

RELATIONAL FORMALISM, LINGUISTIC THEORY, AND LEGAL CONSTRUCTION

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ABSTRACT

Legal formalism and legal relationalism are traditionally thought of as defining opposite poles of jurisprudential analysis. This study develops the notion of “relational formalism” as it emerges from practices of commercial law and from linguistic theory. As an interpretation of practice, relational formalism—although maintaining the precedence of formalist construction over functional analysis—does so while responding to practical concerns and interests entailed by relations. It argues that legal formalism needs not be an expression of positivistic commitments, and can be approached on relational grounds, and must respond to those.

The study empirically analyzes a well-known problem of negotiable instruments to support both the tenability of relational formalism and its theoretical and practical fruitfulness. It then uses performative linguistics to sustain a relational construction of formalism. Finally, it claims that tacit judicial divergence over formalism, rather than doctrinal differences, sometimes explains conflicting outcomes in similar cases.

- I. Preface: Dogmatic and Relational Formalism
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I. Preface

This study develops the concept of “relational formalism” in the context of financial law to support both the tenability of the concept and its fruitfulness in interpreting practice.

As an interpretative and theoretical approach, relational formalism—although maintaining the precedence of formalist construction over functional analysis and policy considerations—does so while responding to practical concerns and interests entailed by the relations between the relevant parties and in particular, reliance relations. Legal formalism thus needs not be a manifestation of positivistic commitments,¹ but can be justified in some areas on relational and functional grounds.² Thus formalism does not necessarily stem from an independent commitment

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¹ See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 CULM. L. REV. 809 (1935) (according to Cohen, formalism (or “conceptualism”) supplies the philosophical basis for “objectifying” legal concepts or assuming that they stand for objects in the real world, namely normative entities rather than artifacts or constructions, or ways of talk. The critique today may be typified as “metapragmatic,” because its salient point concerns about how certain modes of talk—here, conceptual—frame and determine both discourse and further modes of action (linguistic and otherwise). See Michael Silverstein, *Metapragmatic discourse and metapragmatic function*, in *Reflexive Language: Reported Speech and Metapragmatics* 33 (John Lucy ed., 1993).

² For literature dealing with functional analyses of formalist strategies see *infra* notes 3, 5, 7, 10, 11, 20 and *passim*. Works that were especially helpful in shaping the present study are Anthony T. Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335 (1988); Duncan Kennedy, *Legal Formalism* in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES, vol. 13, 8634 (Amsterdam: Elsevier, 2001); Richard H. Pildes, *Forms of Formalism*, CHI. L. REV. 607 (1999); ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998) (especially pp. 83-104). Hanoch Dagan, *The Realist*

to the precedence of form over function,³ or to coherentist deontic logic over experience and practice. It does, however, hold in contexts where, as a legal architecture, formalism is preferable to other modes of construction because it best serves the reliance, expectation, enforcement and other concerns typical of the given legal relationship (in the case explored below, the relationship is a financial or payment transaction).⁴ Nor should the idea that formalism is a

Conception of Law, 57 TOR. L. JOUR 607 (2007) offers a sophisticated critique of the collapse of some legal realist approaches into new formalism in the law and economics school; it also offers extensive references. *See also* Thomas C. Grey, *The New Formalism*, Stanford Law School Public Law and Legal Theory Working Paper, No. 4, 1999 (SSRN 200732) and a symposium devoted to “Formalism Revisited” in 66 U. CHI. L. REV. 529 (1999); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); and of course, MORTON HOROWITZ, *THE TRANSFORMATIONS OF AMERICAN LAW, 1870-1960* (1977), which deals also with a major theme that the present study does not attempt to trace or reconstruct, namely the realist-formalist tension in its historical background. Further references are found below, in notes 3, 5, 7, 8, 10, 11, 20, and 42.

³ In its most offensive—for realists—manifestation, formalistic jurisprudence is a “science for the sake of science” engrossed with “the niceties of [law’s] internal structure and the beauty of its logical processes,” Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

⁴ Relational formalism does not call for ignoring context, but for contextualizing how form operates. On such basis I have elsewhere opposed “new formalism” in contract doctrine and interpretation; but *see* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003) (advocating, *inter alia*, strict rules of construction in contract interpretation on functional grounds). Another argument favoring rigid default rules in contract interpretation and performance is offered in Omri Ben-Shahar, *The Tentative Case*

category that suffers contextualization and functional nuances come as a surprise, except for its staunchest critics.⁵

Questions of form in devising and regulating performance are germane to language as much as they are to law. The second part of this study applies modern linguistic theory to support the insights generated in the first part. It outlines a “speech act analysis of legal instruments.” The argument is that analysis based on pragmatic and performative linguistics supports a relational construction of formalism, independently of its normative appeal. In the last two decades, linguistic theory has contributed both directly and indirectly to a critical understanding of legal concepts, legal discourse and legal practice and institutions, and this study follows in this vain.⁶

The matter itself involves a certain type of persistent problems in the law of negotiable instruments, relating to so-called “quasi instruments,” that allows to typify and explore relational formalism against traditional conceptions of “strict” or “dogmatic” formalism.⁷ The

Against Flexibility in Commercial Law, 66 U. CHI. L. REV. 781 (1999) (balancing incentives for “flexibility effects” and “rigidity effects”).

⁵ See MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1957).

⁶ See *infra*, notes 10 and 59.

⁷ For work dealing with forms of formalism see Richard H. Pildes, *Forms of Formalism*, CHI. L. REV. 607 (1999). Relational formalism does not fall into either of the categories Pildes explores (formalism as non-consequentialism, as “apurposeful rule following,” or as an instrument of “optimal efficiency” in contracts). For the efficiency justification for formalism see Schwartz & Scott; Ben-Shahar, both *supra* note 4; Bernstein, *infra* note 93; Merrill & Smith, *infra* note 20.

Excellent explorations of “strict” or dogmatic formalism are offered in Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) and in Mark L. Movsesian, *Formalism in American Contract Law: Classical and Contemporary*, Hofstra Legal Studies Research Paper

jurisprudence of negotiability, on top of its legal and practical importance,⁸ provides a rewarding case study for the application of relational formalism. The reason is that albeit legal doctrine that

Series, Research Paper No. 06-8, 5 (n.d.) (<http://ssrn.com/abstract=894281>) (contrasting Langdell's dogmatic formalism with Williston's more pragmatic approach). *See also* Daniel R. Ernst, *The Critical Tradition in the Writings of American Legal History*, 102 YALE L.J. 1019 (1993) at 1037-44 (doubting that Langdellian formalism really ever dominated American jurisprudence as the realists like to think).

⁸ Although such has been seriously critiqued and undermined, recently on the basis of the claim that novel technology is better equipped—and at a much lower cost—to provide for the kind of protection of reliance that negotiability does. *See* Albert J. Rosenthal, *Negotiability — Who Needs It?* 71 COLUM. L. REV. 375 (1971); Ronald Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 U.C.L.A. L. REV. 951 (1997); *Symposium on Negotiability in an Electronic Environment*, 31 IDAHO L. REV. 679 (1995); Jane Kaufman Winn, *Couriers Without Luggage: Negotiable Instruments and Digital Signatures*, 49 S.C. L. REV. 739, 742 (1998). A claim I cannot elaborate on here is that the ongoing popularity of checks and other negotiable instruments owes to the ability to tender them in a “secondary” circle of business payments, whereby they are not presented by the original payee (or subsequent holders) and thus not subjected to such defenses as overdraft, liens, or bankruptcy. For the six months of its effective validity, the check—although sometimes discounted from its face value—may function for most purposes as cash.

While it may certainly be claimed that the role of negotiable instruments (and thus of their constitutive category, negotiability) has eroded in favor of other payment systems—in particular, electronic transfers—studies show that checks still make for the bulk of noncash transactions, and their negotiability still considered essential, especially for small business transactions (this includes their secondary usage as credit devices, e.g. in the form of postmarked checks). The numbers are telling: in the year 2000 checks were used almost twice as much as debit and credit cards combined—over 42.5 billion check transactions per annum (down from almost 49.5 billion in 1995, when checks dominated almost seventy-seven percent of retail transactions); Geoffrey

is clearer than most, different courts have in fact generated opposite opinions in essentially similar cases involving negotiable instruments (i.e., applying the same Uniform Commercial Code rules to virtually identical fact-patterns and coming up with opposite conclusions on the validity of the purported instruments.⁹) I shall claim that this discrepancy rests on the various

R. Gerdes & Jack K. Walton II, *The Use of Checks and Other Noncash Payment Instruments in the United States*, 88 FED. RES. BULL. 360, 360 fig. 1; it was still the case that “the paper check continues to be the most commonly used type of noncash payment instrument in the U.S. economy,” *id.* at 360. By 2003 electronic payments were made for slightly over fifty-three percent of the eighty billion noncash transactions in the U.S. economy; Geoffrey R. Gerdes et al., *Trends in the Use of Payment Instruments in the United States*, 91 FED. RES. BULL. 180, 180 fig. 1 (2005), although checks continued to be the largest noncash payment type by value and exceeded the combined value of all the other noncash payment types; *id.* at 182. The average annual rate of decline in the number of checks paid is estimated to have been 3.3 percent between 1995 and 2000 and 4.3 percent between 2000 and 2003. The number of checks quoted is “net”: it represents the number of checks used and paid as such, and does not include checks converted to electronic payments at the point of sale or during the process of collection. For more recent data that backs this trend *see* Ron Borzekoeski, K. Kiser Elizabeth, Ahmed Shaista, *Consumers’ Use of Debit Cards: Patterns, Preferences, and Price Response*, 40 JOURNAL OF MONEY, CREDIT AND BANKING 149 (2008); The Boston Fed Study of Consumer Behavior and Payment Choice (2007), available online at <http://www.bos.frb.org/economic/ppdp/2007/ppdp0701.htm>.

⁹ *In rem* validity of negotiable instruments is determined as such—*qua* instruments— independently from other kinds of legal effect that they may hold, such as being contractually binding *in personam*. For a more detailed discussion *see infra*, text relating to note.

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courts' approach to formalist construction and to what this entails, rather than simple variation in application or judicial discretion. The snag in following the case study is that it requires a little more detail of positive law than is usually the case with theoretical works. To a degree, this is unavoidable for any persuasive relational argument; however, most technicalities are relegated to the notes. A few introductory comments are added for the benefit of readers possibly less versed in this area.

The notion that formalist construction appears in degrees and can be functionally motivated while not collapsing into realism has been offered in other contexts, especially contract and property, and the present study benefits from previous work that develops this insight.¹⁰ The case of negotiability should count as a prime arena for the challenge of relational formalism. This owes to the combination of the normative underpinnings that propel negotiability, which urgently suggest themselves to relational and functional analysis, with an apparently formalist structure of regulation (in particular, the UCC Article 3).¹¹ And because

¹⁰ See especially Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1151-53 (2003) (offering a spectrum of formalism in contract interpretation and in communication in general); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003) (identifying degree of formalism with size of evidentiary base); and Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerous Clausus Principle*, 110 YALE L.J. 1 (2000). A useful general work offering a functionalist approach to formalism in terms of relative independence from context is Francis Heylighen, *Advantages and Limitations of Formal Expression*, 4 FOUNDATIONS OF SCIENCE 25 (1999), although, like much of traditional philosophy, this work's main concern is epistemological rather than performative (i.e. it deals more with formalism as an architecture for crystallizing and expressing truth than for exploring conditions for valid or felicitous performance).

¹¹ On the formalist structure of Article 3 see Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979); Kurt Eggert, *Held Up in Due*

instruments are always textual artifacts—and relatively succinct ones, at that—they are especially suitable for careful linguistic analysis, not less so when the analysis focuses, as in this study, on matters of linguistic performativity (“what does this communicative act *do*?”) rather than on more traditional approaches to meaning (“what does this text *mean*?”).

The following case study begins with a discussion of so-called “quasi instruments”—commercial paper that lacks certain constitutive aspects of form and thus fails to be, e.g., a check or a note under the relevant UCC provisions. The study then moves away from conceptual analysis to examine various courts’ construction and application of what “formalism” entails in approaching quasi instruments. Explaining these decisions requires unfolding the divergent approaches to formalism tacitly applied by the several courts. The study concludes that rather than doctrinal preferences, it is the distinct approach to formalism—on a continuum ranging from “relational formalism” to dogmatic constructions—that typically determines the outcome of such cases.

II. Formalism in the UCC Article 3

Course: Codification and the Victory of Form over Intent in Negotiable Instruments Law, 35 CREIGHTON L. REV. 363 (2002). Gilmore condemns contemporary negotiable instruments law for what he sees as being woefully behind the times: “[T]ime seems to have been suspended, nothing has changed, the late twentieth century law of negotiable instruments is still a law for clipper ships and their exotic cargoes from the Indies.” *Id.*, at 448. In this study, among other things, I hope to show that under relational formalism, Gilmore’s position is overly skeptical. See also Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341 (1948). For interesting links on this and related issues between scholars a generation apart see Rosenthal, *infra* note 39, and Ronald Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 U.C.L.A. L. Rev. 951 (1997). This article does not deal with the general question of the desirability of negotiability as a legal category, addressed critically by Rosenthal and Mann.

The revised UCC Article 3,¹² which deals with negotiable instruments and is in force in all States but New York,¹³ is characterized by incorporation of several provisions that respond to challenges posed to prior regulation by realities of practice. Some of these feature obvious patchwork intended to respond to particular problematic situations that the pre-revision Article 3 ran into.

The primary function of the law of negotiable instruments is to facilitate exchange by enhancing the attractiveness of cash substitutes such as drafts, checks, promissory notes, etcetera.¹⁴ This requires that such questions as whether an instrument is negotiable, or whether by taking it a person becomes entitled to enforce it relatively free of defenses—e.g., a holder in due course¹⁵—be resolvable easily, accurately, and at minimal cost and administrative hassle. We could imagine a number of normative architectures that would accomplish this: e.g., establishing an accessible, inexpensive and expeditious agency to provide pre-rulings on specific cases, or following a Continental-style code enumerating various commercial occurrences, etc. Another architecture is formalism: the creation of relatively-strict definitions in the form of cumulative necessary conditions for validity that, when satisfied and *only* when satisfied, meet

¹² “Revision” here and throughout this study indicates the post-1990 revision Article 3; all references are to the revised Article 3 unless otherwise indicated. “Pre-revision” indicated the Code prior to the 1990 revision.

¹³ For the subject-matter of Article 3 *see* UCC §3-102. Negotiable instruments are defined in UCC §3-104, analyzed closely below. Article 3 does not deal with money, funds transfers, and investment instruments or securities. *See* UCC §1-102(a).

¹⁴ Another function—the creation of credit mechanisms—will not be discussed in this study.

¹⁵ A “holder in due course” is a holder of an instrument who took it for value, in good faith, and without any of a series of notices pertaining to the instrument’s integrity or claims against it; *see* UCC §3-302. Such a holder’s claim preempts any prior property rights in the instrument. *See* UCC §3-306. *See infra*, note 19.

the sufficient condition of negotiability. “Formalistic” is thus a kind of logical structure, a normative architecture that typically narrows the scope of “family likeness” open-ended definitions to sets of necessary and sufficient conditions.¹⁶ Formalism also entails a mode of construction that separates legal application from normative or policy considerations. This is entailed by a “positivist fiction,” according to which the process that produced the legal norms has exhausted the applicable normative and policy considerations, and these should not reappear at the level of construction.

In contrast to the legal-realistic and even relational character of various provisions of UCC Articles 1 and 2,¹⁷ Article 3 is generally characterized as “formalistic.”¹⁸ This, however, should

¹⁶ For a discussion contrasting the “classical” (more precisely, Aristotelian) conception of definition with Wittgenstein’s concept of “family likeness,” *see infra*, text accompanying notes 105-107.

¹⁷ Comments on the Code’s legal-realistic biases are numerous. Some helpful sources are Richard Danzig, *A Commentary on the Jurisprudence of the Uniform Commercial Code*, 26 STAN. L. REV. 621 (1975); Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 12 (Jody S. Kraus and Steven D. Walt eds., 2000); James J. White, *The Influence of American Legal Realism on Article 2 of the Uniform Commercial Code*, in PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS: FESTSCHRIFT FOR ROBERT S. SUMMERS 401 (Werner Krawietz et al. eds., Berlin: Duncker & Humblot, 1994); Eugene F. Mooney, *Old Kontract Principles and Karl’s New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213 (1966); Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules and Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 396 (1950). Some new and illuminating insights are offered in Dagan, *supra* note 2.

¹⁸ *See* Gilmore, Eggert, *supra* note 11. Apparently, the Article 3 revision committee discussed and rejected switching from a formalist to a functional structure; *see* ROBERT L. JORDAN, WILLIAM D. WARREN, AND STEVEN D. WALT, NEGOTIABLE INSTRUMENTS, PAYMENTS

not mislead us to construct any and all versions of formalism as strict or dogmatic formalism. The overall character of Article 3, I argue, is much more attractive when construed in terms of an instrumental, reliance-responsive formalism, generated not so much by an ideology of formalist jurisprudence as by the interest of creating relatively sharp distinctions and clear categories in an area of practice characterized by intense private policing and stronger than usual claims of action—at times at the expense of innocent parties—as well as otherwise preemptive defenses, such as property defenses.¹⁹ As Merrill and Smith note, “Negotiability imposes very strict formality requirements precisely in order to reduce the need to measure the reliability of an

AND CREDITS 26-28 (5th ed. 2000). A model for such a structure is offered in FRED H. MILLER AND ALVIN C. HARRELL, *THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES 2-7* (2nd ed. 1992). Gilmore condemns contemporary negotiable instruments law for what he sees as being woefully behind the times: “[T]ime seems to have been suspended, nothing has changed, the late twentieth century law of negotiable instruments is still a law for clipper ships and their exotic cargoes from the Indies.” *Id.*, at 448. In this study, among other things, I hope to show that under relational formalism, Gilmore’s position is overly skeptical. *See also* Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 *YALE L.J.* 1341 (1948). For interesting links on this and related issues between scholars a generation apart *see* Rosenthal, *infra* note 39, and Ronald Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 *U.C.L.A. L. Rev.* 951 (1997). This article does not deal with the general question of the desirability of negotiability as a legal category, addressed critically by Rosenthal and Mann.

¹⁹ Thus the right of a “holder in due course” in an instrument overrides property defenses: the law here must adjudicate a-priori between innocent parties in situations where shifting risk to the least cost avoider—ostensibly, the defendant—may seem artificial, unsupported by real life situations (the defendant—whether a drawer or previous holder/indorser—may never be in any actual sense in a position to avoid losing an instrument or having it stolen, than a later—and equally innocent—holder is from verifying any lack of prior claims or defenses). *See supra*, note 15.

instrument.”²⁰ Thus—the formalist position argues—the question whether any person in possession of a negotiable instrument is a holder in due course requires relatively clear and formal demarcation standards, because the ability to become a holder in due course is a weighty consideration for anyone who considers taking an instrument as a cash substitute or a credit mechanism.

The central provision of the UCC Article 3 that governs negotiability (“the definition clause”) presents a list of requirements that any document must meet in order to count as a negotiable instrument,²¹ in contradistinction to the non-formalistic, family resemblance-style definitions that govern other parts of the Code (significantly, the open-ended definition of “contract.”)²² What happens, then, when entrenched, widespread patterns of practice “violate” the definition clause?²³ The case at point is the seemingly innocuous custom among many

²⁰ Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerous Clausus Principle*, 110 YALE L.J. 1, 42 (2000). The authors add that “when technology furnishes alternative means of promoting reliance (including lowering the need to measure risk), there is less need for the standardization provided for by the requirements of negotiability. In general, to the extent that technological change allows cheaper notice of relevant interests, the need for standardization by the law will be somewhat diminished.” *Id.*, see also *supra* note 8.

²¹ UCC §3-104(a) requires that A negotiable Instrument must be in *writing* (UCC §§3-103(6) for “order” and 3-103(9) for “promise”), *signed (id.)*, *unconditional* (UCC §§3-104(a), 3-106), a *promise* or an *order* (UCC §3-104(e)) *to pay a fixed amount* of money (see Official Comments to UCC §§3-104(a), 3-112 for provisions regarding interest).

²² UCC §1-201(11).

²³ A typical example is when technology preempts law, such as in some banking practices (in fact, the Code can be shown to continually yield to technology). A case in point are postdated checks. Under pre-revision Article 4, such a check was not “properly payable” until the indicated date, and thus a bank was not allowed to charge the customer’s account on it

drawers of checks to cross out the “order” or “bearer” language on a standard (or “legended”) check in an attempt to limit its transferability, thus ostensibly “falling out” of the scope of application of the definition clause that requires such language.²⁴ One way to go about such cases would be to leave such drawers to their own devices, falling back on default regulation of instruments that are nonnegotiable, or simply on general contract law.²⁵ A jurisprudence that holds by independent justifications to formalist architecture may choose this way to deal with formal defects in instruments. It would then risk forsaking unsuspecting parties who take quasi

prior to that date. Under post-revision Code (UCC §4-401), banks are not required to check for postdated checks, and may pay such instruments before the date indicated on them, unless the drawer specifically requires dated payment for each and every check. The official comment to §4-401 justifies allocating the risk for untimely payment to the drawer rather than the bank “because automated check collection system cannot accommodate postdated checks.” This seems not to be the case, as large numbers of checks are drawn manually and require preparation for the automated system, during which they may in fact be scrutinized for postdating or irregularities (e.g. private customer and small business checks; typically, only commercial and payroll checks are fully machine-readable).

²⁴ UCC §3-104(a).

²⁵ Under no statutory regulation, the common law of contracts and assignment of rights and obligations would apply as matter of *lex generalis*, complete with the interpretative procedures that govern contractual allocation of risks and the defenses relevant to that area of law. Common law applies to negotiable instruments whenever it is not trumped by Code provisions, as stated in UCC §1-103, which White and Summers consider as “probably the most important single provision in the Code,” JAMES J. WHITE AND ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 8 (5th ed. 2000). *See also* Grant Gilmore, *Article 9: What it Does for the Past*, 26 LA. L. REV. 285 (1966), emphasizing the parallel and continuing application of common law in jurisdictions that have adopted the Code; *see also* Danzig, *supra* note 17.

instruments inadvertently, in misguided reliance and while employing a mistaken allocation of risks.

A different, or “relational” strategy would be to understand formalism in a way that, while retaining the significance of form, does not divorce it from the functional context of relations.²⁶ Indeed, in 1990 the revisers of UCC Article 3 revealed a tacit preference for “relational formalism”: instead of treating “violations” as transgressing the scope of application of the

²⁶ The term “relational” is used here in the sense it was given by scholars of relational contract theory, an approach that has since been applied to torts and restitution law as well. Under the relational approach, contracts are not distinct legal instruments that exist independently of relations between the parties, but the aggregate of these relations, only some of which are articulated. While relational contract theorists supplied insights into understanding long-term and complex contractual relations, they also drew away from the view of contract as such being merely a mechanism for the rational allocation of risks. Reliance and future relations are important parameters of relational contracts. *See* Richard Speidel, *Court-Imposed Price Adjustments in Long-Term Agreements*, 76 NW. U. L. REV. 369 (1981); IAN MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); *idem*, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a “Rich” Classificatory Apparatus* 75 NW. L. Rev. 1018 (1981); *idem*, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NW. L. REV. 854 (1978); *idem*, *Relational Contract: What we do and do not Know*, 1985 WIS. L. REV. 483, *VALUES IN CONTRACT: INTERNAL AND EXTERNAL*, 78 NW. U. L. Rev. 342 (1983); Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); *idem*, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOCIETY REV. 507-28 (1977); *idem*, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TUL. L. REV. 1161 (2006); Robert W Gordon, *Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565; John P. Esser, *Institutionalizing Industry: The Changing Forms of Contract*, 21 LAW & SOCIAL INQUIRY 593 (1996).

definition clause, the revision acknowledged and incorporated some practices that prior to it fell outside.²⁷ The case of “quasi instruments,” to which we now turn, is the most prominent example of the relational strategy in this area of law. It also illustrates the problems (and sometimes quasi-problems) that a piecemeal relational approach risks running into when positioned within an otherwise formalist framework.

III. The Problem with Quasi Checks

A negotiable instrument must satisfy several constitutive formal conditions.²⁸ In particular it must contain the “language of negotiability,” namely that the instrument be “payable to bearer or to order at the time it is issued or first comes into the possession of a holder.”²⁹ Under the formalistic architecture these requirements constitute a set of necessary and sufficient conditions, and anything that fails to satisfy them is not a negotiable instrument and thus does not fall under the scope of Article 3. The drafters of the revised Article 3 became aware, however, that the most common of all instruments, the check, in fact often lacks “order” or “bearer” language because drawers omit the language or cross it out from preprinted checks.³⁰ Drawers typically do

²⁷ Not to say that only the revision introduced relational jurisprudence to Article 3 application. *See, e.g., Taylor v. Roeder*, 234 Va. 99, 360 S.E.2d 191 (Ct. App.1987), decided under the pre-revision law, in which the majority and the minority clearly expressed strict formalist v. relational-functionalist approaches to interpretation, respectively (at bar was the question whether a variable rate of interest renders a note nonnegotiable; the majority held that it did, under pre-revision §3-104(1)(b) that required a note to contain “a sum certain.”)

²⁸ *See generally* UCC §3-104(a).

²⁹ *See* UCC §§3-104(a)(1), 3-109.

³⁰ It may be worthwhile to note that while most drawers use legended checks, such paper enjoys no legal privilege and there is normally no obligation, contractual or statutory, to use it. Indeed, ad-hoc drafts, promissory notes and assorted IOU’s—some fulfilling the requirements of negotiability, others not—fill the annals of fiction. One such instrument played

this not in order to invalidate the instrument but rather to limit its further transferability beyond the initial payee. The power to limit an instrument's negotiability is not trivial for drawers who wish to restrict its transferability and retain some of its *in personam* characteristics and the defenses that follow from them—in other words, retaining some of the transaction's contractual attributes as opposed to a more complete *in-rem* “proPERTIZATION.” There may be various reasons for this: some wish to be able to invoke future defenses that are untenable against a holder in due course, or attach the instrument's enforcement to an obligation pertaining to the underlying transaction (which can be achieved, e.g. in the form of a condition stipulated on the instrument

a pivotal role in Henry Fielding's TOM JONES (1749), where a draft for one hundred pounds was lost by the eloping Sophia Western (both first and last names are not accidental), only to eventually make its way into the possession of her banished lover, Tom. A particular advantage of the negotiable instrument is emphasized in that case: the note was initially found by a less than entirely scrupulous person, who—due to his illiteracy—never realized the instrument's nature and value, and consequently tendered it to the honest Tom for a mere pittance (a “peppercorn” consideration as it were). The example cited with the most relish must be the case of the “negotiable cow,” a.k.a. *Board of Inland Revenue v. Haddock*, featuring an English tax-protestor who “draw” a “check” on the back of a live cow and attempted to tender it in payment for dues owed to the British tax authorities, located just off Trafalgar square, London. When the latter objected that “it would be difficult or even impossible to pay the cow into the bank,” Haddock suggested that the tax collector could simply “endorse the cow to any third party to whom he owed money” (as indorsements are placed on the back of the check, and the “check” was inscribed on the cow's back, the indorsement belonged on its belly). While the “case of the negotiable cow” gained the status of urban myth among students, it is in fact the product of the English satirist A.P. HERBERT, UNCOMMON LAW 201-205 (London: Dorset 1991) (1935). A Maryland appellate case, *Messing v. Bank of America* is sometimes ridiculed for citing *Haddock* as if it were an actual case; however, *Messing* clearly refers to it as a literary case of *ad absurdum* (Maryland Ct. App. case # 24-C-00-004998, Sept. term 2002).

and thus revoke its negotiability),³¹ or rely on an oral promise to defer presentment of the instrument, that even if binding in personam is certainly not binding in rem.

These non-negotiable, quasi checks would have posed a problem for the banking system had banks purchased the instruments from their customers and proceeded to enforce them—as holders in due course—against the drawee, i.e. the drawer’s bank.³² This would have shifted the enforcement and credit risks associated with cash-substitutes from the payee to the bank. Such risks are avoided when banks or other persons present instruments for payment as agents “on behalf of a person entitled to enforce the instrument” instead of as holders themselves.³³ This is simply agency: the presenter bank does not take title and assumes no liability on the instrument, except as an agent (e.g., for loss).³⁴ However, more often than not the presenting bank actually does become a holder because banks require customers to indorse checks that they deposit.³⁵ Most persons indorse in blank by simply signing on the back of the check,³⁶ thus making the instrument to bearer,³⁷ and by physically handing it over to an officer or employee of the bank or

³¹ See UCC §§3-104(a), 3-106.

³² Holder in due course is a subset of the set of holders, which in turn is a subset of the more general set of persons entitled to enforce the instrument. See UCC §3-309.

³³ See UCC §3-501.

³⁴ See UCC §3-501: “Presentment.”

³⁵ A special provision of Article 4, which regulates bank-customer relations, allows banks to become holders in items they receive for collection—as depository banks—“whether or not the customer indorses the item,” UCC §4-205(1). See also Rosenthal, *infra* note 39.

³⁶ See UCC §3-204.

³⁷ See UCC §3-204(a): “Regardless of the intent of the signer, a signature and its accompanying words is an indorsement.” There are exceptions to the rule, notably when the “circumstances unambiguously indicate” that the signature was *not* an indorsement. Is the act of depositing an instrument such a circumstance? The question is not trivial, as indorsers become liable on the instrument, to any person entitled to enforce it upon dishonor, as well as

a designated automated system, they complete the negotiation.³⁸ And if the depository bank irrevocably credits the customer's account before the check is honored by the drawee, then it in fact becomes a holder in due course (it took the instrument for value).³⁹

to subsequent indorsers who paid the instrument upon dishonor; *see* UCC §3-415(a). Banking practices may be putting customers at risk of becoming liable indorsers when all the latter wished to do is to empower their bank to present. (Avoiding such a liability is possible through an addition of the words “without recourse,” *see* UCC §3-415(b)).

³⁸ *See* UCC §3-201. Otherwise restrictive indorsement, *see* UCC §3-205.

³⁹ *See* UCC §4-205, as well as §§3-302, 3-303. This conclusion runs counter to that of Professor Rosenthal's, according to which depository banks do not, as a rule, become holders in due course in deposited checks, as they do not take them for value. *See* Albert J. Rosenthal, *Negotiability — Who Needs It?* 71 COLUM. L. REV. 375 (1971). It is clear, however, that they in fact do, whenever they credit the customer's account irrevocably (for the definition of “value” in this context *see* UCC §4-211), following either the Federal Expedited Funds Availability Act, 12 U.S.C. 4001 *et seq.*, or Federal Regulation CC, 12 CFR 229, or simply bank practices that, experience shows, are sometimes more forthcoming to depositing customers than the statutes actually require (according to a Federal Reserve publication from January 27, 2005, “most banks make funds available faster than required [by EFAA],” <http://www.federalreserve.gov/paymentsystems/truncation/faqs2.htm#ques7>). With the use of electronic transmissions instead of paper transfers between an intermediary bank and the drawee since October 28, 2004, according to the Check Clearing for the 21st Century Act (a.k.a. “Check 21”), 12 U.S.C. §§ 5001-5018, this trend should accelerate, since EFAA itself requires the Federal Reserve Board to reduce maximum hold times in step with reductions in actual or “achievable” check-processing times, EFAA, 12 U.S.C. § 4002(d)(1)). Note, however, that such credit may be provisional, as the EFAA does not effect the bank's right to revoke a provisional settlement on a draft that was later dishonored; 12 U.S.C. §4006(c)(2); UCC §4-201.

How to deal, then, with a “quasi-check” that bears no “order” language because that was crossed off of the instrument? In practice, even under the pre-revision Article 3, banks paid little attention to such omissions or deletions on the face of the check.⁴⁰ What banks care about, are indorsements. As a matter of practice, anything that appeared like a standardized check and was properly indorsed counted as a check for purposes of presentment, even if it bore no “order” language and was, strictly speaking, not a negotiable instrument.⁴¹ This reality is largely due to

⁴⁰ At least, such is the premise on which the revision of Article 3 seemed to proceed. See *Reporter’s Memorandum to Drafting Committee of UCC Articles 3-4-4A*, of March 30, 2000, section VIII(B), quoted here verbatim:

Legended Checks (§ 3-104(c))

Section 3-104(c) provides that a check can be an instrument even if it does not include order language. As the comment explains, that ordinarily occurs because the maker crosses out the order language on the preprinted check form. § 3-104 cmt. 2. The rationale for that rule is that banks using current check-processing practices cannot reasonably be expected to notice that type of writing on a check. It happens, however, that customers often write other things on checks (“Void after 90 days” “Not good for over \$1,000”). The rationale for § 3-104(c) would apply to those legends as well, but they plainly are not protected by that provision. The questions for the Committee are (a) whether to extend the policy reflected in § 3-104(c) more broadly; and (b) how the extension might be limited to accommodate business practices dependent on such legends.

On file with author; available online at <http://www.uccpayments.org/docs/finalblueprint.htm>; also <http://www.law.upenn.edu/bll/ulc/ucc3-4-4A/ucc3m300.htm>.

⁴¹ This does not mean that deleting these words from the face of checks has no practical function: it may render the instrument relatively unattractive for future transferees, who might be reluctant to take such instruments in payment. Likewise, their value in the secondary market

the automated technology that banks employ when they “deal with the billions of checks issued every year.”⁴² Checks are processed primarily by optic sensors that read the machine-readable data encoded on them. But even if banks could check the negotiability of checks they process—and as argued below, they can, should, and some in fact do—they are by and large uninterested in doing so. A dissonance occurred between the law and the practice of quasi checks. Manifesting a relational approach to formalism—formalism as grounded in practice and relations, not merely superimposed by statutory regulation—the revisers of the UCC Article 3 added the following provision to the defining section (henceforth the “extension clause”):

3-104(c) An order that meets all the requirements of subsection (a), except paragraph (1), and otherwise falls within the definition of “check” in subsection (f) is a negotiable instrument and a check.

This means that an order that otherwise fulfills the conditions for a check (set in §3-104 (a) and (f)) yet fails to be “payable to bearer or to order”⁴³ is still a check. Black-letter law bowed to practice. One may produce an instrument that does not contain the negotiability language, or delete it from a standard-issue check, and it would still be a check and negotiable at that. Or would it? In the following section I argue that the answer is neither simple nor clear cut, and depends to a good extent on the linguistic approach one works from when attempting to understand when and how the extension clause applies.

IV. The Formalist Catch

The problem ostensibly *not* dealt with by the extension clause is not the lack of “bearer” or “order” language as such, but the lack of the imperative “Pay,” usually crossed out as well. The “pay” language is the imperative that constitutes the order to begin with, and its lack ostensibly

for negotiable instruments—the market that deals in dishonored and otherwise enforcement-challenged drafts and notes—may be considerably lower than otherwise.

⁴² ROBERT L. JORDAN, WILLIAM D. WARREN, AND STEVEN D. WALT, *NEGOTIABLE INSTRUMENTS, PAYMENTS AND CREDITS* 27 (5th ed. 2000).

⁴³ *See* UCC §3-104(a)(1).

revokes not merely the paper's status as bearer or order paper, but its very status as an "instruction to pay."⁴⁴ If it is not an instruction, such quasi-instrument cannot be an order,⁴⁵ let alone a draft⁴⁶ or a check,⁴⁷ because a draft is a sub-species of order, and a check a sub-species of draft. Thus establishing the negotiability of such quasi instruments will fail much before we ever come to the failure that the extension clause remedies. That is unfortunate, as quasi instruments—namely, all those that fail to be "instructions" for lack of "pay" language—will fail the negotiability requirement exactly in situations which the extension clause was supposed to cover. Observe the formalist architecture as it serves the contrarian's argument: the extension clause compensates for an instrument's failure to include "order or bearer" language, a requirements set in §3-104(a)(1). However, it does not compensate for a failure pertaining to the very essence of a check, namely that it is an order to "Pay." The requirement that a check be an "order" is set in the parent clause §3-104(a), not in subsection (1), and failures pertaining to it are thus not covered by the extension clause. Moreover, as noted above an "order" must itself be a "written *instruction to pay*" (emphasis added).⁴⁸ Thus an instrument lacking "pay" language—a case not covered by the extension clause—is not a negotiable instrument, let alone a check, and by itself possibly not paper with any legal effect, perhaps not even contractual.⁴⁹

This is a troubling outcome that defeats the purpose of the extension clause. In view of the initial justifications of the extension clause, it appears to create a silly inconsistency in the law and a pitfall for payees who accept such instruments in reliance on the extension clause. Note, however, that it sits squarely with the strict formalist's approach in general: it distinguishes

⁴⁴ UCC §3-103(a)(6).

⁴⁵ See UCC §3-103(a)(6).

⁴⁶ See UCC §3-104(e).

⁴⁷ See UCC §3-104(f)

⁴⁸ As defined in UCC §3-103(a)(6)

⁴⁹ Paper claiming contractual status rather than negotiability must satisfy a different set of conditions, namely those pertaining to formation, consideration, form, etcetera.

sharply between drawers or indorsers who cross out “Pay to the order of” and those who cross out “to the order of” but leave the “pay” imperative. The revised Code simply does not deal with the former case, in which the “pay” language is missing. Note, however, that from a formalistic standpoint this is not a lacuna that may be filled by purposive construction or by analogy to the extension clause, but a perfectly coherent rule.⁵⁰ The distinction between the two cases is formally tenable and consistent with a formalist approach to Article 3. It also makes no sense at all. Both actions attempt to limit the check’s negotiability and thus its transferability. None of them intends to invalidate the check completely in the sense that it ceases to be an “order” altogether. The check exception of the extension clause is intended to broaden the negotiability of checks and make them less risky as an instrument of exchange for non-suspecting payees and subsequent holders.⁵¹ Nitpicking what exact words were crossed out and what were not reduces the effectiveness of this measure and shifts non-allocated risks to payees and subsequent holders, as well as subjects them to abuse by crafty drawers who ostensibly only need to cross out the “pay” imperative in order to render the instrument nonnegotiable; in other words, to fraud. The strict formalist approach is consistent and even elegant, but it distinguishes arbitrarily between persons who deserve equal protection (the payees of both kinds of quasi checks) and may even create a haven for crooks. Instead of simplifying exchange through negotiability, exchange becomes more complicated and more risky, failing to balance the interests of innocent drawers with the reliance interest of innocent holders. A strictly formalist approach defeats the purpose of the extension clause not by failing to supply a strict line between negotiable and non-negotiable instruments—a “bright line test”—but by supplying a patently arbitrary one. Arbitrariness in itself is not a devastating criticism, and a measure of it is unavoidable when attempting to draw

⁵⁰ Even the Official Comment 2 to §3-104 discusses only the case in which “the drawer of a check may strike out” order or bearer language, but not that in which she strikes out the “pay” language.

⁵¹ See UCC §3-104(a), official comment 2. This claim—quite different from the one based on banking practices—is dealt with in more detail below.

clear the lines of demarcation for negotiability. Patent arbitrariness, however, functions as a trap into which unsuspecting innocent parties fall while attempting to accomplish the very act that the statute attempts to facilitate. It is an unattractive solution in the extreme. Can it be avoided?

Both the official comment and the secondary literature that deals with the extension clause generally fail to recognize this problem altogether, because they do not distinguish between the two kinds of quasi checks—those lacking order or bearer language, and those lacking the “pay” imperative. The other commentaries cited throughout this article share this omission.

The omission exists also in the pre-revision UCC Article 3. Yet the pre-revision extension clause works from an entirely different approach to the lack of order or bearer language in quasi instruments.⁵² On the one hand, the pre-revision provision is less rigid than the revised extension clause in that it applies not just to checks but to all instruments that would otherwise be negotiable but for lack of order or bearer language, as long as they do not preclude transfer—hence the practice of stamping “NON-NEGOTIABLE” language on such documents as check carbon-copies (or “duplicates”) or payslips that record direct deposit payments. On the other hand, the pre-revised clause precludes all such instruments from being held in due course; and it does not privilege checks over other instruments.

In order to solve rather than ignore the quasi checks problem under the extension clause, I wish to engage a more attractive approach to formalism than the strict approach that governed the discussion so far. For this, I resort to an examination of the relations between law and language, and in particular regarding checks as a sort of speech act. I argue that legal formalism and linguistic formalism both face some similar problems and, in the following section, will enlist a non-formalistic approach to language and communication in support of a contextually-formalist approach (rather than a dogmatic one). Recently, work in this vein has been offered by law and language scholars. Thus Henry E. Smith uses the contextual-formalist tension to

⁵² UCC §3-805.

reinterpret aspects of the legal realist project.⁵³ Smith argues that “an investigation of the communicative aspect of property will lead to a more complete view [of legal relations and concepts]” and that “the relationship between context and form... vary with the nature of the audience. Relatively context-sensitive realism and relatively acontextual formalism can be seen as points along a spectrum” of communicative matrices.⁵⁴ Smith argues that the structure of legal entitlements (such as pertaining to property) owes considerably to tacit and underlying communicative functions and characteristics in conveying meaning; and that, following relatively recent insights in linguistics and communication, the question of the textual generation of meaning should center not on inherent textual meaning but on audience-centered analysis: what do the purported audience of any legal text (broadly conceived) understand by it? The present analysis works from a general insight quite similar to Smith’s. Where it attempts to make a new contribution is in applying speech act theory and openly stressing legal texts’ performative functions – what they do, not simply what they mean. The following section is devoted to exploring this perspective. Like Smith’s approach, it stresses the formal-contextual tension that is constitutive of communication, and proceeds from the insight that like law, language is a rule-governed activity whose rules frequently operate quite differently from popular notions.

V. What Do Checks Do? A view From Speech-Act Theory

Language—whether written or spoken or using some other vehicle of performance and signification—does different things, often simultaneously (this is sometimes referred to as

⁵³ Smith, *supra* note 10 at 1107-8. Another “neorealist” perspective shared with Smith is that, whereas traditional legal realism was by and large court-centered, later approaches look to multiple audiences (not just judges) as “clients” of communication. *See also* Stuart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine* 80 TUL. L. REV. 1161, 1165-7 (2006), and Dagan, *supra* note 2.

⁵⁴ *Id.*

linguistic *multifunctionality*).⁵⁵ This insight is surprisingly modern: for most of its history, thinking about language revolved either around questions of representation of non-linguistic entities (and the conditions for such representation),⁵⁶ or around questions of rhetoric, conceived mostly in terms of persuasiveness of language mobilized in the service of practical goals (a language paradigm abhorred by Plato as subversive in relation to the possibility of true representation, yet considered by the Hellenic sophists and their intellectual progeny—lawyers and advocates of all generations—as the foundation of the *polis*, the public sphere, and collective action.⁵⁷ The notion that linguistic acts or “speech acts” (somewhat of a misnomer, as speech acts may be textual and need not be spoken) may be, in different contexts and for different persons, multifunctional—that is, *perform* in different ways—emerged as a mainstream approach in the 1960’s and 70’s, mainly in the work of the philosopher J.L. Austin.⁵⁸ On the background of logical positivism—a philosophy of language preoccupied with questions of meaning and signification—Austin’s primary insight was to think about language as *action*, and about its use as *performative*, i.e. bringing about certain effects in the social-normative world rather than merely describing it. Austin was primarily interested in “illocutionary” functions such as, e.g., promising: the utterance “I promise to be there on time” does not merely describe or report what the utterer does, but *constitutes* a promise, creates something in the social world—namely an obligation—where such did not exist before. Legal performances are frequently linguistic, especially those that create normative entities, such as constitutions or checks (consider likewise

⁵⁵ See *infra*, note 72.

⁵⁶ See LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (1922).

⁵⁷ See PLATO, *GORGIAS* (Tr. Donald J. Zeyl, 1987).

⁵⁸ See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962). For an earlier version of the basic distinction see Austin, *Performatif-Constatif*, in *CAHIERS DE ROYAUMONT, PHILOSOPHIE NO. IV: LA PHILOSOPHIE ANALYTIQUE* 271 (Paris: Editions de Minuit, 1962), translated as *Performative-Constative* in *THE PHILOSOPHY OF LANGUAGE* 13 (G. J. Warnock, trans., John Searle ed., 1971).

forming contracts, “pronouncing” verdicts, legislation)—although, of course, many forms of legally significant acts are not linguistic.⁵⁹

Linguistic insights are invaluable to the understanding of relational formalism and how it links formalism with context. This is because language itself relates to context in ways that significantly resemble those of law, both in constituting meaning and in allowing for performativity. In language, both theories of meaning and theories of performativity have struggled long and hard with the role of context in, respectively, structuring meaning and bringing about performative effects. Austin, in fact, generated some of his key insights from legal practices, distinguishing between the executory and non-executory clauses of contracts as “performative” (or illocutionary) v. “constative” (or locutionary)—those that impose obligations, as opposed to those that state facts (although suggested to Austin by no less an eminent legal scholar than H.L.A. Hart, the example is, nevertheless, mistaken—obviously, contractual representations may be as performative as overt promises; this was indirectly acknowledged by Austin himself later in time).⁶⁰ The mistake is due to the failure to consider the several speech acts in their contractual context, which ascribes normative effects both to illocutionary speech acts such as “I promise to sell you this car” and to representational ones like “this car belongs to me.” Austin was quick to respond to this point and could not, on the whole, be accused of not paying attention to context. When describing how performative language works, context becomes pivotal. Saying “I do”—Austin’s own example—amounts to marrying only in the context of a wedding,⁶¹ rather than, e.g., on a theater stage;⁶² the context of wedding in turn

⁵⁹ There are by now several important contributions in this area of examining performative legal language—distinct from questions of interpretation that center on meaning rather than on performance—of which some notable examples include XXX [this note to be completed].

⁶⁰ See Austin, *supra* note 58 at 7, *also* note 1.

⁶¹ J.L. Austin, *Performative Utterances*, in PHILOSOPHICAL PAPERS, 233, 235 (3rd ed. 1979).

becomes operative only upon fulfilling a specific set of preliminary requisites. While the *meaning* of such utterances as “I do,” “I promise,” etcetera, may keep across contexts, their *performance*—what they *do*, how they change things in the social world—depends on social, communicative, and institutional contexts. Austin called those contextual constituents the “felicity conditions” of performance, in the sense that when a set of felicity conditions is met, the designated act is performed.⁶³ So it could never be the case that performativity rested entirely in semantic properties of words, even if one happened to be a semanticist in questions of meaning (the semanticist here would approximate the legal formalist, while the pragmatist would approximate the legal relationalist).⁶⁴ Austin was clear about felicity conditions being a matter of convention rather than some semantic essence; they were about the world and action, not about language. His term for their arrangement was “procedures,” by which he characterized them as matters of practice.⁶⁵

⁶² For the relation of “serious” speech acts to those performed in “non-serious” or fictional contexts *see* Jacques Derrida, *Signature Event Context*, 1 GYLPH (1977).

⁶³ *See* Austin, *supra* note 58, at 14-32.

⁶⁴ For an excellent review of the role of semantic and pragmatic approaches to meaning in language and in legal practices *see* LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993); ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007); Scott Brower, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HAR. L. REV. 923 (1996).

⁶⁵ This does not mean—as many critics of Austin reproach him for—that felicity conditions are always presupposed by the performance. Unorthodox performances may be construed as offers to modify what may count as a valid set of felicity conditions, either through discourse or in authoritarian manners, both of which interplay in law (e.g. persons may incrementally change the “procedures” for marrying through actual practice, or changes may occur by fiat.)

Is this also the case with negotiable instruments and quasi checks? Is the use of the word “pay,” in this context, a necessary felicity condition for conveying an instruction to pay? An influential school within the philosophy of performative language, coined “Speech Act Theory” (or SAT) and originally associated mostly with the philosopher John Searle, offers a sophisticated framework for exploring the proposition that the presence of “pay” might be obligatory for constituting an order to pay.⁶⁶ While accepting the salience of context for communication generally, Searle’s approach—unlike Austin’s—emphasizes performative words, mostly verbs, that “manifest” their utterer’s intention to perform in the indicated way (this appears mainly in Searle’s later writings, which are quite critical of earlier work.)⁶⁷ This means that while the order “Pay!” will only take effect—i.e., create an obligation—in certain contexts (such as when uttered by a customer to her bank, but not to a stranger, although the meaning of the utterance remains the same), it is nevertheless a necessary condition that “pay” or an equivalent word be used. Not all utterances, claims Searle, have a performative or “illocutionary” *force*;⁶⁸ only particular ones may function in such a way.

Strictly applying this approach was critiqued by several commentators,⁶⁹ and in fact is not entailed by the philosophical premise of Searle’s own approach, worked out by his precursor H. Paul Grice.⁷⁰ Communication, for Grice, is about entailment and inference: what participants in any given linguistic interaction infer about each other’s intentions to communicate. Linguistic performativity, as a communicative category, builds on our ability to recognize a speaker’s intention to perform through the utterance. Thus an order to pay operates by the typical hearer inferring from the speaker’s imperative utterance “pay!” the speaker’s intention that the hearer

⁶⁶ See JOHN SEARLE, *SPEECH ACTS* 35 (1969).

⁶⁷ See John Searle, *How Performatives Work?* 58 *TENN. L. REV.* 371 (1991).

⁶⁸ See *infra*, text to note 73.

⁶⁹ See JOHN SEARLE AND HIS CRITICS (Ernest Lepore and Robert Van Gulick eds., 1991).

⁷⁰ See H. PAUL GRICE, 3 *SYNTAX AND SEMANTICS: SPEECH ACTS* (1975).

pays. In Searle's terms, the imperative use of the word "pay" "manifests" a performative intention to order payment, just as the utterance "I promise," in the first person indicative, creates a promise by "manifesting" an intention to promise. However: Although Searle, eventually, holds that certain terms are performative due to a semantic characteristic (although he still recognizes the salience of the context in which these terms are cast), neither according to Austin nor Grice is there any reason to think that "pay" (in the imperative) or any other term acts as a *sine qua non* of performativity, or, indeed, that a category of performative words, which exclusively hold a performative force, exists at all. Grice's pragmatic point, after all, was that performative language operates when a performative intention is *inferred*, and such inference may be entailed by various communicative acts involving different signifiers. Similar critical arguments concerning Searle's apparent semanticism were made by such commentators as the philosopher Jürgen Habermas⁷¹ or the linguist Michael Silverstein,⁷² to the effect that communication is much subtler and richer than can be reduced to a presupposed set of necessary and sufficient conditions for performativity.⁷³ Silverstein in particular argues that what SAT overlooks is language's "metapragmatic" grounding in practice: that performativity depends on conventional "felicity conditions" that are generated *through* practice rather than being *presupposed* by practice (this critique goes back to Austin, as well).

Checks, too, are speech acts. They depend on a relatively rigid set of semiotic signifiers as felicity conditions in constituting a valid "order to pay." No reason, however, to think that usage

⁷¹ See Jürgen Habermas, *Comments on John Searle: "Meaning, Communication, and Representation,"* in Lepore and Van Gulick, *supra* note 69, at 12.

⁷² See Michael Silverstein, *Metapragmatic Discourse and Metapragmatic Function, in REFLEXIVE LANGUAGE: REPORTED SPEECH AND METAPRAGMATICS* 33 (John Lucy, ed., 1993).

⁷³ This claim is actually anteceded by Austin who, already in *How To Do Things With Words*, criticized the strict interpretation of the "performative-constative" distinction, emphasizing that acts of describing or asserting are indeed distinct kinds of performing. See *supra*, note 58.

of the word “pay” is one of these conditions. Using “pay” is paradigmatic, but the social and transactional context of the production of a check, as well as the aggregate of other relevant signifiers, may easily compensate for the lack of the “pay” language. When commenting on the absence of “order” or “bearer” language from checks, White and Summers acknowledge that “courts have been slow to recognize substitutes for these symbols.”⁷⁴ Yet under an interpretative regime guided by the extension clause of §3-104(c), acknowledging such substitutes for the lack of “pay” language should not prove prohibiting. It serves the purpose of the provision just as much as it applies to the lack of order or bearer language. As Habermas would say, everything about the check (or other instrument) is communicative—the words it carries, other semiotic constituents, even contextual signifiers germane to its creation or tender.⁷⁵ This context is by definition relational, invoking the reliance of a party (or both parties) on the assumed validity of the instrument.⁷⁶

To sum up the answer to the formalistic catch: Both the pre- and post-revision extension clauses⁷⁷ discuss instruments that carry sufficient communicative data to be checks, but lack

⁷⁴ See *supra*, note 25 at 514. See also *Davis v. Davis*, 838 S.W. 2d 415, 19 UCC 2d 808 (Ky. App. 1992).

⁷⁵ For the “courier without excess baggage” doctrine, that supposedly precludes the contextual constituents of meaning from the construction of negotiable instruments, see below, text to note 108 *et seq.*

⁷⁶ This is an advanced relational position: that the content of a legal interaction is shaped not merely through the constitutive act that brought it about (e.g., in contracts, offer and acceptance), nor just through privileged subsequent acts (such as overt modifications), but also through parties’ communicative conduct throughout their relationship, especially such that generates reliance. For relational provisions that underlie modern legal instruments see, e.g., articles 8 and 29 of the United Nations Convention on Contracts for the International Sale of Goods (1980) (“CISG”), 15 U.S.C.A. App. 332-62 (1998).

⁷⁷ UCC §§3-805, 3-104(c), respectively.

certain typical, paradigmatic language, namely the “pay” order. The point is that there is no requirement in the UCC or elsewhere that checks or other drafts use the *word* “pay” or other obviously-performative words in order to count as orders that are “instructions to pay”.⁷⁸ Linguistically, the requirement that an instrument be, e.g., an order, is best approached using pragmatics than insisting on any single semantic device. Granted, a check must be an order to pay, hence it must be, by nature, imperative. Yet the existence of the word “pay” on its face, while typically satisfying the imperative requirement, is not an exclusive way of compliance with the requirement. The imperative requirement may be satisfied by any number or kind of semiotic devices as long as these satisfy the *communicative* rather than merely semantic “felicity condition” of performance: namely, that in the salient communicative contexts of tender in which checks operate, they entail an instruction to pay. A court that is satisfied that such pragmatic compliance exists must not be deterred from enforcing the instrument on the grounds of formal deficiencies, even under a relatively formalist construction. Thus an instrument can be an order to pay by virtue of the overall communicative data that it contains in the context in which it was created or tendered. Even a relatively strict interpretation of SAT will only require that the check contain some clear semiotic indication, or “manifestation,” for its being an instruction to pay, whether employing the word “pay” or not.

In linguistic theory, as in legal construction, strict formalism is found to be highly unattractive. In linguistics, it fails to explain how language works, and in law it fails to prescribe how we would like instruments to work. Contextual theories of performative language (sometimes called “intersubjective” to note that performativity is created by and through practice, and does not presuppose it) explain social realities better than a semantic interpretation of SAT, just as constructing UCC provisions using a relational approach to formalism promotes relevant normative goals better than dogmatic formalism.⁷⁹ As a matter of interpretative strategy,

⁷⁸ See UCC §3-103(6).

⁷⁹ There is an affinity between this interpretative strategy and Dworkin’s “constructive interpretation,” according to which the purpose of construction is not to discover something

I believe that this approach is more coherent with the general approach of the UCC to formalism as a contextualized mode of regulation, used for policy purposes and not as a dogma or a jurisprudential ideology in its own right.

Does this theoretical approach hold in practice? How is it expressed, if at all, in case law? In the following section, cases that involve determining the negotiability of quasi instruments are examined and found to express the two contrasting constructions of formalism discussed above. The theoretical preference for either, I claim below, invariably proves to be the deciding factor in deciding cases.

VI. Form or reliance? Formalism in the Courts

Sometimes, drawers of notes or drafts fail either to designate a payee or, by use of such words as “bearer” or “cash,” create bearer paper.⁸⁰ As a negotiable instrument must be one or the other, this would seem a defense against enforcement. Such quasi instruments would then be reduced to contractual status and consequently subject to the contractual defenses that the merger doctrine—merging instrument with value, rather than having the instrument represent value—

essential about its object but instead to present it in “the best possible light.” Here, the light is pragmatic and relational: to allow instruments to best serve the relations between the various parties. *See* RONALD DWORKIN, *LAW’S EMPIRE* (1986).

⁸⁰ Both cases fell under pre-revision UCC §3-111, according to which an instrument is bearer paper if it is payable to:

- (a) bearer or the order of bearer; or
- (b) a specified person or bearer; or
- (c) “cash” or the order of “cash,” or any other indication which does not purport to designate a specific payee.

overcomes.⁸¹ The significant aspect of the following discussion is that, in such cases featuring virtually identical fact patterns and subject to the same UCC provisions, courts reached opposite decisions. That, I claim, is due to their different approaches to formalism: constructing and applying either dogmatic or relational formalism, respectively. Two cases—from Illinois and Tennessee—will be discussed in some detail. In both cases the language immediately following the promise/order language indicated, instead of a payee or some designation of bearer, the sum of money held by the instrument (for instance, “Pay to the order of three hundred dollars.”)⁸² In such cases the defendant’s typical claim is that the promise or order paper fails to satisfy the constitutive conditions of bearer paper by failing to feature—after the promise or order language—any proper indication of a payee.⁸³

⁸¹ The merger doctrine is described in numerous sources; *see* Gilmore, *supra* note 18; *SNS Financial, LLC v. ABCO Homes, Inc.*, 167 F.3d 235; *Lambert v. Barker*, 232 Va. 21, 348 S.E. 2d 214.

⁸² I use the term “sum of money held” by an instrument in preference to “represent” and the like, as better fitting the so-called merger doctrine. A valid instrument does not merely represent a sum of money, it *is* that sum. The value is invested in the instrument, it is not an object for which the instrument stands for or indicates or refers to or signifies.

⁸³ *See* pre-revision UCC §3-111, *supra* note 80. There is no real significance to the fact that these are pre-revision cases: the concept of quasi-instrument remains the same, and the revision §3-104(c) refers only to checks (which are drafts), while these cases concern notes. Pre-revision §3-104(1) stated that “Any writing to be a negotiable instrument within this Article must... (d) be payable to order or to bearer.” Thus the double condition—that the instrument be payable, and that it must be either to bearer or to order, is similar in pre-and post-revision versions.

In the case of *Broadway Mgmt. Corp. v. Briggs*,⁸⁴ the instrument—which the court interpreted as a note (it had both “promise” and “order” language, the former preceding the latter)⁸⁵—read in pertinent part as follows:

Ninety Days after date, we, or either of us, promise to pay to the order of Three Thousand Four Hundred Ninety Eight and 45/100 Dollars.⁸⁶

The underlined words and symbols were typed in; the remainder was pre-printed. Was this bearer paper? It certainly does not squarely fall under any UCC provision.⁸⁷ Did it, alternately, contain “any other indication which does not purport to designate a specific payee”?⁸⁸ On a dogmatic-formalistic reading of the governing provision, UCC §3-111, the Illinois Court of Appeals judged that this alternate condition was not satisfied, either:⁸⁹

The instrument here is not bearer paper. We cannot say that it “does not purport to designate a specific payee.” Rather, we believe the wording of the

⁸⁴ 332 N.E.2d 131 (Ill. App. 1975).

⁸⁵ Not a very unusual case. When an instrument can be equally interpreted as a draft as well as a note, it is the prerogative of the person entitled to enforce it to choose either (UCC § 3-104(e)). In *Broadway Mgmt.* the promise language precedes the order language, thus extending the promise function over the order function; everything that follows the promise language is subject and parenthesized by it.

⁸⁶ *Supra* note 84, at 132.

⁸⁷ See UCC §3-111(a) (bearer or the order of bearer); §3-111(b) (a specified person or bearer).

⁸⁸ UCC §3-111(c).

⁸⁹ Influenced, perhaps, by the Official Comment’s emphasis on a different situation, namely that of leaving a blank after the order language: “Paragraph (c) is reworded to remove any possible implication that “Pay to the order of _____” makes an instrument payable to bearer.” Official Comment to §3-111(pre-1990 revision).

instrument is clear in its implication that the payee's name is to be inserted between the promise and the amount...⁹⁰

Such is also the position of Anderson's treatise on the UCC:

When a note is improperly written so that the blank for the name of the payee shows the amount to be paid, the paper is not bearer paper.⁹¹

This approach fails to place the purported instrument in any communicative or relational context. There are two ways to understand it. According to one, it expresses an instance of "mechanical" application, in Roscoe Pound's terms.⁹² according to the other, the court may acknowledge the possibility of casuistic injustice—here, the misdrafting might have been due to a simple mistake that shouldn't, other things being equal, be allowed to take normative effect—yet, upholding it is justified by the *ex ante* value of systematic and general clear-cut, bright line rules that promote predictability⁹³ or efficiency.⁹⁴ The court does not state its reasons beyond pointing out to the formal deficiency.

⁹⁰ *Supra* note 84, at 133.

⁹¹ RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE 275-76 (3d ed. 1994).

⁹² *Supra* note 3.

⁹³ See e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1735-44 (2001) (stressing the advantages of formalist application in arbitration tribunals; this continues Bernstein's project of attempting to prove not just that relational standards in commercial law are inadequate, but that in many cases such do not exist at all).

⁹⁴ See Schwartz & Scott, *supra* note 10, at 547 (advocating default formalist construction and preference for plain-meaning interpretation—as well as relatively strict application of such rules as the parol evidence rule—and the relatively strict enforcement of merger clauses). Schwartz & Scott, however, work from a gradual framework of formalist construction, and are certainly committed to functional justifications for these preferences. The problem with this latter approach, according to its critics, is that it very quickly loses site of

In a similar case, *Waldron v. Delfs*,⁹⁵ while still committed to the formalism of the code, a Tennessee court analyzed a purported instrument in its “pragmatic,” i.e. communicative and functional contexts. The paper read as follows:

[P]romise to pay to the order of one hundred and fifty three thousand and four hundred and fourty dollars Dollars (sic).

The underlined text was inserted, handwritten, between the pre-printed legends. Among other defenses on the instrument, the main question was the same as in *Broadway Mgmt.*: on UCC §3-111, was this bearer paper?⁹⁶ The court ruled that it was:

[I]t would appear to be a “perversion of logic” if an instrument payable to “cash” qualifies as bearer paper, whereas an instrument payable to a specific amount of cash fails to qualify as bearer paper.⁹⁷

relational concerns—indeed, possibly never considered them seriously—in favor of a new essentialism (“contract as efficiency”) or at least a “new formalism” far removed and abstracted from practice, experience and relations. For Dagan, this not only shows that “we are not all realists now” but that, indeed, in approaching law through a putatively comprehensive theory, law and economics has “torn it apart,” “it” standing for the basic, pluralistic tenets of legal realism that stresses law’s inherent tensions (Dagan, *supra* note 2 at 660); see also *infra* note 120. See Mark L. Movsesian, Formalism in American Contract Law: Classical and Contemporary, Hofstra Legal Studies Research Paper Series, No. 06-8 (<http://ssrn.com/abstract=894281>) at 5 (n.d.).

⁹⁵ C.A. No. 01A01-9712-CH-00740 (Tenn. Appeal 1998) (on file with author). I thank Edward Janger for drawing my attention to this case.

⁹⁶ As the facts in *Waldron* occurred prior to Tennessee’s enactment of UCC revised Article 3 in 1995, the case was decided under pre-revision Tennessee Code Annotated §47-3-104 and §47-3-111.

⁹⁷ This is an supplemental reason: it joins the argument that under §3-111(c) there was no “any other indication which does not purport to designate a specific payee.” The court adds that

What logic would this be a perversion of? Certainly such a construction would not offend strict formalism, whose logic is attractive precisely in its claim of unequivocal precision. The rationalization of formalism that underlies *Broadway Mgmt.* is, that in an area of practice marked by a salient need to provide certainty, rules of interpretation and construction should be semantic rather than pragmatic, and no quarter given to communicative nor to functional considerations. This is an entirely consistent, logical approach. On this approach instruments must follow a strict grammar, according to which invoking a sum where it does not belong violates a sense-creating rule. From a meaning point of view the text then has no sense; consequently it can have no performative effect, either: it cannot be a promise or an order.⁹⁸

There is no logical justification for creating a distinction between the designation of an inanimate object... as the payee and the designation of a certain sum of money as the payee. Judicially creating such a distinction would risk uncertainty for contracting parties, thus thwarting the very intent of the adoption of the UCC.

Supra note 95, p. 5 of the unpublished decision.

⁹⁸ Jurisprudentially, this section of the paper seems to support a traditional realist critique that centers on the indeterminacy of single rules (in terms of application). Dagan belittles this critique, claiming that adjudicative and other manifestations of practical indeterminacy owe more to doctrinal multiplicity – the “multiplicity of doctrinal materials potentially applicable at each juncture in any given case” than to indeterminacy at the single rule level, Dagan, *supra* note 2 at 614. Note, however, that the doctrinal indeterminacy of the single UCC rule studied here is generated not to the usual suspect— namely the indeterminacy of language (the focus of the problem from Hart to Radin to Schauer)—but to the jurisprudential divergence among the various courts in terms of a theory of formalist construction. This is anticipated by—of all scholars—Dworkin, whose “best possible light” principle shifts the focus of application from linguistic indeterminacy to theoretical indeterminacy (i.e., what interpretation makes the interpreted object the “best” among all

However, when the court in *Waldron* calls this construction a “perversion of logic”⁹⁹ it works from a different conception of formalism.¹⁰⁰ It does not require that a performative effect be grounded in semantic rules of meaning. Instead, it determines the success, or “felicity” of performance (Austin’s term) as responding to given communicative and relational contexts. Nevertheless, it does not substitute form for context: it is still the *form* of bearer paper that the court is committed to reconstructing through the “other indication” clause of the code.¹⁰¹ The court does not, e.g., apply a reliance-biased “objective theory” to language, as it would had the purported legal interaction been strictly contractual (e.g., had this been a matter of offer and acceptance).¹⁰² Instead, it places the question of formalist construction within the performative context. It looks for what such a paper *does* rather than what it semantically *means*, and finds that enough signifying conventions were followed to avoid nullifying the instrument and making it a piece of legal nonsense. The “perversion of logic” invoked by the court pertains to formalist logic in relational context: it is still the matter of form that determines the case, not a comprehensive switch to functionalism.¹⁰³

possible permutations. See RONALD DWORKIN, *LAW’S EMPIRE* 51-2 (1986)). See generally, BRIAN BIX, *LAW, LANGUAGE, AND LEGAL DETERMINACY* (1993).

⁹⁹ *Supra* note 97.

¹⁰⁰ For a useful jurisprudential distinction between a concept and competing conceptions of it (“what does the concept really entail?”) see DWORKIN, *supra* note 98 at 70-71.

¹⁰¹ See UCC §3-111(c).

¹⁰² Yet note a certain resembles to interpretative strategies that draw from the common law’s “mischief rule” of interpretation See E. ALLAN FARNSWORTH, *CONTRACTS* 118-126 (2nd ed. 1990).

¹⁰³ See White and Summers, *supra* note 25, at 19; see also Brett H. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978); Note: *How Appellate Opinions Should Justify Decisions Made Under the UCC*, 29 STAN. L. REV. 1245 (1977). The court also follows the

There is another device offered by the philosophy of language that pertains to the different approaches of the two courts to formalist definitions, namely presuppositions regarding what counts as a *definition* to begin with. To recall, we interpreted the *Broadway Mgmt.* decision as dealing with an application of analogy relations: what was the paper at bar more “like,” bearer paper or non-bearer paper?¹⁰⁴ Two different traditions—one going back to Aristotle, the other to Wittgenstein—offer different approaches to this question, and I suggest that the courts in question, as well as other courts generally, tacitly apply either of these two different models of definition and likeness relations. If to be “like” bearer paper means to satisfy a strict set of

UCC’s own chief interpretative rule, set in §102(1), according to which any provision “shall be liberally construed and applied to promote its underlying purposes and policies,” including the promotion of “custom, usage, and agreement of the parties.” UCC §1-102(2)(b).

¹⁰⁴ Analogical reasoning works on two axis: qualitative (“what is the quality X that object A and object B must share in order to be “alike”?) and quantitative (“how much resemblance in relation to X do we require in any practical context to consider A to be “like” B?) Thus “likeness” is a contextual and practical device: A is like B only in relation to a certain trait X, and when that trait is expressed in both to a required degree. More precisely, in order to say that “A is like B” we must be able to satisfy the following criterion: “for the purposes of the practical context C, A is *like* B *in relation to* X if and only if both A and B express X to a degree determined by C.” The literature on analogy in both common law and continental traditions is, of course, vast. Some very helpful critical analyses are Cass R. Sunstein, *Analogical Reasoning*, 106 HAR. L. REV. 741 (1993); Scott Brower, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HAR. L. REV. 923 (1996); RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 86-92 (1990); Giuseppe Zaccaria, *Analogy as Legal Reasoning: The Hermeneutic Foundation of the Analogical Procedure*,” in *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics, and Linguistics* (Patrick Nerhot ed., Kluwer Law and Philosophy Library, 1991).

shared, presupposed, necessary and sufficient conditions then the papers in both cases seem not to be “like” bearer paper: both failed under the definition, lacking a necessary condition under §3-111. Suggested by Aristotle, this model of definition—sometimes termed the “classical” approach—has for centuries ruled supreme over western logic, and to an extent still does.¹⁰⁵ The court in *Waldron*, however, seemed to claim that there was any number of signifiers that may satisfy the “bearer” requirement of §3-111, and that it did not make sense to try and presuppose, or stipulate in advance, what those may be because they are products of practice. In *Waldron* it was a linguistic string that signified the exact amount of money involved. That was close enough to the “cash” language required by §3-111(c). But the *relation* between the words that indicated a figure and the word “cash”—in this case, the former specifying the amount of the latter—does not originate from the code. Semantically, one does not mean the other, neither in sense nor in reference. But pragmatically they may be interchangeable, as determined by the relevant context. Given the communicative and relational context, the court judged that to specify the amount of cash is close enough to “cash” in order to satisfy the definition of “bearer.” There are no presupposed necessary or sufficient conditions involved here. In another case, another context, the court may find that some other linguistic relation satisfied §3-111(c).

This flexible approach to meaning is very much like what the philosopher Ludwig Wittgenstein termed “family likeness.”¹⁰⁶ Some things, Wittgenstein tells us, are *like* other things

¹⁰⁵ See DAVID H. SANFORD, *IF P, THEN Q: CONDITIONALS AND THE FOUNDATIONS OF REASONING*, (1989); BRIAN McLAUGHLIN, *ON THE LOGIC OF ORDINARY CONDITIONALS* (1990). For the Aristotelian sources of this approach to definition see JAN LUKASIEWICZ, *ARISTOTLE’S SYLLOGISTIC FROM THE STANDPOINT OF MODERN FORMAL LOGIC* (1957).

¹⁰⁶ LUDWIG WITTGENSTEIN, *THE BLUE AND BROWN BOOKS*, 17 (2nd ed. 1960). See also Wittgenstein’s functional treatment of what a “copy” is: “roughly speaking, copies are good when they can easily be mistaken for what they represent” (*id.* at 37), namely the thing they are copies of—a teleological approach quite close, of all things, to Aristotle’s. Of course, in

not because they share a presupposed set of necessary or sufficient conditions, but because they share non-exclusive, non-conclusive elements that are not privileged as “necessary”; furthermore, they may not be defined in advance, prior to practice. Wittgenstein’s famous example was the set of all games (another was that of all “Churchill-like faces.”)¹⁰⁷ A practice X would count as a game if it featured enough game-like traits (e.g. competition, turn-taking, symbolic representation—“enough” being a pragmatic, context-dependent measure), even if it did not feature others (e.g., coordination, use of artifacts, chance).

Accepting that some concepts yield better to Wittgenstein’s approach than to Aristotle’s does not mean relinquishing formalism. In UCC Article 3 construction, we are still interested in—and committed to—the form or forms of negotiable instruments. Relational formalism does not mean a recession to general contract law or to community standards. All it says is that *form itself is contextual*, to be constructed and judged functionally, not independently as some autonomous object that may be examined outside the framework of relations. Indeed, it is exactly the typical reliance relations involved that may require a stricter brand of formalism in some areas of private law (e.g., negotiable instruments, some types of contracts) than in others (e.g., general contracts). As the court in *Waldron* implies, Article 3 formalism is a communicative device in the service of relational purposes—chiefly, reliance—not a detached interpretative dogma.

A relational approach to negotiable instruments—one that reads and judges them in the communicative context of relations in which they were issued or otherwise used—may seem to run afoul of an entrenched doctrine of construction one may term the “face value” approach.

different contexts artifacts masked as copies are intended to express something about the original by *not* being easily mistaken for it (consider Warhol’s work).

¹⁰⁷ *Id.*

According to this, in determining the negotiability of an instrument, a court may look only to the face of it.¹⁰⁸ Using a complex metaphor, the Oklahoma Court of Appeals famously remarks that

Negotiable notes are designed to be couriers without excess luggage . . . and so negotiability must be determined from the face of the note without regard to outside sources.¹⁰⁹

This appears to contradict the relational approach through and through as the “face of the instrument” is taken to be an autonomous entity, a hermetic interpretative object, and the context of its creation or tender excluded as an “outside source.” This notion, however, is far from devastating for relational formalism. The reason is that the “face value” doctrine is itself relational: it designates, that in the context of determining negotiability (as opposed to other interpretative questions pertaining to negotiable instruments), the document itself is the salient aspect of the parties’ relations. Accordingly, the “face value” doctrine is used in one direction: namely, to avoid derogating negotiability on the basis of “outside sources” when the document appears to satisfy the conditions of negotiability.¹¹⁰ Thus the doctrine kicks in when an external defense is raised against a purported instrument that, on face value alone, is negotiable:

[The purpose of the doctrine is] to declare that transferees in the ordinary course of business are only to be held liable for information appearing in the instrument itself and will not be expected to know of any limitations on negotiability or changes in terms, etc., contained in any separate documents. The whole idea of the facilitation of easy transfer of note and instruments requires that a transferee be able to trust what the instrument says, and be able

¹⁰⁸ See *Walls v. Morris Chevrolet, Inc.*, 515 P.2d 1405, 1406 (Okla. Ct. App. 1973); *First State Bank at Gallup v. Clark*, 91 N.M. 117, 570 P.2d 1144, 1146 (N.M. 1977).

¹⁰⁹ *Walls, supra* note 108, at 1407.

¹¹⁰ Denying negotiability requires no special doctrine: if a document does not meet the conditions of negotiability—all of which must be apparent on its face—it is deemed either non-negotiable (like in *Broadway Mgmt.*) or, alternately, negotiable on relational grounds, as in *Waldron*.

to determine the validity of the note and its negotiability from the language of the note itself.¹¹¹

This is an outright relational justification. It justifies an interpretative rule on the basis of transferees' reliance on the instrument—more to the point, it takes the relational fact-pattern of reliance (“transferees rely on the face of the document to determine negotiability”) and renders it legal validity (“transferees have a *right* to rely on the face of the document to determine negotiability”). Read this way, the “face value” doctrine is not a result of a dogmatic approach to formalism but rather an inference from an analysis of reliance. It should accordingly not hold when its effects circumvents legitimate reliance.

The language of the Oklahoma court is both literate and precise. It does not proclaim instruments to be “without” luggage, only without “excess luggage.” The qualifier is significant both interpretatively and in relation to the metaphor's literary origin. It invokes the 1937 play *Le voyageur sans bagage* [*Traveler without Luggage*] by the French playwright Jean Anouilh,¹¹² whose protagonist is an amnesiac veteran of the Great War who has completely lost his memory, albeit not the use of language. In some ways, this serves as a perfect metaphor for legal formalism itself: language is still at our disposal, but it is approached without recourse to prior events or considerations (such as the relations between parties to a commercial interaction or the normative underpinnings of a piece of legislation). The court's qualification of the phrase is thus significant in that it does not call for amnesia—it simply deters interpretative exegesis. However, determining what should count as an “excess” of contextual signifiers is itself a judgment call. How much is too much? We can supply heuristic guidelines, but not rules to work through this question. In respect to the relevant relations between the parties, the matter of the *degree* of recourse to context cannot be precisely predetermined—either in the case of instruments or otherwise. Relational formalism thus emerges as a formalism-in-practice, where determining

¹¹¹ First State Bank at Gallup, *supra* note 108, at 1147. *See also* Yin v. Society National Bank Indiana (Indiana Ct. App. 1996) (unpublished, on file with author).

¹¹² Jean Anouilh, *Le voyageur sans bagage* (Paris 1937).

what belongs to the category of form and what does not is itself a matter of application and construction.

In the cases of *Broadway Mgmt.* and *Waldron*, enforcement was clearly based on legitimate reliance. In *Waldron* the court deemed it absurd to rule on a strict, face-value grammatical rule. Instead, it first determined whether in the context of the relations between the parties there were good grounds for reliance, namely, for the payee taking the instrument. Once the court determined that there were, certain flaws on the face of the document (but, ostensibly, not others) could not, by themselves, revoke negotiability on a doctrine whose purpose is to protect legitimate reliance in the first place.

It may be claimed that the variance in the courts' decisions may be better explained on other grounds, namely the value that they respectively ascribe to negotiability to begin with rather than any commitment to a given jurisprudence of formalism. Hence a court that values negotiability as a serious mechanism in the service of legitimate reliance interests (typically, those of payees and further holders) would accordingly tend to be relatively forthcoming in evaluating relational context. A court that, in contrast, puts more relative value on adherence to the governing legal norm, would approach the matter more narrowly. This realist explanation initially seems quite attractive. My claim, however, is that it is in fact identical with the analysis offered above. The court that values negotiability for its relational functions is the court that prefers relational formalism in general; the case of negotiability is a private case, expressing the more general relational bias. The court that values adherence to valid, binding legal rules and understands its own role in terms of enforcing them is the court that applies strict formalism rather than engaging in functional or relational analysis, expressing the bond between legal formalism and legal positivism.¹¹³

¹¹³ This relation, however, is more complex and less obvious than often assumed, and especially does not necessarily entail a politically conservative approach, as very persuasively shown in ANTHONY SEBOK, *POSITIVISM IN AMERICAN JURISPRUDENCE* (1992).

VII. Conclusion

Both law and language share a parsimonious aspiration to apply to the ever expanding and shifting forms of human experience. Both approach this through a generative yet finite structure of norms of different types and functions.¹¹⁴ The applicability of linguistic theory to legal and jurisprudential questions thus relies on shared modalities, on top of the fact that a great deal of law is done with language.

¹¹⁴ See Merrill & Smith, *supra* note 20 at 36-8. Keeping on the analogy between law and language, the authors stress that

Quite complex structures—of property rights or sentences—can be constructed from a limited number of standard building blocks. Importantly, these complexes are easier to process for the very reason that they are built with the standard building blocks. In language, sentences that obey grammatical constraints are likely to be easier to parse than are ungrammatical sentences... Similarly, in property, a complex of property rights built from a small number of standard building blocks is likely to be easier for third parties to process than functionally equivalent complex property rights for which third parties must figure out the nature of the building blocks.

A functional approach to formal construction seems in line with the authors' further comments:

In both language and property, standardizing the building blocks will cause some frustration of purposes, but the analogy to language suggests why this may be tolerable. If there were only one form of tailor-made property right for each objective people might have, then limiting such rights would have a severe effect on the objectives people could pursue with the law's aid. But if building blocks can be combined in many ways to serve objectives that cannot be served with the building blocks themselves, then the degree of frustration depends on how well and how easily the building blocks can be combined to serve those objectives. That is, it is important to know the generative power of the system of property rights. (*id.* at 36).

As for dogmatic formalism, there is certainly something attractive about it. It is an interpretation of law that endorses the possibility of approximating a perfect representational and performative language. In the formal sense relevant to this study, perfect languages typically strive for a finitude of expression and modes of performance through an abrogation of the contingencies produced by natural languages.¹¹⁵ In a perfect language, by following the prescribed grammar—and only by following the prescribed grammar—one is guaranteed to perform felicitously; e.g., to successfully create a check or bearer paper or anything else. Unfortunately or not, perfect languages for the most part do not work.¹¹⁶ Not that they are necessarily flawed, but rather, once cast into the ever-expanding, shifting and unpredictable matrices of human action and relations, they crumble and cease to function as languages. If too strict, their own systematicity—their structure as constitutive systems, prescribing exclusive legitimate modes of expression, and thus of action—arbitrarily inhibits both. If open-ended, they eventually tend to resemble natural languages. In both cases of quasi instruments explored

¹¹⁵ In this vein, consider the attractive notion of a “closed system” of inferences, defined by the 19th century logician Karl Friedrich Hauber: a system of material implications of the form “if p then q,” where the antecedents exhaust all possible cases and the consequents exclude each other. In such a system it is always determine determinable—through grammar, not empirical knowledge—whether any argument featuring one connective is true or false each time this is known of the other. *See* ALFRED TARSKI, INTRODUCTION TO LOGIC AND TO THE METHODOLOGY OF THE DEDUCTIVE SCIENCES 176 (1956). “Hauber’s theorem,” as it awkwardly came to be known (for it is not a theorem but a model) first appeared in F.K. Hauber, SCHOLAE LOGICO-MATHEMATICAE §287 (Stuttgart, 1829). *See* Cyril F. A. Hoormann, Jr., *On Hauber’s Statement of his Theorem*, 12 NOTRE DAME JOUR. FORMAL LOGIC 86 (1971).

¹¹⁶ *See* UMBERTO ECO, THE SEARCH FOR THE PERFECT LANGUAGE (James Fentress trans., 1995). Eco traces an entire history in which linguistic perfection is conceived in different terms: from those of function or structure to perfection of expression and communication or even perfection in terms of mystical performance and transcendence.

above, we found good grounds to accept performance that deviated from grammar; validating experience required forsaking linguistic perfection.

When teaching a class in the law of payment systems, I can candidly assure my students of a much higher level of certainty than in many other branches of private or commercial law. This does not mean a shortage of interpretative questions or normative underpinnings. It does, however, involve a relative straightforwardness of application in most situations. This is due to a relatively strict legal grammar of what counts and what does not count as a member of the system (e.g., a negotiable instrument) and of what the case amounts to or doesn't (e.g., enforceability of an instrument). But—to continue the metaphor—the language of negotiable instruments is not, indeed, perfect, nor is it utopian.¹¹⁷ It recognizes the need to accommodate non-paradigmatic uses, make sense to multiple audiences, and indeed deal with clear-cut mistakes. The two types of quasi instruments explored above feature what may be termed syntactical mistakes within the language-game of negotiability.¹¹⁸ Dogmatic formalism would

¹¹⁷ The notion of linguistic perfection I have in mind here is akin to the *Characteristica Universalis* envisaged by the philosopher Gottfried Wilhelm Leibnitz (who was also a lawyer by training and some practice), where grammar is a sort of calculus, guaranteeing truthful descriptions of diverse aspects of reality. In a 1679 letter to the Duke of Hanover, Leibnitz—who, among other things, invented differential calculus independently of Newton and slightly before him—rhapsodizes that

[M]y invention uses reason in its entirety and is, in addition, a judge of controversies, an interpreter of notions, a balance of probabilities, a compass which will guide us over the ocean of experiences...

Eco, *supra* note 116 at xii; *see also* 271-279.

¹¹⁸ The concept of “language game” served Wittgenstein to characterize any system of communicative and linguistic performance, defined by its own rules of usage, whether a full-fledged language or the most minimal frameworks of linguistic interaction. *See* LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§1-21 (G.E.M. Anscombe tr., 1953).

disqualify both expressions as meaningless, or illegitimate performances, just as moving the bishop horizontally in chess is not a legitimate move in chess. Dogmatic formalism claims a constitutive status for the syntactical rules of the relevant form (e.g. that of draft or bearer paper) in relation to the language-game of negotiability.¹¹⁹ Relational formalism, in contrast, sees both

¹¹⁹ It is by design that I do not wish, in this study, to frame the different approaches to formalism on the somewhat dusty distinction between constitutive and regulative rules. The reason is not the inapplicability of the distinction but an effort to provide new insights rather than merely apply entrenched ones. Here, cursorily, is how the distinction might be useful in the context of this study. Approached as *constitutive* rules, the UCC Article 3's extension provisions—§3-104(c) and pre-revision §3-111(c)—constitute types of instruments, or speech-acts. On this interpretation, they do so exclusively: what does not follow the rule cannot be an instrument or a speech-act of the type in case. Derogate from the fixed set of recognized speech-acts and you will not be speaking (or writing) within that language-game anymore, just as making a move on the chessboard that violates the rules of chess cannot be a move in chess. Conversely, on the *regulative* interpretation these provisions direct our actions in relation to the creation—or further manipulation—of instruments. Chess, on this interpretation, is a misleading metaphor for language, even for such a relatively-formal language-game as the law of negotiable instruments. Of course, employing the distinction between regulation and constitution is itself contextual and must be applied carefully: every constitutive act is also regulative, and every regulative act contains a constitutive aspect as well. Many rules simply have both aspects (Joseph Raz makes the point that regulative rules actually constitute the action of acting on them *qua* rules, whether following or breaching them. To wit: any rule creates the possibility of a new form of practice, namely, action by adhering, breaching, or merely referring to it *qua* rule. Regarding the rule as a reason for action, even if the behavior it mandates has existed antecedently, is possible only once there is a rule, whether in relation to other action it functions constitutively or regulatively. See JOSEPH RAZ, PRACTICAL REASON AND NORMS 108-113 (1975)). It is a matter of what counts more: to constitute, through a legal language-game, a form of action, or to regulate through a legal language-game a form of action

language and form as pragmatic devices in the service of practical goals. Devising and interpreting legal language means constantly accommodating useful forms of action stemming from relational concerns such as reliance, even in a legal field dominated—and rightly so—by matters of form. Viewing legal practices and discourse as constituted by such constitutive tensions, according to recent and illuminating work by Hanoch Dagan, puts this analysis squarely within the realist conception of law: not because it considers context to preempt form, but precisely because it considers both to operate in the same practical, normative, and institutional space.¹²⁰

One aim of this study was to discuss conceptions of formalism with the aid of linguistic theory, relatively independent of notions entrenched by previous legal scholarship. In its relative

of which we have a pretty good idea even before the legal language-game tells us how to implement it in practice. Dogmatic formalism envisions the former, relational formalism—the latter. For the distinction itself *see Raz, id*, as well as Searle, *supra* note 66 at 31; *see also* Max Black, *The Analysis of Rules* in *MODELS AND METAPHORS* 95 (1962); H.L.A. Hart, *Definition and Theory in Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 21 (1983); FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991). For important applications of the distinction *see* David K. Lewis, *Scorekeeping in a Language Game*, 8 *JOUR. OF PHILOSOPHICAL LOGIC* 339 (1979).

¹²⁰ *See* Dagan, *supra* note 2, at 622-660. According to Dagan, the realist conception sees law as bounded by three constitutive tensions: between power and reason, science and craft, and tradition and progress. It is not my intention here to indorse these tensions particularly, or any given formulation of them (I have elsewhere suggested that these are actually some of the constitutive categories of modernity rather than of the concept of law, to which we must add the tension between regulation and idiosyncrasy that accounts for the modern phenomenon of the subject), but rather to join Dagan in identifying legal realism with a dialectic—yet decidedly non-Hegelian—approach to law as a series of constitutive tensions, played out in institutional and non-institutional contexts alike, which do not yield to any a-priori or secondary forms of control. Elaborating this theory must wait for another opportunity.

rigor and precision, formalism can, in some areas, still be a useful interpretative approach. Yet it should not be considered anything like a perfect language nor, in fact, strive to become one. It can prove a valuable tool in the protection of reliance, in regulating the allocation of risks, and in providing not merely efficient but *just* rules for distribution and allocation. This, however, requires that we conceive of formalism itself as an imperfect, contextual, relational device, in the service of the interests that inform and invoke it rather than claiming to govern or supersede them.