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LANGUAGE AND FORMALITIES IN COMMERCIAL CONTRACTS: A DEFENSE OF CUSTOM AND CONDUCT

*David V. Snyder**

NEW questions are undermining old faith in the legal worth of custom and conduct in private transactions. Scholars of law and economics, reinforced by a neoformalist movement, have suggested that custom[1] and conduct[2] be removed from judicial view. This Article, while trying to learn from these criticisms, gives an assent-based justification for construing contracts in light of custom and conduct.[3] Somehow the detailed objections of different schools have obscured assent as the fundamental criterion of contractual liability. Uncovering assent shows that custom and conduct still have a role to play. It also suggests limits for that role. The context for this argument is the recodification of usage of trade, course of dealing, and course of performance as constituents of an agreement under the Uniform Commercial Code. This Article is meant to help justify their retention in light of recent criticism.

Assuming that the parties' assent is central, this Article suggests that custom and conduct should be understood as part of the parties' lan-

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1. "Custom" here refers to that which is ordinarily done in similar situations. It is roughly equivalent to usage of trade as defined in U.C.C. § 1-205(2) (1999).

2. "Conduct" here refers to what the contracting parties actually have done in the situation at hand. It is roughly equivalent to course of dealing, see *id.* § 1-205(1), and course of performance, see *id.* § 2-208(1).

3. This Article attempts to follow standard definitions of "construction" and "interpretation." *See* RESTATEMENT (SECOND) OF CONTRACTS § 200 & cmt. c (1981) (discussing how "[i]nterpretation of a promise or agreement or a term thereof is the ascertainment of its meaning," while "construction" is the determination of its legal operation). However, because the view suggested here is that the parties' manifested assent—their "meaning" as understood in light of custom and conduct—should be given legal effect, the distinction between interpretation and construction to some extent collapses.

guage, and that their performance of the contract should be understood as a legal formality.[4] Language, as Wittgenstein taught and as the drafters of the original Code knew, consists of more than words. Parties express themselves not only through verbal conduct, but through nonverbal conduct. Both verbal and nonverbal conduct are necessary components of language; both are essential ingredients in understanding the parties' manifestations of assent. Custom, or in the phrase of the Code, "usage of trade,"[5] is part of the language that parties use to express themselves to each other and to others. The parties' own past conduct in dealing with each other (their "course of dealing")[6] makes up part of this customary language too.

The parties' conduct in performing the contract in question (their "course of performance")[7] is also part of their expression, but it is harder to view performance, which comes *later*, as a linguistic tool to understand *previous* expressions. The argument here is not simply linguistic, however. A course of performance constitutes a "natural formality," in Lon Fuller's words.[8] For that reason it is a valuable tool in deciding the legal content of a contracting party's obligation. To be sure, this argument hearkens to days before the "neo-" was added to "formalism," when formalities meant something more than mere words. Current scholars of law and economics, and the proponents of neoformalism, have emphasized verbal conduct—especially written words, and the "plain meaning" of those words.[9] A seal, however, the archetype of legal formalities, is nonverbal conduct. Nonverbal conduct may be a better indicator of assent than verbal conduct, especially when making judgments about legal relations.

There is much at stake here, if we take the parties' assent to be important. If the neoformalists' views prevail, courts will be constrained to the written terms of an agreement when deciding the content of the parties' contract. The context for those written terms—as shown by how those terms are used in the industry—will be stripped away. The evidence of what the parties took those terms to mean—as shown by what the parties have actually done when dealing with each other—will be pushed outside the court's gaze. Parties who would have won a case, if more evidence were presented, will lose because the facts showing their assent will be excluded. Other parties may try to counteract these results by trying to capture more in their written contracts. If so, this effort will cost them some real expense (the cost of specifying all the terms that usually go unspecified because they are assumed). In any event, such a regime

4. A "legal formality" as used here refers to such institutions as an impressed seal, a signed writing, or manual delivery.

5. U.C.C. § 1-205(2).

6. *Id.* § 1-205(1).

7. *Id.* § 2-208(1).

8. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 815 (1941).

9. *See infra* Part II. *See generally Symposium: Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999) [hereinafter *Symposium*]; Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 848 (2000).

would mean that a judge's uninformed understanding of the papers will prevail over the parties' manifestations of assent, understood in the context of their industry and their transaction.

From many perspectives, such a regime is undesirable. In previous generations of scholarship, two large-scale arguments were mounted against it. The first is represented by Llewellyn, Corbin, and the Legal Realists. They sought to show that apparent formalism hid other desiderata, that the purported certainty of formalism was an illusion, however attractive.[10] The second is represented by Ian Macneil and the theorists of relational contracts. They argue that many contracts develop over the life of a contractual relationship, and that not all of the content of a contract is captured in the agreement reached at an earlier point in the relationship.[11] For many, these two schools of thought are as persuasive now, in response to the neoformalists, as they were against the paleoformalists. Indeed, their arguments carry real weight for me as well.

The realist and relational arguments will not be rehearsed here, however, and the one-sentence summaries in the preceding paragraph can hardly do justice to these schools of thought. Instead, this Article advances arguments that are more sympathetic to the basic concern of the neoformalists. The neoformalists emphasize language and formality. This piece shows how custom and conduct are part of what we should understand as language and formality. These ideas are elaborated in the following pages. Part I introduces the essential framework, briefly explaining the current treatment of these issues in the Code as well as the proposed revisions to the Code. Part II summarizes some of the recent challenges to Llewellyn's conception and offers a partial critique of some of those challenges. The primary argument of the Article appears in Parts III and IV. Part III elaborates and defends the thesis given in the preceding paragraphs. Part IV discusses some of the limits on custom and conduct.

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10. *See* Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 n.46 (1965); Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 877 (1939) ("[D]octrine . . . tends into blunt broad form which guides decision little, hides the actual process of deciding, [and] leaves little record of the intuitional influence of the varying fact-pressures."). Obviously the literature of Legal Realism cannot be collected in this footnote. Perhaps the best introduction to Llewellyn and the Realists is still WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

11. The foundations of the theory are in Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974), and *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589 (1974). For Professor Macneil's more recent views, see *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000), which is contained in a symposium on relational contract theory. Another good starting point for understanding the relational arguments and their impact (or lack thereof) is William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545 (1985).

I. THE ONCE AND FUTURE CODE

The UCC exalted and transformed the roles of custom and conduct.[12] The Code not only makes custom and conduct relevant to interpreting an agreement; it makes them part of the agreement itself. "Agreement" is defined to "includ[e] course of dealing or usage of trade or course of performance."[13] Llewellyn figured that "the bargain of the parties in fact"[14] must include not only their words but also the surrounding circumstances, necessarily including custom and conduct.[15] Thus the Code strategy is said to "incorporate" any applicable usage of trade, course of dealing, or course of performance into the agreement; the scheme is sometimes called the "incorporation" strategy.

The definition of "agreement" holds throughout the Code. It appears in Article 1 with other general provisions. It is not limited to the sale or lease of goods under Articles 2 and 2A.[16] The definition therefore governs secured transactions[17] and the various commercial transactions governed by other articles,[18] although there is some controversy over the

12. For a classic article, see Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975). For a thorough treatment of the regime under the present Code, see 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*, 64 N.C. L. REV. 777 (1986).

13. U.C.C. § 1-201(3).

14. *Id.*

15. For a more extended history of these sections, as well as Llewellyn's and other contemporary views, see DENNIS M. PATTERSON, GOOD FAITH AND LENDER LIABILITY: TOWARD A UNIFIED THEORY 20-35 (1990) (incorporating Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEXAS L. REV. 169 (1989), and Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988)).

16. Curiously, "course of performance" receives full treatment in Articles 2 and 2A, see U.C.C. §§ 2-208, 2A-207, not Article 1, see U.C.C. § 1-205.

17. *See id.* § 9-105(l) (defining a "security agreement" as "an agreement which creates or provides for a security interest"). The revised definition, § 9-102(a)(73), is nearly identical. *See also, e.g.*, Westinghouse Credit Corp. v. Shelton, 645 F.2d 869, 872-73 & n.3 (10th Cir. 1981) (holding that course of performance may result in waiver of term in security agreement governed by Article 9); Nat'l Livestock Credit Corp. v. Schultz, 653 P.2d 1243, 1246-47 (Okla. Ct. App. 1982) (applying waiver principles from § 2-208(3) to security agreement under Article 9, despite argument that they only apply to Articles 2 and 2A).

18. *See, e.g.*, U.C.C. §§ 3-409 (stating that an acceptance of a negotiable instrument is a kind of "agreement" that "may consist of the drawee's signature alone"), 4-103 (allowing variation "by agreement"), 4-401 ("An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank."), 5-104 (stating letters of credit may be authenticated "in accordance with the agreement of the parties"), 8-104(d) (including "agreement to transfer . . . a security"); *see also* J.R. Hale Contracting Co. v. United N.M. Bank, 799 P.2d 581 (N.M. 1990) (allowing evidence of course of dealing in repayment of note); Driftwood Manor Investors v. City Fed. Sav. & Loan Ass'n, 305 S.E.2d 204, 207 (N.C. Ct. App. 1983) (holding that an Article 3 note holder who repeatedly accepts late installments waives right to accelerate because of subsequent late payment unless the payor is first notified that prompt payment will be required). For further treatment, see David V. Snyder, *The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver, and Estoppel*, 1999 WIS. L. REV. 607, 649-53.

course-of-performance element.[19]

Under Article 1, "usage of trade" are the Code words for industry custom.[20] A "course of dealing" is more specific, being "a sequence of previous conduct between the parties to a particular transaction."[21] It is understood as the parties' dealings with each other "previous" to the agreement in question.[22] A "course of performance" is more specific still, being defined as the parties' conduct with respect to the contract at issue.[23] The Code appears to rank the terms according to their specificity. If all the constituents of the agreement cannot be construed harmoniously, the express terms of the agreement prevail over course of performance, which prevails over course of dealing, which prevails over usage of trade.

As has been pointed out before, however, the ranking can be upset[24] (and perhaps Llewellyn never intended a strict hierarchy anyway).[25] For instance, a course of performance may result in a waiver or a modification, thus displacing the express terms. In addition, a course of dealing or usage of trade may be used to interpret the express terms until they approach nonexistence. In the familiar case of *Columbia Nitrogen Corp. v. Royster Co.*, for instance, the parties agreed to a sale over three years of a minimum of 31,000 tons of phosphate.[26] The stated price was subject to escalation with the cost of production.[27] The court allowed evidence of course of dealing or usage of trade to show that the dealer was obligated to adjust the price and/or quantity downwards to reflect a declining market when the contract contained no term with respect to a declining market.[28] On one view of the case, a fixed term that could only increase was remade by a court to decrease. A seller who laid off the risk of a declin-

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19. PATTERSON, *supra* note 15, at 187-89 (suggesting that course of performance should be kept out of Article 9) (citing Borg-Warner Acceptance Corp. v. First Nat'l Bank, 18 U.C.C. Rep. Serv., 526 (Minn. 1976)). Although I have learned a great deal from Professor Patterson's work—and indeed wish only that I had found it sooner—we may disagree on this point.

20. U.C.C. § 1-205(2) defines "usage of trade" as "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."

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

22. *See id.* § 1-205 cmt. 2; 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 3-3 (4th Practitioners ed. 1995).

23. "Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." *Id.* § 2-208(1).

24. *See* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997); 1 WHITE & SUMMERS, *supra* note 22, § 3-3; *see also* Kirst, *Usage of Trade and Course of Dealing: Subversion of the U.C.C. Theory*, 1977 U. ILL. L. REV. 811; PATTERSON, *supra* note 15, at 20-31; Snyder, *supra* note 18, at 632-34.

25. *See* PATTERSON, *supra* note 15, at 20-23, 143.

26. 451 F.2d 3, 6 (4th Cir. 1971).

27. *See id.*

28. *See id.* at 9-11.

ing market was reassigned that risk through course of dealing and usage of trade. The express terms hardly prevailed.

Despite the criticism engendered by *Columbia Nitrogen* and similar cases,[29] the proposed revision to the UCC is continuing the roles of usage of trade, course of dealing, and course of performance. They remain in the definition of "agreement."[30] Moreover, course of performance now appears with usage of trade and course of dealing in revised Article 1.[31] The revision thus strengthens the role of course of performance, putting to rest any remaining doubts[32] about its applicability throughout the Code.

II. RECENT OBJECTIONS TO CUSTOM AND CONDUCT

Recent scholarship has identified several potential problems with the Code scheme. This Part summarizes some of the leading arguments in the neoformalist school[33] but suggests that opponents of incorporation have not shown that the incorporation strategy should be discarded. To the extent that these scholars would exclude custom and conduct from judicial consideration, they would subordinate assent to other goals.

A. RELATIONSHIP-PRESERVING NORMS AND END-GAME NORMS

One sustained and scholarly attack on the incorporation strategy begins with the observation that parties may behave one way during an

29. *See* Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 794-805 (9th Cir. 1981); Brunswick Box Co. v. Coutinho, Caro & Co., 617 F.2d 355 (4th Cir. 1980); Steuber v. Hercules, Inc., 646 F.2d 1093 (5th Cir. Unit A June 1981); Modine Mfg. Co. v. North East Indep. Sch. Dist., 503 S.W.2d 833 (Tex. Civ. App.—Beaumont 1973, no writ).

30. U.C.C. § 1-201(3) (Rev. 1998).

31. *Id.* § 1-303.

32. *See supra* note 19 and accompanying text.

33. "Neoformalist" here refers to those who have recently grouped themselves under the rubric of Formalism but who have strong (if perhaps latent) tendencies to Legal Realism through their devotion to social scientific research and analysis. *See* Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 617-19 (1999). *See also infra* notes 219 to 223 and accompanying text. David Charny calls neoformalism "anti-antiformalism." David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 842 (1999). *Compare* Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 845 n.86 (2000) ("Those advocating the virulent strain of the new formalists are neither realists nor relationalists and the sooner we say so the better."). My usage of "neoformalism" is congruent with some but not all of the usages in the literature. Although there are neoformalists working in several fields, this Article focuses on contracts and commercial law. Annelise Riles discusses the neoformalists under the heading of "New Formalists" in Annelise Riles, THE TRANSNATIONAL APPEAL OF FORMALISM: THE CASE OF JAPAN'S NETTING LAW 7-12 (forthcoming) (collecting sources). For prominent manifestations and discussions of the neoformalist phenomenon, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988), which interestingly appears in the same volume as Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988); *see also* Ernest J. Weinrib, *Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 579 (1992). More recent, and more relevant to the current project, is the *Symposium*, *supra* note 9. *See also Free Bargaining and Formalism*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT ch. 1 (F. H. Buckley ed., 1999). Another participant in this symposium responds to the neoformalists in William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. ___ (forthcoming).

ongoing relationship, adhering to "relationship-preserving norms," even though they would expect written "end-game norms" to govern if the relationship deteriorated into litigation.[34] The implication, according to Lisa Bernstein, is that courts should not use course of performance in deciding contract disputes, as the course of performance would likely represent the informal norms that were in place when the relationship was good. Moreover, she argues, if the parties fear that accommodations made during a healthy relationship will be transformed into fixed contract terms, the parties will be less likely to be accommodating even during a good relationship. The result is rigidity,[35] not the flexibility for which the UCC aims.[36]

There are responses to these arguments, however, even within the economic camp. Jody Kraus and Steven Walt point out that Professor Bernstein's analysis does not account for the cost of specifying more terms in the contract.[37] Omri Ben-Shahar has also written on this issue from within the economic discipline, and although it is difficult to do justice to his analysis in simple language and a short space, an effort is worthwhile. First, he challenges Professor Bernstein's analysis. Although he recognizes that relationship-preserving conduct may erode the end-game terms written in the agreement, he notes a contrasting tendency: faced with this prospect, parties are encouraged to take "antierosion" measures to assure that their rights are not too far eroded. He shows that regardless of whether the regime is the permissive one of the UCC or the plain-meaning ideal of the neoformalist,[38] these two contrasting tendencies will al-

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34. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796 (1996). Robert E. Scott had also written about these ideas in *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 615 (1990); *see also* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 275-76 (1985) (stating it is "difficult to determine whether a particular act sheds light on the *ex ante* meaning of the agreement or merely represents an *ex post* waiver").

35. *See* Bernstein, *supra* note 34, at 1807-15.

36. *See* U.C.C. § 2-208 cmt. 3.

37. *See* Jody S. Kraus & Steven D. Walt, *In Defense of the Incorporation Strategy*, *in* THE JURISPRUDENCE OF CORPORATE AND COMMERCIAL LAW 193 (Jody S. Kraus & Steven D. Walt eds., 2000) [hereinafter this book is referred to as KRAUS & WALT]. Parties will not want to invest untold (much less infinite) resources in specifying every possible term just in case a dispute arises. *See* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 780 (1999); W. Bentley MacLeod, *Complexity and Contract*, 92 REVUE D'ECONOMIE INDUSTRIELLE 149, 150 (Apr. 2000); Scott, *supra* note 9, at 862-63; Lawrence B. Solum, *The Boundaries of Legal Discourse and the Debate Over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 311, 326-27 (1993). *But see* Richard Epstein, *Confusion About Custom: Disentangling Informal Customs from Standard Contractual Provisions*, 66 U. CHI. L. REV. 821, 828 (1999) (most contracts are largely complete).

38. For an example of the neoformalism sought by some scholars, see Goetz & Scott, *supra* note 34, at 311-16; Scott, *supra* note 9; Robert E. Scott, *Rethinking the Uniformity Norm in Commercial Law: Optimal Institutional Design for Regulating Incomplete Contracts*, *in* KRAUS & WALT, *supra* note 37, at 162.

ways precisely counterbalance each other.[39] The legal regime is therefore irrelevant, according to the first stage of the argument. Then Professor Ben-Shahar widens his view and concludes that what had seemed irrelevant is actually relevant, but for reasons that were not obvious.[40] In a recent article, he demonstrates how the relatively permissive structure set up by the Code, which allows course of performance to result in waiver or estoppel, can actually encourage the creation of economic value.[41]

Other responses might be offered as well. The argument against incorporation neglects the possibility that courts can interpret relationship-preserving conduct while also limiting it to its appropriate role.[42] *Southern Concrete Services v. Mableton Contractors, Inc.*[43] suggests this approach. The court was interpreting a contract for the sale of "'approximately 70,000 cubic yards' of concrete from September 1, 1972 to June 15, 1973" at $19.60 per cubic yard.[44] The buyer only took about 12,000 cubic yards, and the seller sued. Relying on *Columbia Nitrogen*,[45] the buyer wanted to show that because of a usage of trade (and additional agreed terms), neither price nor quantity was "mandatory."[46] The buyer was met with the parol evidence rule[47] and a clause stating that "[n]o conditions which are not incorporated in this contract will be recognized."[48]

The court had "grave doubts" about applying *Columbia Nitrogen* to different facts.[49] The court anticipated evidence that contracts in the trade were not strictly enforced by the parties. It understood the reasons: "Lawsuits . . . do not facilitate good business relations with customers."[50] A contracting party may prefer to renegotiate "rather than rest on its strict legal rights. Yet, the supplier or purchaser knows that he may resort

39. *See* Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 794-805 (1999). For a discussion and critique of Professor Ben-Shahar's approach, see Ian Ayres, *Eroding Entitlements as Litigation Commitment*, 66 U. CHI. L. REV. 836 (1999).

40. *See* Ben-Shahar, *supra* note 39, at 806-18; Omri Ben-Shahar, *The Erosion of Rights by Past Breach*, 1 AM. L. & ECON. REV. 190, 215 (1999) [hereinafter *Erosion*].

41. *See Erosion*, *supra* note 40, at 228-29. The example that Professor Ben-Shahar gives is outside the scope of the UCC. The analysis can apply just as well in the context of the Code, however. Imagine a debtor who, in a complex security agreement, has agreed not to grant junior security interests. The debtor may nevertheless do so, perhaps with the acquiescence of the secured party. If the debtor thereby obtains credit and makes investments that increase the social pie, value has been created. This result is encouraged by the Code regime (which Professor Ben-Shahar would refer to as "erosion rules"). For a different justification of waiver and estoppel in this context, see Snyder, *supra* note 18, at 660-62 & n.252.

42. *See* Bernstein, *supra* note 34; *see also* Scott, *supra* note 9, at 861 (envisioning "that every relational norm be judicialized," apparently as a result of the incorporation approach).

43. 407 F. Supp. 581 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978).

44. *Id.* at 582.

45. Columbia Nitrogen v. Royster Co., 451 F.2d 3 (4th Cir. 1971).

46. *Southern Concrete*, 407 F. Supp. at 582-83.

47. *See* U.C.C. § 2-202.

48. *Southern Concrete*, 407 F. Supp. at 582-83.

49. *Id.* at 583.

50. *Id.* at 584.

to those enforceable contract rights if necessary."[51] The court understood that the buyer sought to introduce evidence of relationship-preserving conduct when only the end-game terms were relevant.[52]

Other courts have reached similar decisions,[53] and there is no reason to think that courts are particularly error-prone in this regard. The contrary argument has been made: without incorporation, Professors Kraus and Walt say,

> [t]he only possible source of interpretive error is a misinterpretation of the plain meaning by contractors and judges. Under an incorporation regime, however, contractors and judges can mistakenly identify the domain for which a term's meaning is determined, in addition .... Because the two types of mistakes are not correlated, incorporation regimes would be expected to have a higher rate of interpretive error ....[54]

How this argument works is unclear, however. Suppose a nonlawyer reader is asked the meaning of the following sentence, found in a judicial opinion: "With a few exceptions, binding contracts require consideration." The plain meaning to the untrained reader would be, "With a few exceptions, binding contracts require the parties to think about what they are doing."[55] If we allow the reader to ask a lawyer the meaning of "consideration," the chance of misinterpretation should be diminished. True, the reader might instead choose to ask a priest or a philosopher or a bus driver, and doing so might increase the chance of misinterpretation. But the risk of going the wrong route does not necessarily outweigh the benefit of allowing the reader to go the right route.[56]

Of course, a court must inquire into the nature of the customs being asserted.[57] The inquiry may be complex, requiring the court to determine, perhaps, what the relevant trade and transaction are before it can decide what customs are relevant.[58] But the context should help fix the

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51. *Id.*

52. Notably, the court did not evince any hostility to the Code regime; the opinion extols custom as "an important aid in the interpretation of the terms of a contract." The court feared that extending *Columbia Nitrogen* would only lead to boilerplate exclusions of such evidence, as well as the undermining of contracts. *See id.*

53. *See* United States v. Grayson, 879 F.2d 620, 623-24 (9th Cir. 1989) (Kozinski, J.) (refusing to enforce lenient collection policy where parties failed to agree on written payment deferral); State *ex rel.* Nichols Mach. Co. v. Safeco Ins. Co., 671 P.2d 1151, 1154-55 (N.M. Ct. App. 1983); 1 WHITE & SUMMERS, *supra* note 22, § 3-3 (collecting and explaining authorities).

54. Kraus & Walt, *supra* note 37, at 198; *see also id.* at 24-36; Clayton P. Gillette, *Cooperation and Convention in Contractual Defaults*, 3 S. CAL. INTERDISC. L.J. 173, 183 (1993).

55. *See infra* Part III.A.2 (defining "plain meaning").

56. *Compare* Scott, *supra* note 9, at 860 & n.34; *see also* Goetz & Scott, *supra* note 34, at 283-86.

57. *See* Gillette, *supra* note 54, at 183.

58. *See* Bernstein, *supra* note 37, at 757 n.187; Richard Craswell, *Do Trade Customs Exist?*, *in* KRAUS & WALT, *supra* note 37, at 121-25; Clayton P. Gillette, *Harmony and Stasis in Trade Usages in International Sales*, 39 VA. J. INT'L L. 707, 718-20 (1999).

meaning of the agreement,[59] and at least some courts have shown that they will look into context quite carefully, being sure not to extend a practice into a context where it does not belong.[60] Judicial error is certainly possible, but it has not been shown that courts err more under the incorporation regime than a different interpretive regime.[61]

The problem of opportunism is another reason to permit courts to attend to parties' unwritten norms.[62] Suppose the parties to a feed contract are in relationship-preserving mode. The written agreement requires that the weight of the delivered feed be certified by a federal agent, but feed sellers rarely go to the trouble, and buyers rarely object.[63] This particular buyer and seller have foregone federally supervised weights for a number of previous contracts. Then the market shifts and prices fall. The buyer, after a delivery without the required certification, declares a breach and obtains the feed from another seller at the (now much lower) market price. Under the neoformalist regime, the buyer would win. Professor Bernstein's approach exalts the written term into the only relevant term. It is not. The relationship-preserving norms are relevant because the parties (or at least the seller, so far as it knew) were still in relationship-preserving mode.[64] The neoformalist result would surprise both parties and would be inconsistent with their manifested assent.

B. The Nonexistence Argument and the Limits of Empirical Research So Far

Another critique of incorporation questions whether industry customs actually exist, arguing that merchants do not agree on the meaning of trading terms or practices.[65] The argument is based on Professor Bernstein's examination of early twentieth-century efforts in certain trade groups to codify their customs.[66] Customs often did not spread across the nation, she finds, and the customs of one locale sometimes conflicted with

59. Dennis Patterson, *The Pseudo-Debate Over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235, 277 (1993). Patterson makes the argument in a hypothetical opinion replacing Judge Kozinski's in *Trident Center v. Connecticut General Life Insurance Co.*, 847 F.2d 564 (9th Cir. 1988). Nevertheless, the implication is that Professor Patterson believes this to be true too. Dean Scott agrees that "contractual context may frequently be useful in clarifying meaning," *supra* note 9, at 857, although in the end he focuses more on its dangers, *see supra* note 56. *See also infra* note 140 and accompanying text.

60. *See* H&W Indus. v. Occidental Chem. Corp., 911 F.2d 1118 (5th Cir. 1990) (asserting trade usage inapplicable because of duration of contract and state of market).

61. *Cf.* Bernstein, *supra* note 37, at 780 (stating only the surmise that "third-party application of these types of customs may well be error prone").

62. *See* Charny, *supra* note 33, at 853; *see also* Gillette, *supra* note 58, at 717.

63. The example is adapted from Bernstein, *supra* note 34, at 1793.

64. *See* Charny, *supra* note 33, at 853.

65. *See* Bernstein, *supra* note 37, at 715, 721. Richard Craswell advances a related critique, arguing that "the existence (and identification) of customs" are influenced by "the goals, beliefs and other normative premises of the person doing the identifying." Craswell, *supra* note 58, at 118-19. Professor Craswell's ideas are addressed carefully in Kraus & Walt, *supra* note 37, at 203-07, and their debate will not be repeated here. Professor Craswell's essential argument is acknowledged *infra* notes 171 to 173 and accompanying text.

66. *See* Bernstein, *supra* note 37, at 715.

those of another.[67]

This research and Professor Bernstein's assessment of it offer new perspectives. On the other hand, a number of responses are possible,[68] and some scholars have already presented opposing evidence from the international context.[69] In addition, there is the problem of extrapolating from codification debates that took place in the first decade or two of the last century.[70] Plus, the evidence discloses plenty of customary usage within a locale, and in a dispute between two local merchants, the Code conception would often work just fine.[71] Moreover, the arguments about custom that Professor Bernstein discusses show primarily that merchants disagreed about the precise meaning of terms, but there was also some common ground.[72] Perhaps one would find disagreement about whether hay with twenty percent clover qualifies as "No. 1 hay," but there seems to be no question that pure timothy would indeed constitute "No. 1 hay."[73] Customs, like language, can be less than fully determinate; it does not follow that they are indeterminate or nonexistent.[74]

In addition, the evidence that Professor Bernstein uses suffers an inherent problem: a codification effort, and the debate inevitable in such a move, seems likely to highlight the grounds of disagreement.[75] The troublesome areas that require investigation, debate, and decision will be the focus. The finding that merchants vehemently debate the meaning of various terms does not compel the conclusion that Llewellyn's conception of custom is unworkable.

Similarly, arbitrators' pronouncements, which Professor Bernstein emphasizes, suffer from inherent biases. Their assertions that they do not

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67. *See id.* at 715-21.

68. Some responses have now been published. *See, e.g.*, Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 784-800 (2000); Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory—"Real" Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909, 926-29 (2000).

69. Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79 (2000); Gillette, *supra* note 58, at 710 n.10.

70. Kraus & Walt, *supra* note 37, at 202.

71. *See* Bernstein, *supra* note 37, at 753 n.173 ("[I]n the early years more trade was local in scope, so those local customs that did exist may have been a sound basis for deciding cases."); *see also* Epstein, *supra* note 37, at 824 ("[V]ariation among customs only creates genuine friction when the transactions take place between members of two different communities."); Macaulay, *supra* note 68, at 788-89.

72. The Code contemplated that this situation would arise. *See* U.C.C. § 1-205 cmt. 9; *see also* Gillette, *supra* note 58, at 716-21; Kraus & Walt, *supra* note 37, at 202.

73. *See* Bernstein, *supra* note 37, at 720-21 (using the terms "No. 1 hay," "clover," and "pure timothy" in her discussion of trade usage).

74. For similar arguments in the context of language in public law, see Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 430 (1985) (constitutional language establishes "a frame with fuzzy edges" which may still "tell us when we have gone outside it"); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (distinguishing indeterminate from underdeterminate).

75. *Cf.* Bernstein, *supra* note 37, at 740-41 ("[D]ebates provided an opportunity for rent-seeking subgroups to fabricate disputes about the content of custom and to lobby for the recognition of the trade practices most favorable to them.").

resort to custom[76] may not be accurate. Since they are merchant arbitrators, operating within the same community as the disputants, they likely use customary understandings of terms in resolving disputes without realizing it.[77] For a merchant arbitrator, deciding that pure timothy constitutes No. 1 hay may not seem like a resort to custom; it is too obvious. By contrast, a law-trained judge will have to resort to extrinsic evidence, and will have to do so consciously.

Another bias of arbitrators' pronouncements is shown by their exhortations to make contracts more definite. These appeals for more specific contracts do not mean that no useful commercial standards exist. Parties can always make their contracts less vague, and someone deciding a dispute is likely to scold the parties for their inattention. But it does not follow that the dispute is therefore undecidable for lack of any useful standard.

Finally, the nonexistence argument can go only so far. Professor Bernstein does not deny the existence of any customs, and her research would not support such a claim.[78] The Code does not require the use of custom where there is no practice "having such regularity of observance . . . as to justify an expectation that it will be observed."[79] The UCC approach does not assume that there must be "widely known commercial standards and usages that are geographically coextensive with the scope of trade," as Professor Bernstein argues.[80] Indeed, many customs may not meet the definition in the Code,[81] and many contracts will lack any course of dealing or course of performance. In such cases, there is no information to supplement the express terms of the contract. The existence of such situations, however, does not mean that courts should blind themselves to the information where it does exist. And sometimes it does exist, even according to Professor Bernstein's evidence.

C. Is Commercial Custom Inefficient?

One of the arguments against incorporating custom and conduct is centered on their possible lack of efficiency. A group of articles discusses the possible inefficiency of commercial customs, and whether they are better than state-created norms. Eric Posner discusses many reasons that commercial customs may be inefficient.[82] Customs may result from idiosyn-

76. *See id.* at 770.

77. *Cf.* Craswell, *supra* note 58, at 135-38; Charny, *supra* note 33, at 848.

78. *See* Bernstein, *supra* note 37, at 715, 770-72; Gillette, *supra* note 58, at 710; Macaulay, *supra* note 68, at 787; Mertz, *supra* note 68, at 929-30.

79. *See* U.C.C. § 1-205(2); Macaulay, *supra* note 68, at 788.

80. Bernstein, *supra* note 37, at 777.

81. *See* U.C.C. § 1-205(2); *see also* Kraus & Walt, *supra* note 37, at 222.

82. *See* Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); *see also* Michael Klausner, *Corporations, Corporate Law, and Network Externalities*, 81 VA. L. REV. 757 (1995); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting ("or the Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377 (1997).

cratic facts, path dependence, or information cascades. They may suffer a bias for the status quo or for conformity. They may be influenced by other factors unrelated to efficiency.[83] Customs may favor stronger parties or particular types of firms,[84] and some customs may represent practices that many want to change.[85]

The economic literature is ambivalent, however. Some have responded with arguments that can be deployed in defense of incorporation. One version is a sort of minimalist approach that suggests that commercial customs are suboptimal but are better in general than either individual decisions or legislated rules.[86] Another economic response is almost amusing in its irony. Simply put, the argument goes: Some commercial norms are inefficient. They therefore operate as "penalty default" rules, penalizing parties who do not displace them. Parties are thus given an incentive to adopt by express provision a better rule instead of being stuck with the penalty default. Adopting an express provision necessarily reveals information to the other side (and to the courts). At least arguably, the law should give parties an incentive to reveal information.[87] Yet another economic view suggests that in certain circumstances—particularly involving international transactions—evolved customs are more likely to be efficient.[88]

This research is illuminating, but from the standpoint of assent it is beside the point. In assent-based construction, the law should give effect to

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83. See Bernstein, *supra* note 37, at 754 (citing David Hirshleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, *reprinted in* MARIANO TOMMASI & KATHRYN I. IERULLI, THE NEW ECONOMICS OF HUMAN BEHAVIOR 188, 191 (1995)); Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347 (1996); Gillette, *supra* note 58, at 712 nn.16-17 (collecting authorities on network effects).

84. *See* Bernstein, *supra* note 37, at 749; Danzig, *supra* note 12.

85. *See* Bernstein, *supra* note 37, at 752.

86. *See* Kraus, *supra* note 82 (defending incorporation in general but hoping to enhance the efficiency of selected commercial practices); *see also* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389 (1993) (discussing the difficulty of legislating satisfactory default rules through contract law).

87. The pioneering piece on penalty default rules is Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989). For further economic discussion and debate, see Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L. REV. 1 (1993); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992); Lucian Ayre Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J. L. ECON. & ORG. 284 (1991); Jules L. Coleman et al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J.L. PUB. POL'Y 639 (1989); Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. LEGAL STUD. 535 (1990); Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); Scott, *supra* note 34; *see also Symposium on Default Rules and Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 1 (1993).

88. *See* Gillette, *supra* note 54, at 187. *See generally* Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215 (1994); Gillette, *supra* note 58.

what the parties have agreed, efficiency notwithstanding.[89] If there is an applicable usage of trade—"having such regularity of observance . . . as to justify an expectation that it will be observed with respect to the transaction in question"[90]—then the parties should not be surprised with some other rule that is arguably more efficient. Nor should a court substitute its view of an efficient rule with a rule chosen by the parties.

Moreover, even if particular customs are inefficient, judicial intervention is not likely to be an effective remedy. Court decisions, in the tradition of the common law, are unsystematic. Cases come up for appellate decision (or fail to come up) by happenstance. Judicial opinions cannot be expected to yield systematic norms for an industry, much less efficient ones. Trade associations, comprised of experienced market transactors, are better suited to generate systematic and efficient customs.[91] The state is ill suited for such a task.[92]

D. ENCRUSTATION

More than fifteen years ago Charles Goetz and Robert Scott argued that the incorporation strategy tends to solidify commercial practice so that innovation becomes more difficult and "encrustation" results.[93] This can partly be seen as a consequence of path dependence and the status quo bias.[94] Lawyers might best understand it as an issue of precedent: as courts follow decided cases about commercial practice, the findings of earlier decisions can become encrusted.[95] Later cases hesitate to stray from precedents, even if they are couched in terms of fact rather than law,[96] and even if they are outmoded.

As with all of the critiques of incorporation, there is real weight to these arguments. A tentative response is possible, however. Dean Scott advances another critique of incorporation that is in tension with the encrustation objection. In a recent publication on this subject, he argues

89. Contracting parties need not confine themselves to what an economic analyst finds efficient or rational, and there may be a non-economic reason that a party has acted "irrationally." *See, e.g.*, Steven J. Burton, *Default Principles, Legitimacy, and the Authority of Contract*, 3 S. CAL. INTERDISC. L.J. 115, 133-39 (1993); *cf.* Coleman et al., *supra* note 87, at 639 (exploring types of rationality aside from maximizing joint outcomes). Efficiency is not completely irrelevant, however, at least on some theories of assent. *See* Randy E. Barnett, . . . *and Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421, 430-31 (1993) [hereinafter *and Consent*]; Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 907-09 (1992) [hereinafter *Silence*].

90. U.C.C. § 1-205(2).

91. *See* Bernstein, *supra* note 37, at 757 n.186.

92. *See* Schwartz, *supra* note 86, at 392.

93. *See* Goetz & Scott, *supra* note 34, at 288-305; *see also* Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998); Gillette, *supra* note 58, at 721-32; Kraus, *supra* note 82.

94. *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998). *See supra* notes 82 to 83.

95. *See* David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1859 nn.149-150 (1991).

96. *See* U.C.C. § 1-205(2) ("The existence and scope of such usage are to be proved as facts.").

that "the fact-specific nature of the contract dispute leaves, in virtually every case, little opportunity for subsequent incorporation of interpretations as default terms suitable for other contracting parties."[97] If this is the case, then it is difficult to see how encrustation would present any practical difficulties. Moreover, if the judicial decisions are as various and unpredictable as Dean Scott suggests,[98] encrustation would not seem to be a problem.[99]

III. CUSTOM AS LANGUAGE AND PERFORMANCE AS FORMALITY

A. INTRODUCTORY NOTES

Before advancing into the heart of the argument, a few assumptions need to be stated and explained, if not justified. The purpose of this section is to make those assumptions clear and to disclose some of the ideas behind the assumptions. These ideas no doubt color the argument, so an attempt at disclosure seems worthwhile.

1. Assent as a Basis for Legal Liability

Assent as a basis for legal obligation is a large subject that is outside the scope of the present inquiry, which is focused on the role of custom and conduct in contract interpretation and construction. This Article simply assumes assent to be the basis of contractual liability, and hence the proper concept on which to build an interpretive or constructive regime. The explanation for this assumption is bottomed on tradition.

Assent and consideration are the traditional grounds for finding contractual liability. This Article, which concentrates on commercial law, disregards the consideration element because it is generally present in commercial transactions.[100] Since consideration cannot help to test the role of custom and conduct, that leaves assent as the remaining traditional ground. It is possible to question (or defend) assent and consideration, but that project is left to other articles. That assent is a traditional basis of ordinary contractual liability is relatively uncontroversial,[101] and

97. Scott, *supra* note 9, at 868; *see* Scott, *supra* note 38, at 166; *see also* Gillette, *supra* note 58, at 732-40 (stating that encrustation through court decision "will still fail to threaten the vitality of custom if judicial intervention is sufficiently rare").

98. *See* Scott, *supra* note 38, at 22-24.

99. Dean Scott is writing on a broader topic than mere incorporation of usage of trade, course of dealing, and course of performance. Interestingly, he sees little use of these criteria in the case law. *See id.* at 25-27.

100. Consideration can cause difficulties in the context of contract modification, but that subject is treated elsewhere. *See* Snyder, *supra* note 18.

101. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) (stating that with a few exceptions, "a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration"); *see also* U.C.C. § 2-204 (using the term "agreement" instead of "mutual assent").

assent remains quite viable today.[102]

I have started with tradition in this brief explanation in an attempt to avoid the divisiveness that a deep theory can bring. As Cass Sunstein has pointed out, people who may disagree on theoretical grounds may nonetheless reach some agreement, "incompletely theorized" though it may be.[103] Thus, "assent" is the designated norm for this Article, following generations of learning in contract law. As the norm is used here, it is roughly congruent with the essential ideas of Charles Fried's "promise" theory[104] or Randy Barnett's "consent" theory,[105] but one need not buy into those thickly theorized views, or their philosophical and political implications.[106] The argument here is just as congruent with a typical legal argument built on the rules in the *Restatement (Second) of Contracts*.[107] Rather than relying on a particular theory of assent, the argument seeks to include all those who are not ready to jettison assent from the calculus.[108]

As used here, then, "assent" is purposefully vague. The term does need to carry some content, however. The first step is to determine what assent can be *fairly attributed* to the parties. The ultimate goal of an assent theory, as used here, is to find out their subjective intent. That goal, however, must be tempered by practicality. A workable system requires a third party (such as a judge or arbitrator) to determine the parties' assent. Ordinarily, assent is attributed to the parties based on their "manifestation[s]" of assent, viewed objectively.[109] The objective theory is necessary for a reliable system, but the point is to come as close as is practical to the parties' subjective agreement.[110] This is the view of "assent" used here.

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102. *See* Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987).

103. *See* Cass R. Sunstein, *From Consumer Sovereignty to Cost-Benefit Analysis: An Incompletely Theorized Agreement*, 23 HARV. J.L. & PUB. POL'Y 203, 205 (1999).

104. *See generally* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

105. *See Silence*, *supra* note 89, at 876-82.

106. *See* Randy E. Barnett, *A Consent Theory of Contract*, 88 COLUM. L. REV. 269 (1986). *But see* Jean Braucher, *Contract versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

107. For such a *Restatement*-style argument, see Patterson, *supra* note 59, at 245-49.

108. The law may decide to remove assent from the calculus in particular cases, as with contracts in restraint of trade (not to mention contract murder). *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 186-188 (1981); Richard Craswell, *Default Rules, Efficiency, and Prudence*, 3 S. CAL. INTERDISC. L.J. 289, 299-301 (1993). Such issues are beyond the scope of this Article.

109. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981). Even the strongest current consent theorists in contract recognize the objective theory of assent. *See Silence*, *supra* note 89, at 857-59.

110. For an example of subjective assent replacing objective assent in a situation where reliability concerns can be allayed, consider two parties who share the same subjective assent, even though their objective manifestations indicate otherwise. In such a case, the parties' subjective agreement governs. *See* RESTATEMENT (SECOND) OF CONTRACTS § 201(1).

The law, of course, could *deem* assent for any number of reasons unrelated to the parties' own manifestations of assent. For example, the parties might be deemed to assent to the most efficient term,[111] or the term that will generate an immanent commercial law.[112] They might be deemed to have reached an agreement that will help produce a useful menu of standardized terms, or a neat set of uniform default rules.[113] These goals have been advanced by some of the scholars discussed in Part II. On the assumptions adopted here, however, such "deemed" assent is not fairly attributed to the parties. These methods of contract construction deviate from the principal goal, which is to approach as nearly as possible to subjective assent, within the confines of a workable system.

The primary question for this Article is whether a system based on assent can follow the neoformalists' suggestions and ignore custom and conduct. Here, the question is answered in the negative. In a sense, the issue is framed by the debate on the parol evidence rule. Chief Justice Traynor famously thought written words inadequate to arrive at the parties' assent, preferring to allow a writing that was clear to the trial judge to be supplemented with parol evidence.[114] Judge Kozinski responds (from the next generation) that a surer way to discern the parties' intent is to rely on the clear and carefully lawyered writing rather than on extrinsic evidence.[115] This Article seeks to contribute to that debate. It argues that the regime for interpreting and construing contracts must take account of custom and conduct, or else risk subordinating assent to some other goal. At the same time, the Article suggests limits for custom and conduct, realizing that sometimes they must give way to the parties' other manifestations of assent.

2. *Meaning*

This is no more the place for an exploration of meaning and its possibility than it is for an exploration of assent or the underlying theory of contract law. There can be (and has been) much debate about whether

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111. *See* Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105 (1989) ("[W]hat rational parties would have agreed to is . . . evidence of what these parties did, in fact, agree to where there is silence or ambiguity."); Juliet P. Kostritsky, *Looking for Default Rule Legitimacy in All the Wrong Places*, 3 S. CAL. INTERDISC. L.J. 189, 192, 202-07 (1993) (arguing that efficiency leads to a finding of consent).

112. *See, e.g.*, Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 903-04 (1939); Danzig, *supra* note 12, at 627-31.

113. *See* Scott, *supra* note 9, at 866-69; Scott, *supra* note 38, at 150, 11-13; Goetz & Scott, *supra* note 34, at 308-09.

114. *See* Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968).

115. *See* Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988) ("We question whether [Chief Justice Traynor's] approach is more likely to divulge the original intention of the parties than reliance on the seemingly clear words they agreed upon at the time.").

language can have a "plain meaning"[116] or even any meaning at all.[117] This is ground on which the present author fears to tread, and indeed finds himself uncomfortably close. Still, some assumptions ought to be made explicit because they underlie the following analysis.

This Article takes the view that language sometimes has a "plain meaning," defined here as the meaning conveyed to the relevant audience if the meaning (in the eyes of that audience) is clear and unambiguous. Even if the language does have a plain meaning, however, the plain meaning may vary from the meaning most closely associated with the assent of the parties. This is most likely to happen when the relevant audience (say, a judge) is not a member of the same community of discourse[118] as the speakers (the contracting parties).

Sometimes proponents of a plain-meaning approach underplay the importance of perspective. One can emphasize the idea of enforcing the plain meaning of terms, "as written."[119] From the standpoint of assent-based interpretation, this approach is seductive. What could be better than following the assenting parties' own instructions, "as written"? The problem is that a court using a plain meaning rule necessarily decides what the plain meaning is, "as read." The plain meaning to the judge may well be different than the meaning of the parties. There is no opportunity to correct this discrepancy under the plain meaning rule, which forbids recourse to extrinsic evidence.[120] This result is inconsistent with assent-based interpretation.

An example may clarify the point. We may imagine an instance where "70,000 cubic yards of cement"[121] has the plain meaning to a judge of precisely 70,000 cubic yards of cement, while the parties that used such a quantity term in their contract assented to a sale of 70,000 cubic yards, give or take 5000. This Article chooses the meaning that is closer to the parties' assent. The Article rejects the idea that language has no meaning that can be ascertained, although it admits that mistakes in interpretation are perfectly possible. To put it succinctly, this Article takes the view (1) that there is sometimes a plain meaning, (2) that courts should not be constrained exclusively to plain meaning, and (3) that there is such a thing as meaning (not necessarily plain to the relevant audience, i.e., the judge) which is useful in deciding many contract disputes.

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116. Rather than a lengthy list of citations to literary and interpretive theorists, perhaps a reader will prefer this quotation: "The notion that the plain meaning of the words of a statute defines the meaning of the statute reminds one of T.H. Huxley's gay observation that at times 'a theory survives long after its brains are knocked out.'" Mass. Bonding & Ins. Co. v. United States, 352 U.S. 128, 138 (1956) (Frankfurter, J., dissenting).

117. *See* Kraus & Walt, *supra* note 37, at 227 n.4 (collecting authorities).

118. *See infra* Part IV.B.

119. The quotations refer to a hypothetical argument.

120. *See* Scott, *supra* note 38, at 162. As a doctrinal matter, this approach relies on a robust parol evidence rule, along with a strict plain meaning rule. *See* Goetz & Scott, *supra* note 34, at 311-16; Scott, *supra* note 38, at 162-63.

121. The example is adapted from *Southern Concrete Services v. Mableton Contractors, Inc.*, 407 F. Supp. 581, 582 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978).

3. *Default Rules Analysis*

Some mention of "default rules analysis" seems required, not only because of the enormous (and inescapable) literature on the subject,[122] but particularly because custom and conduct become part of the agreement[123] unless "negated" by the parties.[124] As custom and conduct can be displaced if the parties reach an express agreement to do so, custom and conduct are "default rules,"[125] as opposed to "mandatory" or "immutable" rules. Custom and conduct do not fit easily into the usual default rules analysis, however. Much default rules analysis revolves around the questions, "[S]hould the law seek to complete the contract for the parties? And if so, from what vantage point should the contractual gaps be filled?"[126] Custom and conduct, as understood in this Article, are not the sort of default rules that "complete" the parties' agreement, filling in gaps. Custom and conduct tell us what the agreement contains. Only after custom and conduct have been put to use do we know what the parties have provided for, and what they have not.

This point can be made easily in the abstract; it becomes more complex as it becomes more concrete. The effort shows, however, why default rules analysis does not work very well for custom and conduct. First consider two typical default rules.[127] (1) Courts should fill a price gap with a "reasonable price at the time for delivery . . . if nothing is said as to price."[128] (2) If there is no delivery term, "the place for delivery of goods is the seller's place of business or if he has none his residence."[129] As long as the parties set the price and the place for delivery, these default rules will have no effect. They go away easily.

Custom and conduct are stickier. As custom and conduct are part of the agreement not only by the fiat of the UCC definition but also as a practical matter, the parties will have a rough time banishing them generally. If the parties call for a delivery of 100 loads of lettuce and include a boilerplate clause that "usage of trade, course of dealing, and course of performance shall not be used to interpret the agreement," it is hard to understand how a court could decide the quantity of lettuce specified in the contract. (Apparently, a load of lettuce consists of forty bins, each of which weighs 1000-1200 pounds, so a "load" is 40,000 to 48,000 pounds.)[130] The parties could state in their agreement that a load of let-

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122. *See, e.g.*, *Symposium*, *supra* note 87. For a listing of representative articles, see Scott, *supra* note 9, at 849 n.3.

123. *See* U.C.C. §§ 1-201(3), 1-205, 2-208.

124. *See id.* § 2-202 cmt. 2.

125. *See, e.g.*, W. David Slawson, *The Futile Search for Default Rules*, 3 S. CAL. INTERDISC. L.J. 29, 29 (1993).

126. Scott, *supra* note 9, at 847.

127. There are at least six different kinds of default rules, but the text treats only the most basic. *See* Schwartz, *supra* note 86, at 390-92.

128. U.C.C. § 2-305.

129. *Id.* § 2-308.

130. *See* KGM Harvesting Co. v. Fresh Network, 42 Cal. Rptr. 2d 286 (Cal. Ct. App. 1995).

tuce "must weigh 50,000 pounds or more (not less), any custom to the contrary notwithstanding." If that is what the parties want, such a clause ought to work. But such clauses require some specificity and care.

If the situation is sticky in the preceding example, involving a usage of trade, it is even stickier when the parties' own conduct is brought in, as it is through course of dealing or course of performance. Insofar as their conduct is a manifestation of assent, it becomes part of their agreement both by default, and by agreement. The parties can try to shut out their conduct, both through general disclaimers as in the preceding example, and by clauses that require modifications and waivers to be in writing.[131] In addition, they may insert some more specific clause (e.g., "acceptance of shipments weighing less than 50,000 pounds shall not bar any action by buyer for breach, even if buyer accepts repeated shipments without objection"). But because the parties' own conduct is so much a part of the relationship, and because reasonable reliance is possible, courts have often been willing to estop a party whose conduct has given rise to reasonable reliance by the other party.[132] We cannot quite say that conduct constitutes some kind of immutable rule, because careful planning can still displace it, but it does not fit well within the default rule paradigm either. This Article therefore analyzes these issues differently (although it does take up the issue of the "quasi-mandatory" nature of custom and conduct below).[133]

There is another reason custom and conduct do not fit easily into default rules analysis. Default rules need to be justified somehow, to the extent that they are not part of the agreement of the parties.[134] Because custom (as part of the parties' language) and conduct (as manifestations of the parties themselves) become part of the parties' agreement, they tell us "*what the transactors have consented to.*"[135] They do not pose the same problems of legitimacy and authority, since they are justified by agreement.[136]

B. Custom as Language

Having established that the interpretive regime should be built on the assent that can be fairly attributed to the parties, the parties' language is the natural place to begin. The argument advanced here is that custom is part of that language.[137] Understanding custom as language allows us to

131. U.C.C. § 2-209(2).
132. *See id.* § 2-209. For fuller treatment, see Snyder, *supra* note 18.
133. *See infra* notes 206 to 224 and accompanying text.
134. *See* Charny, *supra* note 95, at 1817.
135. *Id.* at 1835 (emphasis in original).
136. *See also* Burton, *supra* note 89, at 117 (stating that default rules that are not justified by agreement must be otherwise justified); Gillette, *supra* note 54, at 173 (trade usage falls within the parties' mutual understanding). *Compare* Charny, *supra* note 95, at 1835 (focusing on the obligations to which transactors "would have consented").
137. To be clear, I certainly do not claim to be the first to see custom and language together. Their relation to each other is intuitive; they are so close that the basic idea can be asserted simply, without much elaboration or citation. *See, e.g.*, Macaulay, *supra* note

see how custom can be as important as the words printed on the back of a purchase order or on the face of a security agreement. When we see custom as language itself, we can be less worried about using particular customary understandings to interpret words that appear to have a plain meaning but that in fact carry latent messages as well.

In seeing custom as language, this Article follows Ludwig Wittgenstein's *Philosophical Investigations*.[138] But the Article is not meant to be about Wittgenstein or his philosophy. Rather, his thinking helps to shape the argument. In addition, perhaps his rigor, and the work and care of his followers, lend some authority to the propositions for which I argue.

Here, *language* is understood as a whole system of communication, including verbal and nonverbal conduct.[139] *Language* as used here means a "system of communication,"[140] including verbal communication (consisting of words) and nonverbal communication (e.g., shipping goods). Language can do its job of communication because of conventions[141] or agreements[142] as to the message to be taken from particular signs,[143]

68, at 786. My goal here is to make a careful argument from this intuition. Professor Craswell also analogizes trade custom and language, although in a different way and with different conclusions. *See* Craswell, *supra* note 58, at 129-35.

138. Mistrusting my own training, I follow a philosopher with considerable trepidation. *Cf.* Jean C. Love, *Legal Formalism from the Perspective of a Reasonable Law Professor*, 16 HARV. J.L. PUB. POL'Y 627, 627 (1993) (limited "ability of the reasonable law professor to comprehend abstract philosophical terms"). As Wittgenstein has so much to teach on this subject, I seek to tap his work, but only to the extent it might help a lawyer, a judge, or "a reasonable law professor." This Article attempts to avoid great questions of jurisprudence. It tries not to discuss questions like the truth of legal propositions. *Cf.* DENNIS PATTERSON, LAW AND TRUTH (1996), *discussed in Law, Truth, and Interpretation: A Symposium on Dennis Patterson' Law and Truth*, 50 SMU L. REV. 1721 (1997); George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 LOY. L.A. L. REV. 545, 547 (1996). The Article tries to stay away from any general theory of meaning or interpretation. Readers interested in larger questions of linguistics and philosophy, including the discussions among Gadamer, Habermas, Geertz, and their followers, are referred to other writers. Professor Patterson has written extensively on Wittgenstein, both with respect to law generally and commercial law in particular. See generally WITTGENSTEIN AND LEGAL THEORY (Dennis M. Patterson ed., 1992), and more particularly PATTERSON, *supra* note 15. For a wide-ranging discussion including many philosophical and linguistic schools of interpretation, see the *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); *Symposium*, 73 WASH. U. L.Q. 769 (1995), and very recently the work of Mertz, *supra* note 68, and Jonathan Yovel, *What Is Contract Law "About"? Speech Act Theory and a Critique of "Skeletal Promises,"* 94 NW. U. L. REV. 937 (2000).

139. For an example in Wittgenstein of nonverbal conduct (pointing) as "a part of [a] language-game," see LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 669 (reissued 2d ed., G.E.M. Anscombe trans., 1997) (Wittgenstein completed his work by 1949); *see also id.* § 666. The argument here follows Wittgenstein's later philosophy, as reflected in the PHILOSOPHICAL INVESTIGATIONS. Note that the argument does not limit language to that which can be taught through ostensive definition. *Cf.* Schauer, *supra* note 33, at 527-28, *criticized by* PATTERSON *supra* note 15, at 91-92 n.66.

140. *Cf.* WITTGENSTEIN *supra* note 139, § 3 ("Augustine, we might say, does describe a system of communication; only not everything that we call language is this system.").

141. *See id.* § 355.

142. *See id.* § 242.

143. One might refer to the *meaning* of those signs; in more familiar language, we might say that a particular word *means* this or that. I try to speak instead of the message associated with these signs. The word *meaning* carries two messages itself: intent and definition. This point is important to Wittgenstein, because the two ideas are linked (inextricably, if I

whether those signs be words or nonverbal conduct. Context often helps clarify communications that would otherwise be ambiguous or that otherwise would be understood differently,[144] again because of a shared understanding or convention regarding what the context signifies. Nonverbal communication is often key to conveying important messages about other communications. That is part of the idea behind formalities like the impressed wax seal of ancient legal documents. The seal is itself a nonverbal communication that carries important messages.

Consider another example of nonverbal contractual communication: A man shops regularly at the same haberdashery, buying clothes over the years and being billed on account. One day (a casual day at the office) an unexpected meeting requires him to get a tie in a hurry. He goes to the shop and finds the staff occupied with other customers. He picks out a tie himself. Holding it up, he catches the proprietor's eye. The proprietor nods, and the customer walks out. The next month, the haberdashery sends a bill, which the customer pays.[145] Until the bill arrives, the transaction has involved simple signs (lifting the tie, nodding, walking out) and complex messages (Customer: I want to buy this tie, please bill me in the usual way, and I will pay you, although if it is defective I would expect a refund if I return it with a satisfactory explanation; Merchant: I accept all of those terms and conditions and probably others, and I will bill you). Until the bill arrives, the transaction is wordless. In all likelihood, this system of communication will work just fine for this transaction, and about as well as if the transaction had been filled with words.[146] Here, the customer and the haberdasher have communicated with each other by means of a language that does not always require words. That is the first point: that *language* can usefully be conceived to include nonverbal communications.

This conception of language is bolstered if we realize that "[l]anguage is an instrument."[147] It is a tool for accomplishing a purpose. If the purpose is the sale of goods (say, a tie), nonverbal language may be a better suited instrument than verbal language. Just as words are tools,[148] other

understand him correctly): what a word or other sign *means* (i.e., its definition in context) depends on the speaker's *meaning* (i.e., the speaker's purpose or intention). *See id.* §§ 544-545. Much of what Professor Patterson has written on Wittgenstein and contract construction has to do with this purposive approach to interpretation. *See generally* PATTERSON, *supra* note 15, at 90-93. *See also* Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 543 (2000) (noting that Llewellyn put his purposive approach in Article 1, although its impact is fading, and it should be removed in the revision of Article 1). Professor Maggs excludes custom and conduct from his discussion. *See id.* at 543 n.11.

144. WITTGENSTEIN, *supra* note 139, §§ 584, 591.

145. I am grateful to my colleague David B. Goshien for teaching me this illustration, which I have adapted for present purposes. It is similar to RESTATEMENT (SECOND) OF CONTRACTS § 4 illus. 2 (1981) (lifting an apple), which itself makes the point that the promises that make up a contract may consist partly or entirely of nonverbal conduct.

146. *See* RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. a ("Conduct may often convey as clearly as words a promise or an assent to a proposed promise.").

147. WITTGENSTEIN, *supra* note 139, § 569.

148. *See id.* § 11.

signs—nonverbal signs—are other tools. A carpenter who sets to work on a project will use a variety of tools. A commercial transaction may require a variety of tools, including different ways of communicating—verbal communication and nonverbal communication.

The explanation so far only gives part of the argument, however. The other part is that we can understand words only by understanding how they are used—how players in the language-game (the users of the particular language) "*act.*"[149] Mere "[e]xplanation" must "come to an end somewhere."[150] Where explanation ends, what people do is what matters. A "*whole* language" consists not just of words and how they are used, but how people react to those words, that is, what actions are performed in relation to the use of the words.[151] The same is true of communicative conduct other than words, such as pointing or the use of a color sample to indicate the color of building materials being requested.[152]

This idea fits well within the interpretive system of the Code. It is at the core of the first section of Wittgenstein's *Philosophical Investigations.* It is also the first definition in section 1-205, which speaks of "conduct between the parties . . . which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."[153] Perhaps Llewellyn's sources for the UCC were more eccentric,[154] but in this regard he might as well have been reading Wittgenstein, his contemporary.[155]

With these ideas in mind, the next step is to consider how commercial custom and conduct in the performance of a contract may be the type of nonverbal conduct that comprises language. Commercial transactions will involve the use of many words. A concrete transaction will help clarify how parties to a contract are players in a language-game that includes many instruments aside from words.

Take the sale of fifty bales of No. 1 hay to be delivered to the buyer on June 1.[156] The buyer places the order by filling out a form at the seller's place of business. The only blanks the buyer completes call for a quantity (fifty), a commodity (No. 1 hay), a date, and a signature. The back of the

149. *Id.* § 1 (emphasis in original).

150. WITTGENSTEIN, *supra* note 139, § 1.

151. *See id.* § 6 (emphasis in original). *Cf.* Charny, *supra* note 95, at 1857 (discussing cases that investigate "parties' conduct in reference to particular language"). The point made in the text is not the same as (or at least is more specific than) the general idea; at the core of Wittgenstein's later philosophy, that the meaning of a word turns on how it is used in the language (a question of "grammar"). *See* PATTERSON, *supra* note 15, at 67, 77 (quoting WITTGENSTEIN, *supra* note 139, § 43), 90-93; *cf.* Charny, *supra* note 95, at 1857 (distinguishing cases that turn on "how transactors in the trade ordinarily *use a word*" from those that turn on "*how the parties conduct themselves*") (emphasis in original); PATTERSON, *supra* note 15, at 38-39.

152. *See* WITTGENSTEIN, *supra* note 139, § 8.

153. U.C.C. § 1-205(1).

154. *See* James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 156-59 (1987).

155. *See* PATTERSON, *supra* note 15, at 37-42. Note that I am not making the claim that Llewellyn did read Wittgenstein.

156. *See* Bernstein, *supra* note 37, at 720-21.

form contains a number of boilerplate terms, such as an express warranty of merchantability, a disclaimer of other warranties, an integration clause, and a force majeure clause. It is not hard to see that all of these terms are "express," being stated in words, and that the written form contract consists of something that might usefully be called *language.*

Despite the integration clause, the agreement also consists of much else. Suppose that stores of hay are kept in a shed or barn behind the seller's main building. Buyers sometimes inspect the hay and other commodities kept back there, keeping an eye on quality and noting what has come in, when, and perhaps from whom. Behind the building many conversations take place among farmers, ranchers, and others. They catch up with each other, and with the merchant who owns the business, and with the various traveling representatives selling feed supplements, seed, animal health products, and so on. Wittgenstein might see this scene as a "whole, consisting of language and the actions into which it is woven," and he might call it a "language-game."[157]

The crucial point is that language and actions are woven together. We are familiar with the legal idea that a sample—the hay that the merchant points out to the buyer—"creates an *express* warranty that the whole of the goods shall conform to the sample."[158] It is perhaps odd to call the warranty express since "express" usually describes a contractual term that is specified in words. But if the merchant points to where the No. 1 hay is kept so the buyer can inspect it, and the buyer does inspect it and then places his order, the warranty might as well have been stated in words. Indeed, the chief difference between the warranty by sample and the warranty by verbal affirmation is that inspection seems much more effective than verbal description. It seems more just to hold the merchant to warranty liability where he has invited the buyer to inspect the product as when a merchant has described it verbally or otherwise (e.g., by a picture, or in another context, by a diagrammatic drawing).[159] By the same token, the inspection is as effective to protect the merchant, through an unspoken, unwritten disclaimer of warranty liability for any defects the inspection should reveal.[160] The buyer could see that the No. 1 hay contained ten percent clover, and he is no more justified in complaining about a delivery containing ten percent clover than the seller would be in delivering hay containing fifty percent clover.

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157. *See* WITTGENSTEIN, *supra* note 139, § 7; *see also* Yovel, *supra* note 138, at 937, 955. The scene described is based on conversations with G. John Veta of Wyoming and with the United Farmers Exchange Association of Ohio. I can make no empirical claim that the scene is typical, but I have tried to make it realistic. The main exception is that the people I spoke to do not use the term "No. 1 hay." The "No. 1 hay" term is used in the text for the sake of argument.

158. U.C.C. § 2-313(1)(c) (emphasis added).

159. *See* WITTGENSTEIN, *supra* note 139, § II.iv. ("And why should such a picture be only an imperfect rendering of the spoken doctrine? Why should it not do the *same* service as the words? And it is the service which is the point.").

160. *See* U.C.C. § 2-316(3)(b).

Let us now widen the view. Consider the scene described above—the farmers and ranchers and sales representatives all talking and doing business and working at the merchant's place of business and in the community. Many of them have bought or sold No. 1 hay. They have signed similar orders—contracts—and saw fit to behave in certain ways in relation to those contracts. Their actions, as well as the words in the contract, make up the language-game in which we are interested if we have to enforce the contract. When another rancher ordered No. 1 hay, the merchant delivered hay with five percent clover; yet another received something between five and ten percent. Most received around ten percent. None complained, either to the merchant or each other. The whole of this contract consists of the words of the agreement and the actions into which they are woven.[161] The agreement and the contract consist not only of the words "No. 1 hay." The words alone are useless without knowing how people act in relation to those words.

This is the way to understand usage of trade, course of dealing, and course of performance, which are labels that describe how people act in certain situations, and in relation to certain words and other signs. When the UCC defines the parties' "agreement" to include all three, as well as the "express" terms,[162] it is saying the same thing about contracts as Wittgenstein says about a "*whole* language."[163] The parties' course of performance and course of dealing, and the way that similarly situated players act in relation to the words or signs in question, are inseparable. "It is most natural, and causes least confusion, to reckon [nonverbal signs, i.e., color samples] among the instruments of language."[164] Just as the words and actions are woven together into language in general, words and actions are woven together into the language of a contract.[165] Perhaps it is possible to pull out a thread. But at best this will weaken the fabric, and more likely, the whole will unravel.

Until this point, custom and conduct have been treated together. That is appropriate to some extent, as they are the same in that the parties' past conduct—their "course of dealing"—may function as custom does. Their understanding is linked to practices, and thus their "previous conduct," to the extent it "establish[es] a common basis of understanding,"[166] is a part of the fabric of the parties' language. If their assent is what the courts aim to find out, what the parties have done in relation to previous contracts tells the courts (not to mention the parties themselves) what certain signs are taken to mean. In this way, we see that the parties' course of dealing functions just as custom does, as part of the parties' language, their system of communication.

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161. *See* WITTGENSTEIN, *supra* note 139, § 7.
162. *See* U.C.C. § 1-201(3).
163. WITTGENSTEIN, *supra* note 139, § 6.
164. *Id.* § 16.
165. *See id.* § 7.
166. U.C.C. § 1-205(1).

Course of performance presents a weaker case. It differs from course of dealing, which is part of the background in which the present contract is made. Like custom, a course of dealing is part of the vast practical, nonverbal dictionary to which the parties might have recourse when they make the present contract. The same is not true of their course of performing the present contract, however; what they have done in performing the contract could not have been part of the background in which they made the contract, chronologically speaking.[167] In that sense, the course of performance is less solid proof of the parties' meaning at the time of contract formation. On the other hand, it may still be relevant. What the parties later do in performance may give clues to their earlier meaning.

Course of performance, then, is ambiguous. Imagine a neophyte rancher who orders No. 1 hay and receives a delivery that is ten percent clover.[168] He may be surprised. On the other hand, this post-contractual conduct is not without significance. The neophyte rancher after the delivery may think, "No. 1 hay contains clover, at least from this seller." The seller's conduct—delivery—informs the rancher (and potentially, a court) of what the seller apparently meant by "No. 1 hay." The information is uncertain because it may simply constitute a breach by a corner-cutting seller. But the delivery does give some information about the meaning of "No. 1 hay" in the following sense: If the farmer receives another delivery from another seller under another contract calling for No. 1 hay, the meaning of "No. 1 hay" becomes more certain. With repetition the certainty increases. The evidence is not incontrovertible, and it is not direct. But it is valuable information as the neophyte rancher learns a new language-game. It is similarly valuable to a court, which is required to referee a language-game it has never seen.[169] True, the value of the information is undercut by its ambiguity. But if admissibility were limited to unambiguous evidence, trials would be short indeed.

On this score, it is worth pointing out that if custom (putting aside questions of course of performance) is understood as language, it comes not only with the benefits of language but also its weaknesses. Few would claim that language is perfectly precise. Past practice, while often susceptible of reliable proof, may be distinguishable from the case at issue. A practice that obtained in a sale of corporate jets might not obtain in a case involving cargo planes.[170] There will be questions of the extent and application of a custom, as there are similar questions about words.

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167. The problem of presentiation, and the work of Macneil and his followers, is particularly relevant to course of performance. See the works cited *supra* note 11.

168. See Charny, *supra* note 95, at 1862-63 (discussing the "neophyte rule").

169. Perhaps it is not wisest to have such inexperienced referees. Llewellyn proposed merchant juries, but that move failed. *See generally* Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 65 (1987). The parties cannot complain too loudly about the quality of judicial referee since they can always choose someone more expert by opting for arbitration. *See infra* Part IV.C.

170. *See* Craswell, *supra* note 58, at 121-25 & 144 n.23 (citing Fed. Express Corp. v. Pan Am. World Airways, 623 F.2d 1297 (8th Cir. 1980)).

There will be, to put it more philosophically, problems of induction, as Wittgenstein taught.[171] In addition, the customs may be vague,[172] just as words may be vague. Understanding customs, like understanding language, is a complex undertaking. Context, experience, and judgment are necessary.[173] None of this is denied here. Custom is nevertheless useful, as is language.

C. COURSE OF PERFORMANCE AS FORMALITY

The linguistic argument for course of performance is not as strong as the argument for usage of trade and course of dealing. There is more to the argument, however, than language. For course of performance, the principal idea advanced here is that performance can be usefully understood as a "natural formality,"[174] much like the delivery of a chattel that makes effective an otherwise unenforceable promise to make a gift.[175] The concept is not limited to the realm of donations; it obtains just as well in the contractual paradigm, as where a seller delivers the goods being sold.[176] This section of the Article applies Fuller's analysis of legal formalities to course of performance, which is here conceived as a form. It is perhaps most orderly to work through Fuller's now traditional list of the three functions of formalities: evidentiary, cautionary, and channeling.[177]

Course of performance is good evidence of what the terms of the contract are considered to be by the parties, and that is precisely the goal of assent-based construction. A contract calling for No. 1 hay may be unintelligible to a court, which would somehow have to figure out whether the hay could contain, say, five percent clover and still be classified as "No. 1 hay." It would surely be relevant to know, however, if the seller had delivered ten installments with five percent clover and that the buyer had paid for all of them, seemingly content. The evidence is ambiguous, as mentioned before; the seller may have breached and the buyer's acceptance may represent only an effort to preserve the relationship. But it does seem relevant in the sense that to a judge who is otherwise in the

171. WITTGENSTEIN, *supra* note 139, §§ 185-189, 198-201, *cited in* Craswell, *supra* note 58, at 144 n.15.

172. *See* Craswell, *supra* note 58, at 126.

173. *See id.* at 28-33 (discussing pragmatics as well as Stanley Fish). For a response to Professor Craswell, see Kraus & Walt, *supra* note 37, at 203-07. *See also supra* note 65.

174. Fuller, *supra* note 8, at 815.

175. *See id.* at 805.

176. *See id.* at 815 (in the sale of a horse, "delivery and acceptance of the horse involve a kind of natural formality, which satisfies the evidentiary, cautionary, and channelling purposes of legal formalities"). What the parties do in performing the contract is not solely formal, of course; "both a 'formal' and a 'substantive' aspect is apparent." *Id.* at 799.

177. *See id.* at 800-02. This Article does not attempt a complete discussion of legal formalities. For views of particular interest, see Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931). For a more recent historical examination, see David Ibbetson, *From Property to Contract: The Transformation of Sale in the Middle Ages*, 13 J. LEGAL HIST. 1, 4-12 (1992). Regrettably, this Article was being revised for the press when Duncan Kennedy's *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94 (2000), was published, and I was unable to take full account of it.

dark on the meaning of "No. 1 hay," such evidence makes it more likely that No. 1 hay describes hay that includes five percent clover, especially if corroborated by other evidence.[178]

In assessing the value of this ambiguous evidence, it is helpful to compare it to consideration, the legal form with which Fuller was concerned. Actual performance would seem to be at least as good evidence as consideration, and almost certainly better. With performance there has been some execution. With consideration, there could be a mere allegation of something entirely executory.[179] With course of performance, something has happened. There may well be hard evidence, and even in the absence of something physical, actual performance increases the likelihood of other evidence: more witnesses, more testimony, perhaps shipping documents, or the like.

Course of performance also serves the cautionary function. There is a "natural formality in the turning over of property or the rendition and acceptance of services" or in the "surrender and acceptance of a tangible benefit."[180] Plus, presuming the parties are interested in the performance of the contract, and in their relationship, their performance is a matter of importance to them. Whether they perform, how they perform, whether there is acceptance or rejection—all of these things we can expect the parties to a commercial contract to take seriously. A party who performs over a period of time so that a meaningful course of performance is established must know that its chance of future business, not to mention its relations with the other party, depend on its performance. And as Judge Posner has put it, actually doing something—here, performing—"makes one put one's money where one's mouth is."[181] On the other side, a party who does not object to a course of performance (and a course of performance, by definition, requires that there be no objections after repeated performances)[182] must figure that what it got this time it is likely to get the next time, absent some objection. The taking of action in performance of the contract, and the repeated acceptance of those performances, would seem an excellent "check against inconsiderate action."[183]

The channeling function, which "mark[s] or signalize[s]" what the parties mean to be legally enforceable,[184] is also served by a course of performance. Before going further, though, additional clarification is necessary. The channeling function serves "to make sure that [the parties] understood and could organize their behavior around a very clear distinction between legally enforceable and unenforceable promises."[185] A formality shows what promises are within the channel of judicial cogni-

178. *See supra* text accompanying notes 168 to 169.
179. *See* Fuller, *supra* note 8, at 816-17.
180. *Id.* at 816-17.
181. Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1287 (7th Cir. 1986).
182. *See* U.C.C. § 2-208(1); 1 WHITE & SUMMERS, *supra* note 22, § 3-3.
183. Fuller, *supra* note 8, at 800.
184. *Id.* at 801.
185. Kennedy, *supra* note 177, at 102.

zance and state enforceability, and which ones are left to the purely private, moral realm. A legal formality, through the channeling function, "effect[s] a categorization of transactions into legal and non-legal."[186] Admittedly, the channeling function is often understood otherwise, as a means to channel people into particular behaviors (like writing down contracts) that are thought to be desirable.[187] Although that view is consistent with the arguments advanced here, it is not my reading of Fuller.

In what way, then, does course of performance furnish an assurance that it is within the channel of legal transactions, or that it is an appropriate "channel[ ] for the legally effective expression of intention"?[188] Most obviously, the course of performance takes place within a channel that has already been marked for the legal realm because it is by definition the performance of a contract. The existence of the contract is itself one signal that a transaction with legal consequences is underway; that signal is strengthened by the very act of performance. Any doubts that a legally binding relationship existed are allayed by the actual performance of the contract. In this way we can understand Fuller's argument that the delivery and acceptance of goods "involve a kind of natural formality, which satisfies the evidentiary, cautionary, and channeling purposes of legal formalities."[189]

As Fuller also observed, legal formalities have dangers. One who conceives an objective may choose a legal form to achieve it, but if he is not aware of all of the effects of that form, the objective may be endangered.[190] This again is an apt description of a course of performance. A party who accepts a course of performance may not realize that the written terms of the contract—the so-called "end-game norms"—may be undermined by relationship-preserving conduct.[191] This of course raises an issue, just as the seal raised an issue: Would the person who sealed a specialty understand that he would give up even the defense of fraud?[192] Consideration runs into similar problems, but worse; many promises that are supported by a bargain are nevertheless excluded from legal enforcement because they are of a social, familial, or religious nature. The courts have traditionally assumed those promises were not meant for legal enforcement, despite the presence of a bargain.[193] Rarely can a legal formality distinguish perfectly between behavior that is meant to have legal consequences from that which is not. Legal formalities are imperfect, and these imperfections frequently lead to involved argument about the chan-

186. Fuller, *supra* note 8, at 803.

187. Teaching materials seem to emphasize this understanding. *See, e.g.*, LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 168 (3d ed. 2000) ("By refusing to enforce oral security agreements, the law encourages the parties to put them in writing.").

188. Fuller, *supra* note 8, at 801.

189. *Id.* at 815.

190. *See id.* at 801-02.

191. *See supra* Part II.A.

192. *See* Fuller, *supra* note 8, at 802.

193. See cases cited in E. ALLAN FARNSWORTH, CONTRACTS § 3.7 (3d ed. 1999).

neling function.[194]

Although it is as imperfect as other legal formalities, course of performance does fulfill the channeling function in several ways. Putting course of performance in the channel of legally effective transactions allows courts to head off surprising opportunistic behavior to which the parties have not assented.[195] And if the relationship has in fact reached the stage where the stricter end-game norms are relevant, the assertion that a particular practice is only meant as a non-binding accommodation may be credible or not, just as it may be true or not. To say that a course of performance *may* be a relationship-preserving norm is not to say that it must be. Nor is it clear why we should assume that courts are incapable of distinguishing accommodations accepted while the relationship was good from standards expected when the relationship has reverted to a stricter mode.[196]

The cautionary and evidentiary characteristics of legal formalities counsel against such an assumption. Certainly a party that continues to accept a course of performance (i.e., a succession of performances),[197] and acquiesces to ten percent clover in each delivery, will realize as time goes on that demanding hay with less clover will grow increasingly difficult, either practically or in litigation. A good way for the point to be driven home to the buyer is that it keeps getting similar deliveries. These should certainly serve as a due caution that continuing acquiescence will lead to more of the same. The buyer might also suspect that repeated acceptances without objection will give evidence that such deliveries were acceptable, once a neutral (but not necessarily knowledgeable) third party is called to look into a dispute. These aspects of the cautionary and evidentiary functions suggest that the channeling function is also fulfilled by the performance of a legally binding obligation: a judge should know, and the parties should know, that their actions will be given legal effect.[198]

The channeling argument, concededly, is the weakest for course of performance. Visiting legal consequences on anything always comes with certain costs. By allowing a course of performance to amount to a legally enforceable promise, the law and its machinery come into the relationship of the parties. In some ways, we may prefer to confine the law to the written contract. Perhaps we feel safer without the law roaming through a continuing relationship. To my mind, though, the case is relatively weak. Such a principle would presumably be grounded on the idea, in Fuller's words, that "[t]here is a real need for a field of human intercourse freed from legal restraints, for a field where men may without liability withdraw assurances they have once given."[199] But the justice of

194. *See* Fuller, *supra* note 8, at 800-03; Kennedy, *supra* note 177, at 102.
195. *See supra* notes 62 to 64 and accompanying text.
196. *See supra* notes 42 to 64 and accompanying text.
197. *See* U.C.C. § 2-208(1); 1 WHITE & SUMMERS, *supra* note 22, § 3-3, at 113.
198. *See* Fuller, *supra* note 8, at 801.
199. Fuller, *supra* note 8, at 813.

that idea is considerably diminished when the parties are already within a binding contractual relationship.[200] This is a field where the dangers of inconsiderate action, and legal liability, seem small.

We thus see that course of performance fulfills Fuller's three criteria of legal formalities, and we can now better understand the significance of course of performance. A legal formality, because it meets those criteria, is an especially valuable form of expression from the perspective of the law. In litigation, disputes can be settled with greater confidence. There is more than a bare expression of assent. The manifested assent is bolstered by indications of considerate action, with the promise of better proof, with less fear that the law is interfering where it ought to stay away. From the perspective of contracting parties, legal formalities are similarly valuable; the formalities give greater assurance that what the parties have done will be taken seriously by a court. The evidentiary and channeling functions reduce the chance that a court will misinterpret what the parties mean, and what they mean to be bound to.

IV. LIMITS TO CUSTOM AND CONDUCT

The arguments advanced above come with inherent limits. To say that custom is part of language and that a course of performance is a formality shows how custom and conduct are useful in determining the parties' assent. In general, though, commercial contracts will include other language and other formalities. Many contracts will also include parties who are not in the same community, and who may be playing different language-games. These facts help set the bounds for custom and conduct.

A. CONFLICTING LANGUAGE, CONFLICTING FORMS

Deducing assent from custom and conduct is merely an exercise in probability. How helpful custom and conduct are in arriving at the parties' assent will be affected by what other language and what other forms they have used. Using custom and conduct makes particular sense in the absence of other information, as where the express terms leave an unambiguous gap. In that case a customary term—one that the parties expect to be observed[201]—is probably better than no term (which would render the contract unenforceable) or an arbitrary term.[202] Either of the latter holdings will result in one party winning for reasons that have nothing to do with the parties' assent. The same analysis holds for a patent ambiguity in the express terms. A term that is ambiguous is by definition unclear.[203] So far as a court is concerned, that is almost as much of a gap as

200. *See id.* at 818 (quoting Llewellyn); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. a (1981).

201. *See* U.C.C. § 1-205(2).

202. Even Professor Bernstein would look to custom to fill an unambiguous gap. *See* Bernstein, *supra* note 37, at 753, 757 & n.186.

203. *See* BLACK'S LAW DICTIONARY 79 (7th ed. 1999).

a gaping hole is. The court has to decide the meaning to use; it ought to choose in a way that relates to the parties' assent.

What the neoformalists most dislike, I think, are two related aspects of the Code regime: (1) the use of custom and conduct to interpret facially unambiguous terms[204] and (2) the difficulty of displacing custom and conduct[205] (a difficulty which makes them "quasi-mandatory").[206] These objections raise most clearly the problem of apparently conflicting expressions; the parties may seem to be saying one thing in their written agreement and doing another in practice. Even if we understand the writing, custom, and conduct as manifestations of assent, the question remains: Which expression should be given legal effect?

The clearest case for subordinating custom and conduct is a contract in which the express, negotiated terms of a written and integrated agreement carefully negate custom and conduct. In that situation, the writing, through verbal language, expresses the parties' assent, and the agreement also partakes of the formal aspects of a signed writing. Recall the clause, discussed above, that would require deliveries of 50,000 pounds of lettuce, despite custom and conduct that would show that a load of lettuce is 40,000-48,000 pounds.[207] The example demonstrates several points. First, negation of usage of trade and course of dealing can be relatively easy, although it does require attention. Such attention may at first seem an unreasonable cost to impose on the parties, but it seems more reasonable when we consider that the parties are asking the court to ignore a convention. If the parties want their unconventional agreement to be honored, some care on their part is necessary.

Second, the example shows how some trade usages, though hard to state precisely, may still be displaced with relative ease (if the parties are paying attention). It is not true, as has been asserted, that a custom that cannot be formulated cannot be displaced.[208] There may be considerable disagreement, for instance, on whether a "load" of lettuce is 40,000 pounds, 48,000 pounds, either, something in between, or something else entirely. Yet an express contract term can specifically negate the customary term with one sentence. In such a case, it should be privileged over considerations of custom and conduct; the parties have informed each other and the court of which expression of assent to follow.

This example does not suggest, however, that written contract terms should always be privileged over custom and conduct. A written express term (which is express because stated in words, and formal because writ-

204. *See supra* notes 24 to 27 and accompanying text.

205. *See supra* text accompanying notes 126 to 129.

206. *See* Bernstein, *supra* note 37, at 758.

207. *See supra* text accompanying note 126.

208. *But see* Bernstein, *supra* note 37, at 759-60 (citing U.C.C. § 2-202 cmt. 2) ("[I]f there are, in fact, customs that cannot be linguistically captured in a contract provision ex ante, the incorporation strategy transforms them into mandatory terms because in order to be excluded, the contract must negate them with specificity, something that by assumption is not possible.").

ten) is a manifestation of assent that should carry legal significance. But where the parties have used other language, and other formalities, the written express term should sometimes give way. A written term may appear, for instance, as boilerplate[209] in a software licensor's clickwrap form; it may even be hidden inside a box, unknown to a buyer of goods until the box is opened.[210] These terms cannot be ignored. In each case, there may be some manifestation of assent. In the clickwrap case, for instance, suppose the licensor includes the term in the license agreement, and the licensee's employee clicks "OK" in order to run the program that the company had bought. Or the employee opened the box containing the computer equipment, seeing that various terms appeared on the boxtop.[211] This is some evidence of assent, but it is doubtful.[212] Other evidence of assent may be considerably stronger, and in some cases, the stronger evidence of assent will be custom and conduct.

Admittedly, the approach to contract construction suggested here is not cheap or easy. It requires courts to consider more evidence, not less. There will be hard cases and no shining bright line. In a case like *Columbia Nitrogen*, at least the judge will need to hear evidence of custom and conduct, and some judges may go wrong while others go right.[213] But the possibility of error—which always exists—cannot justify a rejection of custom and conduct, at the expense of the parties' assent.

An aficionado of efficiency might argue that the plain meaning of verbal language is so plain, and thus so easy and inexpensive for courts to follow, that the law should only enforce transactions that are expressed in

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209. *See* Goetz & Scott, *supra* note 34, at 314-15 ("The lingering argument against a strong plain-meaning presumption is that the interpreter must somehow distinguish between meaningful language and empty boilerplate.").

210. The possibility of a term becoming part of the contract when appearing in only one party's form may be obviated in a battle of the forms governed by the revision of U.C.C. § 2-207, but it is currently possible, and will remain possible as long as a court holds § 2-207 inapplicable. *See generally* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305 (Wash. 2000). *But see* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000) (rejecting 7th Cir. rule), *vacated for lack of jurisdiction*, 2000 WL 1372886 (D. Kan. Sept. 6, 2000); Westendorf v. Gateway 2000, Inc., 41 U.C.C. Rep. Serv. 2d 1110 (Del. Ch. Mar. 16, 2000) (adopting 7th Cir. rule but coming out opposite). For scholarly discussion of these sorts of issues, see, e.g., Kastely, *supra* note 12, at 802-05; Woodward, *supra* note 33.

211. *See* Step-Saver Data Sys. v. Wyse Tech., 939 F.2d 91, 94 (3d Cir. 1991).

212. *See generally* James J. White, *Autistic Contracts*, 45 WAYNE L. REV. 1693 (2000).

213. Even though some may be distressed by *Columbia Nitrogen v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971), they should take comfort from *H&W Industries, Inc. v. Occidental Chemical Corp.*, 911 F.2d 1118 (5th Cir. 1990) (asserting trade usage inapplicable because of duration of contract and state of market), and *Southern Concrete Services v. Mableton Contractors, Inc.*, 407 F. Supp. 581, 582 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978). As for *Columbia Nitrogen*, it is impossible to tell from the reported decision what the right result would be. Under the approach of this Article, a judge should hear the proffered evidence. Even if the judge found that the practice of adjustment was not displaced by the parties' written agreement, *see* 451 F.2d at 9-10 (because they disagreed, the parties simply omitted the portion of the contract concerning adjustment for a declining market), the practice should still be kept from the factfinder if it was an informal norm that could be enforced only through nonlegal sanctions.

words. This would parallel the idea that only contracts supported by consideration, i.e., involving an exchange, are economically worth the trouble and expense of enforcement. But this is a serious limit on freedom of contract. Many transactions might fail the test. Is plain meaning a requisite of an enforceable contract? We might as well argue that only contracts with a plain (or indisputable) meaning, derivable from an unimpeachable writing, deserve legal enforcement. In any event, such a regime would probably only shift the argument from (a) what is the meaning of the communication, to (b) whether the communication is indisputably plain.

Another objection might draw a parallel to a different rule. Even if custom and (at least some) conduct make up part of the language, contract law often excludes some language from the consideration of the factfinder. That is the whole point of the parol evidence rule,[214] which protects certain communications from being undermined: the parties have made the choice, and gone to the trouble, of reducing at least part of the contract to written form. That process requires some deliberation and suggests that cautionary and channeling functions are fulfilled. The parties have elected written words, with concomitant advantages in terms of evidence and perhaps certainty. The parol evidence rule respects that choice. The words of a written contract, the argument goes, are a surer way to the communicated assent of the parties than a more free-ranging inquiry, where sharp incentives color the memory.[215]

The same argument does not work as well for custom and conduct. They are susceptible of more reliable proof compared to the parties' oral communications or tacit assumptions.[216] Others, who are less interested in the outcome, can testify to custom. We may also expect better evidence when the operative question is, "What has been done?" rather than, "What did he say?" or "What did he mean?" More witnesses are likely, and physical evidence may even be available. A court need not admit evidence to show "an oral declaration or even an agreement that words in a dispositive instrument making sense as they stand should have a different meaning from its common one . . . . [e.g.,] that when they wrote five hundred feet it should mean one hundred inches."[217] If the parties' own repeated performances show that "five hundred feet" to them means "one hundred inches," or if the conduct of people in the

214. *See, e.g.*, Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564 (9th Cir. 1988).

215. *See id.* at 569.

216. *See* Charny, *supra* note 95, at 1859 n.149; Kraus & Walt, *supra* note 37, at 209-10. *Cf.* Barnett, *Silence*, *supra* note 89, at 880 (resting his consent theory of default rules on tacit assumptions and common-sense expectations); Craswell, *The Relational Move: Some Questions from Law and Economics*, 3 S. CAL. INTERDISC. L.J. 91, 111 (1993) (criticizing use of tacit assumptions as being unsusceptible of reliable proof); Barnett, *and Consent*, *supra* note 89, at 430 (arguing that tacit assumptions may be proved by course of dealing and course of performance).

217. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899).

industry shows the same thing,[218] then we fear less that a court will stumble and credit evidence that ought not to be believed.[219] Moreover, it is not at all clear that the custom or conduct, once proved, will have a less certain meaning than the words used in the contract.

This point highlights an irony in the neoformalists' claim that the Code transforms custom and conduct into quasi-mandatory terms.[220] There, the neoformalist argument depends on the failure of written words.[221] The argument emphasizes the difficulty or impossibility of drafting express contract language that will successfully negate any relevant custom or conduct.[222] On the other hand, the neoformalist position advocates a plain meaning approach to express contractual language,[223] an approach that depends on the efficacy of language.[224] In the end, we cannot help but rely on language, but we ought not to be too constrained in our view of it.

B. COMMUNITIES OF CUSTOM

An assent-based justification for custom and conduct carries its own limits. Customs apply within a community, like language.[225] The definitions in the Code and the revision make this clear,[226] but its implications should be made explicit. A court should not expect a usage of trade to be followed if there are competing usages for the same kind of transaction within the same community, as there could be no expectation as to which one would be followed.[227] A court should not expect a usage to be followed if a member of the community contracts with someone outside the community, particularly if the outsider has no reason to know of the industry customs. Under the current Code, the courts generally have not

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218. Professor Macaulay gives the example of "two-by-fours." Apparently, they are 1½ by 3½ inches. This fact can be proved with testimony from countless people in the trade, not to mention actual two-by-fours, and birdfeeders made to be mounted on two-by-fours. (Such birdfeeders would not fit on a board that was actually 2 by 4 inches.) *See* Macaulay, *supra* note 68, at 787.

219. *See* 1 WILLIAM D. HAWKLAND, HAWKLAND UNIFORM COMMERCIAL CODE SERIES § 1-205:4, at 1-261 (responding to Holmes); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 559-60 (1998).

220. *See* Bernstein, *supra* note 37, at 758-60; *see also* Goetz & Scott, *supra* note 34, at 286, 305 (explaining the difficulty of displacing implied terms).

221. *See* Scott, *supra* note 38, at 164.

222. *Id.* at 22.

223. See Bernstein, *supra* note 37, at 756 & n.186 (apparently preferring to look to a written contract provision rather than an unwritten custom, although this preference is not clear); Scott, *supra* note 9; Scott, *supra* note 38.

224. See Mertz, *supra* note 68, at 927-28.

225. *See Silence*, *supra* note 89, at 882; *see also* Epstein, *supra* note 37, at 824.

226. "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." U.C.C. § 1-205(2). Revised U.C.C. § 1-303(c) retains the wording.

227. On the other hand, if two customs are not entirely inconsistent, the court should use the customs to the extent they overlap. For example, if some in the industry allow a 10% tolerance and others allow 15%, the court should allow 10% rather than zero. *See* U.C.C. § 1-205 cmt. 9.

had trouble confining usage of trade to those in the trade or those who know or ought to know of the usage.[228] There is no reason to expect that courts will have trouble under the revision either, at least as a general matter.

There is a troublesome exception, however, in Article 4. Section 4-103 visits on a bank customer all manner of banking rules and practices "whether or not specifically assented to by all parties interested."[229] The customer is thus deemed to assent to "Federal Reserve regulations and operating circulars, clearing-house rules, and the like." The customer is unlikely to know the contents of these obscure documents and has no opportunity to find them out. This approach is no doubt convenient for banks, and they (or other parties who control adhesionary contracts) may try to bolster unfair practice by making it customary.[230] Such a move is indeed encouraged by U.C.C. sections 4-104(1)(c) and 3-103(a)(7). The definition of "agreement" in Article 4 is simple legislative fiat. It has nothing to do with assent, and any justification for it must be found elsewhere.

In this regard, another point should be mentioned even though it falls outside the scope of the present inquiry. As the comments to the present Code acknowledge, a dishonest or unconscionable practice may sometimes become standard.[231] As with express terms, customary terms may favor one side to an extent that the law cannot stomach. Some express contracts, therefore, are invalidated despite the parties' assent, and the same should hold for customary terms (or terms based on conduct) when they are in bad faith or unconscionable.[232]

C. Opting Out: Assent, Arbitration, and Alternative Regimes

The argument here does not claim that assent-based construction is the single superior method for everyone. The regime of the Code is defended; it is the rule of law, as applied in the courts. Parties can escape the Code and its regime, however, and there is nothing wrong with their doing so. Their decision to put aside the Code and exit the courts is not an indictment of the entire system.[233] Exit may be more efficient for par-

228. *See* 1 White & Summers, *supra* note 22, § 3-3, at 114-15 & n.4; Barnett, *Silence*, *supra* note 89, at 906 ("What exactly is the 'relevant community of discourse'?"); Woodward, *supra* note 33. For a justification of the objective theory, even from the perspective of one who strongly propounds a consent theory of contract, see Barnett, *Silence*, *supra* note 89, at 857-59. For an economic justification for applying trade usage to those in the trade, see Elizabeth Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 Pitt. L. Rev. 515 (1981).

229. U.C.C. § 4-103(b).

230. *See also* Bernstein, *supra* note 37, at 779 n.246.

231. U.C.C. § 1-205 cmt. 6. *See generally* Danzig, *supra* note 12.

232. *See* U.C.C. §§ 1-203, 2-302. On the regulatory role for contract law, even contrary to traditional assent, see generally Braucher, *supra* note 106. *See also supra* note 108.

233. *See* Charny, *supra* note 33, at 843 ("[T]rade association formalism . . . does not counsel formalism in commercial law generally").

ticular parties, especially if they are part of an idiosyncratic or homogeneous group.[234] This option is especially important because the Code lacks a "safe harbor" provision that would allow the parties to signal their preference for a different interpretive regime.[235]

Judicial adjudication involves the coercion of the state. That coercion must somehow be justified.[236] Assent is the basis for that justification in this Article, as elsewhere.[237] Of course many different kinds of contracting parties may find the Code regime uncongenial, just as they may find the judicial system inconvenient. Particular merchant groups may prefer a different regime and a different system.[238] They may prefer adjudication by peers, with its inherently different interpretive regime.[239] But a prerequisite for the different regime is that the parties assent to it. They cannot reach arbitration and its alternative possibilities without their own valid agreement. That agreement provides the necessary justification.

The same is not true of courts or the interpretive tools that they use. As parties do not consent to judicial jurisdiction and to the law in the same way that they consent to arbitration, the legal regime must itself take assent into account. The arbitral regime need not, since it only has jurisdiction over parties who have consented to arbitration.[240] And while some merchants may prefer particular mechanisms that they can obtain through arbitral dispute resolution, it does not follow that the law must copy them.[241]

V. CONCLUSION

The use of custom and conduct in the construction of contracts has lately come under increasing challenge. Perceptive and careful scholar-

234. *See* Kraus & Walt, *supra* note 37, at 214-17.

235. Several scholars have suggested that parties be allowed a "safe harbor" provision to signal their interpretive preference. *See* Bernstein, *supra* note 34, at 1820-21; Kraus & Walt, *supra* note 37, at 219; *see also* Goetz & Scott, *supra* note 34, at 263 (discussing burden on those wishing to opt out of state-created default rules). The revision does not follow this suggestion. From the perspective of assent, a safe harbor that the parties could agree to would be a healthy step. From a practical and theoretical standpoint, however, it is hard to know how a safe harbor would work. If the parties invoke the safe harbor provision and tell the judge not to look to custom or conduct, how is the judge supposed to know, say, what a "load" of lettuce is? *See* KGM Harvesting Co. v. Fresh Network, 42 Cal. Rptr. 2d 286 (Cal. Ct. App. 1995) (a load is 40,000 to 48,000 pounds). Such a safe harbor, by shutting out part of the parties' language, would close their dictionary to the judge.

236. See Burton, *supra* note 89, at 117.

237. *See supra* Part III.A.1.

238. *See* Bernstein, *supra* note 34; Bernstein, *supra* note 37; Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

239. The neoformalists suggest that the regime is legal formalism. *See* Scott, *supra* note 9, at 873. *See generally* Bernstein, *supra* note 34; Bernstein, *supra* note 37. For the reasons stated above, I am not sure. *See supra* note 75 and accompanying text.

240. Again, the question of whether certain manifestations of assent should be invalidated—perhaps because the law suspects the assent is unreal—is beyond the scope of this inquiry. *See supra* note 108.

241. *See* Scott, *supra* note 9, at 873 n.78.

ship raises important questions. Some of these questions can be answered, though, in favor of continuing the role of usage of trade, course of dealing, and course of performance in the revision of the UCC. They are an integral part of the parties' agreement. Like the words the parties use in a written contract, usage of trade and course of dealing constitute a part of the parties' language. Courts ignore that language, verbal and nonverbal, at the risk of ignoring the parties' manifested assent. Although course of performance presents a weaker linguistic case, it is important, particularly in a legal context, because it partakes of the cautionary, evidentiary, and channeling functions of a natural legal formality. The Code does well to retain custom and conduct as constituents of the parties' agreement. To do otherwise would be to reject or subordinate assent as a basis for contractual liability.