Relational Formalism and the Construction of Financial Instruments: A study in the Jurisprudence of Commercial Law

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Introduction

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

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functional grounds.[2] Formalism does not necessarily stem from an independent commitment to the precedence of form over function[3] or to coherent deontological type of logic over experience

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[1]*See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (noting that formalism, or "conceptualism," supplies a 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 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 A. Lucy ed., 1993).

[2]For literature dealing with functional analyses of formalist strategies, see *infra* notes 3, 5, 11, 12, & 21. For works that were especially helpful in shaping the present study, see Duncan Kennedy, *Legal Formalism*, *in* 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8634 (N.J. Smelser et al. eds., 2001); ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 83–104 (1998); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607 (2007) (offering a sophisticated critique of the collapse of some legal realist approaches into new formalism in law and economics; also offering extensive references); Anthony T. Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335 (1988); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999); *see also* MORTON J. HORWITZ, THE TRANSFORMATIONS OF AMERICAN LAW, 1870–1960 (1992) (dealing with the major theme that present study does not attempt to trace or reconstruct, namely realist-formalist tension in its historical background); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 529 (1999); Thomas C. Grey, *The New Formalism* (Stanford Law School, Public Law & Legal Series, Working Paper No. 4, 1999), *available at* http://ssrn.com/abstract=200732; works cited *infra* notes 3, 5, 12, 12, 21, & 43.

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] The idea that formalism is a category of discourse that suffers contextualization and functional nuances should not come as a surprise, except to 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

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[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. I have also made the claim, which cannot be repeated in detail here, that the specific institutional or other normative context that frames the practice determines the level of strictness of formalist construction. Jonathan Yovel, *Legal Formalism, Institutional Norms, and the Morality of Basketball*, 8 VA. SPORTS & ENT. L.J. 33, 33–70 (2008). *Cf.* 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). For another argument favoring rigid default rules in contract interpretation and performance, see Omri Ben-Shahar, *The Tentative Case 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).

of legal concepts, legal discourse, and legal practice and institutions, and this study follows in this vein.[6]

The case study itself involves a persistent problem in the law of negotiable instruments, relating to what are popularly known as "quasi-instruments." The jurisprudence of negotiability, in addition to its legal and practical importance,[7] provides a rewarding arena for the application

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[6]*See infra* notes 11 & 62.

[7]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* Patricia Brumfield Fry, *Negotiating Bit by Bits: Introducing the Symposium on Negotiability in an Electronic Environment*, 31 IDAHO L. REV. 679 (1995); Ronald J. Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 UCLA L. REV. 951 (1997); Albert J. Rosenthal, *Negotiability—Who Needs It?*, 71 COLUM. L. REV. 375 (1971); 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 are 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 is still considered essential, especially for small business transactions (this includes their secondary usage as credit devices, for example, 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 77% of retail transactions). Geoffrey 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 (2002), *available at* http://www.federalreserve.gov/pubs/bulletin/2002/0802_2nd.pdf. 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 53% 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),

of relational formalism. The specific case study I develop here allows us to typify and explore relational formalism against traditional conceptions of strict or dogmatic formalism.[8] Despite the formal and doctrinal nature of negotiable instruments law, different courts have in fact generated opposite opinions in similarly situated cases. These opinions involve the application of the same Uniform Commercial Code (U.C.C. or Code) rules to virtually identical fact patterns, but they

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available at http://www.federalreserve.gov/pubs/bulletin/2005/spring05_payment.pdf. Checks continued, however, 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% between 1995 and 2000 and 4.3% 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 Marques Benton et al., The Boston Fed Study of Consumer Behavior and Payment Choice: A Survey of Federal Reserve System Employees (Fed. Reserve Bank of Boston Public Policy Discussion Papers, Paper No. 07-1, 2007), *available at* http://www.bos.frb.org/economic/ppdp/2007/ppdp0701.pdf; Ron Borzekowski et al., *Consumers' Use of Debit Cards: Patterns, Preferences, and Price Response,* 40 J. MONEY, CREDIT & BANKING 149 (2008).

[8]For work dealing with forms of formalism, see Pildes, *supra* note 2. Relational formalism does not fall into either of the categories Pildes explores. *See generally id.* (discussing formalism as nonconsequentialist, "purposive," "rule following," or an instrument of optimal efficiency in contracts). For the efficiency justification for formalism, see Ben-Shahar, *supra* note 4; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1735–44 (2001); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 42 (2000); Schwartz & Scott, *supra* note 4. For excellent explorations of strict or dogmatic formalism, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Mark L. Movsesian, *Formalism in American Contract Law: Classical and Contemporary* (Hofstra Legal Studies Research Paper Series, Paper No. 06-8), *available at* 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 Writing of American Legal History*, 102 YALE L.J. 1019, 1037–44 (1993) (reviewing HORWITZ, *supra* note 2) (doubting that Langdellian formalism really ever dominated American jurisprudence as realists like to think).

reach opposite conclusions on the validity of the purported instruments.[9] This discrepancy rests on the various courts' approach to formalist construction and to what this entails, rather than simple variation in application or judicial discretion.[10]

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.[11] The case of negotiability is 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 as reflected in U.C.C. Article 3.[12] And because instruments are always

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[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 accompanying notes 33–34.

[10]The snag in following the case study is that it requires more detail of positive law than is usually the case with theoretical works. To a degree, this is unavoidable for any persuasive argument; however, most technicalities are relegated to the notes.

[11]*See, e.g.*, Merrill & Smith, *supra* note 8; Schwartz & Scott, *supra* note 4 (identifying the degree of formalism with the size of evidentiary base); 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 communication in general). For a useful general work offering a functionalist approach to formalism in terms of relative independence from context, see Francis Heylighen, *Advantages and Limitations of Formal Expression*, 4 FOUND. OF SCI. 25 (1999). Like much of traditional philosophy, however, Heylighen'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).

[12]On the formalist structure of Article 3, see Kurt Eggert, *Held Up in Due Course: Codification and the Victory of Form over Intent in Negotiable Instrument Law*, 35 CREIGHTON L. REV. 363 (2002); Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979) [hereinafter Gilmore, *Negotiable Instruments*]. 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

textual artifacts—and relatively succinct ones, at that—they are especially suitable for careful linguistic analysis, not less so when the analysis focuses, as I do here, 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 study begins with a discussion of so-called quasi-instruments—commercial paper that lacks certain constitutive aspects of form and thus fails to gain the imprimatur of negotiability under the relevant U.C.C. provisions.[13] I then move away from conceptual analysis to examine various courts' construction and application of what formalism entails in approaching quasi-instruments. Explaining these decisions requires me to unfold the divergent approaches to formalism that have been tacitly applied by the different courts. I conclude 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.

I. Formalism in U.C.C. Article 3

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century law of negotiable instruments is still a law for clipper ships and their exotic cargoes from the Indies." *Id*. at 448. In this article, 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) [hereinafter Gilmore*, Commercial Law*]. For interesting links on this and related issues between scholars a generation apart, see Mann, *supra* note 7, and Rosenthal, *supra* note 7. This article does not deal with the general question of the desirability of negotiability as a legal category, which both Mann and Rosenthal have addressed critically.

[13]For a more detailed analysis of quasi-instruments than can be offered here, as well as their treatment under different legal regimes, see Jonathan Yovel, *Quasi-Checks: An Apology for a Mutation of Negotiable Instruments*, 5 DEPAUL BUS. & COM. L.J. 579–603 (2007).

Revised U.C.C. Article 3,[14] in force in all states but New York, governs negotiable instruments.[15] It is characterized by incorporation of several provisions that respond to challenges posed by realities of practice. These provisions seek to correct the shortcomings of the earlier Article 3—namely, the divergence of the rules from commercial practice.

The primary function of the law of negotiable instruments is to facilitate exchange by enhancing the attractiveness of cash substitutes such as drafts, checks, and promissory notes.[16] This requires that such questions as whether an instrument is negotiable or whether by taking it a person becomes a holder in due course[17] and so is entitled to enforce it relatively free of defenses be resolvable easily, accurately, and at minimal cost and administrative hassle. We could imagine a number of normative architectures that would accomplish this by establishing an accessible, inexpensive, and expeditious agency to provide pre-rulings on specific cases or by enacting a Continental-style code that provides specific rules for various commercial occurrences. Another possible architecture framework is formalism: the creation of relatively strict definitional regimes in the form of cumulative necessary conditions for validity that, when satisfied and *only* when satisfied, meet the sufficient condition of negotiability. "Formalistic" is thus a kind of logical structure, a normative architecture that typically narrows the scope of

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[14]"Revision" here and throughout this article refers to the post-1990 revision of Article 3. All references are to revised Article 3 unless otherwise indicated. "Pre-revision" refers to the Code prior to the 1990 revisions.

[15]*See* U.C.C. § 3-102 (2009); *see also* U.C.C. § 3-104 (defining negotiable instruments). Article 3 does not deal with money, funds transfers, and investment instruments or securities. *See* U.C.C. § 1-102(a) (2009).

[16]I do not treat another function—the creation of credit mechanisms—in this article.

[17]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* U.C.C. § 3-302 (2009). Such a holder's claim preempts any prior property rights in the instrument. *See* U.C.C. § 3-306 (2009); *infra* note 20.

"family likeness" open-ended definitions to sets of necessary and sufficient conditions.[18] Formalism also entails a mode of construction that separates legal application from normative or policy considerations.[19]This is entailed by what I term the "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 U.C.C. Articles 1 and 2,[20] Article 3 is generally characterized as formalistic.[21] This, however, should not mislead us to construct any and all versions of formalism as strict or dogmatic formalism. The overall character of Article 3 is much more attractive when construed in terms of

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[18]For a discussion contrasting the classical (more precisely, Aristotelian) conception of definition with Wittgenstein's concept of family likeness, see *infra* text accompanying notes 107 & 109.

[19]*See*, *e.g.*, Schwartz& Scott, *supra* note 4.

[20]Comments on the Code's legal-realistic biases are numerous. *See, e.g.*, Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950); 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); Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 12 (Jody S. Kraus & 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., Duncker & Humblot 1994). For some new and illuminating insights, also see Dagan, *supra* note 2.

[21]*See* Eggert, *supra* note 12; Gilmore, *Negotiable Instruments*, *supra* note 12 (condemning contemporary negotiable instruments law for what he sees as being woefully behind the times). Apparently, the Article 3 revision committee discussed and rejected switching from a formalist to a functional structure. *See* ROBERT L. JORDAN ET AL., NEGOTIABLE INSTRUMENTS, PAYMENTS AND CREDITS 26–28 (5th ed. 2000). For such a structure, see FRED H. MILLER & ALVIN C. HARRELL, THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES 2–7 (2d ed., Anderson Publishing Co. 1992) (1985); *see also* Gilmore, *Commercial Law*, *supra* note 12; Mann, *supra* note 7; Rosenthal, *supra* note 7; *supra* note 8.

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. These sometimes operate to the detriment of innocent parties and may overcome otherwise preemptive defenses, such as property defenses.[22] As Merrill and Smith note, "[n]egotiability imposes very strict formality requirements precisely in order to reduce the need to measure the reliability of an instrument."[23] Thus, the formalist position argues that the question of whether any person in possession of a negotiable instrument is a holder in due course requires relatively clear and formal demarcation standards, because holder in due course status is a weighty consideration for anyone who considers taking an instrument as a cash substitute or a credit instrument.

The central provision of U.C.C. Article 3 that governs negotiability—the "definition clause"—presents a list of requirements that any document must meet if it is to count as a negotiable instrument.[24] This is in contradistinction to the nonformalistic, family resemblance–style definitions that govern other parts of the Code, significantly, the open-ended definition of

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[22]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 and unsupported by real-life settings. The defendant—whether a drawer or previous holder/endorser—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* discussion, *supra* note 17.

[23] [W]hen 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.

Merrill & Smith, *supra* note 8, at 42; *see also supra* note 9.

[24]*See* U.C.C. § 3-104(a) (2009) (defining "negotiable instrument" as "an unconditional promise or order to pay a fixed among of money); § 3-103(a)(8) (defining "order" and noting it must be signed); § 3-103(a)(12) (defining "promise" and noting it must be signed). For provisions regarding interest, see U.C.C. § 3-104(a), official cmt.; § 3-112, official cmt.

"contract."[25] What happens, then, when entrenched, widespread patterns of practice violate the definition clause?[26] A case in point is the seemingly innocuous custom among drawers of checks of crossing out the "order" or "bearer" language on a standard, preprinted check form in an attempt to limit its transferability and thereby ostensibly losing the right of negotiability provided by the definition clause.[27] One way to respond 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.[28] A jurisprudence that holds by independent justifications to formalist

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[25]U.C.C. § 1-201(b)(12). Another example is the use of the standard of reasonableness in contemporary sales law, such as in the U.C.C. art. 2 or in the United Nations Convention on Contracts for the International Sale of Goods (CISG) art. 8, *opened for signature* Apr. 11, 1980, 1489 U.N.T.S. 3; *see also* Principles of European Contract Law art. 1:302 (2003) (expressing recent expansion of standard of reasonableness from sales law into general contract law and its link to the concept of good faith); *Principles of European Contract Law: Reasonableness*, PACE LAW SCHOOL, http://cisgw3.law.pace.edu/cisg/text/reason.html#over (last visited Jan. 15, 2011).

[26]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 is 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 prior to that date. *See* U.C.C. § 4-401(a) (pre-revision). Under post-revision Code, 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. *See* U.C.C. § 4-401 (2009). The official comment to § 4-401 justifies allocating the risk for untimely payment to the drawer rather than the bank "because the automated check collection system cannot accommodate postdated checks." *Id.* at official cmt. 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.

[27]U.C.C. § 3-104(a).

[28]With no statutory regulation, the common law of contracts and more particularly the doctrine of assignment of rights and obligations would apply as a 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

architecture may choose this way to deal with formal defects in instruments. It leaves unsuspecting parties who take these quasi-instruments while unknowingly losing their rights of negotiability.

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.[29] Indeed, in 1990 the revisers of U.C.C. Article 3 revealed a tacit preference for relational formalism. Instead of treating violations as transgressing the scope of application of the

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is not trumped by Code provisions. *See* U.C.C. § 1-103; JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 8 (5th ed. 2000) (referring to Section 1-103 as "probably the most important single provision in the Code"); *see also* Danzig, *supra* note 20; Grant Gilmore, *Article 9: What it Does for the Past*, 26 LA. L. REV. 285 (1966) (emphasizing parallel and continuing application of common law in jurisdictions that have adopted the U.C.C.).

[29]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. Using the relational approach, contracts are not distinct legal instruments that exist independently of relations between the parties but are 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* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980); John P. Esser, *Institutionalizing Industry: The Changing Forms of Contract*, 21 LAW & SOC. INQUIRY 593 (1996); Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985WIS. L. REV. 565; Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of* The Yellow Submarine, 80 TUL. L. REV. 1161 (2006) [hereinafter Macaulay, *Yellow Submarine*]; Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507–28 (1977); Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study,* 28 AM. SOC. REV. 55 (1963); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483; Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983); Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U. L. REV. 1018 (1981); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); Richard Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369 (1981).

definition clause, the revision acknowledged and incorporated some practices that the prior version of the Code did not permit to fall within the clause.[30] The case of quasi-instruments, to which I now turn, is the most prominent example of this relational strategy in action. It also illustrates the problems that a piecemeal relational approach risks encountering when positioned within an otherwise formalist framework.

II. The Problem with Quasi-Checks

A negotiable instrument must satisfy several constitutive formal conditions.[31] In particular it must contain 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."[32] Under the formalistic architecture, these requirements constitute a set of necessary and sufficient conditions. 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 revised Article 3 became aware, however, that the most common of all negotiable instruments, the check, in fact often lacks order or bearer language because drawers omit the language or cross it out on their preprinted check forms.[33]

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[30]That is not to say that only the revision introduced relational jurisprudence to Article 3 application. *See*, *e.g.*, Taylor v. Roeder, 360 S.E.2d 191 (Va. 1987) (debating whether a variable rate of interest renders a note nonnegotiable and deciding that it did, under pre-revision § 3-104(1)(b) which required a note to contain "a sum certain"). *Taylor* was decided under the pre-revision law, in which the majority and the minority clearly expressed strict formalist versus relational-functionalist approaches to interpretation, respectively. *Id*.

[31]*See generally* U.C.C. § 3-104(a).

[32]U.C.C. § 3-104(a)(1); § 3-109.

[33]It may be worthwhile to note that, while most drawers use preprinted check forms, 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 IOUs—some fulfilling the requirements of negotiability, others not—fill the annals of fiction. One such instrument played a pivotal role in HENRY FIELDING, 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

Drawers typically do 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, drawers wish to retain some of the transaction's contractual attributes as opposed to a more complete in rem "propertization."[34] There may be various reasons for limiting negotiability, for instance, to leave open the possibility of invoking future defenses that are untenable against a holder in due course or to attach the instrument's enforcement to an obligation pertaining to the underlying transaction. This can be achieved by placing a condition on the instrument[35] or by relying on an

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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" in *Board of Inland Revenue v. Haddock*, featuring an English tax protestor who drew a "check" on the back of a live cow and attempted to tender it in payment for dues owed to the British tax authorities. 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 endorsements are placed on the back of the check, and the "check" was inscribed on the cow's back, the endorsement belonged on its belly). While the case of the negotiable cow may have gained the status of urban myth among students, it is in fact the product of the English satirist A.P. HERBERT, UNCOMMON LAW 201–05 (1935). A Maryland Court of Appeals opinion, *Messing v. Bank of America*, 821 A.2d 22 (Md. 2003), refers to it as a literary case of legal *ad absurdum*.

[34]The jurisprudence of private law distinguishes between legal relations that confer rights and obligations on specific parties whom the interaction itself identifies ("in personam" relations, such as contract) and those that hold in relation to other parties in general, where no prior establishment of a legal relation is necessary ("in rem" relations, such as property). "Propertization" signifies the process transformation where a normative relation adds on in rem properties and sheds off in personam properties. Negotiability is a prime example of propertization; another is the securitization of obligation.

[35]*See* U.C.C. § 3-104(a) & § 3-106.

oral promise to defer presentment of the instrument, which even if binding in personam is certainly not binding in rem.[36]

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 drawer's bank.[37] This would have shifted the enforcement and credit risks associated with cash substitutes from the payee to the drawee 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.[38] The presenting bank simply acts as an agent; it does not take title to and assumes no liability on the instrument, other than as an agent.[39] However, more often than not the presenting bank does become a holder because banks require customers to endorse checks being deposited.[40] Most persons endorse in blank by simply signing on the back of the check,[41] thus making the instrument bearer paper.[42]

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[36]An example of such a defense against enforcement is one that holds between specific parties but would not hold against a further holder to whom the instrument may be negotiated. *See* Yovel, *supra* note 13.

[37]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* U.C.C. § 3-309.

[38]*See id*. § 3-501.

[39]*See id*. (defining "presentment").

[40]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." *Id*. § 4-205(1). *See also* Rosenthal, *supra* note 7.

[41]*See* U.C.C. § 3-204.

[42]*See id*. § 3-204(a) ("[R]egardless 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 endorsement. *Id.* Is the act of depositing an instrument such a circumstance? The question is not trivial, as endorsers become liable on the instrument to any person entitled to enforce it upon dishonor, as well as to subsequent endorsers who paid the instrument upon dishonor. *See id*. § 3-415(a). Banking practices may be putting customers at risk of becoming liable endorsers when all the latter

By then physically handing it over to an officer or employee of the bank or a designated automated system, the customer completes the negotiation.[43] If the depository bank irrevocably credits the customer's account before the check is honored by the drawee, then the depository bank in fact becomes a holder in due course.[44]

How should we deal, then, with a quasi-check that bears no order language because it was crossed off the preprinted check form? In practice, even under pre-revision Article 3, banks paid little attention to such omissions or deletions on the face of the check.[45] What banks care most

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wishes to do is to empower their bank to present. Avoiding such a liability is possible through addition of the words "without recourse." *See id*. § 3-415(b).

[43]*See id*. § 3-201 & § 3-205 (explaining "restrictive indorsement").

[44]*See id*. § 4-205; *see also id.* §§ 3-302 & 3-303. This conclusion runs counter to that of Professor Rosenthal's, which concludes that depository banks do not, as a rule, become holders in due course in deposited checks because they do not take checks for value. *See* Rosenthal, *supra* note 7. It is clear, however, that depository banks in fact do take checks for value when they credit the customer's account irrevocably. *See* U.C.C. § 4-211 (defining "value" for this context). This can happen when banks follow either the Expedited Funds Availability Act, 12 U.S.C. §§ 4001-4010 (2009) [hereinafter EFAA], or the Federal Reserve System regulations, 12 C.F.R. § 229 (2009), or simply bank practices that, experience shows, are sometimes more forthcoming to depositing customers than the statutes actually require. *See Frequently Asked Questions About Check 21*, FED. RESERVE BOARD, http://www.federalreserve.gov/paymentsystems/check21_faq.htm ("[M]ost banks make funds available faster than required [by Expedited Funds Availability Act]."). Since October 28, 2004, electronic transmissions have been used instead of paper transfers between intermediary banks and drawees. This trend should accelerate, because EFAA itself requires the Federal Reserve Board to reduce maximum hold times in step with reductions in actual or "achievable" check-processing times. *See* EFAA § 4002(d)(1); Check Clearing for the 21st Century Act, 12 U.S.C. §§ 5001-5018 (2009) [hereinafter "Check 21"]. Note, however, that such credit may be provisional, as the EFAA does not affect the bank's right to revoke a provisional settlement on a draft that was later dishonored. EFAA § 4006(c)(2); U.C.C. § 4-201.

[45]At least that seems to be the premise upon which the revision of Article 3 proceeded.

> *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

about is endorsements. As a matter of practice, anything that appeared to be a standardized check that was properly endorsed counted as a check for purposes of presentment, even if it bore no order language and was, strictly speaking, not a negotiable instrument.[46] This reality is largely due to the automated technology that banks employ as they handle the billions of checks that are issued every year.[47] Checks are processed primarily by optic sensors that read data encoded on them. Even if banks could check the negotiability of checks they process, they are by and large uninterested in such costly processes. A divergence thus occurred between the law and the practice of negotiating and presenting quasi-checks. This dissonance led the drafters of revised Article 3 to take a relational approach to formalism—a formalism grounded in practice and relations and not merely superimposed by statutory regulation. The revisers of U.C.C. Article 3 added the following provision, or extension clause, to its definitional section:

> An order that meets all the requirements of subsection (a), except paragraph (1) [which requires the instrument be "payable to bearer or to order"], and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.[48]

> 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.

See Memorandum from Ronald J. Mann & Edwin Smith to 3-4-4A Drafting Committee § VIII(B) (Mar. 30, 2000), *available at* http://www.law.upenn.edu/bll/archives/ulc/uccpayment/ucc3m300.pdf.

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

[47]JORDAN ET AL., *supra* note 21.

[48] U.C.C. § 3-104(c).

This means that an order to a drawee that otherwise fulfills the conditions for a check—set forth in Sections 3-104 (a) and (f)—yet fails to be "payable to bearer or to order"[49] is still a check. Hence, one may issue an instrument that does not contain negotiability language, or one may delete it from a standard check form, and it will still be a check and, so, negotiable. Or will it? In the following part I argue that the answer is neither simple nor straightforward, and it depends to a good extent on the linguistic approach one takes when attempting to understand when and how the extension clause applies.

II. The Formalist Catch[50]

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[49] *Id*. § 3-104(a)(1).

[50] 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 U.C.C. 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 108–13 (1975).

The problem with which Section 3-104(c)'s extension clause fails to deal is not the lack of bearer or order language as such, but the lack of the imperative "Pay," which may be crossed out as well. The "pay" language is the command that constitutes the order in the first instance, and its absence revokes not merely the check's status as bearer or order paper, but also its very status as an "instruction to pay."[51] If it is not an instruction, such quasi-instrument cannot be an order,[52] let alone a draft[53] or a check.[54] By definition, a draft is a subspecies of such an order, and a check is a subspecies of draft.[55] Thus, the non-negotiability of such quasi-instruments is established before there can be an invocation of extension clause remedies. That is unfortunate, as quasi-instruments—namely, all those that fail to order the drawee to pay—will fail the negotiability requirement in precisely those situations the extension clause was intended to cover.

The formalist architecture of Article 3 serves the contrarian's argument: the extension clause compensates for an instrument's failure to include order or bearer language, a requirement set forth in Section 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 forth in the parent clause Section 3-104(a), not in subsection (1), and failures

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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 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 *id.*; JOHN R. SEARLE, SPEECH ACTS 31 (1st ed. 1969) ; *see also* FREDERICK SCHAUER, PLAYING BY THE RULES (1991); 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). For important applications of the distinction, see David K. Lewis, *Scorekeeping in a Language Game*, 8 J. PHIL. LOGIC 339 (1979).

[51]U.C.C. § 3-103(a)(6).

[52]*See id*. § 3-103(a)(6).

[53]*See id.* § 3-104(e).

[54]*See id.* § 3-104(f).

[55]*See id.* § 3-104(e) & (f) (defining, respectively, draft as an order instrument and check as a draft "payable on demand and drawn on a bank").

pertaining to it thus are not covered by the extension clause. Moreover, as noted above an order must itself be a "written *instruction to pay.*"[56] Thus an instrument lacking pay language—a case not covered by the extension clause—is not a negotiable instrument, certainly not a check, and by itself possibly without any legal effect.[57]

This is a troubling outcome that defeats the purpose of the extension clause. In view of its initial justifications, this formalistic construction would create a silly inconsistency in the law and a pitfall for payees who accept such instruments in reliance on the extension clause.[58] Distinguishing sharply between drawers or endorsers who cross out "Pay to the order of" and those who cross out "to the order of" but leave the "pay" imperative is an example, in general, of the strict formalist's approach. From a formalistic standpoint, the fact that the revised Code does not deal with the former case, in which pay language is missing, is not merely a lacuna that may be filled by purposive construction or by analogy to the extension clause, but instead a perfectly coherent rule.[59]

The distinction between the two cases—order or bearer missing versus the pay command being omitted—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. Neither the drawer (or further holder down the line of negotiability) who crosses

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[56]*See id.* § 3-103(a)(8) (emphasis added).

[57]Paper claiming contractual status rather than negotiability must satisfy a different set of conditions, namely those pertaining to formation, consideration, form, etc. *See generally* E. ALLAN FARNSWORTH, CONTRACTS 12–96 (2d ed. 1990).

[58]These may be termed syntactical errors within the language game of negotiability. 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 & Rush Rhees eds., Anscombe trans., 1953).

[59]*See* U.C.C. § 3-104, official cmt. 2 (discussing case in which "the drawer of a check may strike out" order or bearer language, but not discussing a case wherein the drawer strikes out "pay" language).

out the order or bearer language, nor the drawer (ditto) who crosses out the pay language intends to invalidate the check completely in the sense that it ceases to be an order altogether. Yet on the formalistic construction the latter has done so while the former has not.

The check exception created by the extension clause is intended to broaden the negotiability of checks and make them less risky as instruments of exchange for unsuspecting payees and subsequent holders.[60] While the strict formalist approach is consistent and even elegant, nitpicking exactly which words were crossed out and which were not reduces the effectiveness of this measure and shifts unallocated risks to payees and subsequent holders. It also subjects them to abuse by drawers who intentionally and fraudulently cross out the pay imperative in order to render the instrument nonnegotiable. Instead of simplifying exchange through negotiability, exchange thus becomes more complicated and more risky. This is the product of not properly balancing 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 bright line between negotiable and non-negotiable instruments, 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 clear the lines of demarcation for negotiability. Patent arbitrariness, however, functions as a trap into which unsuspecting parties fall while attempting to accomplish the very act that the statute attempts to facilitate. It is an unattractive solution in the extreme. The question becomes how can this result be avoided?

Both the U.C.C. Official Comment and the secondary literature fail to recognize the problem mainly 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 also fail to make this distinction. The same omission exists in pre-revision U.C.C. Article 3, which takes an entirely different approach to normalizing the lack of order or bearer language in quasi-instruments.[61] The pre-revision provision is less rigid than the revised Code's extension clause in that the former applies not just to checks but to all

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[60] *See id*. This claim—quite different from the one based on banking practices—is dealt with in more detail below.

[61] *Id*. § 3-805.

instruments that would otherwise be negotiable but for lack of order or bearer language, as long as such instruments do not preclude transfer.[62] However, pre-revision Article 3 precludes all such instruments from being held in due course.

In order to solve rather than ignore the quasi-checks problem, a new interpretive approach is needed—one that loosens the constraints of strict formalism. For this, I resort to an examination of the relations between law and language by viewing checks as a speech act. Legal formalism and linguistic formalism both face some similar problems, especially when striving for systematic perfection of expression or performance, or both. In the sense relevant to this study, so-called perfect languages typically strive for a finitude of expression and modes of performance through an abrogation of the contingencies produced by natural languages.[63] With a perfect language, by following the prescribed grammar—and only by following the prescribed grammar—one is guaranteed to perform felicitously.[64] In the area of negotiable instruments, this means to successfully create a check or bearer paper. Unfortunately, perfect languages for the most part do not work. When they are too strict, their usefulness is limited; when too loose, they begin to resemble natural languages.

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[62]This explains the practice of stamping "NON-NEGOTIABLE" language on such documents as check carbon-copies (or duplicates) or pay slips that record direct deposit payments.

[63]*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.

[64]In this vein, consider the attractive notion of a "closed system" of inferences, defined by the nineteenth-century logician Karl Friedrich Hauber as 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 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 KARL FRIEDRICH HAUBER, SCHOLAE LOGICO-MATHEMATICAE § 287 (1829). *See* Cyril F.A. Hoormann, Jr., *On Hauber's Statement of His Theorem*, 12 NOTRE DAME J. FORMAL LOGIC 86, 87 n.1 (1971).

In the following part, I enlist a nonformalistic 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. Henry E. Smith uses the contextual-formalist tension to reinterpret aspects of the legal realist project.[65] 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."[66] Relatively context-sensitive realism and relatively acontextual formalism can be seen as points along a spectrum of communicative matrices.[67] Following an influential strand in linguistics known as pragmatics, Smith further argues that the structure of legal entitlements owes considerably to tacit and underlying communicative functions in conveying meaning.[68] Unlike textually centered, or "literal" approaches, the question of the textual generation of meaning should center not on presumed inherent textual meanings but on relational analysis: what does the purported audience, the users of any legal text, understand by it? My analysis works from a general insight quite similar to Smith's. It makes a new contribution by applying Speech Act Theory (SAT) and openly stressing legal texts' performative functions: what they *do*, not simply what they mean.

I devote the following part to exploring this perspective. Like Smith's approach, I stress the formal-contextual tension that is constitutive of communication, proceeding from the insight that, like law, language is a rule-governed activity, the rules of which frequently operate quite differently from popular notions.

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[65]Smith, *supra* note 11, at 1107–08. 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* Dagan, *supra* note 2; Macaulay, *Yellow Submarine*, *supra* note 29, at 1165–67.

[66]Smith, *supra* note 11, at 1106.

[67]*Id.* at 1107.

[68]*Id.* at 1108–9.

III. 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.[69] This insight is surprisingly modern: for most of its history, thinking about language revolved either around questions of representation of nonlinguistic entities (and the conditions for such representation),[70] or around questions of rhetoric, conceived mostly in terms of persuasiveness of language mobilized in the service of practical goals and constituting the foundation of the *polis*, the public sphere, and collective action.[71] The notion that linguistic acts or speech acts may be, in different contexts and for different persons, multifunctional—that is, they may perform in different ways—emerged as a mainstream approach in the 1960s and 1970s, mainly in the work of the philosopher J.L. Austin.[72] Against a backdrop 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 or a mode of social performance. Put another way, language brings about certain effects in the social-normative world, rather than merely describing it. Austin was primarily interested in "illocutionary" functions, such as promising.[73] The utterance "I promise to be there on time"

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[69]This is sometimes referred to as linguistic "multifunctionality." *See* H. Paul Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS: SPEECH ACTS (Peter Cole & Jerry L. Morgan eds., 1975).

[70]*See* LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1922).

[71]*See* PLATO, GORGIAS (Donald J. Zeyl trans., Hackett Publ'g Co. 1987).

[72]*See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (2d ed. 1962). For an earlier version of the basic distinction, see also J.L. Austin, *Performative-Constative*, *in* THE PHILOSOPHY OF LANGUAGE 13 (John R. Searle ed., G.J. Warnock trans., 1971) (translating J.L. Austin, *Performatif-Constatif, in* CAHIERS DE ROYAUMONT, PHILOSOPHIE NO. IV: LA PHILOSOPHIE ANALYTIQUE 271 (Paris:Minuit, 1962)).

[73] By "illocutionary act" Austin meant "performative" in the sense of functioning through a performative force, distinct (functionally but not morphologically) from the speech act's propositional content, otherwise denoted the "locutionary act." AUSTIN, *supra* note 72. By "perlocutionary act" Austin signified those speech acts whose chief function is to induce action (sometimes treated as language's "rhetorical" aspect in a rather narrow sense). *Id.* I have

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 an obligation did not exist before. Legal performances often are linguistic, especially those that create normative entities like constitutions, statutes, contracts, verdicts, and checks.[74]

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 structuring meaning and in bringing about performative effects. Austin, in fact, generated some of his key insights from legal practices, distinguishing between the executory and nonexecutory clauses of contracts as "performative" or illocutionary rather than "constative" or locutionary. His example is, nevertheless, mistaken—warranties and other contractual representations may be as performative as overt promises.

Austin's error arose from his initial 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," as well as to representational ones like "this car belongs to me."[75] Austin was quick to respond to this point and could not, on the whole, be accused of ignoring context. When describing how performative language works, context becomes pivotal. Austin's

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analyzed both the jurisprudential and the legal significance of these distinctions elsewhere. *See* Jonathan Yovel, *Rights and Rites: Initiation, Language and Performance in Law and Legal Education*, 3 STANFORD AGORA 1 (2002), *available at* http://agora.stanford.edu/agora/volume2/articles/yovel/yovel.pdf.

[74]While some legally significant acts may be primarily physical rather than linguistic (for instance, tender of goods as contractual performance, or contract formation by conduct rather than by language), it could be claimed that a necessary condition for any act to be legally meaningful is its communicative aspect. This, however, goes beyond the scope of the present work and must be explored elsewhere.

[75]Austin indirectly acknowledged this in later years. *See* AUSTIN, *supra* note 72, at 7; *see also* note 1.

own example, saying "I do," may amount to performing the act of marrying only in the context of a wedding[76] and not, for example, on a theater stage in the context of performing in a play.[77] The context of a wedding in turn becomes operative only upon fulfilling a specific set of preliminary requisites. While the *meaning* of such utterances as "I do," "I promise," and so forth, may be the same 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.[78] So it could never be the case that performativity rested entirely on semantic properties of words, even if one happened to be a semanticist in questions of meaning. The semanticist here is analogous to the legal formalist, while the pragmatist would approximate the legal relationalist.[79] Austin was clear about felicity conditions being a matter of social convention rather than semantics; they were about the world and action, not about language.[80]

Austin's linguistic framework cannot by itself solve the problems posed by 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

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[76]J.L. AUSTIN, *Performative Utterances, in* PHILOSOPHICAL PAPERS 233, 235 (3d ed. 1979).

[77]For the relation of "serious" speech acts to those performed in nonserious or fictional contexts, see Jacques Derrida, *Signature Event Context*, 1 GLYPH (1977).

[78]*See* AUSTIN, *supra* note 72, at 14–32.

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

[80]This does not mean—as many critics of Austin assume—that Austin's 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. For example, persons may incrementally change the procedures for marrying through actual practice, or changes may occur by fiat.

performative language is SAT, whose most prominent contributor is probably philosopher John Searle. SAT offers a sophisticated framework for exploring the proposition that the presence of such words as "pay" might be obligatory for constituting an order to pay.[81] 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.[82] Not all utterances, claims Searle,[83] have a performative or illocutionary force; only particular ones may manifest intentions in such a way.[84] The imperative "Pay!" means, in given contexts, that you must pay (it "manifests" the drawer's intention to order payment); however, merely uttering or writing numbers on a piece of paper would, as a rule, create no such obligation: the meaning of writing numbers on paper cannot normally mean that one must pay. In other words, although usually classified as an essential contributor to pragmatics, Searle's position relies heavily on a special property of specific words to manifest intention.

The philosophical basis for Searle's position lies in the work of another philosopher, H. Paul Grice.[85] Grice's seminal work on the universal characteristics of communication was the first systematic account of language as conveying meaning due to the hearer inferring the speaker's intentions from the language spoken, written, or otherwise conveyed.[86] Other

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[81] *See* JOHN R. SEARLE, SPEECH ACTS 35 (1st ed. 1969).

[82] *See* John R. Searle, *How Performatives Work*, 58 TENN. L. REV. 371 (1991). Of course, Searle does not discount context: the order "Pay!" will only 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.

[83] *See infra* text accompanying note 87.

[84] Manifestation is a term of art Searle uses to signify a mode of conveying meaning that bypasses interpretation. Searle, *supra* note 82, at 386.

[85] *See* Grice, *supra* note 69.

[86] For instance, when a commander tells a soldier to storm a hill, the *order* to storm a hill is created by the soldier's inferring, upon hearing the utterance "storm that hill," that the commander *intends* to order him to storm the hill.

commentators maintain that strictly applying the Searlian position is both a skewed account of how performative language operates and is not in fact entailed by Grice's work.[87]

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 the speaker's intent from the speaker's imperative utterance "Pay!" 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, neither Austin nor Grice would think that the word "pay," used in the imperative, or any other term, acts as a *sine qua non* of performativity. Nor indeed would they say that there exists a category of performative words that exclusively hold a performative force. Grice's pragmatic point, after all, was that performative language operates when a performative intention is inferred and that inference may be entailed by various communicative acts involving different signifiers. Such commentators as the philosopher Jürgen Habermas[88] and the linguist Michael Silverstein[89] have made similar critical arguments concerning Searle's apparent semanticism, 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.[90] Silverstein in particular argues that what SAT overlooks is language's metapragmatic grounding in practice. Put another way, performativity depends on conventional felicity conditions that are generated *through* practice rather than being *presupposed* by practice.

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[87]*See* JOHN SEARLE AND HIS CRITICS (Ernest Lepore & Robert Van Gulick eds., 1st ed. 1991).

[88]*See* Jürgen Habermas, *Comments on John Searle: "Meaning, Communication, and Representation," in* JOHN SEARLE AND HIS CRITICS, *supra* note 87, at 12.

[89]*See* Silverstein, *supra* note 1, at 33.

[90]This claim is actually anteceded by Austin who, already in HOW TO DO THINGS WITH WORDS, *supra* note 72, criticized the strict interpretation of the "performative-constative" distinction, emphasizing that acts of describing or asserting are indeed distinct kinds of performing. *See id.*

Checks, too, are speech acts. In constituting a valid "order to pay" instrument, they depend on a relatively rigid set of semiotic signifiers as felicity conditions. But, there is no inherent reason to think that use of the word "pay" is one of these conditions. Using the term "pay" is paradigmatic, but the social and transactional context of the production of a check, as well as the aggregate of other relevant signifiers, should be able to 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."[91] Yet, employing an interpretative regime guided by the extension clause of Section 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. Habermas would see a check or other instrument as a communicative device that includes the words it carries, other semiotic constituents, and even contextual signifiers germane to its creation or tender.[92] This context is by definition relational, invoking the reliance of parties on the assumed validity of the instrument.[93]

The point is that there is no requirement in the U.C.C. or elsewhere that checks or drafts use the *word* "pay" or other obviously performative words in order to count as orders that are "instructions to pay."[94] Linguistically, the requirement that an instrument be an order is best approached using pragmatics rather than insisting on any single semantic device. Granted, a

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[91]*See* WHITE & SUMMERS, *supra* note 28, at 514; *see also* Davis v. Davis, 838 S.W.2d 415 (Ky. Ct. App. 1992).

[92]For the "courier without excess baggage" doctrine, that supposedly precludes the contextual constituents of meaning from the construction of negotiable instruments, see *infra* text accompanying note 108–14.

[93]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 CISG, *supra* note 25.

[94]*See* U.C.C. § 3-103(6).

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, should not be the exclusive way of complying with the requirement. The mandate of an imperative instead 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, 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 only requires that the check contain some clear semiotic indication, or manifestation, for it to be an instruction to pay, whether employing the word "pay" or not.

In linguistic theory, as in legal construction, strict formalism is highly problematic. 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 does a semantic interpretation of SAT, just as constructing U.C.C. provisions using a relational approach to formalism promotes relevant normative goals better than does strict formalism.[95] As a matter of interpretative strategy, this approach is more coherent with the general approach of the U.C.C., in which formal rules are seen as a contextualized mode of regulation, used for policy purposes and not as an inflexible legal regime of pure doctrine.

In the next part, I discuss how the SAT approach compares to actual practice. How is it expressed, if at all, in case law? To answer that question, I examine cases that express forms of

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[95]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 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).

formalism as applied to the determination of the negotiability of quasi-instruments. I conclude that the theoretical approach used by the courts is determinative of their outcome.

IV. Formalism in the Courts: Form or Reliance?

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.[96] As a negotiable instrument must be one or the other, the lack of such language would be a defense against enforcement. This type of quasi-instrument 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—overcomes.[97]

The significant aspect of the following discussion is that, in such cases featuring virtually identical fact patterns and subject to the same U.C.C. provisions, courts reached opposite decisions. Two court opinions, one from Illinois and one from Tennessee, are particularly emblematic of the effect of different approaches to formalism—constructing and applying either dogmatic or relational formalism. In each of these cases the language immediately following the promise or order language indicated, instead of a payee or some designation of bearer, the sum of money held by the instrument: "Pay to the order of three hundred dollars."[98] The defendant's

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[96]Both cases were governed by pre-revision U.C.C. § 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.

U.C.C. § 3-111 (pre-revision).

[97]The merger doctrine is described in numerous sources. *See* SMS Fin., L.L.C. v. ABCO Homes, Inc., 167 F.3d 235 (5th Cir. 1999); Lambert v. Barker, 348 S.E.2d 214 (Va. 1986); Gilmore, *Negotiable Instruments*, *supra* note 12, at 449–51.

[98]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

typical claim in such cases is that the promise or order paper fails to satisfy the constitutive conditions of bearer paper by failing to properly identify a payee after the promise or order language.[99]

In the case of *Broadway Management Corp. v. Briggs*,[100] the court interpreted the instrument, which had both promise and order language, the former preceding the latter,[101] as a note. It read in pertinent part: "Ninety Days after date, I, we, or either of us, promise to pay to the order of Three Thousand Four Hundred Ninety Eight and 45/100 Dollars."[102] The drawer typed in the underlined words and symbols; the remainder was preprinted.

Was this bearer paper? It certainly does not squarely fall under any U.C.C. provision.[103] Did it, alternately, contain "any other indication which does not purport to designate a specific payee"?[104] On a strict formalistic reading of the governing provision, U.C.C. Section 3-111, the

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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.

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

[100]332 N.E.2d 131 (Ill. App. Ct. 1975).

[101]This is 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. *See* U.C.C. § 3-104(e) (2009). In *Broadway Management*, 332 N.E.2d at 132, the promise language precedes the order language, thereby extending the promise function over the order function; everything that follows the promise language is subject and parenthesized by it.

[102]*Broadway Mgmt.*, 332 N.E.2d at 132 (emphasis added).

[103]*See* U.C.C. §§ 3-111(a) – (b) (pre-revision) ("An instrument is payable to bearer when by its terms it is payable to (a) bearer or the order of bearer; or (b) a specified person or bearer.").

[104]*Id*. § 3-111(c) (pre-revision).

Illinois Court of Appeals held that this alternate condition was not satisfied:[105] "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 instrument is clear in its implication that the payee's name is to be inserted between the promise and the amount…"[106]

Thus the court did not recognize the instrument, despite recognizing the parties' obvious intentions to create it. Anderson's treatise takes the same position: "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."[107]

This approach fails to place the purported instrument in any communicative or relational context. Instead it expresses an instance of "mechanical" application that Roscoe Pound ridiculed.[108] While the court acknowledges the possibility of casuistic injustice caused by a simple drafting error, it nonetheless upholds the ex ante value of systematic and general clear-cut, bright-line rules that promote predictability[109] or efficiency.[110] The court does not state its reasons beyond pointing out the formal deficiency.

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[105]The court may have been influenced by the comments to Section 3-111, which emphasized 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 the instrument payable to bearer." *Id*. § 3-111, official cmt. (pre-revision).

[106]*Broadway Mgmt.*, 332 N.E.2d at 133.

[107]RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE § 3-111:4 (3d ed. 2010).

[108]*See* Pound, *supra* note 3.

[109]*See, e.g.*, Bernstein, *supra* note 8, at 1735–44 (stressing the advantages of formalist application in arbitration tribunals and attempting to prove not just that relational standards in commercial law are inadequate, but that in many cases do not exist at all).

[110]*See* Schwartz & Scott, *supra* note 4, 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 relatively strict enforcement of merger clauses). Schwartz and 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 sight of relational concerns—

In a similar case, *Waldron v. Delffs*,[111] while still committed to the formalism of the Code, a Tennessee court analyzed a purported instrument in its "pragmatic," or communicative and functional contexts. The relevant portion of the document read as follows: "[P]romise to pay to the order of one hundred and fifty three thousand and four hundred and forty dollars Dollars (sic)." The underlined text was handwritten, inserted between the preprinted legends.[112] Among other defenses to the enforceability is the one that was successful in *Broadway Management.* Under U.C.C. Section 3-111—was this bearer paper?[113] 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."[114] What logic might this pervert? Certainly such a construction would not offend strict formalism, the logic of which is attractive precisely in its claim of unequivocal exactitude. The rationalization of formalism that underlies *Broadway Management* is that, in an area of practice

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indeed, possibly never considers 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 have "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 132; Movsesian, *supra* note 8, at 5.

[111]988 S.W.2d 182, 183 (Tenn. Ct. App. 1998). I thank Edward Janger for drawing my attention to this case.

[112]*Id.*

[113]The facts in *Waldron* occurred prior to Tennessee's enactment of U.C.C. revised article 3 in 1995. The case was therefore decided under pre-revision TENN. CODE ANN.§§ 47-3-104, -111.

[114]*Waldron*, 988 S.W.2d at 186. Additionally, there was not "any other indication which does not purport to designate a specific payee." TENN. CODE ANN. § 47-3-111(c) (pre-1995). The court adds that

> 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 U.C.C.

Waldron, 988 S.W.2d at 186.

marked by a salient need to provide certainty, rules of interpretation and construction should be semantic rather than pragmatic, and no communicative or functional evidence can be taken into consideration. This is an entirely consistent, logical approach. Using this approach, instruments must follow a strict grammar, according to which placing a sum where a sum does not belong violates a rule. The text—having deviated from the rule—fails to acquire meaning, and as such it can have no performative effect as a promise or an order.[115]

When the court in *Waldron* calls this construction a "perversion of logic,"[116] it is simply working from a different conception of formalism.[117] It does not require that a performative effect be grounded in semantic rules of meaning. Instead, it determines the success, or felicity, of performance 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" language of the Code.[118] The court does not apply a

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[115]Jurisprudentially, this section of the article 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 U.C.C. 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 Dworkin, of all scholars, 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 possible permutations). *See* DWORKIN, *supra* note 95, at 51–52; *see generally* BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY (1993).

[116]*Waldron*, 988 S.W.2d at 186.

[117]For a useful jurisprudential distinction between a concept and competing conceptions of it ("what does the concept really entail?"), see DWORKIN, *supra* note 95, at 70–71.

[118]U.C.C. § 3-111(c) (2009).

reliance-based "objective theory" to the language.[119] 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*, finding that the maker employed enough signifying conventions 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 a relational context. The form of the paper remains the determining factor.[120]

The differences in the judicial outcomes of these two cases can be explained through two other schools of thought, offering a different philosophical device—formalist definitions. Inherent to the outcomes of the two cases are presuppositions regarding what counts as a definition in the first instance. To recall, we interpreted the *Broadway Management* decision as applying an interpretation-by-analogy approach: what was the paper at bar more like, bearer paper or nonbearer paper?[121]

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[119]Yet, note a certain resemblance to interpretative strategies that draw from the common law's "mischief rule" of interpretation. *See* FARNSWORTH, *supra* note 57, at118–26.

[120]*See* WHITE & SUMMERS, *supra* note 28, at 19; *see also* Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978); James L. Carpenter, Jr., Note, *How Appellate Opinions Should Justify Decisions Made Under the U.C.C.*, 29 STAN. L. REV. 1245 (1977). The *Waldron* court also follows the U.C.C.'s own chief interpretative rule, set out in U.C.C. § 1-102, 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." *Waldron*, 988 S.W.2d at 186 (citing TENN CODE ANN.

§ 47-1-102(2), which was repealed in 2008); U.C.C. § 1-102 (pre-revision).

[121]Analogical reasoning works on two axes: 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 is required 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, 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 vast. For some very

If to be like bearer paper means to satisfy a strict set of shared, presupposed, necessary, and sufficient conditions, then the paper in both cases was not bearer paper because each document lacked a necessary condition under Section 3-11, and so failed under the definition. According to this Aristotelian (sometimes termed "classical") approach to definition, an object must fulfill a set of necessary and sufficient conditions in order to belong to a certain set of objects, for example, negotiable instruments.[122] The court in *Waldron*, however, rather than approach the formal requirements as strictly necessary conditions, ruled that a signification of an exact amount of money is close enough to the "cash" language required by Section 3-111(c). Now, under a purely semantic approach, one does not mean the other, neither in sense nor in reference. But pragmatically one may stand for the other, as determined by the relevant context. Given the communicative and relational context, the court ruled that to specify the amount of cash is similar enough to "cash" to satisfy the definition of bearer. There are no presupposed, necessary conditions involved here. In another case, another context, the court may find that some other linguistic relation will satisfy Section 3-111(c).

This flexible approach to meaning is very much like what the philosopher Ludwig Wittgenstein termed "family likeness,"[123] a framework legal scholars have found useful since the

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helpful critical analyses, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 86–92 (1990); Brewer, *supra* note 79; Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); 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 42–70 (Patrick Nerhot ed., Kluwer Academic Publishers 1991).

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

[123]LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 17 (2d ed. 1960); *see also id.* at 37 ("[R]oughly speaking, copies are good when they can easily be mistaken for what they represent," namely the thing of which they are copies—a teleological approach quite close, of all things, to Aristotle's). Of course, in different contexts, artifacts masked as copies are intended to

1950s.[124] Some things, Wittgenstein tells us, are like other things not because they share a presupposed set of necessary or sufficient conditions, but because they share nonexclusive, nonconclusive elements that are not privileged as "necessary." Furthermore, they may not be defined in advance, prior to practice. Wittgenstein's famous example of "like things" was the set of all games.[125] A practice X would qualify as a game if it featured enough game-like traits, traits like competition, turn taking, rules for determining victory, symbolic representation, and so on; but there is no set of necessary and sufficient conditions that could define all games. In the case of instruments, *Waldron* expresses a Wittgensteinian approach: the instrument held a sufficient measure of negotiability markers, or signifiers, to qualify as such.

Accepting that some concepts yield better to Wittgenstein's approach than to Aristotle's does not mean relinquishing formalism. With U.C.C. Article 3 construction, we are still interested in, and committed to, the form or forms of negotiable instruments. Relational formalism does not mean a digression to general contract law or to commercial standards. It merely stands for the proposition that form itself is contextual, to be construed 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, such as negotiable instruments, secured transactions, and bills of lading, than in general contract law. As the court in *Waldron* implies, Article 3 formalism is a communicative device in the service of relational purposes—chiefly, reliance—not a detached, internal, or purely conceptual interpretative methodology.

A relational approach to negotiable instruments—one that reads and interprets instruments in the communicative context of relations—seems diametrically opposed to a strict doctrinal approach to construction. Under the latter approach, in determining the negotiability of an

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express something about the original by not being easily mistaken for it. Consider Andy Warhol's work, for example.

[124]H.L.A. Hart in particular found this concept useful. *See* Hart, *supra note* 50.

[125]*See* WITTGENSTEIN, *supra* note 123.

instrument a court may look only to the face of the document.[126] The Oklahoma Court of Appeals remarked, metaphorically, "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."[127] This appears to contradict the relational approach 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 are excluded as "outside sources." This argument, 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.[128] The face value doctrine becomes operative when an external defense is raised against an 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 to determine the validity of the note and its negotiability from the language of the note itself.[129]

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

[127]*Walls*, 515 P.2d at 1407.

[128]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, as in *Broadway Mgmt. Corp. v. Briggs*, 332 N.E.2d131 (Ill. App. Ct. 1975) or, alternately, negotiable on relational grounds, as in *Waldron v. Delffs*, 988 S.W.2d 182 (Tenn. Ct. App. 1998).

[129]*First State Bank at Gallup*, 570 P.2d at 1147; *see also* Yin v. Soc'y Nat'l Bank Ind., 665 N.E.2d 58 (Ind. Ct. App. 1996).

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"—to give the instrument 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.

Furthermore, the language of the Oklahoma court does not proclaim instruments to be without luggage, only without "excess luggage." The qualifier is significant. The metaphor's literary origin invokes a well-known stage play, *Le voyageur sans bagage* [*Traveler without Luggage*], by the French playwright Jean Anouilh,[130] whose protagonist is an amnesiac veteran of the Great War, who has lost all memory of his past but 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. Determining what should count as an excess of contextual signifiers is subject to judicial discretion. How much is too much? To work through this question, we can supply heuristic guidelines, but not rules. 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 formalism in practice, where determining what belongs to the category of form and what belongs to context is itself a matter of application and construction.

In the cases of *Broadway Management* 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 by the payee taking the instrument. Once the court

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[130] JEAN ANOUILH, LE VOYAGEUR SANS BAGAGE (Paris 1937).

determined that there were, certain flaws on the face of the document (but, ostensibly, not others) could not, by themselves, revoke negotiability based on a doctrine the purpose of which is to protect legitimate reliance in the first place.

It may be claimed that the variance in the courts' decisions is 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 subsequent holders) would accordingly tend to be relatively forthcoming in evaluating relational context. A court that, in contrast, places greater value on adherence to the governing legal norm, would approach the matter more narrowly. This 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 an ad hoc decision expressing a general relational perspective. 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.[131] Relational formalism emerges from this study as a practical operative jurisprudence that is preferable both to strict formalism and to all-out realist adjudication.[132] On the one hand, it allows courts to go beyond a rigid "face of the instrument"

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[131]This relation, however, is more complex and less obvious than often assumed and does not necessarily entail a politically conservative approach, as very persuasively shown in SEBOK, *supra* note 2.

[132]According to Dagan's extremely helpful reconstruction of legal realism, the realist conception sees law as bounded by three constitutive tensions: between power and reason, science and craft, and tradition and progress. *See* Dagan, *supra* note 2, at 622–60. It is not my intention here to either critique or endorse these tensions specifically or any given formulation of them (I have elsewhere suggested that they express some of the constitutive categories of modernity itself rather than of its concept of law, to which we may add the tension between regulation and idiosyncrasy that accounts for the modern subject; as well as, in this article, form and function). Rather, my intention is to join Dagan in identifying legal realism with a dialectic,

doctrine and examine the reliance and other relations that generate instruments. On the other hand, it retains the advantages derived from using legal form without collapsing to the contingencies of judgment, all things considered. It best serves the functions that law is there to promote, without going exclusively to function and forsaking law. It is a third way between formalism and realism, attempting to rearrange in as a conceptually coherent framework as possible the advantages of both. Lastly, I claim that a close observation of cases shows relational formalism to be an attractive descriptive model that explains how some courts reach decisions, even when they do not invoke these concerns at all.

Conclusion

My aim was to discuss conceptions of formalism with the aid of linguistic theory, relatively independent of notions entrenched by previous legal scholarship. In its relative 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 to be 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, one that serves the interests that inform and invoke it, rather than claiming to govern or supersede those interests.

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. 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.

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yet decidedly non-Hegelian, approach to law as defined by a series of constitutive tensions, played out in institutional and noninstitutional contexts alike, which do not yield to any a priori or secondary forms of control. Elaborating on this theory must wait for another opportunity.

As for strict 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. Such perfect languages are not necessarily flawed, but rather, once cast into the dynamic 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 their usefulness in dealing with complex phenomena. If open-ended, they eventually tend to resemble natural languages. In both cases of quasi-instruments explored above, we found good grounds to accept performance that deviated from grammar; thus validating experience required forsaking linguistic perfection.

In the end, the best negotiable instruments law can hope for is to accommodate nonparadigmatic uses, to make sense to multiple audiences, and to deal with clear-cut mistakes. The two types of quasi-instruments I explored feature syntactically erroneous expressions or mistakes in what may be termed the language game of negotiability. Consequently, strict formalism would disqualify both of them as meaningless or illegitimate performances, just as moving the bishop horizontally is not a legitimate move in chess. Strict formalism claims a constitutive status for the syntactical rules of the relevant form, such as a draft or bearer paper, in relation to the language game. Relational formalism, in contrast, sees both 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 like reliance, even in a legal field dominated—and rightly so—by matters of form. Viewing legal practices and discourse as constituted by such tensions places this analysis squarely within the realist conception of law. This is not because it considers context to preempt form, but precisely because it considers both to operate in the same practical, normative, and institutional space.