final and complete the writing, no matter how fully integrated, this . . . evidence [trade usage, course of dealing, and course of performance] is always admissible."); Wallach, *The Declining "Sanctity" of Written Contracts—Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 MO. L. REV. 651, 665 (1979) ("Under the Code, parol evidence includes only prior oral and written agreements, and contemporaneous oral agreements.").

25. U.C.C. § 1-205(4) (1978).

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."[29] 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[30] 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*,[31] 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.[32] 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,[33] 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.[34] The bank responded by citing a term in the surety agreement that purported to waive "all notices whatsoever in respect to this Agreement."[35]

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.

31. 196 Pa. Super. 180, 173 A.2d 780, *aff'g per curiam* 24 Pa. D. & C.2d 720, 173 A.2d 780 (1961) (The trial judge's opinion was reprinted at 173 A.2d 780, following the opinion of the superior court.).

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.[36] Relying on sections 1-205(2) and 2-202(a),[37] 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.[38] 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.[39]

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.*[40] 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.[41] 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.[42] Relying on section 1-205, the court held that trade usage could be used to determine the actual agreement of the parties.[43] 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.[44] 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

36. *Id.* at 728-29, 173 A.2d at 784.

37. *See supra* notes 9, 24 (text of cited provisions).

38. The court reasoned that the "no notice" clause referred only to parts of the agreement other than those concerning insurance. *Pemberton*, 24 Pa. D. & C.2d at 728, 173 A.2d at 784. The dissent argued that the "explicit language" of the document should be given "its literal meaning." *Pemberton*, 196 Pa. Super. at 182, 173 A.2d at 781 (Flood, J., dissenting).

39. The court relied on U.C.C. § 2-202 comment 2 (1978): " 'Unless *carefully negated* [usages of trade and courses of dealing] have become an element of the words used.' " *Pemberton*, 24 Pa. D. & C.2d at 728, 173 A.2d at 784 (emphasis added). For a discussion of this comment, see *infra* text accompanying notes 88-89.

40. 111 N.J. Super. 383, 268 A.2d 345 (Law Div. 1970).

41. *Id.* at 386, 268 A.2d at 349.

42. Cardinale also alleged that the parties had followed this normal industry practice in their prior course of dealing and in the course of performance of the contract at issue in the case. *Id.*; *see* U.C.C. § 2-208 (1978) (course of performance).

43. *Gindy Mfg.*, 111 N.J. Super. at 389, 268 A.2d at 349. The court also relied on U.C.C. § 2-314(3) (1978), which provides that "other implied warranties may arise from course of dealing or usage of trade." *Gindy Mfg.*, 111 N.J. Super. at 389, 395, 268 A.2d at 349, 352.

44. *Gindy Mfg.*, 111 N.J. Super. at 397, 268 A.2d at 353. The court therefore denied Gindy's motion for summary judgment. *Id.* at 399, 268 A.2d at 354.

"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).[45]

In another relatively early case, *Michael Schiavone & Sons v. Securalloy Co.*,[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.[47]

In these early decisions[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. *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.[49] It is not surprising, therefore, that courts eventually used the parol evidence rule for guidance in interpreting section 1-205(4).[50] Unfortunately, reliance on the parol evidence rule brought confusion and complication rather than clarity. In effect, this analytical approach reinstituted 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[51] directly linking section 1-205(4) to the parol evidence rule was *Division of Triple T Service, Inc. v. Mobil Oil Corp.*[52] Mobil terminated

45. *Id.*

46. 312 F. Supp. 801 (D. Conn. 1970).

47. *Id.* at 804. Securalloy argued that those in the stainless steel trade actually understood the quantity term to be a mere estimate.

48. In addition to the cases discussed *supra* notes 31-47 and accompanying text, see Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1046-48 (5th Cir. 1971) (trade usage may show that a written term was not actually agreed to or that it had a special meaning to the parties).

49. *See* cases cited *supra* note 23.

50. Some courts may have seen similarities between § 1-205(4) and the parol evidence rule of U.C.C. § 2-202 (1978) because both provisions use the word "consistent." As discussed in Part II, however, this term has quite different significance in the two sections. *See infra* notes 190-201 and accompanying text. Moreover, key differences in the two sections outweigh the slight similarity arising from the use of the term "consistent." Most importantly, the parol evidence rule's requirement of a "final" writing is not a prerequisite to the application of § 1-205(4).

51. One earlier case suggested such a connection, but did not rely on it. *See* Miron v. Yonkers Raceway, 400 F.2d 112 (2d Cir. 1968) (citing Chase Manhattan Bank v. May, 311 F.2d 117 (3d Cir. 1962)).

52. 60 Misc. 2d. 720, 304 N.Y.S.2d 191 (Sup. Ct. 1969), *aff'd mem.*, 34 A.D. 618, 311 N.Y.S.2d 961 (1970).

Triple T's service station franchise[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.[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 *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.[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.[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 *Columbia Nitrogen Corp. v. Royster Co.*[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."[58] Although concluding that section 1-205(4) restates the parol evidence rule concerning trade usage,[59] the court broadly defined the term "consistency"[60] and held that the evidence of trade usage in the case should have been admitted.[61] Nevertheless, by endorsing the analogy between section 1-205(4) and the parol evidence rule, the *Columbia Ni-*

53. Mobil apparently wanted to use the land occupied by the Triple T franchise for a different purpose. *Id.* at 722, 304 N.Y.S.2d at 194.

54. *Id.* at 730-31, 304 N.Y.S.2d at 202.

55. *Id.* at 731, 304 N.Y.S.2d at 203.

56. *Id.*

57. 451 F.2d 3 (4th Cir. 1971). The written term in dispute in *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. *Id.* at 6-7.

58. *Id.* at 9 (citing *Division of Triple T Serv.*, 60 Misc. 2d 720, 304 N.Y.S. 2d 191 (Sup. Ct. 1969)).

59. *Id.*

60. *Id.* at 9-10.

61. *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 § 4-1-205(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.[70]

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"[71] 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.*,[72] 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.[73] 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.[74] 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

---

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.").

72. 664 F.2d 772 (9th Cir. 1981). For cases supporting the total negation interpretation, see Sunbury Textile Mills, Inc. v. Commissioner, 585 F.2d 1190 (3d Cir. 1978); Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971); Michael Schiavone & Sons v. Securalloy Co., 312 F. Supp. 801 (D. Conn. 1970); Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc., 59 Cal. App. 3d 948, 131 Cal. Rptr. 183 (1976); American Mach. & Tool v. Strite-Anderson Mfg., 353 N.W.2d 592 (Minn. App. 1984); Modine Mfg. Co. v. North East Indep. School Dist., 503 S.W.2d 833 (Tex. Civ. App. 1973).

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.[75]

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.*,[76] 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.[77] 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.[78] 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.[79]

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.' "[80] 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

75. *Nanakuli Paving*, 664 F.2d at 805 (emphasis added).

76. 581 F. Supp. 592 (D. Colo. 1984).

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.[81] In the leading case, *Hunt Foods & Industries, Inc. v. Dolimer*,[82] 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."[83] 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.[84]

Regardless of the value of the *Hunt Foods* test under the parol evidence rule,[85] 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

81. Hunt Foods & Indus., Inc. v. Dolimer, 26 A.D.2d 41, 270 N.Y.S.2d 937 (1966), was cited in Michael Schiavone & Sons v. Securalloy Co., 312 F. Supp. 801, 804 n.4 (D. Conn. 1981), to support the exclusion of evidence relating to an alleged oral agreement. *Michael Schiavone* was cited in Modine Mfg. Co. v. North East Indep. School Dist., 503 S.W.2d 833, 840 (Tex. Civ. App. 1973), in support of the proposition that trade usage is admissible unless it totally negates the written terms. All three decisions were cited in *Nanakuli Paving*, 664 F.2d at 797, 801-02.

82. 26 A.D.2d 41, 270 N.Y.S.2d 937 (1966).

83. *Id.* at 43, 270 N.Y.S.2d at 940. *See generally* Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 DUKE L.J. 881, 891-96 (discussing *Hunt Foods*); Wallach, *supra* note 24, at 669-71 (discussing *Hunt Foods*).

84. *Hunt Foods*, 26 A.D.2d at 43, 270 N.Y.S.2d at 940.

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. Pielet Bros. Scrap Iron & Metal, 600 F.2d 103, 111 (7th Cir. 1979); Alaska N. Dev. v. Alyeska Pipeline Serv. Co., 666 P.2d 33, 40 (Alaska 1983), *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.

88. U.C.C. § 2-202 comment 2 (1978).

89. *See supra* notes 9-18 and accompanying text; *infra* notes 114-17 and accompanying text.

90. *See* Synder v. Herbert Greenbaum & Assocs., 38 Md. App. 144, 152, 380 A.2d 618, 623 (1977).

91. *See* Division of Triple T Serv. v. Mobil Oil Corp., 60 Misc. 2d 720, 731, 304 N.Y.S.2d 191, 203 (Sup. Ct. 1969), *aff'd mem.*, 34 A.D. 618, 311 N.Y.S.2d 961 (1970).

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.*,[92] for example, the contract included a boilerplate clause stating that the shipper, American Air Filter, did not guarantee shipment on any particular date.[93] 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.[94] The United States Court of Appeals for the Fifth Circuit upheld the exclusion of all evidence relating to the alleged trade usage,[95] 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.[96]

Similarly, in *New Mexico ex rel. Conley Lott Nichols Machinery Co. v. Safeco Insurance Co.*[97] the court excluded evidence of a trade usage that did not totally negate the written term. The equipment lease[98] at issue in *Nichols* specified a "rental period of 8 months."[99] 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."[100]

In *Kologel Co. v. Down in the Village, Inc.*[101] 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."[102] The trade practice under such documents also allowed delivery to the party specified as the "notify

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.*

95. The reported decision cites MISS. CODE ANN. § 75-2-205 (1981). *General Plumbing*, 696 F.2d at 378. This citation is obviously a misprint. The court apparently relied on both §§ 1-205 and 2-202. *See* MISS. CODE ANN. §§ 75-1-205, 75-2-202 (1981).

96. *General Plumbing*, 696 F.2d at 378.

97. 100 N.M. 440, 671 P.2d 1151 (Ct. App.), *cert. denied*, 100 N.M. 327, 670 P.2d 581 (1983).

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.*

101. 539 F. Supp. 727 (S.D.N.Y. 1982).

102. *Id.* at 728.

party."[103] 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.[104]

The courts have given two justifications for a restrictive definition of the term "consistency."[105] The first justification is mentioned in *Kologel*: the need to protect the integrity of documents.[106] 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.[107]

Although this view appears reasonable, the drafters of section 1-205(4) believed that the factual presumptions underlying this traditional doctrine were inaccurate.[108] Based on their own experience and that of many others,[109] Karl

---

103. 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.*

104. *Id.* at 729 (quoting Koreska v. United Cargo Corp., 23 A.D.2d 37, 42, 258 N.Y.S.2d 432, 437 (1965)).

105. A third reason may be simply that a restrictive definition lends integrity to the "quasi parol evidence rule," while the "total negation" test blatantly undermines it. *Cf.* Southern Concrete Servs., Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581, 583-85 (N.D. Ga. 1975) (liberal admission of trade usage evidence would undermine the law's deference to written agreements), *aff'd mem.*, 569 F.2d 1154 (5th Cir. 1978).

106. *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."), *aff'd mem.*, 569 F.2d 1154 (5th Cir. 1978).

107. *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).

108. *See supra* note 17 and accompanying text. For further discussion of Professor Llewellyn's views on the relationship between contract law doctrine and practice, see Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779 (1939); Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 712-14 (1931) [hereinafter cited as Llewellyn, *What Price Contract?*].

Information on the drafting of the Uniform Commercial Code is available in UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 10, in The Karl Llewellyn Papers (unpublished collection available at the University of Chicago Law School Library) [hereinafter cited as Llewellyn Papers], and in the records of the National Conference of Commissioners on Uniform State Laws. *See generally* R. ELLINWOOD & W. TWINING, THE KARL LLEWELLYN PAPERS: A GUIDE TO THE COLLECTION (1970) (listing the documents included in the Karl Llewellyn Papers). Among the important secondary materials are W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 270-301 (1973) (discussing the genesis of the Code); Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958) (discussing the changes made by the first states to adopt the Code).

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[110] or interpret such terms differently than lay persons would.[111] Business people use paper to record "dickered

---

Code included the provision that "[p]rior drafts of text and comments may not be used to ascertain legislative intent." U.C.C. § 1-102(3)(g) (1953), *reprinted in* 16 UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 10, at 44. *See* Braucher, *supra*, at 809 (describing reaction against comments as source of interpretation). Prior drafts of Code provisions and comments, however, are rich sources of information that should not be overlooked. Of course, any interpretation of the Code must be warranted by the current version, but consideration of the Code's history can be useful in the task.

109. As Llewellyn noted in a different context, any conclusion about what expectations and presumptions underlie an agreement is unavoidably colored by the observer's beliefs about "decent" business ethics and culture. *See* Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1362 (1940). The rhetoric of legal realism, however, emphasized the factual basis of experience and judgment, and these clearly were the terms in which its insights were conceived. *See generally* W. TWINING, *supra* note 108 (exploring the ideas and methods of legal realism); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) (discussing legal realism); *cf.* Casebeer, *supra* note 2 (arguing that Llewellyn's work fundamentally rejected a distinction between fact and value).

110. As the drafters observed:

> "Written" bargains, in the days when the rules about them crystallized, were bargains whose detailed terms the two parties had looked over; and the rule was proper, that a signature meant agreement. When, however, parties bargain today, they *think* and *talk* of such matters as price, credit, date of delivery, description and quantity. These are the bargained terms. The unmentioned background is assumed without mention to be the fair and balanced general law and the fair and balanced usage of the particular trade . . . .

REVISED SALES ACT, SECOND DRAFT, *supra* note 29, at 332-33 (Comment to § 1-C). An introductory comment to an early draft of the Code reiterated this point:

> The business truth is that "explicit" terms are of two strikingly diverse types which are of strikingly diverse significance. The one type or set of terms is made up of those which are consciously dickered out by the parties and are commonly represented by their telegrams or by the typed or handwritten fill-ins on a form. Such terms are indeed always to be read against the background, but they are also to be always read as being the matters to which both parties' attention was in fact addressed.
>
> . . . . The familiar rule that "writing controls printing" is again a recognition of the fact that the parties' minds, in the process of dicker, are directed not to the clauses on a form but to the terms under actual negotiation. The equally familiar rule calling for "construction most strongly against the party preparing the document" rests upon the same strong likelihood that the party who merely "adheres" to a standard document has given its form portions no careful consideration, if any.

Introductory Comment to Parts II and III, Formation and Construction, Llewellyn Papers, *supra* note 108, at J.VI.2.h. [hereinafter cited as Llewellyn Papers, Introductory Comment, 1945].

This Introductory Comment was apparently discussed, renamed "General Comment," and approved by the Joint Advisory Committee on the Uniform Commercial Code in May 1945. *See* Meeting of Joint Advisory Committee, May 21 and 22, 1945 (Minutes), Llewellyn Papers, *supra* note 108, at J.VII.2.a. The comment was circulated, with minor revisions, as part of the Uniform Commercial Code Drafts through 1948. *See* General Comment on Part II, Commercial Law Materials 13 (Harvard Law School 1948), Llewellyn Papers, *supra* note 108, at J.X.2.h. [hereinafter cited as Llewellyn Papers, General Comment, 1948]; General Comment on Parts II and IV, Selected Comments to Uniform Commercial Code 1 (Harvard Law School 1947), Llewellyn Papers, *supra* note 108, at J.IX.2.a [hereinafter cited as Llewellyn Papers, Selected Comments].

The General Comment was one of many comments omitted from the 1949 version of the Code. *See* UNIFORM COMMERCIAL CODE (1949), *reprinted in* 7 UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 10, at 1. There is no reason to think the omission resulted from any change in policy or interpretation. Prior to 1949, the proposed comments were approximately 1000 pages long; the 1949 abridgment apparently was done to reduce the overall length of the comments. *See* American Law Institute, Report of the Director (Nov. 16, 1945), Llewellyn Papers, *supra* note 108, at J.VII.1.c.

111. The Llewellyn Papers, Introductory Comment, 1945, *supra* note 110, stated:

> First, words are used and are to be read as the words are understood in the trade. Whatever meaning the words have in the trade is the meaning which, between merchants or as against a merchant, the agreement incorporates . . . . This does not mean merely

terms" such as price, quantity, or description, but they expect that other aspects of the transaction will be governed by normal trade practices.[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.[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.[114] To give weight to something so ill-defined, these courts claim, is to compound the risk of uncertainty and injustice.[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,[116] but once proved, such usages should be given full weight as evidence of the parties' actual expectations.[117]

> 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.

113. *See infra* note 164 and accompanying text; *cf.* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 362-71 (1960) (discussing the need for a realistic approach to form contracts).

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 589, 591-92, 469 N.E.2d 389, 392 (1984) (dicta that trade usage "must be established by several witnesses"); Beachcomber Coins, Inc. v. Boskett, 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 863, 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.[118] Consequently, some courts have suggested that relevant trade usage evidence is always admissible[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*,[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."[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.[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.[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.[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

537 F.2d 751, 757 (3d Cir. 1976). *See generally* Levie, *supra* note 3, at 1102-09 (discussing elements in the proof of trade usage); Note, *supra* note 5, at 1206-08 (discussing proof of trade usage). *But see* Williams, *The Search For Bases of Decision in Commercial Law: Llewellyn Redux* (Book Review), 97 HARV. L. REV. 1495, 1506-08 (1984) (arguing that trade usages do not exist).

118. *See* Kirst, *supra* note 3, at 816.

119. *See, e.g.*, American Mach. & Tool Co. v. Strite-Anderson Mfg. Co., 353 N.W.2d 592, 597 (Minn. App. 1984) (trade usage evidence should be admitted if it is relevant); Modine Mfg. Co. v. North East Indep. School Dist., 503 S.W.2d 833, 837-41 (Tex. Civ. App. 1973) (trade usage evidence is admissible to ascertain the intent of the parties) (quoting Dwyer v. City of Brenham, 70 Tex. 30, 32, 7 S.W. 598, 599 (1888). Admissibility of trade usage evidence assumes compliance with other rules of evidence, of course.

120. 503 S.W.2d 833 (Tex. Civ. App. 1973).

121. *Id.* at 840. The court assumed, however, that trade usage evidence could be excluded under § 2-202. *Modine Mfg.*, 503 S.W.2d at 838-39; *see also* Carl Weissman & Sons v. Pepper, 480 F. Supp. 1364 (D. Mont. 1979) (applying § 1-205 as a rule of construction).

122. *See supra* notes 9-18 and accompanying text.

123. *See* Kirst, *supra* note 3, at 832, 835-36.

124. This is not true of the earlier cases discussed *supra* notes 29-48 and accompanying text. One recent case demonstrates a renewed flexibility in evaluating trade usage and express terms. *See* Urbana Farmers Union Elevator Co. v. Schock, 351 N.W.2d 88 (N.D. 1984).

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.[125] 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.*,[126] allowing written terms to control over any apparently conflicting trade usage,[127] 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.[128] This reliance is embodied in the Code in three ways. First, section 1-103 expressly provides that the law merchant[129] shall supplement provisions of the Code.[130] Second, numerous provisions incorporate commercial practice to give content to general standards such as

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.

129. For a discussion of the history and current state of the law merchant, see L. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983).

130. U.C.C. § 1-103 (1978); *see* 1 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 1-103:7 (3d ed. 1981).

"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

131. U.C.C. § 2-314 comment 2 (1978) ("Goods . . . must be of a quality comparable to that generally acceptable in that line of trade . . . ."); *see, e.g.*, T.J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338 (5th Cir. 1980); Wakerman Leather Co. v. Irvin B. Foster Sportswear Co., 34 A.D.2d 594, 308 N.Y.S.2d 103, *appeal denied*, 26 N.Y.2d 614, 259 N.E.2d 927, 311 N.Y.S.2d 1026 (1970).

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).

134. *See, e.g.*, Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 373 (E.D. Mich. 1977) (trade usage is relevant to whether a breach is "material"); Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736, 740 (N.D. 1976) (trade usage is relevant to "reasonable time" for delivery); Tacoma Boatbuilding Co. v. Delta Fishing Co., 28 U.C.C. Rep. Serv. (Callaghan) 26, 39-41 (W.D. Wash. 1980) (trade usage is relevant to unconscionability).

135. U.C.C. § 1-205(3) (1978).

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.

138. U.C.C. § 1-205 comment 1 (1978).

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.[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.[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.").

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. *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. [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. *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. *Cf.* Llewellyn, Book Review, 52 HARV. L. REV. 700, 704 (1939) (reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)) (trade practice provides a beginning for the interpretation of standard form contracts) [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. *See supra* text accompanying note 25. Without such actual agreement, it is presumed that the parties expected to follow the trade usage. *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).

The notion that boilerplate terms should not be binding if they do not correspond to the parties' reasonable expectations is consonant with most theories about standard form contracts. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981); Dugal, *Standardized Form Contracts—An Introduction*, 24 WAYNE L. REV. 1307, 1336 (1978); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943); Murray, *The Parol Evidence Process and Standardized Agreements under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342, 1372-85 (1975); Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1248-83 (1983); Slawson, *The New Meaning of Contract: The Transformation of Contract Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984). *See generally*, K. LLEWELLYN, *supra* note 113, at 362-71 (Professor Llewellyn's views on standard form contracts).

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

> *[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,[143] and they often accurately reflect the shared values of a community.[144] For these reasons, the Code consistently provides that trade practices are binding on members of the trade[145] 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"?[146]) 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.

Llewellyn, *What Price Contract?*, *supra* note 108, at 713 (emphasis added).

143. *Cf.* REVISED SALES ACT, SECOND DRAFT, *supra* note 29, at 333 (comment to § 1-C) ("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); Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc., 59 Cal. App. 3d 948, 956-57, 131 Cal. Rptr. 183, 188 (1976); Gord 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.[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[148] if it appears in a signed or otherwise formalized document regardless of whether both parties actually considered and agreed to the term.[149] Although this approach may be useful in other contexts,[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.[151] It makes no sense to say there can be a blanket assent to negate trade practices.[152] Under section 1-205(4), therefore, it is crucial to determine whether the

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).

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.

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.

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).

151. *See supra* notes 136-45 and accompanying text.

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.[153] If they did not, the trade usage should be followed.

In accordance with this view, the court in *Gindy Manufacturing Corp. v. Cardinale Trucking*[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.[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"[156] and therefore did not control the contrary usage of trade.[157]

As the *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."[158] Moreover, earlier drafts of the Code and comments clearly indicate that the phrase "express terms" was meant

---

print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

K. LLEWELLYN, *supra* note 113, at 370.

This analysis does not suggest, however, that there can be a blanket assent to written terms that purport to change trade usage. In the same comment that discusses the idea of blanket assent to fair and reasonable terms, Professor Llewellyn and his colleagues wrote that "attention must be called to a desire to contract in material variance from the accepted commercial pattern." Llewellyn Papers, Introductory Comment, 1945, *supra* note 110, at 11, 14. For criticism of the blanket assent argument, see Rakoff, *supra* note 141, at 1198-1205; Slawson, *supra* note 141, at 32-37.

153. A standard merger clause should not be treated as evidence of such an agreement. *See, e.g.*, Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 782 n.14 (9th Cir. 1981); *cf.* Kirst, *supra* note 3, at 863-69 (arguing that a standard merger clause should not be sufficient to warrant the exclusion of trade usage evidence). *But see General Plumbing*, 696 F.2d at 378 (merger clause precludes trade usage evidence that contradicts the writing); Duesenberg, *Sales, Bulk Transfers, and Documents of Title*, 38 BUS. LAW. 1109, 1114 (1983) (merger clause should exclude trade usage evidence).

154. 111 N.J. Super. 383, 268 A.2d 345 (Law Div. 1970); *see supra* notes 40-45 and accompanying text.

155. 111 N.J. Super. at 398, 268 A.2d at 353.

156. U.C.C. § 1-205(4) (1978).

157. This result is correct even though the term might qualify as "final" under the parol evidence rule and might, in the absence of a trade usage or course of dealing, be binding on the parties.

The approach followed in *Gindy* is consistent with U.C.C. § 2-207(2) (1978). Under that provision, an additional term in an acceptance that does not "materially alter" the contract may become part of an agreement between merchants, even if it is not actually agreed to by the offeror. The comments to this section make it clear that a term purporting to vary a trade usage would materially alter the contract and thus would not become binding without actual assent. *Id.* § 2-207 comments 4, 5; *see, e.g.*, Luedtke Eng'g Co. v. Indiana Limestone Co., 592 F. Supp. 75, 81 (S.D. Ind. 1983) (An additional term in the acceptance materially altered the contract because it conflicted with the trade practice. The court emphasized that the written term was not actually agreed to by both parties and for that reason alone should not be permitted to alter the normal and expected practice.), *aff'd*, 740 F.2d 598 (7th Cir. 1984); *cf.* Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1580 (10th Cir. 1984) (trade usage may be used to fill a gap left when written terms are "knocked out" under U.C.C. § 2-207(3) (1978)).

158. "Term" is defined merely as "that portion of an agreement which relates to a particular matter." U.C.C. § 1-201(42) (1978).

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,"[165] 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.[166] 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 quagmires.[167] The question is what the parties' probable intention was.[168] The relevant inquiry is whether both parties had actual knowledge of the term and manifested assent to it.[169] 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.[170] Similarly, there should be a presumption against probable agreement when, for example, a disputed term is inconspicuous or unclear.[171] 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. 939, 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* Levie, *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 (Ct. Cl. 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 (Ct. Cl. 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-

---

the architect to state the requirement with clarity."); Celebrity, Inc. v. Kemper, 96 N.M. 508, 509, 632 P.2d 743, 744 (1981) (written terms can change a course of dealing only if specific attention is called to them).

172. Although the plain meaning rule is not a necessary corollary to the parol evidence rule, the two doctrines are closely linked, in that the parol evidence rule's focus on consistency encourages a plain meaning view of the written terms, as discussed in the text.

The official comment to § 2-202 states: "This section definitely rejects . . . [t]he premise that the language used has the meaning attributed to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used . . . ." U.C.C. § 2-202 comment 1(b) (1978).

173. *See, e.g.*, Southern Concrete Servs., Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581 (N.D. Ga. 1975) (trade usage allowing flexibility in quantity could not alter the plain meaning of written terms), *aff'd mem.*, 569 F.2d 1154 (5th Cir. 1978); Doppelt v. Wander & Co., 19 U.C.C. Rep. Serv. (Callaghan) 503, 505 (N.Y. Cir. Ct. 1976) (trade usage cannot be used to contradict "plain and unambiguous terms" of agreement); Stan D. Bowles Distrib. Co. v. Pabst Brewing Co., 69 N.C. App. 341, 349, 317 S.E.2d 684, 689 (1984) (trade usage granting exclusivity to beer distributors was overridden by the plain meaning of a written term); Swiden Appliance & Furniture, Inc. v. National Bank, 357 N.W.2d 271, 275 (S.D. 1984) (plain meaning of written terms controlled a contrary practice among bankers); *cf.* Loeb & Co. v. Martin, 349 So. 2d 11, 12-13 (Ala. 1977) (jury instruction that trade usage need not be considered if written document clearly showed parties' intent not reversible error).

174. *See, e.g.*, Board of Trade v. Swiss Credit Bank, 597 F.2d 146, 148 (9th Cir. 1979); Dreyfus Co. v. Royster Co., 501 F. Supp. 1169, 1172-73 (E.D. Ark. 1980); Urbana Farmers Union Elevator Co. v. Shock, 351 N.W.2d 88, 91-92 (N.D. 1984); Morgan v. Stokely-Van Camp, Inc., 34 Wash. App. 801, 808-09, 663 P.2d 1384, 1388-90 (1983).

175. *See supra* note 69 and accompanying text.

tice. 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 term[179] 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.

181. *Id.* at 1080. For other cases using a plain meaning approach, see Kreis v. Venture Out in America, Inc., 375 F. Supp. 482 (E.D. Tenn. 1973); C & A Constr. Co. v. Benning Constr. Co., 256 Ark. 621, 509 S.W.2d 302 (1974); Fort Wayne Bank Bldg., Inc. v. Bank Bldg. & Equip. Corp., 160 Ind. App. 26, 309 N.E.2d 464 (1974).

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.[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."[186]

Although the express term[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.[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.[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-

185. The contract included a clause providing for a storage fee for seed unclaimed after March 31. Plaintiff's witness explained that this clause triggered the trade practice described in the text. *Dreyfus*, 501 F. Supp. at 1172.

186. *Id.*

187. This characterization of the delivery clause assumes that the parties actually agreed to the term.

188. *See id.* at 1172-73.

189. *Cf.* Ebasco Serv., Inc. v. Pennsylvania Power & Light Co., 460 F. Supp. 163, 184 (E.D. Pa. 1978) (finding that parties used apparently ambiguous language in their written contract because it had a widely accepted meaning in the trade).

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."[190] 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[194] 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.[195] 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.[196] The court specifically found that this practice was followed even when a letter of credit called for a "full set of bills of lading."[197]

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.[198] 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."[199]

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.* Cornswet, 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.[203] Next, the court must determine whether the written term qualifies as an express term.[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.[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[206] because it gives effect to express terms by which the parties actually intended to vary or negate trade usage. In *Carter Baron Drilling v. Badger Oil Corp.*,[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.[208]

In addition, the interpretive approach outlined in this Article avoids the problems posed by a restrictive interpretation of section 1-205(4)[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 *General Plumbing & Heating v. American Air Filter Co.*[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.[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 *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.[212]

---

203. *See supra* notes 114-17 and accompanying text.

204. *See supra* notes 147-71 and accompanying text.

205. *See supra* notes 172-89 and accompanying text.

206. *See supra* notes 71-89 and accompanying text.

207. 581 F. Supp. 592 (D. Colo. 1984); *see supra* notes 76-80 and accompanying text for a discussion of this case.

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).

209. *See supra* notes 90-117 and accompanying text.

210. 696 F.2d 375 (5th Cir. 1983); see *supra* notes 92-96 and accompanying text for a discussion of this case.

211. First the court would have needed to determine if the alleged trade practice actually existed. *See supra* notes 114-17 and accompanying text.

212. In Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981), for example,

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.

---

it was significant that the trade practice of price protection was observed under Chevron supply contracts that contained price terms similar to Shell's. *Id.* at 772, 784. The court relied heavily on the practice among aggregate suppliers of Nanakuli, however, and there was no evidence concerning the price terms in the aggregate contracts. *Id.* at 779.

213. 111 N.J. Super. 383, 268 A.2d 345 (Law Div. 1970); see *supra* notes 40-45 and accompanying text for a discussion of this case.

214. The affidavits and other evidence submitted in opposition to Gindy's motion for summary judgment strongly suggested that the parties did not actually agree to the "as is" clause. The clause was in the fine print of a form contract supplied by the seller, and the buyer swore that he was not aware of the clause and that such clauses normally are used only in sales of used vehicles. *Gindy Mfg.*, 111 N.J. Super. at 386-87, 268 A.2d at 347.

215. 745 F.2d 1076 (7th Cir. 1984); see *supra* notes 177-83 and accompanying text for a discussion of this case.

216. *Advance Process*, 745 F.2d at 1080.

217. This observation assumes that both parties actually agreed to the term. *See supra* notes 147-71 and accompanying text.

218. *See supra* note 183 and accompanying text.

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.[219] 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.[220] 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.[221] Trade usage is thus a key element in a "realistic" interpretation of contracts.[222]

Two major criticisms, however, have been leveled against the view that trade usage should be treated as a primary element in a contractual obligation.[223] The first criticism is that it is anomalous, in this age of the socialization of contract,[224] to treat trade usage as an element of the parties' actual expectations.[225] 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.[226] This theory was consistent with the then-

219. *See, e.g.*, 3 A. CORBIN, *supra* note 4, §§ 555-556; K. LLEWELLYN, *supra* note 113, at 330, 363; Honnold, *supra* note 107, at 508-12; Levie, *supra* note 3, at 1116-17; Mooney, *supra* note 2, at 250-53.

220. *See* K. LLEWELLYN, *supra* note 113, at 121-57; W. TWINING, *supra* note 108, at 215-45; Casebeer, *supra* note 2, at 673-76; Llewellyn, *On the Current Recapture of the Grand Tradition*, 9 U. CHI. L.S. RECORD 6 (1960), *reprinted in* K. LLEWELLYN, JURISPRUDENCE 215-29 (1962).

221. "Situation-sense," which Professor Llewellyn identified as the basis for judgment in the "Grand Style," requires knowledge of communal practices and values. *See* K. LLEWELLYN, *supra* note 113, at 121-57; Rohan, *The Common Law Tradition: Situation Sense, Subjectivism or "Just-Result Jurisprudence"?*, 32 FORDHAM L. REV. 51, 57-60 (1963) (observing that Llewellyn's "situation-sense" is closely tied to commercial practices and customs).

222. Numerous other writers have argued for an expansive use of trade usage as a way to make the law responsive to the concerns and values of contracting parties. *See, e.g.*, J. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915, at 290-91 (1964); L. TRAKMAN, *supra* note 129; Furnish, *supra* note 3; Kirst, *supra* note 3.

223. In addition to the two critiques discussed in the text, see Williams, *supra* note 117. Professor Williams argues that trade usages either do not exist or are too vague to provide a basis for decision. The first part of this claim is peculiar. That the market is characterized by competing interests does not necessarily mean that common practices and expectations do not exist. The few empirical studies available indicate that trade usages do exist, confirming the testimony of expert witnesses in numerous cases. *See, e.g.*, Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952).

224. *See* G. GILMORE, THE DEATH OF CONTRACT 87-103 (1974); F. KESSLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS 1118 (2d ed. 1970).

225. For variations of this argument, see P. ATIYAH, *supra* note 13, at 182; L. FRIEDMAN, CONTRACT LAW IN AMERICA 249 n.69 (1965); M. HORWITZ, *supra* note 13, at 188-201; Gabel & Feinman, *Contract Law as Ideology*, in THE POLITICS OF LAW 172, 180 (D. Kairys ed. 1982).

226. M. HORWITZ, *supra* note 13, at 188-201; *see also* Gray, *The Ages of Classical Contract Law* (Book Review), 90 YALE L.J. 216 (1980) (observing that the device of imputed intention furthered "a judicial vision of a world ruled by private decisionmaking and the price mechanism").

The "will theory" of contract holds that all contractual obligations are the result of individual will, governed by only minimal external regulation. *See* M. COHEN, LAW AND THE SOCIAL ORDER 92-95 (1933 & photo reprint 1982); M. HORWITZ, *supra* note 13, at 173-88; F. KESSLER & G. GILMORE, *supra* note 224, at 2-6; Radin, *Contract Obligation and the Human Will*, 43 COLUM. L. REV. 575 (1943). For an eloquent modern statement of the theory, see C. FRIED, *supra* note 19.

dominant ideology of laissez-faire economics and individualism.[227] In the twentieth century, however, regulation and intervention by the state are thought to be acceptable and desirable,[228] and contract law frankly admits of numerous areas in which the rights and obligations of contracting parties are determined by external authorities.[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[230] and that trade usage should instead be viewed as an external source of law.[231]

Although provocative, this critique oversimplifies the communal character of trade usage and overlooks a fundamental innovation in section 1-205.[232] Although section 1-205 employs the language of individualism, including such key terms as expectation and agreement,[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.[234] The "individual will"

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.

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).

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-ethic.").

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.

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.").

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).

233. *See, e.g.*, U.C.C. §§ 1-205(2)-(4) (1978).

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.[235] Unlike the actors in an individualistic model,[236] 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,[237] or to repair any defects in goods delivered,[238] or to deliver goods in time for their subsequent use by buyers.[239] In some trades, it is understood that buyers will not reject nonconforming goods unless they are totally useless[240] or that buyers will pay for goods prior to delivery.[241] 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.[242]

---

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 mobility and freedom of decision." L. FRIEDMAN, *supra* note 225, at 21; *see* P. ATIYAH, *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).

238. *See, e.g.*, Gindy Mfg. Corp. v. Cardinale Trucking Corp., 111 N.J. Super. 383, 268 A.2d 345 (Law Div. 1970).

239. *See, e.g.*, General Plumbing & Heating, Inc. v. American Air Filter Co., 696 F.2d 375 (5th Cir. 1983); Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc., 120 Ga. App. 578, 171 S.E.2d 643 (1969).

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).

241. *See, e.g.*, Cooper Alloy Corp. v. E.B.V. Sys., 111 R.I. 756, 306 A.2d 837 (1973).

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.* Leff, *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).

of judges or litigants.[248]

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,[249] 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,[250] and enforcement of the common expectations of such characters may make bad law. What is needed, here as elsewhere,[251] 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.

---

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 (E.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 TOCQUEVILLE, 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).