

Contracts as Speech Acts: Bringing Jakobson to the Conversation

ELIZABETH A. JANICKI*

Contracts are formed via language, yet scholars and practitioners alike often ignore the fundamentally linguistic nature of offer and acceptance. Moreover, even those who have written about the intersection of linguistics and contracts have not used the most useful model for understanding speech. Thus, this Note seeks to introduce linguist Roman Jakobson's speech act model as a method of analyzing contract formation. Whereas previous scholarship has applied J.L. Austin's and John R. Searle's work on speech act theory, this Note demonstrates why Jakobson's model better accounts for the dynamic linguistic actions of offer and acceptance. It provides those who must decide whether a contract has been formed—namely, judges—a tool for applying the reasonable person standard in a particular linguistic context.

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INTRODUCTION

Picture a typical contract. It probably looks long and wordy, riddled with legalese. Most people think of contracts like this—as highly specialized and formal documents.¹ What is lost in that image, however, is that contracts fundamentally represent a conversation: one party says, “I offer you x,” and the other party says, “I accept.”² Because contracts are formed through the communication of promises, a comprehensive theory of how language functions is crucial to understanding contract formation. Judges, in particular, need to know how language works, because in deciding whether offer or acceptance exists, they must determine what a reasonable person would understand from the contractual conversation at issue.³

Some legal scholars have taken an initial step toward a more linguistic understanding of contract formation through speech act theory. Speech act theory, pioneered by J.L. Austin and John R. Searle, focuses on *how we do things with words*.⁴ It positions language as performing an action that affects the world when

1. See Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1297 (2015) (describing findings that most people believe the moment of contract formation is synonymous with the formalization of the contract and have “a startling level of interest in contract formalities”).

2. See Peter Meijes Tiersma, Comment, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189, 189 (1986) (describing contract law as “when the law must give legal effect to the utterances of private individuals”).

3. See Peter Meijes Tiersma, *The Judge as Linguist*, 27 LOY. L.A. L. REV. 269, 269–70 (1993) (“[T]he fact that judges and linguists frequently engage in the same professional activity—analyzing language—strongly suggests that each can learn from the other.”).

4. This is a reference to the title of one of the most important books in speech act theory: J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (1962). See MICHAEL

spoken.⁵ Framing speech as active rather than passive is a useful way to think about contracts because two parties use language to create something: a legally enforceable agreement.⁶

This Note agrees that speech act theory is valuable for understanding this process; however, it argues that a different approach to speech act theory—a model proposed by Roman Jakobson—provides a more linguistically accurate method for analyzing contract formation. His model divides the speech act into six component factors and functions,⁷ which supports an analysis of the multiple meanings language can carry—something that Austin’s and Searle’s theories lack. Jakobson’s more comprehensive model of how language functions provides the best tool for judges to understand the linguistic process of contract formation.

This Note has two primary purposes. First, it brings Jakobson’s work into conversation with other contract law scholars. Though legal scholars have used Austin and Searle,⁸ Jakobson’s work has not been explored in the realm of contract scholarship outside of a single footnote.⁹ Second, the Note furthers the conversation about contracts as speech acts by applying Jakobson’s speech act model to contract formation. In particular, this Note seeks to show that contracts are not created solely via the utterance of particular words or the speaker’s intent, but

MORRIS, AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE 231 (2006) (discussing Austin’s *How to Do Things With Words*); see also *Speech Act Theory*, BLOOMSBURY GUIDE TO HUMAN THOUGHT 706 (Kenneth McLeish ed., 1993) (describing speech act theory as focusing on “how words are often used to do things, rather than merely to comment on a state of affairs in the world”).

5. See COLIN MCGINN, *PHILOSOPHY OF LANGUAGE: THE CLASSICS EXPLAINED* 1 (2015) (“Language is about the world—we use it to communicate about things. So we must ask . . . what is it and how does it work?”); *Speech Act Theory*, *supra* note 4.

6. See generally Tiersma, *supra* note 2.

7. Roman Jakobson, *Closing Statement: Linguistics and Poetics*, in *STYLE IN LANGUAGE* 350, 353, 357 (Thomas A. Sebeok ed., 1960).

8. See, e.g., DENNIS KURZON, *IT IS HEREBY PERFORMED . . . EXPLORATIONS IN LEGAL SPEECH ACTS* 5 (1986) (applying Austin and Searle to statutes); Sanford Schane, *Contract Formation as a Speech Act*, in *THE OXFORD HANDBOOK OF LANGUAGE AND LAW* 100, 104–05 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (applying Austin and Searle to contracts); Tiersma, *supra* note 2, at 193–96 (discussing Austin’s and Searle’s speech act theory and its application to contract law).

9. See Dinda L. Gorrée, *Obligations I: Quid Pro Quo: Contractual Semiosis and Translation*, in *SIGNS IN LAW – A SOURCE BOOK* 273, 282 n.21 (Jan M. Broekman & Larry Catá Backer eds., 2015). In discussing the cooperative nature of contract formation, Gorrée notes that “[e]ach contractual speech-act contains really two prior speech-acts in which speaker and hearer assume alternating roles of promisor and promisee.” *Id.* at 282. Gorrée then states in the accompanying footnote:

In Jakobson’s semiotic terminology (as put forth in his famous 1960 essay), a contract would be a form of verbal communication involving an addresser and an addressee who exchange a message in which the primary functions are referential (emphasizing the cognitive, informational aspect of language) and conative (oriented toward the addressee, indicating what he or she must do).

Id. at n.21. As the following pages will show, this Note adopts a far more expansive view of how Jakobson’s model can apply to contracts. Also of note, Jakobson’s model has been applied once before to legislative acts. See KURZON, *supra* note 8, at 25–26. Legal scholars have a history of ignoring linguistics, which may explain Jakobson’s relative absence in legal scholarship. See, e.g., Gary S. Lawson, *Linguistics and Legal Epistemology: Why the Law Pays Less Attention to Linguists than It Should*, 73 WASH. U. L.Q. 995, 995 (1995).

rather are the result of a complicated and dynamic negotiation of language, as best represented in Jakobson's speech act model.

The Note proceeds as follows. Part I provides background on Austin's and Searle's speech act theories and discusses how legal scholars have previously used their work in contract law. Part II introduces Jakobson's speech act model and demonstrates how his model helps respond to criticism of speech act theory. Part III identifies some challenges with applying the Jakobsonian speech act model to contracts, which illuminates issues often overlooked in scholarship. Finally, Part IV demonstrates, first, why Jakobson's model is more linguistically accurate for understanding the process of offer and acceptance and, second, how using it as a tool in applying the reasonable person standard leads to a more nuanced result in the classic contract law case, *Embry v. Hargadine, McKittrick Dry Goods Co.*¹⁰

I. STARTING THE CONVERSATION: AUSTIN AND SEARLE

Jakobson's speech act model is the most linguistically accurate way to understand contracts as speech acts. However, scholars have not applied his model to contract law; instead only the work of Austin and Searle—the pioneers of speech act theory—has previously been applied to contract law scholarship. Thus, to show how Jakobson's speech act model changes the conversation about contract formation, this Part seeks to establish where the conversation has already been by discussing, in section I.A, Austin's and Searle's work on speech act theory and, in section I.B, how legal scholars have used their work to study contract law.

A. HOW TO DO THINGS WITH WORDS: AUSTIN'S AND SEARLE'S SPEECH ACT THEORIES

The beginnings of speech act theory trace to J.L. Austin¹¹ and John R. Searle.¹² Both were scholars of the philosophy of language, a field that studies how language works with an emphasis on the connection between meaning and truth.¹³ Austin sought to examine not how language passively describes the world, but rather the effect language can have in the world¹⁴—hence the term “speech

10. 105 S.W. 777 (Mo. Ct. App. 1907).

11. See Brian Garvey, *Introduction* to J.L. AUSTIN ON LANGUAGE, at ix, ix (Brian Garvey ed., 2014) (“Austin challenged the widespread assumption that asserting propositions was the core function of language, and investigated in depth the many other things that people are doing when they use words.”).

12. See *id.* at xiii (“[Searle] worked with Austin closely, and his own work on speech-acts . . . arises out of the work that Austin began.”).

13. See, e.g., SCOTT SOAMES, *PHILOSOPHY OF LANGUAGE 1* (2010) (“Philosophy of language is, above all else, the midwife of the scientific study of language, and language use. . . . In studying it, we exploit the relationship between meaning and truth.”).

14. See MORRIS, *supra* note 4, at 232 (“Austin's focus on performatives – sentences which we can do things with – leads to a general concern with the *acts* we may perform when we use sentences . . .”). This is self-evident in the title of Austin's most important work: *How to Do Things with Words*. AUSTIN, *supra* note 4. The book is actually a posthumous compilation of Austin's notes for the William James Lectures at Harvard in 1955. J.O. Urmson, *Preface to the First Edition of id.* at v, v.

acts.”¹⁵ His theory posits that “language is primarily about action—speech and texts are acts, and they perform things in the social world and bring about different kinds of effects.”¹⁶

Austin focused on language that is “performative” rather than what he calls “constative.”¹⁷ Constative utterances merely state a fact or describe a state of affairs, whereas performatives, through the utterance, carry out an action beyond merely saying something.¹⁸ For example, according to Austin, in saying, “I name this ship the *Queen Elizabeth*,” the speaker performs the act of naming the ship, rather than simply describing something about it.¹⁹

Constatives and performatives are easily differentiated. Constatives are utterances that are true or false;²⁰ one can verify the truthfulness of the statement, “that ship is called the *Queen Elizabeth*.” By contrast, performatives cannot be thought of as true or false because they are actions; it is neither true nor false that “I name the ship *Queen Elizabeth*.”²¹ Ultimately, Austin even concludes that constatives can serve a performative function as well, with the associated action of “I state”: “*I state* that ship is called the *Queen Elizabeth*.”²²

In shifting towards an understanding of all language as action, Austin describes three types of action an individual might perform when speaking. First, in a locutionary act, the speaker uses words to convey meaning—or performs the physical act of making sounds that have a particular significance.²³ Second, an

15. Cf. AUSTIN, *supra* note 4, at 148 (describing the “speech act” as the general theory that Austin’s lectures address).

16. Jonathan Yovel, *What is Contract Law “About”? Speech Act Theory and a Critique of “Skeletal Promises,”* 94 NW. U. L. REV. 937, 939 (2000) (emphasis omitted) (summarizing Austin and Searle’s speech act theory); see also AUSTIN, *supra* note 4, at 101 (“Saying something will often, or even normally, produce certain consequential effects upon the feelings, thoughts, or actions of the audience, or of the speaker, or of other persons: . . . the speaker has performed an act . . .”).

17. See, e.g., Guy Longworth, *J. L. Austin (1911–1960)*, in PHILOSOPHY OF LANGUAGE: THE KEY THINKERS 103, 111 (Bary Lee ed., 2011) (describing Austin’s distinction between performative and constative sentences); see also AUSTIN, *supra* note 4, at 4–6, 6 n.2 (providing the focus of his lecture as the “performative utterance” while distinguishing performatives from constatives).

18. See AUSTIN, *supra* note 4, at 1–7 (defining performative and constative utterances).

19. *Id.* at 5–6.

20. See *id.* at 2–3 (“[A] statement (of fact) ought to be ‘verifiable’, . . . [but] [n]ot all true or false statements are descriptions, and for this reason I prefer to use the word ‘Constative’.”).

21. See *id.* at 5; see also MORRIS, *supra* note 4, at 233 (“Austin accepted the intuitive view that performative uses of sentences are not uses in which anything true or false is said, and so contrasted these *performative* uses with those he called *constative*. Constative uses, in Austin’s sense, are precisely uses in which something true or false *is* said.”).

22. See AUSTIN, *supra* note 4, at 92 (“When we issue any utterance whatsoever, are we not ‘doing something?’”) (footnote omitted); MORRIS, *supra* note 4, at 236 (“[I]t seems that Austin’s original ‘constative’ (statement-making or descriptive) utterances will count as performative too.”); Longworth, *supra* note 17, at 112–15 (arguing that “Austin’s view of the putative distinction between performatives and constatives is less straightforward than it might at first seem” and suggesting as one explanation for that view that Austin’s true intent was “to argue . . . that there is no such simple distinction” between constative and performative sentences).

23. See, e.g., MORRIS, *supra* note 4, at 237 (defining Austin’s locutionary act as “speaking the words with the meaning they have (or have here)” or “what we might call *saying something*”); see also AUSTIN, *supra* note 4, at 101–02 (analyzing locutions in terms of the speaker’s words and their conveyed meaning).

illocutionary act is what the speaker intends to do with those words: actions like asking a question or making a promise.²⁴ Third, a perlocutionary act is what the speaker achieves in the world by speaking.²⁵ A speaker might perform all three kinds of acts with one utterance. For example, if a speaker says, “shut the door,” she is (1) performing a locutionary act by conveying the meaning of “(you) close the hinged barrier to the room,” (2) performing an illocutionary act by commanding someone, and (3) performing a perlocutionary act by causing the effect of a closed door.²⁶

In dividing speech into these three separate acts, Austin’s overall goal was to highlight the importance of the speaker’s intent to broaden our understanding of meaning.²⁷ In particular, Austin focused on what the speaker intends to do with an utterance—or the speaker’s illocutionary act.²⁸ The meaning of an illocutionary act is based in part on its degree of “force”: according to Austin, the act of stating, for example, has a different force behind it than do the acts of either promising or warning.²⁹ Thus, it is important to understand not only the meaning of the words in a promise like, “I promise to send the letter,” but also (1) what the speaker intends to do in saying those words—to make a promise—and (2) how the force of that illocutionary act compares to others—such as, “I *hope* to send the letter.”

It is here that Searle picks up where Austin left off.³⁰ One of Searle’s major developments in speech act theory was to classify illocutionary acts into a taxonomy to help clarify our different uses of language.³¹ He describes five categories

24. See AUSTIN, *supra* note 4, at 98–99; see also MORRIS, *supra* note 4, at 237 (“[A]s Austin puts it, . . . [i]n using those words, she might be asking a question, giving an order, making a promise, stating a fact, and so on. These are what Austin calls *illocutionary* acts.”).

25. See AUSTIN, *supra* note 4, at 101 (“Saying something will often, or even normally, produce certain consequential effects upon the feelings, thoughts, or actions of the audience, or of the speaker, or of other persons: and it may be done with the design, intention, or purpose of producing them . . .”); see also MORRIS, *supra* note 4, at 237 (“[S]he might achieve something *by means of* saying what she says: she might draw someone’s attention to something, convince her of something, get her to do something, and so on. Austin calls these acts of achieving something by means of saying something *perlocutionary* acts.”).

26. See MORRIS, *supra* note 4, at 237.

27. See AUSTIN, *supra* note 4, at 102–03 (emphasizing that the focus of the lectures is on the illocutionary act, which deals with speaker intent, because “[t]here is a constant tendency in philosophy to elide [speaker’s intent] in favour of [sentence-level meaning] or [the effects of speech]”).

28. See *id.* at 103–04 (noting that his focus “is essentially . . . on the . . . illocutionary act” and that act in “contrast . . . with the other two”); see also Longworth, *supra* note 17, at 114–15 (theorizing that Austin wanted to focus on illocutionary acts because he “thought that the various modes of assessment that he discusses – for example, true/false, happy/unhappy – properly apply to the *illocutionary* act, rather than the locutionary or the perlocutionary act”).

29. See AUSTIN, *supra* note 4, at 99–100; see also Longworth, *supra* note 17, at 114.

30. Searle was Austin’s student at Oxford. See Garvey, *supra* note 11, at xiii.

31. See John R. Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE SOC’Y 1, 1–2 (1976) (introducing “[t]he primary purpose of this paper” as “develop[ing] a reasoned classification of illocutionary acts into [Austin’s] five basic categories,” with an ancillary purpose as “show[ing] how these different basic illocutionary types are realized in the syntax of a natural language such as English”). Although Austin first proposed a categorization of illocutionary acts, AUSTIN, *supra* note 4, at 151–52 (defining five “classes of utterance,” including verdictives, exercitives, commissives,

of illocutionary acts: representatives, directives, commissives, expressives, and declarations.³²

Each of Searle's categories could yield much discussion. Most relevant to contract law, however, are commissives.³³ Commissives "are those illocutionary acts whose point is to commit the speaker (again in varying degrees) to some future course of action."³⁴ Therefore, the commissive category includes promises because promises are oriented toward an action in the future.³⁵ Given that, for most purposes, "contracts are binding promises,"³⁶ Searle's work on commissives provides another connection between speech act theory and contract law. Thus, legal scholars have imported into contract law scholarship both Austin's work, focusing on the kinds of actions language can perform—so-called illocutionary acts—and Searle's subsequent efforts to classify illocutionary acts.³⁷

The idea that language is an action is an important step toward understanding contract formation through a linguistic lens. Yet—to preview a later discussion of why Jakobson's model is a better tool—scholars have criticized Austin and Searle's speech act theory for its narrow focus on only the speaker's intent.³⁸ For Austin and Searle, the action speech performs is defined in reference to the speaker's intent.³⁹ However, this ignores other important aspects of understanding

behabitives, and expositives), the effort to classify illocutionary acts was not a major component of his work. Austin does not bring up his classification system until Lecture XII, his last lecture published in *How to Do Things with Words*. See *id.*

32. Searle, *supra* note 31, at 10–16. Austin also used these classifications. See AUSTIN, *supra* note 4, at 151. However, it is Searle's taxonomy that scholars most often use. See, e.g., KENT BACH & ROBERT M. HARNISH, *LINGUISTIC COMMUNICATION AND SPEECH ACTS* 40 (1979) ("All subsequent taxonomies are attempted improvements on Austin's, but only Searle's is tied to a general theory of illocutionary acts. We agree with Searle that a scheme of classification should be principled." (footnote omitted)).

33. See, e.g., Tiersma, *supra* note 2, at 195–96 (describing the relevance of commissives to contract law).

34. Searle, *supra* note 31, at 11.

35. See *id.* at 12.

36. 3 ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 8.1 (Joseph M. Perillo ed., rev. ed. 1996) ("For the purposes of this treatise and for the purposes of most contract litigation, contracts are binding promises.").

37. See, e.g., Tiersma, *supra* note 2, at 195–96, 198–99 (using Austin's work on performatives and Searle's categorization of illocutionary acts to analyze contractual offer and acceptance).

38. See, e.g., Savas L. Tsohatzidis, *Ways of Doing Things with Words: An Introduction*, in *FOUNDATIONS OF SPEECH ACT THEORY: PHILOSOPHICAL AND LINGUISTIC PERSPECTIVES* 1, 11 (Savas L. Tsohatzidis ed., 1994) (framing Searle's work as problematic because "all reference to a speaker's relations to other members of his linguistic community has been erased and only his internal states are counted as constitutive of the meaningful character of his linguistic accomplishments"); see also Yovel, *supra* note 16, at 958 (criticizing speech act theory because it "does not recognize . . . the essential intersubjective nature of language and its intimate, formative relation with the normative world into which it is launched").

39. See, e.g., AUSTIN, *supra* note 4, at 100 (defining a speech act as an order because the speaker meant it as an order); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 60 (1969) (identifying a promise based on whether the speaker intends to perform the act promised, place himself under an obligation to do so, and create knowledge in the audience that he has placed himself under such an obligation).

language, such as the audience's interpretation and the context. Given that legal scholars have relied only on Austin and Searle in contract analysis, this same issue runs throughout their work as well.

B. HOW TO DO CONTRACTS WITH WORDS: LEGAL SCHOLARS' PRIOR USE OF SPEECH ACT THEORY

In applying Austin's and Searle's theories to contract law, legal scholars have primarily focused on describing when a particular speech act becomes a contract, or "when the law must give legal effect to the utterances of private individuals."⁴⁰ Thus, speech act analysis in contract formation typically uses the principles of illocutionary acts to determine when a proper offer or acceptance has occurred.⁴¹

The main voice in this field, Peter Tiersma, uses Searle's commissive category to argue that a speech act is only successful as an offer when it is expressible as, "I hereby offer you that *p*."⁴² "*p*" represents a proposition: Tiersma suggests that *p* could be replaced with something like, "I hereby offer you that

40. Tiersma, *supra* note 2, at 189. Tiersma is probably the most prominent scholar regarding the crossover between speech acts and contracts. His Comment, written while a law student at Berkeley, *see id.* at 232 (noting biographical information of the author), is "the first sustained application of speech act theory in American legal scholarship," Sidney W. DeLong, *How to Do Legal Things with Words: The Contracts Scholarship of Peter Tiersma*, in *SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA* 79, 79 (Lawrence M. Solan et al. eds., 2015). Tiersma received a Ph.D. in Linguistics prior to attending law school, and after graduating law school he continued to write on subjects borne of the intersection between linguistics and law. *See* Lawrence M. Solan et al., *Preface to SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA*, *supra*, at xi, xi-xii. I include this information merely to demonstrate the sophisticated nature of Tiersma's student Comment.

41. *See, e.g.*, Schane, *supra* note 8, at 104-05 (discussing Searle's work on the conditions a "commissive illocution must satisfy in order to be fully valid or felicitous," two of which "apply to the act of promising and the other four to what is being promised"); Tiersma, *supra* note 2, at 194-98 (applying the rules of commissive illocutionary acts to offer and acceptance).

A second application of speech act theory arises in the context of what contract law is "about." *See, e.g.*, Yovel, *supra* note 16, at 937-38. There are basically two schools of thought. According to the first, under speech act theory, a promise is a linguistic act that exists outside of contract law, to which contract law is applied to determine its legal effect. *Id.* at 943 ("As speech acts, promises are constituted only insofar as they abide by the linguistic rules . . . Normative questions, such as how should a society regulate or otherwise approach promises, are then a matter of law or policy, beyond the scope of linguistics." (emphasis omitted)). Thus, according to speech act theory, contract law is "about" linguistic promises. *See, e.g., id.* at 937-38. The second school of thought, led by P.S. Atiyah, stipulates that contract law regulates what constitutes a promise, such that promises do not exist without reference to contract law. *See id.* at 944-45 (discussing Atiyah's argument set forth in P.S. ATIYAH, *ESSAYS ON CONTRACT* (2d ed. 2001) (1986)). Thus, contract law—rather than being "about" promises—itsself defines what is and is not a promise. *See* ATIYAH, *supra*, at 4 ("I am extremely dubious about the possibility of understanding contract law in terms of a set of rules 'about' promises; . . . the law of contract is a set of rules . . . concerning the creation of obligations, in which the law itself has refined and made use of the concept of a promise."). Although interesting theoretically, this application of speech act theory is not the focus of this Note because the far more common application is to the process of offer and acceptance.

42. Tiersma, *supra* note 2, at 201. Tiersma argues that acceptance has a similar formula, equivalent to uttering, "I hereby accept your offer." *Id.* at 206.

(I promise to do *A* and you promise to do *B*).⁴³ The utterance need not literally match this language but must simply equate with this statement,⁴⁴ just as “this ship is now the *Queen Elizabeth*” is equivalent to “I name this ship the *Queen Elizabeth*.”⁴⁵

Tiersma’s analysis is rule-based: only if it meets the particular conditions and rules of a commissive act does the speech act establish offer or acceptance.⁴⁶ By applying Austin’s and Searle’s framework for commissives to particular contractual language, Tiersma seeks to explain why courts hold that certain language constitutes a contract, whereas other language does not rise to that level.⁴⁷ For example, he proposes that the advertisement speech act at issue in the classic case *Carlill v. Carbolic Smoke Ball Company*⁴⁸ constituted a contract because it properly matched the “I hereby offer you that *p*” formula.⁴⁹ When the company offered a reward for people who became sick after using its product, it created a contractual obligation to pay the reward because anyone who fulfilled the condition of having used the product three times a day for two weeks became the “you” in “I hereby offer *you* that *p*.”⁵⁰ By contrast, a speech act without a clear “you”—such as, “we are authorized to offer Michigan fine salt . . . at [a particular price]”⁵¹—is not a contract because it is not a commissive speech act equivalent to “I hereby offer *you* that *p*.”⁵²

Important to Tiersma’s analysis is that “[i]t is not . . . the *intent* to promise that commits the speaker, but rather the uttering of the words themselves.”⁵³ This principle of speech act theory underlies the objective theory of contracts, which emphasizes the importance of words and actions over the subjective and perhaps hidden intent of the parties.⁵⁴ This is an important piece for understanding how

43. *Id.* at 200.

44. *Id.* at 201.

45. See SEARLE, *supra* note 39, at 19–21 (describing the “principle of expressibility,” by which “whatever can be meant can be said” and “[o]ften we mean more than we actually say”).

46. See Tiersma, *supra* note 2, at 196–98. With this, Tiersma follows in Searle’s and Austin’s footsteps. Searle proposed nine conditions required for the success of a commissive speech act. See SEARLE, *supra* note 39, at 57–61; see also Schane, *supra* note 8, at 104–05 (providing additional information and another application of the conditions of the commissive speech act to contract law). Schane analyzes how a failure of each commissive condition becomes legally significant. For example, he provides that a failure of the sincerity condition—the requirement that “[a] promisor **intends** to do the act promised”—legally results in fraud or bad faith because the party “has acted fraudulently or in bad faith and with intent to deceive.” *Id.* at 113.

47. See Tiersma, *supra* note 2, at 201–06 (showing how an issue with any of the elements in the prototypical offer “I hereby offer you that *p*” can explain how courts decided previous cases or how hypotheticals should be resolved).

48. [1892] 1 QB 256 (Eng.).

49. Tiersma, *supra* note 2, at 204–05.

50. See *id.*

51. *Id.* at 204 (quoting *Moulton v. Kershaw*, 18 N.W. 172, 172 (Wis. 1884)).

52. See *id.*

53. *Id.* at 199.

54. See Joseph M. Perillo, 1 CORBIN ON CONTRACTS § 4.12 (Joseph M. Perillo ed., rev. ed. 1993), LEXIS (updated Spring 2017) (explaining that under the objective theory of contracts, “a valid contract is created by agreement in expression, the subjective intention of the parties being immaterial”); see also

communication—and, within that, contractual agreement—occurs. However, legal scholars—by using Austin and Searle—focus mostly on the speaker’s intent without incorporating other sources of meaning relevant to understanding the speech act and therefore contract formation.

II. BRINGING JAKOBSON TO THE CONVERSATION

Roman Jakobson’s speech act model is a more successful analytical tool for contract formation because it accounts for the multiple meanings words can have. A better model of language yields a better understanding of processes that involve communication, like offer and acceptance. This Part, first, introduces Jakobson’s six factors and functions—his speech act model—and, second, demonstrates how the model responds to criticism of speech act theory.

A. JAKOBSON’S SPEECH ACT MODEL

Roman Jakobson was not a philosopher of language like Austin or Searle;⁵⁵ his perspective in this conversation comes from the field of linguistics, which, broadly, places greater focus on how language functions between people as communication.⁵⁶ Jakobson made several influential contributions to the field of linguistics, but most important for analyzing contract law is his model of communication.⁵⁷

Jakobson’s model consists of six factors and six corresponding functions.⁵⁸ According to Jakobson, speech acts⁵⁹ consist of six separate factors, arranged as follows:⁶⁰

Lucy v. Zehmer, 84 S.E.2d 516, 520 (Va. 1954) (holding that the creation of a contract to sell a farm was binding even though the seller later claimed the offer was made in jest).

55. See Hans Götzsche, *Roman Jakobson*, in *KEY THINKERS IN LINGUISTICS AND THE PHILOSOPHY OF LANGUAGE* 139, 139 (Siobhan Chapman & Christopher Routledge eds., 2005) (noting that Jakobson is most known for his work in the area of structural linguistics).

56. See Tiersma, *supra* note 2, at 193–94 (comparing linguistics with the philosophy of language); ROMAN JAKOBSON & MORIS HALLE, *FUNDAMENTALS OF LANGUAGE* 75–76 (2d rev. ed. photo. reprint 2002) (1956) (“Whether messages are exchanged or communication proceeds unilaterally from the addresser to the addressee, there must be some kind of contiguity between the participants of any speech event to assure the transmission of the message.”).

57. See Götzsche, *supra* note 55, at 143–44.

58. See Jakobson, *supra* note 7, at 353, 357. Jakobson presented his model as part of the Conference on Style, for which he was the closing speaker for the linguistics portion. See *STYLE IN LANGUAGE*, *supra* note 7 (listing Jakobson as the closing speaker “[f]rom the viewpoint of [l]inguistics” for the Conference on Style).

59. Jakobson uses slightly different terminology in discussing his model’s applications. He describes the factors as part of a “speech event.” Jakobson, *supra* note 7, at 353. However, conceptually there is no difference between the “speech act” and the “speech event.” See, e.g., EDNA ANDREWS, *CONVERSATIONS WITH LOTMAN: CULTURAL SEMIOTICS IN LANGUAGE, LITERATURE, AND COGNITION* 18–19 (2003) (describing Jakobson’s “speech act model” as providing “the speech event as a unity of six factors and functions”).

60. Jakobson, *supra* note 7, at 353.

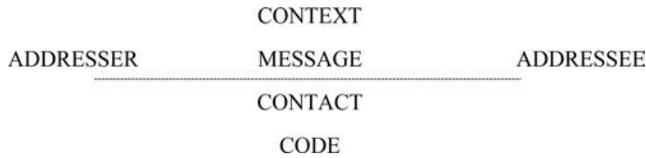


Figure 1. Jakobson's Six Speech Act Factors

In a speech act, the *addresser*, or the speaker, sends a *message*, or the content of the speech act, to the *addressee*, or the audience.⁶¹ The speech act takes place in a particular *context* and uses a particular *code*, or a system of language, that the addresser and addressee have in common, such as a specific dialect of English.⁶² Finally, for the speech act to occur, the addresser and the addressee must make *contact* via “a physical channel and psychological connection . . . enabling both of them to enter and stay in communication.”⁶³

To illustrate Jakobson's six factors, consider an example initially discussed under Austin's and Searle's theories in section I.A. Analyzing the speech act “shut the door” under Jakobson's model, the addresser (speaker) sends a message with the meaning “(you) close the hinged barrier to the room” to the addressee (audience). The context determines to which door the speaker is referring: if there is only one door in the room, then it is obvious, but if there are multiple doors, context such as a gesture toward a particular door may become part of the communication. The addresser and addressee must have a common code: if the addressee does not speak the same dialect of English, the speech act does not function. Finally, the addresser and the addressee must establish contact for the speech act to operate: if the addressee is wearing headphones, for example, no channel of communication actually opens.

Each factor in Jakobson's model has a corresponding language function, which can be arranged in a diagram combining the six factors with their corresponding functions:⁶⁴

61. See *id.* As Jakobson points out, “addresser” and “addressee” are synonyms of the concepts “encoder” and “decoder” used in communication studies. Cf. *id.* (describing addresser and addressee as “the encoder and decoder of the message”); see also Stuart Hall, *Encoding, Decoding*, in THE CULTURAL STUDIES READER 507, 510 (Simon During ed., 2d ed. 1999) (describing the use of the terms “encoding” and “decoding” in communication studies).

62. See Jakobson, *supra* note 7, at 353; Carol Myers-Scotton, *Introduction to CODES AND CONSEQUENCES: CHOOSING LINGUISTIC VARIETIES* 3, 3 (Carol Myers-Scotton ed., 1998) (defining “[c]ode” and “variety” as terms that encompass “linguistic systems at any level, from separate languages to dialects of a single language to styles or substyles within a single dialect”). In fact, even legal English—“the legal variety of modern English,”—might be considered a type of code. Brenda Danet, *Language in the Legal Process*, 14 LAW & SOC'Y REV. 445, 464, 470–73 (1980) (considering whether legal English is its own language, dialect, or register).

63. Jakobson, *supra* note 7, at 353.

64. This is a combination of Jakobson's two separate diagrams for the factors and the functions. See *id.* at 353, 357.

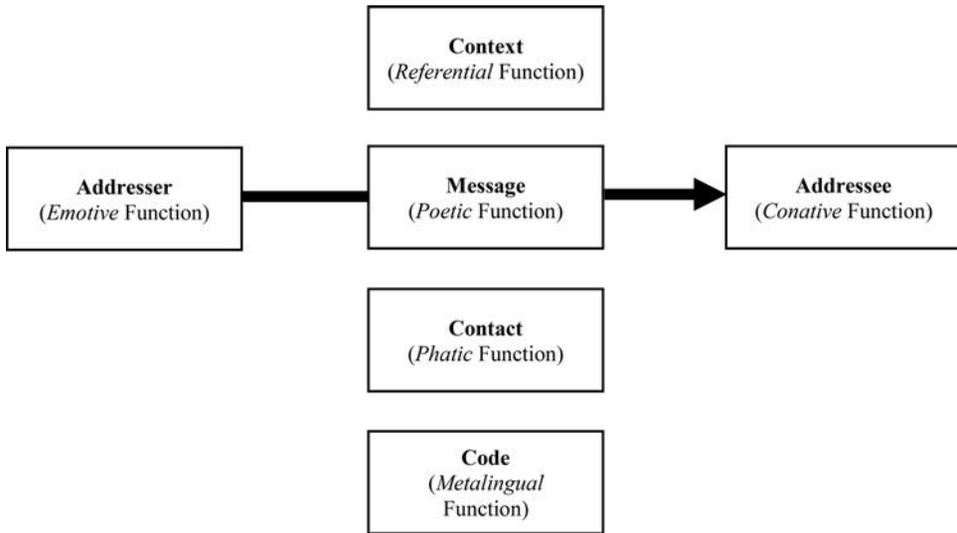


Figure 2. Jakobson's Six Language Factors and Functions

When a particular factor of language is emphasized more than the other factors in the speech act, the function corresponding to that factor becomes the dominant function—or purpose—of that speech act.⁶⁵ First, when the addresser is the dominant factor, the speech act's dominant function is the *emotive* function.⁶⁶ This means the primary function of the speech act is “a direct expression of the speaker's attitude toward what he is speaking about.”⁶⁷ The prototypical example of an emotive-dominant speech act is an interjection like “Oh!,” with the primary purpose of the speaker asserting an attitude—surprise—toward a topic or event.⁶⁸

Second, when the message is the dominant factor, the associated dominant function of the speech act is *poetic*.⁶⁹ Jakobson describes this as a “focus on the message for its own sake.”⁷⁰ In other words, the speech act's function is most poetic when the focus of the speech act is the actual sounds of the message. Poetry, particularly rhyming poetry, is the prototypical example of the poetic function.⁷¹ But Jakobson is careful to point out that the poetic function can be

65. See *id.* at 354 (describing emotive function as focus on addresser factor); ANDREWS, *supra* note 59, at 19 (describing the “inherent hierarchy of six factors and six functions, which are rehierarchized in every individual speech act”).

66. See Jakobson, *supra* note 7, at 354.

67. *Id.*

68. See *id.*; ULRIKE STANGE, *THE ACQUISITION OF INTERJECTIONS IN EARLY CHILDHOOD* 57 (2009) (“*Oh!* is the most common interjection in the English language. . . . In most cases *Oh!* is simply a reaction to a verbal or non-verbal stimulus and its core function is ‘to convey some degree of surprise, unexpectedness, or emotive arousal.’” (quoting DOUGLAS BIBER ET AL., *LONGMAN STUDENT GRAMMAR OF SPOKEN AND WRITTEN ENGLISH* 1083 (1999))).

69. Jakobson, *supra* note 7, at 356.

70. *Id.*

71. See *id.* at 356, 359 (“Poetics in the wider sense of the word deals with the poetic function *not only in poetry*, where this function is superimposed upon the other functions of language, but also outside of

dominant in speech acts even outside what would typically be considered poetry, such as in President Eisenhower's campaign slogan, "I like Ike."⁷² "[T]he catchiest slogan in American political history"⁷³ is so catchy due to the sounds of the speech act involved.⁷⁴ The three words are single syllables with the same vowel sound: "/ay layk ayk/."⁷⁵ Moreover, "like" and "Ike" rhyme, and the first and third words form an alliteration.⁷⁶ The slogan packs several pleasing sounds into one short speech act, and, as Jakobson concludes, the "poetic function of this electional catch phrase reinforces its impressiveness and efficacy."⁷⁷

Third, when the addressee factor is emphasized, the speech act has a *conative* function.⁷⁸ The purest form of this type of speech act is the imperative, or command, because the speaker directs her speech toward the audience to compel a particular response.⁷⁹ Thus, in the example "shut the door," the speech act is directed toward the addressee because the addresser wants the addressee to respond accordingly (by closing the door).

Fourth, when the speech act is oriented toward the context factor, it performs the *referential* function.⁸⁰ Jakobson notes that this is the primary function of most speech acts because it is through this function that the addresser conveys information.⁸¹ Ironically, however, he does not explain it fully. In interpreting his work, others have described the referential function as occurring when the purpose of the message is "to convey information unambiguously"⁸² or "talking about something beyond language itself."⁸³ Thus, although this function is an important part of almost any speech act, the referential function might be most dominant when a speaker specifically identifies to what he or she is referring ("It's the house on the

poetry." (emphasis added)). One of the points of emphasis in Jakobson's closing statement is the importance of considering the poetic function as part of language that can extend beyond the realm of poetry. *See id.* at 356 ("Any attempt to reduce the sphere of poetic function to poetry or to confine poetry to poetic function would be a delusive oversimplification.").

72. *Id.* at 357; *see also generally* JOHN ROBERT GREENE, *I LIKE IKE: THE PRESIDENTIAL ELECTION OF 1952*, at 92–93 (2017) (discussing the 1952 election of President Eisenhower, including the impact of his "I like Ike" campaign slogan).

73. GREENE, *supra* note 72, at 92.

74. *See* Jakobson, *supra* note 7, at 357.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 355.

79. *See id.* This conceptualization of the conative speech act is similar to Austin's and Searle's perlocutionary act, which focuses on the effect the speech act will have upon the world. *See* AUSTIN, *supra* note 4, at 101. Jakobson also adopts Austin's reason for distinguishing performatives from constatives, but he applies it in distinguishing imperatives from declarations. *Compare id.* at 2–3, 6–7 (describing constatives as "true or false statements" and performatives as actions), with Jakobson, *supra* note 7, at 355 (using a similar true-or-false dichotomy in distinguishing declarations from imperatives).

80. Jakobson, *supra* note 7, at 353.

81. *Id.* (calling the referential function "the leading task of numerous messages").

82. MARCEL DANESI, *Verbal Communication*, in 1 *DICTIONARY OF MEDIA AND COMMUNICATIONS* (2008); *see also* Gorrée, *supra* note 9, at 282 n.21 (defining the referential function as "emphasizing the cognitive, informational aspect of language").

83. Brian G. Skotko et al., *Language and the Medial Temporal Lobe: Evidence from H.M.'s Spontaneous Discourse*, 53 *J. MEMORY & LANGUAGE* 397, 399 (2005).

left.”)—in other words, when the addresser uses this function to talk about the external world.

The fifth function of speech occurs when the speech act focuses on the code factor, which is the *metalingual* function.⁸⁴ In this function, the addresser and addressee are able to “check up” on whether they are using the same code,⁸⁵ or system of language.⁸⁶ The prototypical speech act with a metalingual function is a definition:⁸⁷ the word “fructify” means “to bear fruit.”⁸⁸ This function is an essential part of language acquisition because the speech act clarifies the meaning of something within the addresser’s and addressee’s code.⁸⁹ For example, parents of young children frequently use this function in response to questions like, “What does ‘x’ mean?” or “What is that?”⁹⁰

Finally, when the speech act emphasizes the contact factor, it has a *phatic* function.⁹¹ This includes “messages primarily serving to establish, to prolong, or to discontinue communication, to check whether the channel works . . . , to attract the attention of the interlocutor or to confirm his continued attention.”⁹² These are speech acts like, “Hey! Are you listening?”—to check whether the channel of communication is functioning—or “Alright then, goodbye”—to close the channel and end communication.⁹³

B. JAKOBSON’S MODEL RESPONDS TO CRITICISM OF SPEECH ACT THEORY

As introduced in section I.A, the primary criticism of Austin’s and Searle’s speech act theories is that they focus only on the speaker’s intent.⁹⁴ By taking into account multiple sources of meaning, Jakobson’s model responds to such criticism.

The limitations of framing speech acts as primarily about the speaker’s intent can be seen in the following example: two strangers are standing in line and one asks the other, “How long have you been standing here?” Perhaps the speaker’s intent was simply to gather this information so he knows the expected wait time. Under Austin’s and Searle’s analysis, then, the relevant illocutionary act would

84. Jakobson, *supra* note 7, at 356.

85. *Id.*

86. *See generally* Myers-Scotton, *supra* note 62, at 3.

87. *See* Jakobson, *supra* note 7, at 356.

88. MERRIAM-WEBSTER, *Word of the Day: December 15, 2017*, <https://www.merriam-webster.com/word-of-the-day/fructify/2017-12-15> [<https://perma.cc/MP7Y-EAJH>].

89. *See* Jakobson, *supra* note 7, at 356 (“Any process of language learning, in particular child acquisition of the mother tongue, makes wide use of such metalingual operations.”).

90. *See id.*

91. *Id.* at 355.

92. *Id.*

93. *See id.* at 355–56.

94. *See, e.g.,* Mary Louise Pratt, *Ideology and Speech-Act Theory*, 7 *POETICS TODAY* 59, 62 (1986) (describing scholars’ critique of Austin’s notion that “[t]he content of linguistic interaction is determined by the intentions . . . individuals form towards each other It is all a matter, as Austin loved to say, of a man’s (sic) word being his bond”); Tsohatzidis, *supra* note 38, at 11–12 (criticizing Searle for focusing only on the speaker’s “internal states . . . as constitutive of the meaningful character of his linguistic accomplishments”).

be asking a question because that is what the speaker intended.⁹⁵ However, the addressee may have misunderstood the speaker's intent: she may have thought the question was meant to initiate conversation. In this case, the addresser and addressee would have different understandings of the illocutionary act, yet Austin and Searle account only for the speaker's.⁹⁶

By contrast, Jakobson's model can account for the multifaceted and dynamic nature of language. Crucial to his model is that each of the six factors and six functions exists in every speech act.⁹⁷ Even if one factor and its correlated function are dominant in the speech act, the other factors and functions are still underlying parts of the speech act that color the interaction.⁹⁸ Dr. Edna Andrews, a linguist who uses Jakobson's speech act model in her work, describes the advantages of the model as such:

Jakobson models the speech event as a unity of six factors and functions, all of which must be present in any instantiation of language. . . . But clearly, speech acts are distinctly bounded and often idiosyncratic events with high levels of variability. Jakobson represents this variability by defining the model's inherent hierarchy of six factors and six functions, which are rehierarchyed in every individual speech act.⁹⁹

Thus, in the speech act "how long have you been standing here?," one focus is on the context—the referential function—to gather information. However, a secondary function is the phatic function: to establish contact by asking the other person a question that opens up a channel of communication. Moreover, the addressee is an inherent part of the speech act; even if not the dominant factor in that act, the addressee is still part of the model and its attempt to understand the speech.¹⁰⁰ Rather than focusing singularly upon the speaker's intent, the model brings in the addressee and her understanding as well.

95. See Searle, *supra* note 31, at 11 & n.2. Searle classifies questions more generally into the class called "directives" because questions are attempts by the speaker to get the hearer to answer via a speech act. *Id.*

96. See, e.g., AUSTIN, *supra* note 4, at 98–99 (discussing an illocutionary act—the "performance of an act in saying something"—by strict reference to the speaker's intent on the premise that "there are very numerous functions of or ways in which we use speech, and it makes a great difference to our act in some sense . . . in which way and which *sense* we were on this occasion 'using' it," such as "whether we were advising, or merely suggesting, or actually ordering").

97. Jakobson, *supra* note 7, at 353 (describing the six factors—addresser, message, addressee, context, code, and contact—as "inalienably involved in verbal communication"); ANDREWS, *supra* note 59, at 19 ("Jakobson's model requires that all six factors and six functions be present in any speech act.").

98. See Jakobson, *supra* note 7, at 353 ("But even though . . . an orientation toward the CONTEXT . . . is the leading task of numerous messages, the accessory participation of the other functions in such messages must be taken into account by the observant linguist.").

99. ANDREWS, *supra* note 59, at 18–19.

100. See *supra* note 97.

By contrast, Austin's and Searle's theories would require categorizing this speech act into one type of illocutionary act or another.¹⁰¹ As a result, their work narrows the ways we might understand a speech act. If the purpose of speech act theory is to understand language as action that "perform[s] things in the social world and bring[s] about different kinds of effects,"¹⁰² then Jakobson's model does a better job of accounting for that.¹⁰³ By framing his theory as a model of communication in which six factors and functions interact and negotiate with each other,¹⁰⁴ Jakobson is more faithful to the true nature of language. Thus, his model is a better tool for understanding the contractual speech acts of "I offer" and "I accept."

III. CONTRACTUAL CONVERSATIONS: CHALLENGES OF APPLYING SPEECH ACT THEORY TO CONTRACTS

Typically, speech act analysis is applied to a particular utterance or text.¹⁰⁵ Applying speech act theory to contracts, however, presents some challenges because contract formation is a unique form of conversation or writing. Previous

101. Neither Austin nor Searle seem to recognize the possibility that a speech act might belong to multiple categories of illocutionary acts. *See, e.g.,* Searle, *supra* note 31, at 10–13 (introducing categories of illocutionary acts without appearing to allow for overlap). Somewhat relatedly, Shawn Bayern argues that contract law should do away entirely with forcing contract formation into the categories of offer and acceptance. Shawn J. Bayern, *Offer and Acceptance in Modern Contract Law: A Needless Concept*, 103 CAL. L. REV. 67, 100–01 (2015). He argues that "[c]ourts should simply ask what parties reasonably think their obligations are, rather than forcing their interactions into what may not be a natural formality." *Id.* at 101. Jakobson's model would also fit better with this more flexible view of contract formation.

102. Yovel, *supra* note 16, at 937 (emphasis omitted).

103. *See* Jakobson, *supra* note 7, at 357 (illustrating the various interactions and overlaps of the six functions of speech acts).

104. *See id.* at 353, 357. Jakobson's flexible theory also helps to respond to another critique of speech act theory. Gregory Klass specifically criticizes Tiersma's use of speech act theory to analyze whether an offer has been made by reference to a prototypical "I hereby offer you that *p*." *See* Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1747 & n.60 (2008) (citing Tiersma, *supra* note 2, at 198–206). Klass takes issue with the notion that contract law requires a particular speech act for a contract to occur, noting how contract law has evolved to no longer require such formal acts to gain legal effect. *See id.* at 1744 & n.53 (describing the movement away from, for example, the requirement of seal for agreements to be legally enforceable (citing A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 22–25 (1987))). He argues that contract law does not require contracts to be phrased in a particular, formalized manner to have legal effect. *See id.* at 1748 (noting that contracts can be accepted via performance). Although Tiersma tried to account for this with his "equivalence test," Tiersma, *supra* note 2, at 201 (emphasis omitted), Austin's and Searle's focus on categorization of language ultimately makes their theory inflexible and therefore more formal. By contrast, Jakobson's flexible model of language can better account for this movement away from formal contractual requirements because it describes how language occurs rather than prescribing when an utterance qualifies as a particular illocutionary act.

105. *See, e.g.,* Sunhee Kim Gertz, *Fame and Politics: The Persuasive Poetics of Leadership*, 2011 SEMIOTICA 189, 193–95 (analyzing particular lines of a 2008 speech by President Obama using the Jakobsonian speech act model); H.G. Widdowson, *Language Creativity and the Poetic Function. A Response to Swann and Maybin* (2007), 29 APPLIED LINGUISTICS 503, 504 (2008) (analyzing a particular line of a poem using the Jakobsonian speech act model).

legal scholarship mostly ignores this difference.¹⁰⁶ This may be a result of the focus on Austin's and Searle's work, which centers on the words used in the contract without their surrounding context.¹⁰⁷ By contrast, Jakobson's model—which always includes all six factors and functions¹⁰⁸—forces us to consider all the component parts of the contractual speech act, thereby illuminating issues that may arise in contract formation. Thus, before applying the Jakobsonian speech act model to the process of offer and acceptance, this Note considers such challenges, including the questions of how to determine the number of speech acts in a given contract, in section III.A, and the identity of the speaker, in section III.B.

A. HOW MANY SPEECH ACTS ARE IN A CONTRACT?

In theory, a contract could take place without language at all: a person picks up an apple in a market stall and holds it up, and the apple seller raises a finger to indicate he will exchange the apple for one dollar.¹⁰⁹ This exchange of promises—a promise to buy the apple and a promise to sell it for one dollar—creates a contractual obligation,¹¹⁰ albeit an informal one. Speech act theory is probably not of much use for a completely silent contract.

It is also well established that a contract can arise through a single speech act: the offeror makes a verbal offer, and the offeree accepts through performance, which does not require a speech act.¹¹¹ Similarly—although, by default, silence or inaction does not constitute acceptance—courts will uphold silent acceptance in certain circumstances, such as a longstanding relationship of prior dealings.¹¹² In such situations where there is a single use of language, it is easy to determine the relevant contractual speech act to analyze.

106. The sole partial exception to this is D.L. Gorré, who notes that “[e]ach contractual speech-act contains really two prior speech-acts in which speaker and hearer assume alternating roles of promisor and promisee.” Gorré, *supra* note 9, at 282. In the following sections, I argue that this is not limited to *two* prior speech acts, but rather every speech act leading up to and including the contract could be analyzed under Jakobson's speech act model. The more typical formulation of the contractual speech act is as one utterance, such as Tiersma's “I hereby offer you that *p*.” Tiersma, *supra* note 2, at 201.

107. For example, in classifying illocutionary acts, Searle focuses on the verbs used in speech acts as determining their category completely divorced from any consideration of the speaker's identity or the context. See Searle, *supra* note 31, at 10–11 (“Verbs denoting members of [the directive] class are ask, order, command, request, beg, plead, pray, entreat, and also invite, permit, and advise.” (footnote omitted)).

108. See Jakobson, *supra* note 7, at 353, 357.

109. Cf. 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.1 (Joseph M. Perillo ed., rev. ed. 1993) (defining the purpose of contract law as “realization of reasonable expectations that have been induced by the making of a promise”). Thus, assuming it is reasonable to have an expectation arising from the exchange of silent promises, then a contract could be created without language.

110. See RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. Mar. 2018 update) (defining a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty”).

111. See *id.* at § 53 (“An offer can be accepted by the rendering of a performance [but] only if the offer invites such an acceptance.”).

112. See, e.g., *Ammons v. Wilson & Co.*, 170 So. 227, 228–29 (Miss. 1936) (holding that the jury could find silent acceptance reasonable for two parties that had worked together for six or eight months “because of previous dealings”).

However, when a written contract is the result of months of negotiation, there are likely thousands of speech acts related to the final writing.¹¹³ In these situations, it may be difficult to determine the exact speech act to be analyzed. Contract law stipulates that the principal speech act is the contractual text itself: the written language that represents the supposed immortalization of the final agreement resulting from negotiations.¹¹⁴ To be clear, although this speech act is written rather than oral, it can still be analyzed using speech act principles because it uses language to communicate the agreement to the reader.¹¹⁵

Whether the prior negotiation speech acts are legally part of the contract, in turn, becomes a question of integration.¹¹⁶ When a written contract is integrated, it means the parties intended for that writing to constitute the definitive evidence of the agreement.¹¹⁷ If a court determines a contract is integrated, then the prior speech acts leading up to the final written contract are irrelevant; a finding of integration is equivalent to a finding that the parties agreed to disallow this extrinsic evidence.¹¹⁸ In determining integration, a merger clause—which states that the written agreement is meant to constitute the entire agreement¹¹⁹—is strong but not determinative evidence of integration, as is the clarity and detail of the writing.¹²⁰

113. This even includes the “Track Changes” or “red-line” edits that parties make to the document. See Paula Schaefer, *Transactional Lawyers and Inadvertent Disclosure*, 13 *TRANSACTIONS: TENN. J. BUS. L.* 107, 115–16 (2011) (positioning “comments and track changes” on documents as a method of communication between a client and lawyer).

114. See ROY J. LEWICKI ET AL., *NEGOTIATION* 199 (2d ed. 1994) (describing the end stage of negotiations as “reducing the agreement to written form or *writing the contract*”).

115. Jakobson illustrates this, for example, by analyzing written text—specifically, poetry—rather than oral speech. See Jakobson, *supra* note 7, at 360.

116. A distinction arises here, of course, between linguistics and law regarding whether prior speech acts are “part” of the contract. Linguistically, the final writing would exist in reference to the negotiations leading up to the contract. However, the law has developed rules that prioritize certain methods of determining meaning over others, such as excluding evidence of prior negotiations in favor of the final written agreement. See Gregory Klass, *Interpretation and Construction in Contract Law 27* (2018) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913228 (describing how legal rules “establish[] which type of meaning is legally salient”).

117. 6 ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 25.7 (Joseph M. Perillo ed., rev. ed. 1951) (“When we read an elaborate agreement that is the product of extensive negotiations between experienced parties represented by competent counsel, we may reasonably deduce that the parties intended the final writing to supersede what came before it.”).

118. *Id.* (framing integration and the related parol evidence rule as parties agreeing that “a later writing should supersede all earlier agreements and negotiations” (citing *id.* § 25.3)).

119. See *id.* § 25.8(A) (providing as an example merger clause: “This Agreement constitutes the entire Agreement between the parties pertaining to the subject matter contained herein, and supersedes all prior agreements, representations and understandings of the parties” (citing *Nelson v. Elway*, 908 P.2d 102, 107 n.1 (Colo. 1995)).

120. See *id.* § 25.7 (quoting 2 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 7.3, at 232–33 (3d ed. 2004) in which Farnsworth describes factors for determining integration of contracts—such as length, detail, formality, and timing—and adding to those factors “whether or not the contract is a form” and the carefulness with which the parties considered the merger clause, noting that even the presence of a merger clause should not preclude the court from “look[ing] at all factors to decide whether the merger clause should be treated as binding”).

However, if a contract is not integrated or if there is ambiguity in the language, the court may permit introduction of evidence of the prior negotiations to illuminate the meaning of a specific portion of the written contract.¹²¹ In that case, the relevant speech acts—at least for legal purposes—would include not only the writing itself, but also the oral and written speech acts preceding the contract.¹²² It is in these situations that speech act theory may be especially useful, because the written contract is positioned as existing in “conversation” with all of the discussions leading up to it, which is more akin to the typical speech act analysis that is often applied to conversations.¹²³

In sum, a contract’s primary speech act is the evidence of the agreement. If the agreement is oral, then the relevant speech acts are those creating offer and acceptance. If the agreement is written, then that writing itself is the relevant speech act. And finally, if the court considers evidence of prior negotiations, each of those oral or written speech acts become part of the contractual speech act analysis as well.

B. WHO IS SPEAKING? THE ADDRESSER AND ADDRESSEE IN CONTRACT FORMATION

Another aspect of speech act theory that is less clear as applied to contracts are the identities of the addresser and addressee. With oral contracts, it is often clear who the addresser and addressee are. For example, the offeror makes an oral offer to the offeree: “I’ll sell you my book for five dollars.” In this speech act, the offeror is the addresser because he or she is speaking, and the offeree is the addressee. The reverse is true in oral acceptance: the offeree becomes the addresser when he or she orally accepts—“I accept”—and the offeror is the addressee.

With more informal written contracts, it may still be easy to determine who the addresser and addressee are, particularly if one party writes the contract and the other signs it. For example, in *Lucy v. Zehmer*, Mr. Zehmer offered to sell his farm by writing, “We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for \$50,000.00, title satisfactory to buyer.”¹²⁴ Thus, Mr. Zehmer, as the writer and offeror, is the addresser because he selected the words of the written speech act. Mr. and Mrs. Lucy signed the contract,¹²⁵ making them the addressees: they each read and interpreted the words of the contract as an addressee would hear and interpret the words of an oral speech act.

However, more formal business contracts are more difficult to analyze as speech acts with particular addressers or addressees. This is because, first, formal

121. This depends on the court’s approach to parol evidence. Compare *id.* § 25.27 (describing the California approach), with *id.* § 25.32 (describing the New York approach).

122. See, e.g., *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 643, 646 (Cal. 1968) (finding that the lower court should have considered extrinsic evidence to understand the language in the contract).

123. For general examples of speech act analysis applied to conversations, see PHYLLIS KABURISE, *SPEECH ACT THEORY AND COMMUNICATION: A UNIVEN STUDY* 8 (2011), applying Austin’s and Searle’s theory, and Skotko et al., *supra* note 83, at 399, applying the Jakobsonian model.

124. 84 S.E.2d 516, 517 (Va. 1954).

125. *Id.* at 516.

business contracts are more likely to be the result of multiple rounds of negotiation, as analyzed above, meaning there is a multitude of speech acts leading to the final written contractual speech act.¹²⁶

Second, the parties to the contract—the addressers and addressees—are often business entities, made up of groups of people rather than a single person with a single voice.¹²⁷ The entity can only enter contracts via the speech acts of its constituents,¹²⁸ which can create issues. For example, a recent Sixth Circuit case dealt with an oral contract between two people, one of whom was a constituent of several different corporations.¹²⁹ The court had to decide which corporation he acted for when he made the agreement—and thus, which company was the addresser in the speech act—because he did not explicitly identify which company he was representing in that moment.¹³⁰ The Sixth Circuit identified communication norms as the source of confusion: “[e]xcept in formal writing, two individuals rarely refer to each other in the names of their businesses. Two individuals verbally communicating use pronouns like ‘you,’ ‘your,’ or ‘I,’ instead of referring to themselves and the other person as ‘it’—the proper pronoun referring to a company entity.”¹³¹

Third, the people who are speaking or writing may not be the actual parties to the contract. Because attorneys often negotiate these types of contracts on behalf of their clients, it is often the attorneys’ words that are used in the negotiating speech acts as well as the written contract.¹³² Of course, these attorneys act as the clients’ agents, meaning that they step into the shoes of the clients and act on their behalf.¹³³ However, speech acts are affected by a person’s particular experience

126. Cf. Claire A. Hill, *A Comment on Language and Norms in Complex Business Contracting*, 77 CHI.-KENT L. REV. 29, 34 (2001) (defining complex business contracts in part as “heavily negotiated contracts between two businesses”).

127. Cf. *id.*

128. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.13(a) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).

129. See *Innotext, Inc. v. Petra’Lex USA Inc.*, 694 F.3d 581, 584–85 (6th Cir. 2012).

130. See *id.* at 589.

131. *Id.* at 591 (citing *Barber v. SMH (US), Inc.*, 509 N.W.2d 791, 794 (Mich. Ct. App. 1993) (“In analyzing oral statements for contractual implications, a court must determine the meaning that reasonable persons might have attached to the language.”)).

132. See Lori D. Johnson, *The Ethics of Non-Traditional Contract Drafting*, 84 U. CIN. L. REV. 595, 596 (2016) (“The modern transactional attorney’s daily practice consists of structuring, counseling, advising, negotiating and drafting the terms of clients’ contracts, down to the smallest detail. In essence, using language to bring to life the often complex and delicate arrangements between parties entering into business relationships.”). Moreover, complicating the situation, groups of lawyers from a law firm may work on a contract rather than a single attorney, much like how the parties are often business entities rather than individuals. Finally, in some cases humans may not even be the addressers or addressees at all, as envisioned by the field of computer-automated contract negotiation. See James E. Hanson & Zoran Milosevic, *Conversation-Oriented Protocols for Contract Negotiations*, SEVENTH IEEE INTERNATIONAL ENTERPRISE DISTRIBUTED OBJECT COMPUTING CONFERENCE (EDOC’03) 1, 1 (2003) (describing “increasing levels of automation for activities such as: contract negotiation, . . . enforcement, and contract analytics and re-negotiations”).

133. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’)

with language, so it matters who is speaking.¹³⁴ We each belong to particular speech communities—“regionally or socially definable human group[s] which can be identified by the use of a shared spoken language or language variety”¹³⁵—that may overlap but nonetheless affect how each of us uses and understands language. For example, lawyers have a speech community that may not always overlap with their business clients.¹³⁶ Although the clients—or representatives of the client entities—approve the final version of the contract, they may not have read it carefully,¹³⁷ and even still, the process of approval certainly differs from the process of actually drafting the contract.¹³⁸

Fourth, because many complex business contracts are long-term and stay in place for many years,¹³⁹ the original attorneys who negotiated the contract and the client constituents who approved it may no longer be involved with the parties. An example from my own limited experience occurred when I was assigned to analyze an easement agreement written in the 1980s. The officers of the

that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

134. See Johnson, *supra* note 132, at 596 (“[E]very time a transactional lawyer makes a language choice, they are engaging a form of client advocacy.”).

135. *Speech Community*, LANGUAGE LIBRARY: A DICTIONARY OF LINGUISTICS AND PHONETICS 446 (David Crystal ed., 6th ed. 2008) (emphasis omitted).

136. See Richard A. Kaplan, *Toward Better Communications Between Executives and Lawyers*, 24 UTAH B. J. 18, 18 (2011) (“[T]he languages lawyers and executives speak are somewhat different.”). This goes both ways: an attorney must be careful to clarify words that are not a typical part of his or her speech community. See, e.g., *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432, 435 (S.D.N.Y. 2004) (finding that counsel misunderstood email “archive” to mean only backup tape rather than “a separate on-line computer file”). A quote from this case is especially relevant: “[w]hen communication between counsel and client breaks down, conversation becomes ‘just crossfire,’ and there are usually casualties.” *Id.* at 424 (footnote omitted) (quoting PHILIP ROTH, PORTNOY’S COMPLAINT (1967)).

137. See Adam Petravicium, *Incorporating the Appropriate Balance of Licensee and Licensor Protection in an IP License Agreement*, ASPATORE, 2015 WL 1263727, at *3 (Feb. 2015) (noting from experience that “[a] client who is unfamiliar with the nuances of contract drafting may not read the contract language critically, and may approve any language that is not obviously inconsistent with his or her intent”); Wilkinson-Ryan & Hoffman, *supra* note 1, at 1278 (“[N]ot only are people not negotiating form contracts, they are not even reading them.”); Fred C. Zacharias, *The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?* 49 WM. & MARY L. REV. 569, 602 (2007) (noting that unsophisticated clients may not read long retainer documents).

138. For an example of how participating in the drafting processes alters the contractual experience, see Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUDS. 67, 87–88 (2012). Eigen created an experiment in which subjects were divided into groups. *Id.* at 74. Some groups had some control over the drafting of the contract language, whereas others did not. *Id.* at 73–75. The study found that participating in the drafting of the contract had an impact on the participants’ “postagreement behavior”; for example, “[w]hen subjects saw and actively selected the term obligating them to perform the undesirable task, they were significantly more likely to perform that task than when they had no such choice and when there was no contract at all.” *Id.* at 87.

139. See, e.g., *Oglebay Norton Co. v. Armco, Inc.*, 556 N.E.2d 515, 516 (Ohio 1990) (describing a contract in place between two companies over twenty-three years that was amended four times); Jeffrey M. Lipshaw, *The Bewitchment of Intelligence: Language and Ex Post Illusions of Intention*, 78 TEMP. L. REV. 99, 101 (2005) (providing examples of long-term contracts, including: long-term supply agreements; shareholders’ agreements; LLC operating agreements; and acquisition agreements that take months to negotiate and then govern the relationship for years).

company who were around when the agreement was signed had all moved on, as had the attorneys in the firm who had actually drafted the agreement. My assignment was to locate any language that might help resolve a particular issue. Essentially, I was trying to interpret a speech act without the assistance of any single addresser or addressee that was part of the original speech act.¹⁴⁰

As an aid for understanding contracts, Jakobson's model may be most useful for more informal oral or written contracts, like that in *Lucy*,¹⁴¹ which are far more common than complex business agreements.¹⁴² More thought and emphasis are given to the particular words in a formal contractual speech act to a degree not present in informal contracts.¹⁴³ Thus, the more formal a contract, the more metalingual it is.¹⁴⁴ For example, more formal contracts include definition sections, which, again, is the prototypical example of the metalingual function of language.¹⁴⁵ This is not to say that speech act theory is not useful for analyzing these types of contracts; however, the more similar a contract is to a typical conversation that is not so meticulously thought out, the more helpful a model of communication may be for understanding it.

In sum, there are several complications to understanding complex business contracts as speech acts. First, the final contractual speech act is often the result of potentially months of negotiations, each round of negotiation itself a set of antecedent speech acts. Second, it is far more difficult to assign the role of addresser or addressee of the final written speech act to any particular person given that (1) the parties to the contract are often business entities, (2) attorneys often perform the speech acts on behalf of their clients, and (3) the speakers involved in the original speech act may no longer be part of the company or law firm. The Jakobsonian model does not necessarily provide a solution to these complications, but rather helps to identify them. Thinking about a contract as a Jakobsonian speech act

140. Scholars have made a similar argument regarding boilerplate terms. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1131–32 (2006). In their article, Choi and Gulati discuss the problems with using boilerplate terms outside of the language's original context, stating that “[b]oilerplate terms, absent guidance from the initial drafters of the terms . . . inevitably will become less clear over time.” *Id.* at 1131. I argue that this same reasoning applies to an attempt to return to the contract as a whole without the guidance of the initial drafters or client representatives.

141. *Lucy v. Zehmer*, 84 S.E.2d 516, 517 (Va. 1954).

142. Cf. Wilkinson-Ryan & Hoffman, *supra* note 1, at 1270 (“[T]he vast majority of contracts are signed without the advice of counsel.”).

143. See Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CAL. L. REV. 51, 95 (2013) (describing how sophisticated parties use “teams of lawyers” to “carefully parse each word of the written agreement”). But see Lipshaw, *supra* note 139, at 124 (“In the arena of complex deals . . . the practical reality is that gaps and ambiguities also never disappear. Despite the presumption given to such agreements, that they have been tightly negotiated by highly sophisticated and rational lawyers, the philosophy of language teaches us that we begin with a default state of language as communicative [i.e. emotive] and not cognitive [i.e. metalingual].”).

144. Cf. Jakobson, *supra* note 7, at 356 (defining the metalingual function as “focused on the code” (emphasis omitted)).

145. See, e.g., M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. ASS'N LEGAL WRITING DIRECTORS 79, 86 (2008) (“Most contracts contain . . . definitions . . .”).

breaks it into its six component parts;¹⁴⁶ this process, in turn, forces one to stop and think more carefully about the processes of contract formation—for example, determining who is actually speaking in the contract. Recognizing these complications helps us understand where issues in contract formation might arise.

IV. CONTRACTS AS JAKOBSONIAN SPEECH ACTS: A MODEL FOR OFFER AND ACCEPTANCE

Jakobson's model helps us think more critically about the language aspects of contract formation. Yet it not only helps illuminate the challenges inherent in thinking about contracts as speech acts—it also provides a tool for analyzing the most critical part of contract formation: the processes of offer and acceptance.

One of the most common aspects of Austin's and Searle's work that legal scholars have imported into contract law is the idea that speech acts create a certain state of the world.¹⁴⁷ This goes back to speech acts like "I name this ship the *Queen Elizabeth*," which performs the work of naming a ship.¹⁴⁸ However, this is a deficient way of understanding how language works. It is not merely the words that create this new reality: not just anyone can go around officially naming ships.¹⁴⁹ It matters who the addresser of the speech act is: is this someone who has the authority to name a ship? The context also matters: is this a ship that has already been named?

This same problem applies to contract formation. It is not just the words themselves that create offer or acceptance.¹⁵⁰ This Part demonstrates, first, that although prior uses of speech act theory in contract law are useful steps toward understanding offer and acceptance, Jakobson's model better supports the type of contextual analysis—an analysis that goes beyond merely the words of the contract and examines its surrounding circumstances and context¹⁵¹—that courts now typically undertake. Second, moreover, Jakobson's model can be an effective tool for judges to ensure they are performing contextual analysis. For

146. See Jakobson, *supra* note 7, at 353, 357.

147. See, e.g., Hill, *supra* note 126, at 30 ("[E]ntry into the contract has created a state of the world that previously did not exist, namely the attachment of certain legal consequences to certain acts (or failures to act)."); Tiersma, *supra* note 2, at 189 ("[O]ffer and acceptance are . . . acts that commit the speaker to a particular course of conduct.").

148. See AUSTIN, *supra* note 4, at 5–6.

149. In the United States, the Secretary of the Navy holds this power. See DEP'T OF THE NAVY, A REPORT ON POLICIES AND PRACTICES OF THE U.S. NAVY FOR NAMING THE VESSELS OF THE NAVY 2 (2011), <https://www.history.navy.mil/content/dam/nhnc/browse-by-topic/heritage/pdf/Shipnamingreport.pdf> [<https://perma.cc/TE3N-ZXJD>] (stating that authority is derived from Title 10 of U.S. Code, which empowers the Secretary to "organize, train, and equip" the Navy).

150. Although much of the subsequent analysis examines offer rather than acceptance, the two are parallel. Jakobson's model can be equally useful for determining when it is reasonable to interpret a speech act as acceptance. The analysis that applies to offer would also apply to acceptance because both principles rely on communication and the reasonable person standard.

151. See Ronald J. Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 27 (2014) ("Contextualist interpretation . . . directs courts to determine whether extrinsic evidence of the circumstances surrounding the contract or its performance improves understanding of what parties intended regardless of the contractual text.").

example, applying his model to the classic case *Embry* changes the outcome in favor of a more reasonable understanding of the conversation at issue.

A. ADVANTAGES OF JAKOBSON'S MODEL

When the addresser makes a speech act that a reasonable person would interpret as an offer, courts will uphold the contract as long as there is also acceptance.¹⁵² The rationale for doing so relates to the purpose of contract law, which Corbin's treatise identifies as "the realization of reasonable expectations that have been induced by the making of a promise."¹⁵³ Thus, if a speech act sounds like an offer—and a reasonable person would interpret it as such—then courts will uphold the existence of the offer, even if the offeror later claims it was not his or her intent.¹⁵⁴ This is meant to preserve reasonable expectations surrounding speech acts that reasonably sound like offers.¹⁵⁵

Tiersma's use of Austin's and Searle's work is a useful step forward in understanding speech acts reasonably interpreted as an offer because speech act theory focuses on how the offeror's words affect the world.¹⁵⁶ Tiersma argues that if the offer is equivalent to "I hereby offer you that *p*"—his "equivalence test"—the speech act constitutes a valid offer.¹⁵⁷ For example, as applied to the classic case *Lucy v. Zehmer*, Tiersma says that the speech act "We hereby agree to sell to W.O. Lucy the Ferguson Farm complete for \$50,000.00, title satisfactory to buyer" is equivalent to "I hereby offer you that *p*," which means the speech act created an offer that the court should uphold¹⁵⁸—which it did.¹⁵⁹ It does not matter that the offeror later claims the offer was all a joke because his speech created a reasonable expectation of an offer for the offeree.¹⁶⁰ Speech act theory, therefore, helps us understand the effect language can have on the world, which in turn supports the purposes behind contract law—to uphold the reasonable expectations induced by a speech act that sounds like an offer.

By contrast, when a party says something he or she does not intend to be an offer—and a reasonable person would *not* interpret it as an offer—there is no

152. See, e.g., *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954) (holding an offer made purportedly in jest to be valid after the offeree accepted because "[i]f [the offeror's] words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind" (citation omitted)).

153. 1 CORBIN, *supra* note 109, at § 1.1.

154. See, e.g., *Lucy*, 84 S.E.2d at 522.

155. See 1 CORBIN, *supra* note 109, at § 1.1.

156. See, e.g., Yovel, *supra* note 16, at 939 (describing speech act theory as the idea that "language is primarily about action—speech and texts are acts, and they perform things in the social world and bring about different kinds of effects" (emphasis omitted)).

157. Tiersma, *supra* note 2, at 201.

158. See *id.* at 228 (citing *Lucy*, 84 S.E.2d at 516 for proposition that "[a] practical joke constitutes an offer where the other is not aware of the joker's intent").

159. *Lucy*, 84 S.E.2d at 522.

160. See *id.* ("[A] person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement." (citations omitted)).

contract.¹⁶¹ In other words, the court will find the party did not make a true offer.¹⁶² This comports with contract law rationale because the alleged promise did not induce reasonable expectations, so it is not necessary to impose obligations.¹⁶³

Although Tiersma's use of Austin's and Searle's speech act theories is useful in explaining speech acts that a reasonable person would interpret as offers, like in *Lucy*, Austin and Searle are inadequate for explaining this second situation: speech acts that a reasonable person would *not* interpret as offers. This section will show first why Tiersma's equivalence test breaks down for unreasonable offers, and second how Jakobson's model accounts for unreasonable offers through a more contextualist analysis.

1. Tiersma's Equivalence Test Breaks Down

Because Tiersma's use of speech act theory is based upon Austin's and Searle's notion that words with particular illocutionary forces create particular effects in the world, his equivalence test breaks down when the speech act sounds like "I hereby offer you that *p*" but a speaker would not reasonably interpret the speech act that way.

Leonard v. Pepsico, Inc. is an example of an unreasonable interpretation of a speech act.¹⁶⁴ It involves a television commercial for "Pepsi Points": a promotional campaign encouraging viewers to collect points from specially-marked packages of Pepsi that could be redeemed for merchandise in a catalogue.¹⁶⁵ The commercial shows a teen getting ready for school by adorning himself with various items that could be purchased with Pepsi Points.¹⁶⁶ As he dresses, words scroll across the screen indicating each item's cost in Pepsi Points: "T-SHIRT 75 PEPSI POINTS," "LEATHER JACKET 1450 PEPSI POINTS," and "SHADES 175 PEPSI POINTS."¹⁶⁷ The commercial then shows a Harrier jet—a jet fighter aircraft¹⁶⁸—arriving at a school, followed by the words "HARRIER FIGHTER 7,000,000 PEPSI POINTS" scrolling across the screen as the teen exits the jet.¹⁶⁹

Taken literally, this might seem equivalent to Pepsi saying, "I hereby offer you that I will sell you a Harrier fighter jet for 7,000,000 Pepsi Points," which the plaintiff attempted to accept and compel performance.¹⁷⁰ However, the court concludes—for multiple reasons¹⁷¹—that no reasonable person would perceive

161. See, e.g., *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 127 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

162. See *id.*

163. See 1 CORBIN, *supra* note 109, at § 1.1.

164. 88 F. Supp. 2d at 132.

165. *Id.* at 118.

166. *Id.*

167. *Id.*

168. *Id.* at 118–19.

169. *Id.* at 119.

170. See *id.*

171. First, "[a] reasonable viewer would understand such advertisements as mere puffery." *Id.* at 128 (citation omitted). Second, "the callow youth featured in the commercial is a highly improbable pilot,

this to be a real offer.¹⁷² Thus, no contract was formed, and the court would not enforce specific performance.¹⁷³

This case demonstrates the problems with arguing that speech itself creates an offer without considering other aspects of the speech act. There are situations when even a literal statement of “I hereby offer you that *p*” would not constitute an offer: for example, if an actor in a play says “I hereby offer you that I will buy your horse for five hundred dollars” to another actor, no court would actually uphold the formation of a contract between the actor–addresser and the actor–addressee.

To be fair, Tiersma addresses this issue with the equivalence test by specifying that what matters is not just speaker intent but rather “what the speaker intends to make the *hearer* think that the speaker intends.”¹⁷⁴ Explaining further, he offers the example of two situations: first, “A makes a joking offer to sell his farm to B for \$10,000,” which is a reasonable price for B to pay.¹⁷⁵ Second, A makes a joking offer to sell the same farm to B for one million dollars, which A knows B does not have.¹⁷⁶ Tiersma proposes these cases should be analyzed as such:

In the former case, the speaker wants to create in the hearer the impression that he intends to commit himself to the bargain. He knows that the hearer will interpret the offer as sincere, which is the purpose of the practical joke. This approach holds that if the joker, by means of his utterance, intends to make the other believe that he is committing himself, the joker has indeed made an offer. . . . In contrast, where the speaker knows that the hearer is aware that the price is absurdly high and that the hearer would not want to buy the farm anyway,

one who could barely be trusted with the keys to his parents’ car, much less the prize aircraft of the United States Marine Corps.” *Id.* at 128–29. Third, “the notion of traveling to school in a Harrier Jet is an exaggerated adolescent fantasy. . . . No school would provide landing space for a student’s fighter jet, or condone the disruption the jet’s use would cause.” *Id.* at 129. Fourth, “[i]n light of the Harrier Jet’s well-documented function in attacking and destroying surface and air targets, armed reconnaissance and air interdiction, and offensive and defensive anti-aircraft warfare, depiction of such a jet as a way to get to school in the morning is clearly not serious.” *Id.* Fifth, “[t]o amass [the necessary number of Pepsi Points], one would have to drink . . . roughly 190 Pepsis a day for the next hundred years—an unlikely possibility” or “one would have to purchase approximately \$700,000 worth of Pepsi Points. The cost of a Harrier Jet is roughly \$23 million.” *Id.*

172. *See id.* at 128.

173. The court had multiple grounds for concluding no contract existed; two others were that (1) “the commercial was merely an advertisement, not a unilateral offer” and (2) “there is no writing between the parties sufficient to satisfy the Statute of Frauds.” *Id.* at 132. However, this Note is concerned only with the reasonable person standard for determining whether an offer existed.

174. Tiersma, *supra* note 2, at 227. This echoes the way that Searle addresses situations in which the speaker does not have true intentions behind his words. *See* Searle, *supra* note 31, at 4 (“In general, in the performance of any illocutionary act with a propositional content, the speaker expresses some attitude, state, etc., to that propositional content. Notice that this holds even if he is insincere, even if he does not have the belief, desire, intention, regret or pleasure which he expresses, he none the less expresses [it] . . . in the performance of the speech act.”). Searle says that one of the conditions for a promise to be valid is that the speaker “intends that the utterance of [the promise] will place him under an obligation to do [the action].” SEARLE, *supra* note 39, at 60 (emphasis omitted).

175. Tiersma, *supra* note 2, at 228. This is similar to the offer in *Lucy v. Zehmer*, 84 S.E.2d 516, 517 (Va. 1954).

176. Tiersma, *supra* note 2, at 228.

there is probably no intent to create in the hearer the impression that the speaker intends to commit himself.¹⁷⁷

Applying these principles to *Leonard*, Tiersma would say Pepsi did not make an offer because it did not intend for commercial viewers to perceive that it would actually sell them a Harrier jet.

However, there are multiple problems with this method of analyzing whether a reasonable person would interpret a speech act as an offer. First, it is unnecessarily complicated: judges or scholars would have to determine the speaker's intent towards what he or she wanted the hearer to hear. Second, more importantly, it places too much emphasis on solely the speaker's intent, which does not match contract law's aim to uphold reasonable expectations induced by promises.¹⁷⁸ It is not only about whether the speaker intended for the hearer to understand the speech act as an offer, but also about what the hearer reasonably understood.

Relatedly, third, Tiersma's approach does not match how courts engaging in contextualist analysis actually decide these cases, so it would not serve as a helpful tool. In *Leonard*, for example, the court did not focus only on what Pepsi intended for the television viewers to hear, but rather on what a reasonable addressee would understand when the speech act was transmitted.¹⁷⁹ Thus, Tiersma's emphasis on the speaker's intent means that his equivalence test approach is ineffective for analyzing situations where the speech act is similar to "I hereby offer you that *p*," but the addresser claims no intent to make an offer and a reasonable person would not understand it to be an offer.

2. Jakobson's Model Supports Contextualist Analysis

Unlike Tiersma's equivalence test, the Jakobsonian speech act model easily accounts for speech acts that are unreasonable to interpret as offers. It allows for a more robust understanding of the entire speech act, which enables a contextual analysis of whether it is reasonable to interpret a speech act as an offer. Rather than considering just the words themselves or the speaker's intent, Jakobson's model places the alleged offer in the six factors and functions, which a reasonable person would use to interpret the speech act.¹⁸⁰

177. *Id.*

178. See 1 CORBIN, *supra* note 109, at § 1.1.

179. See *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 127 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000). This brings up a normative point: *should* courts perform contextual analyses of contracts? Though there has been a recent call for a return to formalism in certain situations, see, e.g., Gregory Klass, *Contract Exposition and Formalism 4* (Feb. 2017) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913620, most scholars tend to support contextualism overall, see, e.g., Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1745 (2000) (arguing both that contract law should be contextualist rather than formalist and that contract law reasoning has developed towards contextualism over the twentieth century).

180. See Jakobson, *supra* note 7, at 353 (describing the context factor and referential function). To be fair, Tiersma states at one point in his Comment that "[t]he crucial element is not simply the words used, but the context or circumstances in which the utterance is made." See Tiersma, *supra* note 2, at 192. He also states that "only in *context* do words have meaning. Factors such as the relationship between the speakers, as well as the subject of the discourse, are crucial to understanding." *Id.* at 194. However, it

To demonstrate the utility of Jakobson's model for analyzing the reasonable person standard, we can reconsider *Leonard v. Pepsico* through a Jakobsonian lens. In *Leonard*, the Jakobsonian model would consist of (1) the addresser (Pepsi) sending (2) a message (the commercial) to (3) the addressees (the commercial viewers, including the plaintiff, Leonard).¹⁸¹ The commercial exists in (4) a particular context (an advertisement) and uses (5) a method of creating contact (television) with (6) a particular code.¹⁸²

This offers six dimensions by which to analyze the speech act alleged to be an offer. The addressees (television viewers) are part of the speech act, and their understanding is relevant to understanding the speech act as a whole.¹⁸³ Thus, in determining a reasonable interpretation of the speech act, we can consider what a reasonable person in the position of the addressee would understand as part of the speech act in light of the five other factors and functions. This helps to delineate the reasonable person standard as applied to alleged offers.

In the speech act "HARRIER FIGHTER 7,000,000 PEPSI POINTS," several parts of the model indicate that a reasonable addressee would not understand this to be an offer. First, the addresser (Pepsi) states that it did not intend to make an offer.¹⁸⁴ This is relevant but not determinative information.¹⁸⁵ Second, several aspects of the context of the speech act make it unreasonable to interpret as an offer: it occurs within a commercial, which reasonable people understand to often include puffery rather than factual information;¹⁸⁶ it shows an average teenager flying the jet to school—a reasonable person would know this is not how students normally arrive at school;¹⁸⁷ and Harrier jets costed twenty-three million dollars at the time of the commercial, but the supposed offer would allow the addressee to purchase the jet for substantially less money.¹⁸⁸ Third, there is an element of the poetic function to the commercial: the commercial is a clear example of hyperbole, insinuating that Pepsi products could make you as cool as a kid showing up to school in a fighter jet.¹⁸⁹

does not appear that he builds these principles into his analysis of offer and acceptance. For example, in analyzing cases like *Lucy*, Tiersma states that "[b]ecause saying the words 'I hereby offer' or the equivalent counts as committing the speaker to the proposed act, the speaker will usually intend to do that which his utterance predicates." *Id.* at 227. Thus, it is clear that Tiersma, though noting the importance of context, is focusing most on what the words of the speech act do, much like Austin and Searle.

181. See *Leonard*, 88 F. Supp. 2d at 118; Jakobson, *supra* note 7, at 353 (diagramming speech act model).

182. See *Leonard*, 88 F. Supp. 2d at 118; Jakobson, *supra* note 7, at 353.

183. See *supra* note 97.

184. *Leonard*, 88 F. Supp. 2d at 120.

185. See, e.g., Todd Rakoff, *Washington v. Davis and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63, 79 (1994) ("The effect of the objective theory is to attribute a legally relevant social meaning, a meaning not dependent on the states of mind of the particular parties, to statements or acts.").

186. *Leonard*, 88 F. Supp. 2d at 128.

187. See *id.* at 128–29.

188. *Id.* at 129.

189. See *id.* at 128.

This model is a simpler yet more robust way to explore the reasonable person standard compared to Tiersma's focus on what the speaker intended for the hearer to hear. Jakobson's approach considers all of the relevant elements as part of the speech act,¹⁹⁰ which models how a reasonable addressee would understand it. This helps to inform when it is reasonable to understand something as an offer. Under this model, neither the addresser's intent nor the addressee's understanding is determinative, which matches both how courts analyze these issues¹⁹¹ and how language more generally functions.¹⁹² Meaning is negotiated between both the addresser and addressee and the four other parts of the speech act model.

In sum, Tiersma, utilizing Austin's and Searle's speech act theories, places too much focus on the addresser's intent for how the words of the speech act should affect the world around him or her. By starting from the premise that a speech act equivalent to "I hereby offer you that *p*" automatically creates an offer, Tiersma is then required to create a complicated methodology for distinguishing between two types of speech acts: (1) where the speaker says "I hereby offer you that *p*" yet claims she did not intend to make an offer, but a reasonable person would interpret it as such, like the farm sale in *Lucy*,¹⁹³ compared to (2) where the speaker says something equivalent to "I hereby offer you that *p*" but claims no intent to offer, and a reasonable person would not understand the speech to be an offer, as in *Leonard*.¹⁹⁴

Jakobson's model, by contrast, provides a method of analyzing what a reasonable person would understand in speech acts alleged to be offers. For speech acts like *Lucy*'s "we agree to sell our farm" or *Leonard*'s "HARRIER FIGHTER 7,000,000 PEPSI POINTS," it is not simply the words themselves nor the speaker's intent that automatically create the offer; instead, it is the words put into context with the other five factors and functions of the speech act that determine whether it was reasonable to interpret the speech act as an offer.¹⁹⁵

190. See Jakobson, *supra* note 7, at 353 (diagramming speech act model).

191. For example, the above analysis shows how well a contextualist analysis in *Leonard*, 88 F. Supp. 2d at 128–30, fits with the Jakobsonian speech act model. See also Rakoff, *supra* note 185, at 77–78 ("In deciding what particular objective meaning to attribute, the courts have looked at a large range of data [including] . . . general usage[,] . . . the usage of a sub-culture appropriate to the context [like trade usage,] . . . structures prevalent in the society as a whole[,] . . . [and] quite contextual matters.").

192. See, e.g., Edna Andrews, *Language and Brain: Recasting Meaning in the Definition of Human Language*, 2011 SEMIOTICA 11, 25 ("[A]ll meaning in language is negotiated within a multifaceted speech act.").

193. 84 S.E.2d 516, 522 (Va. 1954).

194. 88 F. Supp. 2d at 132.

195. Other scholars' work supports Jakobson's approach of considering the six factors and functions in contracts. For example, Lawrence Solan notes how important it is to consider not just the promisor's words, but also the promisee's understanding. See Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 361 (2007) ("At least when the promisor intends the statement as a promise and the promisee understands it that way, a promise will be enforced, notwithstanding objective considerations Once we take the promisee into account, the array of possible scenarios expands"). Jakobson's model accomplishes this by including both the addresser and the addressee in the speech act, along with the four other factors.

B. REEXAMINING *EMBRY*: JAKOBSON'S SPEECH ACT MODEL AS A TOOL

As the previous analysis demonstrates, Austin's and Searle's speech act theories are insufficient for understanding the reasonable person standard in offer and acceptance; only the Jakobsonian speech act model can account for the multiple sources of meaning that a contextualist examination demands. As a result, judges should use Jakobson's model to ensure they are performing a contextualist analysis in cases of alleged offers and acceptances. To demonstrate the usefulness of his model as a judicial tool, this section reexamines the classic case *Embry v. Hargadine, McKittrick Dry Goods Co.*¹⁹⁶ to show that, had the judge used Jakobson's speech act model, the court would have reached the correct result: a more contextualist decision for the employer rather than the employee.¹⁹⁷

Embry is a first-year contracts class staple¹⁹⁸ for teaching the proposition that a party's hidden intent not to contract does not matter if he or she demonstrates—through words or actions—an objective intent to contract.¹⁹⁹ In other words, *Embry* is a crucial case in the establishment of the reasonable person standard for determining whether a speech act constitutes true offer or acceptance.²⁰⁰ Yet ironically, the court's analysis of what a reasonable person would understand from the speech act at issue is lacking.

The case deals with the alleged renewal of an employment contract.²⁰¹ *Embry* was employed by a wholesale dry goods company under a year-long contract to select samples for the company's traveling salesmen.²⁰² His contract expired on December 15th.²⁰³ On December 23rd, he spoke with McKittrick, the company's president, to determine whether his employment contract would be renewed for another year.²⁰⁴ McKittrick testified he was in the middle of working on a report for a shareholder's meeting and was busy when *Embry* came to his office.²⁰⁵ *Embry* expressed concern that there were only a few days before the first of the year to secure other employment; he had tried twice before to get a firm answer from McKittrick regarding his employment and he wanted a sure answer or he would quit.²⁰⁶ Ultimately, McKittrick told *Embry*, "Go ahead, you're all right.

196. 105 S.W. 777 (Mo. Ct. App. 1907).

197. Or, at least, the court should have returned the case for further fact-finding.

198. See, e.g., Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. PA. L. REV. 2109, 2110 (2015) (identifying *Embry* one of three "canonical cases" that are "the contract law of the first-year Contracts course").

199. See *Embry*, 105 S.W. at 779 ("[I]f what McKittrick said would have been taken by a reasonable man to be an employment, and *Embry* so understood it, it constituted a valid contract of employment for the ensuing year.").

200. See Deborah Waire Post, *Teaching Interdisciplinarily: Law and Literature as Cultural Critique*, 44 ST. LOUIS U. L.J. 1247, 1269 (2000) (describing *Embry* as "a case that is traditionally used to teach the requirement that there be a 'mutual manifestation of assent'" based on articulation of "[t]he reasonable person test").

201. *Embry*, 105 S.W. at 778.

202. *Id.* at 777.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

Get your men out, and don't let that worry you."²⁰⁷ Embry continued to perform his duties until the company discharged him on March 1st, saying they had not renewed the year-long contract and thus could fire Embry at will.²⁰⁸

The court had to determine whether this speech act by McKittrick constituted an offer to renew Embry's year-long contract, which would mean Embry would be entitled to a full year's salary.²⁰⁹ First, the court established that "if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment for the ensuing year."²¹⁰ Embry understood McKittrick's statement as an employment offer, so the question became whether his understanding was reasonable.²¹¹ The court concluded that because McKittrick said "Go ahead, you're all right. Get your men out, and do not let that worry you" in response to Embry's concern about whether he would be employed for another year, a reasonable person would consider this an agreement to employ McKittrick for another year.²¹²

However, Judge Goode's analysis of whether Embry's understanding was reasonable is based almost exclusively on the words of the speech act and some of the surrounding conversation.²¹³ The court should have taken into account the multiple factors and functions that are part of how a reasonable person would have understood McKittrick's statement.²¹⁴ Using Jakobson's speech act model would have ensured a more contextualist analysis and led to the decision that a reasonable person would not have understood McKittrick's speech act to be an offer to extend the year-long contract.

A preliminary issue with the court's analysis is that only McKittrick's final statement is reproduced verbatim. The court summarizes the surrounding circumstances, such as when Embry expresses his worry, rather than recreating the actual conversation.²¹⁵ This is the court's first misstep because part of a speech act's context is the speech acts that came before it,²¹⁶ thus, without evidence of those prior speech acts, it is difficult to analyze how someone would understand a particular utterance.

207. *Id.* at 777, 779.

208. *Id.* at 777.

209. *See id.* at 778.

210. *Id.* at 779.

211. *See id.*

212. *Id.* at 779–80.

213. *See id.* Tiersma, Austin, and Searle—because they too focus on the words of the speech act—likely would have come to the same conclusion as Judge Goode.

214. *See* Jakobson, *supra* note 7, at 353, 357; *see also* Orit Gan, *The Many Faces of Contractual Consent*, 65 *DRAKE L. REV.* 615, 644–46 (2017) (suggesting that employment contracts should be analyzed contextually).

215. *Embry*, 105 S.W. at 777 (“[Embry] had been put off twice before and wanted an understanding or contract at once so that he could go ahead without worry.”).

216. *See* Linda R. Waugh, *The Poetic Function and the Nature of Language*, in ROMAN JAKOBSON, *VERBAL ART, VERBAL SIGN, VERBAL TIME* 143, 149 (Krystyna Pomorska & Stephen Rudy eds., 1985) (describing part of linguistic context as “preceding and succeeding sentences”).

Moreover, the court mentions McKittrick's testimony that he was busy preparing a report, but does not analyze this in determining whether Embry's understanding of the speech act was reasonable.²¹⁷ However, under Jakobson's speech act model, a judge would question whether a channel of communication truly opened between McKittrick and Embry: if Embry could see that McKittrick had his head buried in papers and was not devoting his full attention to the conversation, would it be reasonable to assume that he had been employed for another year? Moreover, even if a channel were established, perhaps McKittrick's statement could be more aptly characterized as an attempt to close the channel—in other words, to get Embry to go away and return at a less busy time to discuss his contract.²¹⁸

A judge using Jakobson's speech act model would also analyze the addresser, the addressee, and the relationship between the two. In a recent Article, Orit Gan also reexamines *Embry* and concludes that the court made its ruling "on the basis of an interpretation of the employer's statement that was divorced from the broader context."²¹⁹ Gan identifies several aspects of the employer–employee relationship that the court did not discuss, but are relevant to a reasonable understanding of McKittrick's statement: "the dependency of the employee on his employer, the reality of working on a yearly contract, . . . the general power imbalance between the parties[,] . . . [and] previous dealings between the parties such as . . . how and when the employment agreement was extended in previous years."²²⁰ These elements of the relationship between an employer and an employee mean it may not be reasonable for an employee—who is in a position of dependence upon the employer—to assume that a speech act like "Go ahead you're all right" was a definite offer of a year-long contract.

Although *Embry* is a seminal case in establishing the reasonable person standard, it would have been decided differently had the judge relied on a truly contextualist understanding of language to determine what was reasonable. But *Embry* is simply an example to support a larger argument: judges deciding cases related to communication need to have a robust understanding of how language functions. The Jakobsonian model facilitates that understanding because it accounts for the multifaceted and dynamic nature of language that influences how we interpret speech acts. Thus, the model can be a valuable judicial tool for ensuring a contextual linguistic analysis of the reasonable person standard for alleged offers and acceptances.

217. Compare *Embry*, 105 S.W. at 777–78 (describing how McKittrick was in the middle of working on reports when he told Embry, "I have no time to take it up now You will have to see me at a later time"), with *id.* at 779–80 (determining the reasonable person's interpretation of the conversation without mentioning that McKittrick was busy).

218. See Jakobson, *supra* note 7, at 355 (including in phatic function messages that "discontinue communication").

219. Gan, *supra* note 214, at 645.

220. *Id.* at 644–45.

CONCLUSION: CONTINUING THE CONVERSATION

Thinking about contracts as conversations—or speech acts—between two parties reinforces the important role that language plays in contract formation. The linguistic nature of contract formation, in which parties communicate offer and acceptance to each other, means that judges need a tool for analyzing how we understand language. Jakobson’s speech act model provides that tool. Although previous efforts to apply speech act theory to contract law provide a step forward, only Jakobson’s model can adequately account for the complex manner in which language functions. Using his model illuminates the challenges of framing contracts as speech acts, which clarifies some potential complications in contract formation, and provides a method for understanding how a reasonable person would interpret speech acts of offer or acceptance. Demonstrating how Jakobson’s model can aid in contractual analysis will hopefully also encourage legal scholars or practitioners to bring Jakobson into other areas: language touches so many parts of the law, and a model that faithfully represents it could help to further many other conversations.²²¹

221. One potential area is statutory interpretation. See, e.g., Anya Bernstein, *Differentiating Deference*, 33 YALE J. ON REG. 1, 4 (2016) (“Recognizing that linguistic signs can take multiple paths to meaning would yield a more realistic image of courts’ abilities to interpret different kinds of statutory language.”). Another is what Gregory Klass calls the “law of deception,” which includes false advertising, misrepresentation, securities law, etc. See Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 449, 473 (2012) (“Because the law of deceit recognizes and incorporates everyday norms of interpretation and truth telling, competent language users generally know what it requires of them.”). Other areas of contract law would also benefit from Jakobson’s model, including contract interpretation. See, e.g., Robin Bradley Kar, Formal Argument that Contract Meaning Depends on Linguistic Cooperation 9 (Feb. 15, 2018) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124706 (discussing “the depth and pervasiveness of the dependence of contract meaning on linguistic cooperation”). Finally, with an increasing interest in the intersection of cognitive sciences and contracts, Jakobson’s speech act model could be of interest. See, e.g., David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1616 (2016) (using experiments to understand “the lay psychology of assent”). For an example of Jakobson’s model used in cognitive research, see Skotko et al., *supra* note 83, at 402–03 (analyzing speech of famous psychology patient H.M. using Jakobson’s speech act model).