

BETWEEN FORMALISM AND DISCRETION: MEASURING TRENDS IN SUPREME COURT RHETORIC

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This is the first study to use an empirical quantitative analysis to determine the nature of formalism in court decisions. Our analysis has revealed the complex interplay between different types of formalism in Supreme Court of Israel decisions and provides a new way of addressing a jurisprudential issue that has been debated by legal scholars for centuries.

The aspiration for formality is an integral element of judicial decision writing. Judges are expected to decide cases based on rules, with limited discretion and choice, using professional, dispassionate, and impersonal language. At the same time, deviation from formalism, which reflects personal expression and acknowledges the complexity of legal cases, has also appeared in judicial rhetoric.

I. INTRODUCTION

It is widely accepted that the aspiration for formality is an integral element of judicial decision writing. Despite ongoing debates in legal literature about the limits of formalism and challenges to the assumption that legal cases can be decided by an objective, straightforward application of rules, there still remains a commitment to the basic view of law as a complete, autonomous, conceptually ordered, and socially acceptable system.¹

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1. WILLIAM HALTOM, REPORTING ON THE COURTS: HOW THE MASS MEDIA COVER JUDICIAL ACTIONS 8-9, 39, 48, 58-59 (1998); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608-09 (1999).

There have been numerous definitions of legal formalism suggested in the literature, often incorporating different approaches to formalism.² Some refer to the inherent quality of law as based on formality in all its institutional manifestations.³ Others condemn both the notion of mechanical jurisprudence and the strict application of rules as rigid and unsophisticated.⁴ Discussions about the nature of formalism have often concluded with normative arguments to follow rules⁵ and to consider policies and principles,⁶ as well as some calls to empirically test whether there are benefits to the use of more flexible considerations or to the reliance on rigid rules.⁷

While traditional analyses of legal formalism have largely relied on jurisprudential reasoning and have promoted a specific stance regarding formalism,⁸ in this Article we adopt an interdisciplinary empirical approach, which aims to provide a new slant on the debate about formalism by presenting a quantitative textual analysis of opinions in randomly selected routine legal cases of the Israeli Supreme Court from 1948 to 2013. Inspired by law and literature studies⁹ and based on the issues raised by legal realists in the debate about formalism,¹⁰ we developed a complex measure to depict the realization of formalism within the rhetoric of Israeli Supreme Court opinions over time.

The Israeli legal system provides a unique case study as it combines a British common law regime with some civil law influences. Moreover, in the past decade, Israeli legal practice and academic writing has been heavily influenced by American jurisprudence, including the incorporation of notions of judicial review.¹¹ Within this rich and diverse legal culture, we expected to find various manifestations of different types

2. Pildes, *supra* note 1, at 608-09, 612-13, 617.

3. Robert S. Summers, *How Law Is Formal and Why It Matters*, 82 CORNELL L. REV. 1165, 1196-97 (1997).

4. RONALD DWORKIN, *LAW'S EMPIRE* 124-26 (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 1-2, 4 (1977).

5. Larry Alexander, "*With Me, It's All er Nuthin'*": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 561 (1999).

6. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 4, at 4-5.

7. Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 667, 669-70 (1999).

8. Pildes, *supra* note 1, at 608, 610-11, 614, 618.

9. John Hollander, *Legal Rhetoric*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 176, 176-86 (Peter Brooks & Paul Gewirtz eds., 1996); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 696-97 (1985); see *infra* notes 48-53 and accompanying discussion.

10. See *infra* text accompanying notes 16-21.

11. MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 36-39, 54, 57, 58 (2011); Aharon Barak, *Some Reflections on the Israeli Legal System and Its Judiciary*, ELECTRONIC J. COMP. L. (2002), <http://www.ejcl.org/61/art61-1.html>.

of legal formalism. While our analysis is based on Israeli judicial decisions¹²—and thus the particular trajectories of formalism that we found may reflect specific socio-legal events that occurred in Israel—the empirical measurements we constructed to explore the realization of formalism in judges’ decision-making can certainly be applied to decisions in other jurisdictions and legal systems. In fact, we anticipate that the Israeli case findings and insights will be of benefit to socio-legal scholars everywhere.

A. *The Claims and Counterclaims of Formalisms of Law*

Many of the arguments about formalism stem from Max Weber’s portrayal of modern law as a gapless system of rules.¹³ According to Weber, one of the most advanced categories of legal thought in Western society is “logical rationality” in which legal rules can be applied to any concrete situation and be used to evaluate any social conduct.¹⁴ Jurisprudential scholarship, nevertheless, has challenged the possibility of a gapless system and has pointed to gaps and ambiguities that exist in legal rules that are particularly evident in hard cases.¹⁵ The Legal Realist movement, which was part of the general intellectual revolt against formalism in the United States,¹⁶ was even more radical. Its proponents claimed that rule-formalism was basically impossible.¹⁷ They maintained that the indeterminacy of legal rules was pervasive, and thus judges constantly made arbitrary decisions.¹⁸ Instead of a formalistic system, they described a legal universe composed of policies and instrumental reasoning, in which legal discretion was the norm and not the exception.¹⁹ The Realists also pointed to the biased nature of fact-finding in legal decision-making, claiming that norm-application was embedded in the descriptions of facts, and they raised doubts about the claim that legal

12. *See infra* text accompanying notes 75-76.

13. MAX WEBER ON LAW IN ECONOMY AND SOCIETY 62 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954).

14. *Id.* at 63-64.

15. H.L.A. HART, THE CONCEPT OF LAW 272-74 (2d ed. 1994); Alexander, *supra* note 5, at 554-55.

16. Morton G. White, *The Revolt Against Formalism in American Social Thought of the Twentieth Century*, 8 J. HIST. IDEAS 131, 136-37 (1947).

17. *Id.*; Brian Z. Tamanaha, *The Realism of the “Formalist” Age* 64 (St. John’s Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 06-0073, 2007), <http://ssrn.com/abstract=985083>.

18. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 160, 171 (2010); Jerome Frank, *Law and the Modern Mind*, in AMERICAN LEGAL REALISM 205, 208 (William W. Fisher III et al. eds., 1993); Tamanaha, *supra* note 17, at 64.

19. TAMANAHA, *supra* note 18, at 160, 171.

concepts had internal meaning.²⁰ They further described the significant discrepancy that existed between law in the books and law in action.²¹

Following the realist critique, various reconstructions of the notion of formalism have been developed. Some scholars have described the formality of the legal universe as entailing principles, policies, and moral considerations.²² Others have redefined the notion of judicial discretion, so that it is now limited and refers to structured reasoning rather than open-ended choice-making.²³ These new “forms of formalism” reflect the multiplicity of views regarding the formalism of law that often are realized within the texts of legal decisions.²⁴

The various claims and counterclaims about formalism that have been developed and discussed in legal literature and academic debates can be categorized into ten constructs of formalism.²⁵

1. The Introduction and Framing of the Legal Decision

Within a formalistic legal culture, the question of formal authority for the decision and the legal framing of the dispute receive paramount attention. From the outset, the issue to be decided is framed as a legal question. Judges present themselves as deciding according to the law and often preface their decision by referring to the formal basis of their judgment.²⁶ Questions of standing are meticulously argued, and procedural concerns are emphasized. Modern critique, however, has challenged the notion that all legal conflicts can or should be framed as legal questions.²⁷ In addition, modern critique has marginalized formalistic questions of jurisdiction and of standing in certain legal contexts in favor of reference to the merits of the legal claim.²⁸ Thus, if the opinion opens with the legal question, if the issue at stake is defined from the outset as a matter of applying legal norms to existing facts, and if questions of jurisdiction are raised at the beginning of the opinion, the opening would be regarded as formalistic.

20. JEROME FRANK, *LAW AND THE MODERN MIND* 30 (spec. ed., The Legal Classics Library 1985) (1930).

21. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 611-12 (1908).

22. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 4, at 3.

23. Pildes, *supra* note 1, at 616-17.

24. *Id.* at 607-09.

25. See Michal Alberstein, *Measuring Legal Formalism: Reading Hard Cases with Soft Frames*, in 57 *STUDIES IN LAW, POLITICS, AND SOCIETY* 161, 176-78 (Austin Sarat ed., 2012); see *infra* text accompanying notes 26-64.

26. Alberstein, *supra* note 25, at 181.

27. *Id.* at 181-83.

28. *Id.* at 182.

2. Reliance on Extra-legal Arguments

Classic descriptions of the modern Western legal system have assumed that there is a separation of the legal realm from other social institutions, such that decisions in the legal sphere are made and rules understood according to abstract principles that are applied to the determination of specific cases.²⁹ Thus, law is considered a closed system in which there is no reference to external considerations, such as political, sociological, or economic issues. Indeed, formalism envisions the operation of the legal system as a separate technical and rational machine. In contrast, the Legal Realism and Critical Legal Studies schools of law have pointed to political and ideological considerations that determine legal decisions and have noted the insertion of personal, political, and ideological elements into judicial decision writing.³⁰ The focus on factors outside the legal field and the use of external arguments are considered inherently anti-formalistic, and many of the claims against the “politicization of the judiciary” have been based on the move away from formalism that relies on these extra-legal rationales.³¹ Indeed, experimental evidence indicates that the legitimacy accorded to the Supreme Courts is damaged to a certain extent when extra-legal rationales are used.³² This Article examines the tendency to rely on extra-legal factors in routine cases, in order to determine whether there is a move away from formalism over time.

3. Reliance on Policy Arguments and Legal Principles

Another corollary of the view of law as a closed, unified rational system is that judges apply legal norms without reference to policy arguments or legal or moral principles. Any appeal to policy considerations or to unwritten principles of the law is considered a deviation from formalism. Rejecting this claim, a large body of writing maintains that legal decisions are based on social goals, policy considerations, and legal principles, which do not necessarily correspond to the definition of a rule, yet are also not considered political or external to the legal field.³³ The Legal Process school of law developed a

29. MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 13, at 63-64.

30. Alberstein, *supra* note 25, at 183-84 (noting cases where judges have utilized either personal, political, or ideological elements as a basis for their judicial decisions).

31. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 194 (1986). In the United States, such claims were raised within famous precedential cases such as *Bush v. Gore*, 531 U.S. 98, 110 (2000); *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-94 (1954); and *Lochner v. New York*, 198 U.S. 45, 59-60 (1905).

32. Dion Farganis, *Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy*, 65 POL. RES. Q. 206, 213 (2012).

33. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 201, 204-06 (2006).

reconstructed version of formalism in law that relies on policies and principles in what is known as “purposive interpretation.”³⁴ Ronald Dworkin further developed the argument that discretion in hard cases is narrow because judges are bound by the principles and policies that are inherent components of legal norms.³⁵ Our empirical analysis will enable us to determine whether there was a move away from rule-based formalism to policy-based decision making over time.

4. Impartiality and Impersonality

Another characteristic of formalism is the use of impersonal language to create the impression that judges speak the law as direct delegates of the legislator and that there is “a government of laws, not men.”³⁶ In contrast to this view, some scholars have discussed judges’ need to express themselves in personal and emotional terms³⁷ and have pointed to the expression of emotions,³⁸ as well as judicial biases and hunches³⁹ in legal decisions. Those who object to expressions of emotion and personal style claim that these challenge judges’ assumed detachment and impersonal reasoning.⁴⁰ Thus, formalism in judicial opinions would be associated with the lack of personal expressions by judges, whereas the move away from formalism would be seen in decisions that include references to the judge’s own thoughts and feelings.

5. Judicial Discretion and Choice

According to a formalist perspective, the application of legal rules is done in a mechanical manner, without exercising discretion or choice.⁴¹ Formal legal writing ignores doubts and covers gaps with sub-rules and procedures. In a formal legal system, judges present the law as

34. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 102, 104, 106 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (tent. ed. 1958).

35. DWORKIN, *LAW’S EMPIRE*, *supra* note 4, at 124-25; Ronald Dworkin, *Judicial Discretion*, 60 *J. PHIL.* 624, 634-35 (1963).

36. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 122-26 (2004); Lorenz Kaehler, *First-Person Perspectives in Legal Decisions*, in 15 *LANGUAGE AND LAW: CURRENT LEGAL ISSUES* 2011, at 533, 548-51 (Michael Freeman & Fiona Smith eds., 2013).

37. Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 *EMOTION REV.* 142, 144 (2014).

38. Sharyn Roach Anleu & Kathy Mack, *Magistrates’ Everyday Work and Emotional Labour*, 32 *J.L. & SOC’Y* 590, 601-03, 614 (2005).

39. Frank, *supra* note 18, at 208.

40. However, Popkin has suggested that today U.S. judges who use a personal/exploratory style “are more, rather than less, likely to accommodate the twin political goals of projecting judicial authority and performing the difficult professional task of deciding cases” See WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* 5 (2007).

41. RICHARD. A POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 241-42 (1999).

determining the decision, as if there is one true resolution to the legal problem, and rarely allow for expressions of doubt or self-reflection in the decision.⁴² In contrast to this view, critics claim that discretion is inevitable in any decision-making and that judges' work involves a substantial degree of intuition, with many junctures where choice is exercised.⁴³ Thus, the acknowledgement of options, and personal reflection on the choices made, would characterize non-formalistic decisions, as would contemplation of difficulties or doubts in the decision-making process.

6. The Relationship Between Facts and Norms

Another tenet of formalism is that judges apply legal norms to facts that have been determined objectively. Many legal disputes are about facts, and judges are considered professional factfinders who use the laws of evidence to distinguish fiction from truth in a definitive way. In a formal system, there is a clear separation between the determination of facts and the application of norms. Judges perceive themselves as professionals who are capable of overcoming any potential biases and who have the ability to differentiate between real justice and the appearance of justice.⁴⁴ Critics of formalism maintain that the legal determination of facts is biased and is influenced by a variety of factors, including the setting, and the emotional and cultural background of the judges.⁴⁵ Contrary to the formalistic assumption that facts are first determined and described, while norms are later applied, critics claim that norm application is embedded in the descriptions of the facts, and therefore a non-judgmental determination of facts does not exist.⁴⁶ Following this critique, contemporary scholars of law and literature have pointed to the close connection between storytelling and fact-finding and the importance of narrative theory in understanding the way courts decide facts.⁴⁷ Thus, a formalistic decision would present the facts of the case as external to and independent of the judgmental act, while in a non-formalist decision, the judge will include emotions and evaluative comments while presenting the facts.

42. *Id.*

43. Warren Lehman, *Rules in Law*, 72 GEO. L.J. 1571, 1574-75 (1984). Lehman argues in favor of an intuition-based approach to decision-making in law that counters the critique of formalism by Legal Realism. *Id.* at 1586, 1595.

44. See generally Issachar Rosen-Zvi, *Are Judges Human? The Construction of the Image of the Professional Judge in Light of Judicial Disqualification Rules*, 8 MISHPAT UMIMSHAL 49 (2005) (in Hebrew).

45. FRANK, *supra* note 20, at 120-21, 126, 128.

46. *Id.*

47. See generally Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, *supra* note 9, at 14, 14-22.

7. Professional Legal Rhetoric

Formalism is related to the use of professional language. “Legal language” refers to more than any particular practice and assumption of the law. It includes the use of legal terminology, special syntax, the avoidance of emotional and everyday language expressions, and the application of legal reasoning that is associated with a specific sequential structure.⁴⁸ The use of professional language also defines the boundaries of legal practice and produces legitimacy and acceptability.⁴⁹ However, as critics have pointed out, judges regularly deviate from professional language.⁵⁰ They may quote poetry or literary texts;⁵¹ they may adopt elements and stylistic devices from other registers, and even include humor in their decisions.⁵² The use of professional language that is often inaccessible to laypersons is a basic feature of legal formalism.⁵³ Evidence of the move away from formalism would be the inclusion of non-legal registers in the decision, the use of poetry, expressions from popular culture, or references to literature and art.

8. Institutional Boundaries

Part of the formalistic conception of law as a complete autonomous system is the idea of preserving boundaries between the different institutions in society and ensuring that the professional competence of each branch of government is maintained without extensive interventions by the judiciary.⁵⁴ This principle also refers to the relationship between instances of the same court, so that a judge will not intervene in a lower court decision unless very specific types of errors have occurred. This implies a conservative approach to judging. Scholars who have studied judicial activism have emphasized the role of courts in influencing and controlling other branches of governance and in promoting human rights

48. Brenda Danet, *Language in the Legal Process*, 14 L. & SOC'Y REV. 445, 474-84 (1980); see Judith Turnbull, *Expert to Lay Communication: Legal Information and Advice on the Internet*, in LANGUAGE AND LAW IN PROFESSIONAL DISCOURSE: ISSUES AND PERSPECTIVES 61, 65-68 (Vijay K. Bhatia et al. eds., 2014).

49. Michael A. Livermore et al., *The Supreme Court and the Judicial Genre*, 59 ARIZ. L. REV. 837, 851-52 (2017).

50. *Id.* at 883, 887.

51. Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L.J. 597, 601-06 (2003).

52. Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 178-79 (1989); Susan K. Rushing, Student Essay, *Is Judicial Humor Judicious?*, 1 SCRIBES J. LEGAL WRITING 125, 125-26 (1990).

53. See Ryan J. Owens et al., *How the Supreme Court Alters Opinion Language to Evade Congressional Review*, 1 J.L. & CTS. 35, 38 (2013) (suggesting that Justices strategically obfuscate the language of their decisions in order to evade congressional review).

54. HART & SACKS, *supra* note 34, at 163-67.

values.⁵⁵ Thus, we suggest that judges who intervene in the decisions of other institutions would be regarded as non-formalistic. In cases of the civil and criminal appeals that we examined, there is always a question of intervention in the decision of the previous instance. In constitutional and public cases, High Court of Justice (“HCJ”)⁵⁶ intervention is debated in reference to the administrative or executive branch or other professional courts.⁵⁷ We assume that over time there will be less rhetoric of maintaining institutional boundaries and more actual intervention, and therefore, less formalism.

9. Rationalism and the Inner Logic of Legal Spheres

According to formalism, the basic quality of law as a system of norms is related to the deductive relations between principles and rules, as well as to the horizontal differentiations among the various fields of the law. Law is a logical system in which coherence and systematization are of paramount importance, and each field of law is characterized by unique and distinct rules.⁵⁸ The counter-argument to the above assumption is that the boundaries of the law are flexible and given to new demarcations in accordance with the needs and problems that arise. According to this parameter, deviation from formalism will occur when an explicit declaration is made regarding the innovation or boundaries-blurring role of the decision.

10. The Gap Between “Law in the Books” and “Law in Action”

In formalistic thinking, there is an assumption that the statement and application of a norm will produce changes in reality, and that “law in the

55. Kenneth M. Holland, *Introduction*, in JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 1, 3 (Kenneth M. Holland ed., 1991); Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism”*, 92 CALIF. L. REV. 1441, 1451 (2004); Marvin Schick, *Judicial Activism on the Supreme Court*, in SUPREME COURT ACTIVISM AND RESTRAINT 37, 37-38 (Stephen C. Halpern & Charles M. Lamb eds., 1982); J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 15 (1968); J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 7-8 (1982) (cautioning against judicial activism).

56. The Israeli Supreme Court functions both as the final instance appellate court in all civil and criminal cases, and as the first and last instance in its role as the HCJ. Plaintiffs can petition the HCJ directly to seek relief from administrative decisions of public agencies, without going through other instances.

57. See Gary J. Jacobsohn, *Judicial Activism in Israel*, in JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE, *supra* note 55, at 90, 96-98.

58. Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 68 (2003) (“Rules enable those subject to them to predict the legal effect of their behavior and therefore enable coordination; rules preclude discretion and enable a claim that we are governed by law, not men; rules ensure that law is prospective, not retroactive.”).

books” corresponds to “law in action.”⁵⁹ Here too, the claim is formalistic in that it regards the rationality of law as a mechanism to control reality. The counterclaim is that law in action is different from law in the books and that legal writing has, at best, only an indirect connection to social change. The origin of this critique goes back to the sociological jurisprudence movement developed by Roscoe Pound,⁶⁰ which criticized legal studies for their emphasis on legal rules and decision-making, while ignoring the social context and implications of those decisions.⁶¹ Legal Realists continued to challenge the overemphasis on norms and on court opinions and have developed a positivist approach based on the empirical analysis of the interaction between norms and reality.⁶² Scholars of law and society have expanded this critique in academic debates and empirical research about the ability of legal rules and decisions to produce social change.⁶³ In general, a formalistic judge takes the implementation of legal norms for granted, without referring to the effect of the rules or the difficulties of ensuring compliance with the decision, whereas deliberation regarding these issues would be signs of non-formalism.

These ten constructs of formalism were operationalized as a code used in the content analysis of 2086 judicial decisions of civil and criminal appeals and public law cases. It thus joins the growing body of scholarly research of legal decisions that use content analysis in order to provide a more systematic and objective way to document what courts do and say than conventional interpretive techniques.⁶⁴ It should be noted that this study does not seek to develop or test a theory of judicial decision-making or opinion writing. Rather, it strives to describe trends and generate conjectures about the nature of legal rhetoric in Israeli Supreme Court opinions and to stimulate questions about similar phenomena elsewhere.

59. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 20 (1910).

60. *Id.* at 20-21; Pound, *supra* note 21, at 609-10.

61. ALAN HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* 14-15 (1978).

62. JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 25 (1995); Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1150 (1999) (reviewing ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998)).

63. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9-10 (2d ed. 2008).

64. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 70-71 (2008). Hall & Wright note that content analysis is particularly suitable in cases that debunk conventional legal wisdom. *Id.* at 84. We sought to examine what has become common opinion among Israeli legal scholars, i.e., that there has been a decline in formalism over time. *See infra* Part I.B.

B. *The Israeli Debate about the Decline of Formalism*

The debate about formalism in Israeli legal culture emerged and developed following a monograph written by Menahem Mautner in which he described the “decline of formalism and the rise of values in Israeli law.”⁶⁵ This essay captured a broad shift in legal writing by the Israeli Supreme Court during the 1980s, which included a greater emphasis on values, on substance, and on judicial activism.⁶⁶ The changes in legal rhetoric, Mautner claimed, were part of an all-embracing shift from collectivism to individualism reflected in other social and cultural arenas.⁶⁷

Despite some criticism of Mautner’s argument,⁶⁸ there is a broad consensus among legal academics that Aharon Barak, the former Chief Justice of the Supreme Court of Israel, who is considered a particularly “activist” and “anti-formalist” judge, had a significant impact on the written opinions of Israeli judges.⁶⁹ Thus, the early period of the State is commonly regarded as formalistic, guided by a strong libertarian spirit of human rights protection. Both personality and socio-legal factors are associated with a decline in formalism and a move to values in Israeli legal decision writing in the eighties.⁷⁰ The promotion of Justice Barak to the Supreme Court of Israel in 1978, the Americanization of Israeli society—with legal actors looking to the United States, rather than Germany and England—as models for decision writing, as well as the exposure of Israeli academics to “law and” movements that promote the approaches of Legal Realism, are all cited by Mautner as explanations for the decline in formalism during that time.⁷¹

65. MENAHEM MAUTNER, *THE DECLINE OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW* 503 (1993) (in Hebrew).

66. *See id.*

67. MAUTNER, *supra* note 11, at 113.

68. *See generally* J.W. HARRIS, *LEGAL PHILOSOPHIES* (2d ed. 1997); Ariel L. Bendor, *The Life of Law Has Been Logic, and Hence Everything is Justiciable: On Appropriate Legal Formalism*, 6 *MISHPAT UMIMSHAL* 591, 591-596 (2003) (in Hebrew) (claiming that the legal formalism has inherent important values which were undermined by Mautner); Daniel Friedman, *Formalism and Values- Legal Certainty and Judicial Activism*, 21 *HAMISHPAT* 2, 2-3 (2007) (in Hebrew) (challenging the negative association between formalism and values); Nir Kedar, *The Educating Legal Formalism of the Early Israeli Supreme Court*, 22 *BAR-ILAN LAW STUDIES* 385 (2006) (in Hebrew) (claiming that the use of legal formalism in the 1950s was part of the Court’s effort to enhance liberal values); *But see* Re’em Segev, *Fairness, Responsibility and Self-Defense*, 45 *SANTA CLARA L. REV.* 383, 392-93 (2005).

69. Roei Amit, *Constructions of Canon: Barak’s Texts as a Formative Canon*, 21 *TEL AVIV LEGAL STUD.* 81 (1998) (in Hebrew); Richard A. Posner, *Enlightened Despot*, *NEW REPUBLIC* (Apr. 23, 2007), <https://newrepublic.com/article/60919/enlightened-despot>.

70. MAUTNER, *supra* note 11, at 54-56, 58.

71. *Id.*

There are a number of reasons to assume that since the mid-nineties there has been some return to formalism. Those who promote this view argue that Mautner's claim about Justice Barak's influence and the subsequent media debate about his judicial activism created a backlash which in turn led to a more conservative, formalistic mode of decision writing.⁷²

Our research examines these taken-for-granted assumptions about the existence and timing of trends in formalism and seeks to define more precisely the type of formalism that is said to have changed over time. In this project, formalism is analyzed as a social construct comprised of diverse jurisprudential cultures and claims, which are discussed below.⁷³ We rely on conceptions of formalism that include assumptions about fact-finding, the relationship between legal decision-making and reality, the level of discretion and creativity in decision-making, and the style of judicial writing. Thus, we attempt to tease out the various dimensions of legal formalism by an empirical analysis of a large number of judicial decisions in public law and civil and criminal appeals. These elements are examined against the expected trends in the timing and periods of legal formalism discussed above: 1948–1979, 1980–1995, 1996–2007, and 2008–2013.⁷⁴

II. METHODOLOGY

Using data from the legal database Nevo,⁷⁵ we examined changes in formalism over time in Israeli Supreme Court cases. We identified our population as all primary decisions marked “judicial opinions” and not just technical decisions that were longer than two pages and were written between the years 1948 and 2013. We based our sample strategy on the distribution of decisions by the Supreme Court of Israel in each of its functions as the final appellate court in civil and criminal cases and as the HCJ over the years.⁷⁶ From that pool of all judicial decisions, we sampled every four years for three consecutive months each year in the early years and two consecutive months each year from 1986 on. We began with a different month each year.

72. Alberstein, *supra* note 25, at 189-90.

73. *See infra* Part III.

74. *See supra* text accompanying notes 65-72.

75. Nevo is regarded as the most complete commercial database of Israeli judicial opinions, and it claims that it receives all of the judicial decisions directly from the Supreme Court of Israel.

76. In Israel, justices usually sit in a panel of three, although the Chief Justice can decide to add as many justices as he/she deems necessary (that result in an odd number), and in rare sensitive cases, all fifteen justices can decide. In general, there is a lead opinion for the majority, but there is no “opinion of the Court” as such. Each of the justices on the panel can also add their own concurring or dissenting opinions. Our sample included all of the decisions in each case.

There were two reasons for oversampling in the earlier years. For one, in the early years, selected decisions of the Israeli Supreme Court were published by the Bar Association, based on the editors' assessments of their importance and precedential nature. Only in 1985 did the Israeli Supreme Court start computerizing all its decisions, and a few years later, the Bar Association and commercial enterprises began producing CD-based and online full text decisions. Today, there are more than five commercial databases that publish court decisions, and the most comprehensive one, Nevo, has also added to current decisions the opinions that were previously unpublished in print form. The problem is that unless we go through court files, there is no way of knowing how many of the early decisions were unpublished. In addition, there is a large gap between the number of decisions made by the Israeli Supreme Court in the early years compared to current numbers, and we wanted to have less of an imbalance between the number of decisions in each time period. Thus, our sample matches the proportion of decisions for each year and each particular instance with the actual number decided by the Court during each year and in the particular court function, slightly weighting the early years. Altogether, there were 2086 opinions in our sample, including 664 criminal, 849 civil and 573 public law (HCJ) cases.

In order to examine the claims about the changes in Israeli decision writing over time we divided the research years into four periods of time: 1948–1979, 1980–1994, 1995–2006, and 2007–2013. This grouping was chosen because, as previously noted, it reflected periods during which there were changes in legislation, in the identity of the Justices of the Supreme Court, and in public opinion and academic perceptions about the Supreme Court.

Our analytical tool was a code of ten parameters that distinguished between formalistic and non-formalistic rhetoric in judicial decision writing in accordance with the claims and counterclaims of the opponents and advocates of the formalism debate. A series of one to seven yes/no questions were used to determine the formalism of each parameter, for a total of thirty-one binary variables.⁷⁷ Apart from two questions (Var46 and Var47), all questions were coded as “0” if the particular phenomenon referred to by the variable was not present in the decision and “1” if it occurred. For purposes of analysis, we recoded the twenty-nine binary variables so that “1” reflects the formalistic option (i.e., either the presence or absence of the particular criterion). The coders were six trained law students. To ensure correct coding and inter-coder reliability, sixty decisions were coded by all coders in order to determine the

77. See *infra* Table 1.

reliability of the coding scheme and the clarity of the variables. The Cohen's kappa test of reliability among the six coders ranged from 0.71 to 1.00, with an average of 0.825 across the coders and variables.

Table 1. Description of Variables Used in Content Analysis*

A. The introductory framing of the decision (refers to the first 2 pages of the decision)		
(Var21) <i>Legal intro</i> : Does the decision open with a legal question or issue?		Y
[If "yes" for Var21, go to Var22 and Var23:]		
(Var22) <i>Policy</i> : Is the legal question presented as one of policy?		N
(Var23) <i>Ideological</i> : Is the legal issue presented as an ideological or value choice issue?		N
(Var24) <i>Non-legal sources</i> : Does the decision open with a quote from external sources (non-legal)?		N
(Var25) <i>Facts-norms</i> : Does the decision open with a presentation of the facts of the case?		Y
[If "yes" for Var25, go to Var26]		
(Var26) <i>Facts</i> : Does the decision present the facts in the first paragraph of the decision?		Y
(Var27) <i>Authority</i> : Does the decision open with a question of jurisdiction?		Y
B. Reliance on extra-legal arguments		
(Var28) <i>Extra-legal</i> : Does the decision refer to extra-legal research (i.e., economics, sociology, etc.)?		N
(Var29) <i>Cultural</i> : Does the decision refer to common knowledge and cultural understandings?		N
C. Reliance on policy arguments and legal principles		
(Var30) <i>Purpose</i> : Does the decision refer to the purpose of the relevant statute?		N
(Var31) <i>Principles</i> : Does the decision present principles such as equality, freedom, security, as inferred from legal texts?		N
(Var32) <i>Balancing</i> : Does the decision refer to the balancing of principles and/or rights?		N
(Var33) <i>Policy</i> : Is the decision presented as geared to the fulfillment of social purposes or based on social policy considerations?		N
D. Impartiality and impersonality		
(Var34) <i>First person</i> : Does the decision explicitly mention personal reflection and deliberation—e.g. "I think," "I believe," "in my opinion"?		N
E. Judicial discretion and choice		
(Var35) <i>Difficulty</i> : Is there reference to the difficulty in deciding the case?		N
(Var36) <i>Discretion</i> : Is the decision presented as a product of discretion (as opposed to the product of logical/legal reasoning and/or necessity)?		N
F. The relationship between facts and norms		
(Var37) <i>Description of facts</i> : Does the decision include a description of the facts of the case?		Y
[if "yes" for var37, go to var38 and var39:]		

(Var38) <i>Feelings of parties</i> : Does the judge's description of the facts of the case include a description of the feelings, attitudes, emotions of the parties?	N
(Var39) <i>Facts, previous instance</i> : Does the decision include a reference to the facts as presented by previous instances or other opinions?	Y
(Var 40) <i>Legal/Other Truth</i> : Does the judge make a distinction between legal truth and factual truth (legal facts and social/other facts)?	N
G. Professional legal rhetoric	
(Var41) <i>Personal experience</i> : Does the decision include events from the judges' own personal experience?	N
(Var42) <i>Popular culture</i> : Does the decision include references to literature, art, popular culture, poetry, humor, etc.?	N
(Var43) <i>Slang</i> : Does the decision include slang or popular idioms?	N
(Var44) <i>Poetic style</i> : Does the language of the decision stylistically diverge from ordinary legal writing?	N
H. Institutional boundaries	
(Var45) <i>Intervention</i> : Does the court intervene in the decision/operation of other institutions?	N
[if "yes" for var45, go to var46 and var47:]	
(Var46): <i>Institution of intervention</i> . Regarding which institution does the court present itself as intervening?	
Administrative branch	
Legislative branch	
Other professional courts (labor, rabbinic, military), lower courts	
<hr/>	
(Var47): <i>Authority to intervene</i> : Does the court determine that it has the authority to intervene?	
No, it determines that it does not have the authority to intervene	
Yes, it determines that it has the authority, but will not intervene	
Yes, it determines that it has the authority to intervene and does intervene	
I. Rationalism and the inner logic of legal spheres	
(Var48): <i>Departure</i> : Does the decision mention that it is a departure from current legal norms and practice?	N
(Var49): <i>Innovative</i> : Does the decision mention that it is an innovative or boundary breaking decision?	N
J. Law in the books and law in action	
(Var50): <i>Implementation</i> : Does the decision refer to the difficulty of implementation?	N
(Var51): <i>Forwarded for implementation</i> : Is the decision forwarded to other institutions for implementation?	N
(Var52): <i>Overcoming implementation problems</i> : Does the decision mention ways of overcoming the hurdles that might prevent implementation?	N

*The formalistic option is indicated, Y=Yes, N=No

Note: The results presented below do not address variables 22, 23, and 26 in an attempt to streamline the analysis because they did not contribute any added value to the discussion

III. RESULTS

As mentioned previously, we expected that, in general, on each of the parameters of formalism the first period (1948–1979) would be marked by formalistic writing, the second (1980–1996) would reflect the decline of formalism, while there would be a return to formalism in the mid-nineties (1997–2007), and that would increase after the retirement of Chief Justice Barak in 2006 (2008–2013). Tables 2–11 present the means and standard deviations for each parameter of formalism in each of these four periods of time with the formalistic option on each criterion scored as “1”.⁷⁸ The means represent the proportion of all judges’ opinions that exhibited the formalistic option on each parameter during each period of time. We employed a one-way analysis of variance (“ANOVA”) test for time differences in the formalism of each parameter. In addition to the F-test, which indicates whether changes over the entire time period are statistically significant, we also present a Bonferroni post hoc test to isolate the particular years in which the differences between the means of formalism are statistically significant.

A. The Introductory Framing of the Legal Decision

Features of decision openings that indicate a move away from formalism include: framing the issues to be decided as policy and value matters, rather than as legal questions; ignoring questions of jurisdiction in the introduction; not referring to the facts of the case in the opening; and including references to sources external to the law at the beginning of the decision. Table 2 reveals differences in both the extent of formalism indicated by these variables and their trajectories over time.⁷⁹ From the earliest period, about half the decisions opened formalistically by presenting the decision as a legal question and continued to do so over time (46% to 53%).⁸⁰ The only exception was the period from 1980 to 1995, when the number of opinions that opened with a legal question dropped to 27%.⁸¹ Even more decisions opened with a formalistic reference to the facts of the case (from 76% to 86%), and there was a significant increase in formalism over time on this variable.⁸²

78. See *infra* Tables 2-11.

79. See *infra* Table 2.

80. See *infra* Table 2.

81. See *infra* Table 2.

82. See *infra* Table 2.

Table 2: Means and Standard Deviations of Formalism in the Introduction of the Decisions over Time

A. <i>The Introductory Framing of the Legal Decision [No/Yes] to Indicate Formalism</i>					
	1948-79 (n=711)	1980-95 (n=437)	1996-07 (n=451)	2008-13 (n=487)	F
(Var21)	0.46***	0.27***	0.53	0.46	24.23***
Does the decision open with a legal question or issue? [Yes]	(0.50)	(0.44)	(0.50)	(0.50)	
(Var24)	1.00	1.00	0.99	1.00	0.98
Does the decision open with a quote from external sources (non-legal)? [No]	(0.04)	(0.05)	(0.08)	(0.05)	
(Var25)	0.76**	0.84	0.82	0.86***	6.93***
Does the decision open with a presentation of the facts of the case [Yes]	(0.43)	(0.37)	(0.38)	(0.35)	
(Var27)	0.15	0.19***	0.33*	0.42***	47.90***
Does the decision open with a question of jurisdiction? [Yes]	(0.36)	(0.39)	(0.47)	(0.49)	

*P<0.05, **P<0.01, ***P<0.001

Note: For Tables 2-11 asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

The results of the formalism of other variables on this parameter were mixed. While hardly any opinions opened with a quote from non-legal external sources, formalistic references to jurisdictional matters rose from 15% of all opinions during 1948–1979 to 42% during 2008–2013.⁸³ Still, most judges did not begin the opinion with jurisdictional matters, which would have been a formalist way of framing the decision.

Overall we can see that while judges did not use the formalistic options on all features of the opening of the decision, there was an increase in the tendency to frame the decision formalistically over time. Although precedential cases sometimes introduce legal cases in a non-formalistic manner,⁸⁴ in an empirical test of a random sample of cases, such framing is not common.

83. See *supra* Table 2.

84. Alberstein, *supra* note 25, at 181-82.

B. *Reliance on Extra-legal Arguments*

Formalists regard law as a closed discourse, and judges are expected to make decisions only in reference to this universe. Our findings suggest that, notwithstanding Mautner's claims,⁸⁵ legal decisions continue to rely largely on legal arguments, without reference to other forms of knowledge. Results in Table 3 indicate that overall there are no statistically significant differences between the various periods of time in the use of extra-legal arguments.⁸⁶ One exception is the period of 1996–2007 in which we find a minor, but statistically significant, decline in the proportion of decisions that did not rely on common knowledge compared to the previous period (1980–1995), so that formalism declined from 96% of all opinions to 90%.⁸⁷ Nevertheless, on this parameter, formalism still remains extremely high over time and the tendency to rely on knowledge outside the legal sphere did not increase in the eighties, as Mautner maintained.⁸⁸

Table 3: Means and Standard Deviations of Formalism in the Reliance on Extra-legal Arguments over Time

B. <i>Reliance on extra-legal arguments [no/yes] to indicate formalism</i>					
	1948-79 (n=711)	1980-95 (n=437)	1996-07 (n=451)	2008-13 (n=487)	F
(Var28)	0.99	0.98	0.98	0.98	5.58
Does the decision refer to extra-legal research (i.e. economics, sociology, etc.)? [No]	(0.07)	(0.14)	(0.15)	(0.15)	
(Var29)	0.93	0.96**	0.90	0.92	4.56**
Does the decision refer to common knowledge and cultural understandings? [No]	(0.26)	(0.19)	(0.30)	(0.28)	

*P<0.05, **P<0.01, ***P<0.001

C. *Reliance on Policy Arguments and on Legal Principles*

Formalism is associated with decision-making based strictly on legal norms, whereas the decline of formalism is related to outcomes that pursue policy goals and are inspired by values and principles. It is on this measure that we found the most significant decline in formalism over time

85. MAUTNER, *supra* note 11, at 36, 39-40, 54.

86. *See infra* Table 3.

87. *See infra* Table 3.

88. MAUTNER, *supra* note 11, at 90-96.

and the greatest support for Mautner's thesis.⁸⁹ Here the transformation of legal rhetoric in Israeli caselaw is clear: Rather than relying basically on legal rules, there is now a significant use of the rhetoric of policy and principles in legal decisions. Each of the variables on this parameter indicates a move away from formalism when comparing the earliest and current periods.⁹⁰ Judges are more likely to refer to the purpose of the statute in their writings (9% of all opinions in 1948–1979 compared with 21% in recent years),⁹¹ they are more likely to mention principles such as “equality and freedom” (7% to 32%),⁹² and to refer to the balance between principles and/or rights (17% to 36%).⁹³ Moreover, judges were not only more likely to cite social purposes and policies but to increasingly present their decisions as *founded* on such sources (12% in the first period compared to 36% in the most recent one).⁹⁴ However, it should be noted that despite the decline in formalism on this measure, on average about 64% to 93% of judges' decisions across time were based strictly on legal norms.⁹⁵ Moreover, contrary to our expectation for a formalist revival since the mid-nineties and after the retirement of Chief Justice Barak, the decline in formalism is mainly attributed to the years of 1996–2007, with no statistically significant change in the later years, 2008–2013.⁹⁶ We have added a figure that graphically represents these trends (Figure 1) and offer an interpretation for these interesting patterns in the discussion.⁹⁷

89. *Id.* at 91.

90. *See infra* Table 4.

91. *See infra* Table 4.

92. *See infra* Table 4. The decision was coded as referring to principles when it did so without clearly presenting these principles as a consequence of the two Basic Laws.

93. *See infra* Table 4.

94. *See infra* Table 4.

95. *See infra* Table 4.

96. *See infra* Table 4.

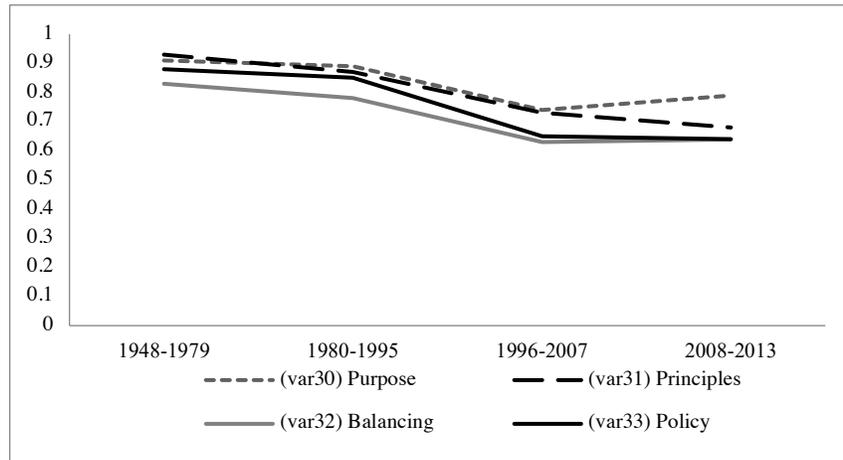
97. *See infra* Figure 1 & Part IV.

Table 4: Means and Standard Deviations of Formalism in the Reliance on Policy Arguments and on Legal Principles over Time

C. Reliance on Policy Arguments and on Legal Principles [No/Yes] to Indicate Formalism					
	1948-79 (n=711)	1980-95 (n=437)	1996-07 (n=451)	2008-13 (n=487)	F
(Var30)	0.91	0.89***	0.74	0.79***	25.30***
Does the decision use the words “purpose” of the relevant statute? [No]	(0.29)	(0.32)	(0.44)	(0.41)	
(Var31)	0.93*	0.87*	0.73	0.68***	53.70***
Does the decision present principles such as equality, freedom, security as inferred from legal texts? [No]	(0.26)	(0.34)	(0.45)	(0.47)	
(Var32)	0.83	0.78***	0.63	0.64***	29.10***
Does the decision refer to the balancing of principles and/or rights? [No]	(0.38)	(0.41)	(0.48)	(0.48)	
(Var33)	0.88	0.85***	0.65	0.64***	52.00***
Is the decision presented as founded on the fulfillment of social purposes, social policy considerations? [No]	(0.33)	(0.35)	(0.48)	(0.48)	

*P<0.05, **P<0.01, ***P<0.001

Figure 1. Reliance on policy arguments and on legal principles



D. Impartiality and Impersonality

In light of the growing interest in recent decades in self-expression, emotions, and individual styles in judging, we expected to find more first-person expressions and references to emotions over time. Surprisingly, we found a decline in the use of personal rhetoric over the years. Whereas before the 1980s about half of all opinions used first-person expressions, in recent years, judges are more formalistic, as 62% of all opinions during 2008–2013 avoided personal reflection and deliberation.⁹⁸

One explanation for this phenomenon may be related to the results on the previous parameter, that is, judges may balance other anti-formalistic trends, such as more policy talk, with less personal or first-person expressions in order to maintain a basically formal opinion. That said, however, despite the rise in formalism on this measure, on average about 38% to 45% of legal decisions over time involve personal expressions.⁹⁹ Thus, notwithstanding the decline in recent years, even when formalism was the norm, judges often inserted their persona into their decisions rather than presenting them as a consequence or outcome of the impersonal application of legal rules.

98. See *infra* Table 5.

99. See *infra* Table 5.

Table 5: Means and Standard Deviations of Formalism of Impersonality over Time

D. <i>Impersonality (use of first-person expressions) [no/yes] to indicate formalism</i>	1948-79	1980-95	1996-07	2008-13	F
	(n=711)	(n=437)	(n=451)	(n=487)	
(Var34)	0.45***	0.51	0.59	0.62***	14.80***
Does the decision explicitly mention personal reflection and deliberation—e.g. “I think,” “I believe,” “in my opinion”? [No]	(0.50)	(0.50)	(0.49)	(0.49)	

*P<0.05, **P<0.01, ***P<0.001

E. *Reference to Discretion and Choice*

Despite the fact that judicial discretion is an integral part of the decision-making process, the formalist notion of the mechanical application of legal rules does not leave room for expressions of doubt on the part of the judge or the acknowledgement of discretion in arriving at his/her ruling. Following this argument, we expected to find an increase in judges' references to discretion and choice during the periods when formalism was said to decline in Israeli decision writing. Our findings demonstrate that judges rarely express doubts or difficulties in the process of decision-making. Nonetheless, we found a minor, yet statistically significant, decline in formalism on this variable during the years 1996-2007.¹⁰⁰ While before the mid-nineties about 95% of all opinions reflect no difficulties in reaching a verdict, in 1996-2007, the percentages dropped to 90%.¹⁰¹ A similar pattern was found for references to discretion: Until the mid-nineties, about 70% of judges' opinions did not mention discretion, whereas, during the third period, the figure dropped to 60% indicating a less formalistic configuration.¹⁰² In the most recent period, formalism rose again to 68% of the opinions in 2008-2013 (see the graphic representation of these trends in Figure 2).¹⁰³ Overall, it appears that judges refer to discretion in decision-making in at least 27% of their opinions, while they acknowledge difficulty in deciding the case in up to 10% of their writing.¹⁰⁴ Apparently, even a formalistic approach can accommodate a limited suggestion of judicial discretion.

100. See *infra* Table 6.

101. See *infra* Table 6.

102. See *infra* Table 6.

103. See *infra* Figure 2.

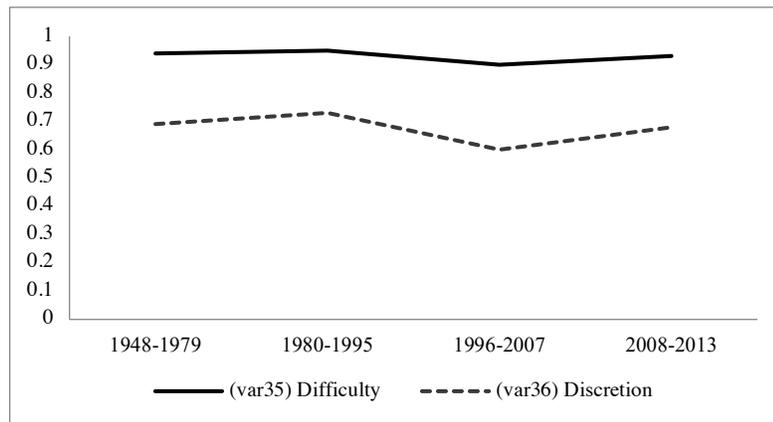
104. See *infra* Table 6.

Table 6: Means and Standard Deviations of Formalism in Reference to Discretion and Choice over Time

E. Reference to discretion and choice [no/yes] to indicate formalism					
	1948-79 (n=711)	1980-95 (n=437)	1996-07 (n=451)	2008-13 (n=487)	F
(Var35)	0.94	0.95***	0.90	0.93	4.35**
Is there reference to the difficulty in deciding the case? [No]	(0.23)	(0.21)	(0.30)	(0.26)	
(Var36)	0.69	0.73***	0.60*	0.68	6.30***
Is the decision presented as a product of discretion or as the product of legal/logical reasoning and/or necessity? [legal/logical/necessity]	(0.46)	(0.44)	(0.49)	(0.47)	

*P<0.05, **P<0.01, ***P<0.001

Figure 2. Reference to Discretion and Choice



F. The Relationship Between Facts and Norms

The formalist emphasis on the facts of the case as separate from norm application led us to expect that there would be a more explicit separation between facts and norms during the periods that have been portrayed as undergoing a decline in formalism. Contrary to our expectations, we found that there was a clear increase in the focus on facts associated with formalism over time: 80% of all opinions before the 1980s include a description of the facts of the case, compared to almost 90% between 1980 and 2007 and 85% in the most recent period.¹⁰⁵ In order to determine whether decisions that refer to facts in a formalistic manner continue in

105. See *infra* Table 7.

this vein on other features as well, we examined whether the description of the facts included non-formalistic elements, such as reference to the emotions of the parties. However, those cases that reported the facts of the case continued using the formalistic option, and more than 90% did not mention the emotions of the parties across all periods of time.¹⁰⁶

Another indication of the formalism of decisions is the distinction between legal and other facts. Although judges rarely made a distinction between legal and other facts (84% to 93%), they were more likely to do so in recent years (15%) than in the early periods (only 7% in the eighties).¹⁰⁷ Thus, while generally, the increased focus on facts indicates a move toward formalism, the reference to different types of facts indicates that other non-formalistic elements have emerged in recent years.

106. *See infra* Table 7.

107. *See infra* Table 7.

Table 7: Means and Standard Deviations of Formalism in the Relationship Between Facts and Norms over Time

F. <i>The Relationship Between Facts and Norms [No/Yes] to Indicate Formalism</i>					
	1948-79 (n=711)	1980-95 (n=437)	1996-07 (n=451)	2008-13 (n=487)	F
(Var37)	0.80**	0.88	0.87	0.88***	8.06***
Does the decision include a description of the facts of the case? [Yes]	(0.40)	(0.33)	(0.33)	(0.33)	
If "yes" for Var37, then:					
(Var38)	0.94	0.94	0.90	0.92	1.97
Does the judge's description of the facts of the case include a description of the feelings, attitudes, emotions of the parties? [No]	(0.24)	(0.25)	(0.30)	(0.27)	
(Var39)	0.31***	0.19***	0.36	0.31	9.50***
Does the decision include a reference to the facts as presented by previous or other opinions? [Yes]	(0.47)	(0.39)	(0.48)	(0.46)	
N	565	383	393	428	
(Var40)	0.90	0.93***	0.84	0.85*	9.65***
Does the judge make a distinction between legal truth and factual truth (legal facts and social/ other facts)? [No]	(0.29)	(0.25)	(0.37)	(0.50)	
N	642	324	262	285	

*P<0.05, **P<0.01, ***P<0.001

G. *Professional Judicial Rhetoric*

Mautner's concept of the decline in formalism in judicial writing in Israel, that has become part of the taken-for-granted view of most legal scholars,¹⁰⁸ also includes a perception of the loosening of professional language and an increased tendency to create legal writing that could be accessible to the wider Israeli public.¹⁰⁹ Again, contrary to our expectations, our findings confirm the formalistic nature of professional legal writing.

108. See MAUTNER, *supra* note 11, at 90-95.

109. See *id.*

Table 8: Means and Standard Deviations of Formalism Addressing Professional Judicial Rhetoric Norms over Time

<i>G. Professional Judicial Rhetoric [No/Yes] to Indicate Formalism</i>					
	1948-79 (n=711)	1980-95 (n=437)	1996-07 (n=451)	2008-13 (n=487)	F
(Var41) Does the decision include events from the judges' own personal experience? [No]	0.99 (0.10)	0.99 (0.08)	0.99 (0.09)	0.99 (0.06)	0.46
(Var42) Does the decision include references to literature, art, popular culture, poetry, humor etc.? [No]	1.00 (0.04)	0.99 (0.10)	0.98 (0.13)	0.98* (0.14)	4.04**
(Var43) Does the decision include slang or popular idioms? [No]	0.81*** (0.39)	0.68*** (0.47)	0.81 (0.39)	0.80 (0.40)	11.10***
(Var44) Is the language of the decision self-consciously literary, i.e., stylistically contrary to ordinary legal writing? [No]	0.95 (0.22)	0.97* (0.16)	0.93 (0.25)	0.92 (0.27)	5.17**

*P<0.05, **P<0.01, ***P<0.001

In all time periods, over 90% of the decisions did not include references to the judges' own personal experience, did not include references to popular culture or artistic expression, and did not use language that was contrary to the conventional professional legal genre.¹¹⁰ The only deviation from this trend was the appearance of slang or popular expressions in about 20% of the decisions in most of the periods, with a slight rise to about 30% during 1980–1995.¹¹¹ It is difficult to explain why there was less formalism on this variable than the others on this parameter. We suggest that contrary to the other variables, the use of which would mark the decision as unprofessional or non-legal, the inclusion of popular idioms in the decision can increase its comprehensibility without affecting its standing as a legal document.

H. Institutional Boundaries

We expected that judges would be most activist during the tenure of Barak as Chief Justice, and that this would be reflected in an increased

110. See *supra* Table 8.

111. See *supra* Table 8.

tendency for judicial intervention in other institutions and legal rhetoric that ignores institutional boundaries. Table 9 indicates that in about 60% of judicial opinions in 1948, there was no intervention in the activities of other institutions.¹¹² However, over time opinions became *more* formalistic, so that by the most recent period, more than 80% of the decisions did not interfere with other institutions.¹¹³ Of those opinions in which judges intervened in the operation of other institutions (644 over all time periods), the vast majority (88%) interfered with professional courts and lower instances, with 11% interventions in the administrative branch, and 1% in the operation of the legislative branch (not shown in Table 9).¹¹⁴ The fact that the majority of interventions were in the context of the Court's traditional supervisory role may be related to other factors in addition to an increase of formalism. One reason that over time the Israeli Supreme Court was increasingly likely to maintain institutional boundaries may be interpreted in the context of the development of Israel's administrative institutions. Over time, the Court appears willing to rely on the judgments of other institutions, and thus is less likely to intervene in their decisions.

Table 9: Means and Standard Deviations of Formalism in the Maintenance of Institutional Boundaries over Time

H. Institutional Boundaries [No/Yes] to Indicate Formalism					
	1948-79 (n=711)	1980-95 (n=437)	1996-07 (n=451)	2008-13 (n=487)	F
(Var45)	0.57***	0.70	0.74	0.81***	28.90***
Does the court intervene in the decision/operation of other institutions? [No]	(0.49)	(0.46)	(0.44)	(0.39)	

*P<0.05, **P<0.01, ***P<0.001

I. Rationalism and the Inner Logic of Legal Spheres

Judges tend to maintain a conservative approach to current legal norms and practices, at least in terms of calling attention to any departure from traditional procedures. In all time periods, judges mentioned they were departing from practice or writing an innovative decision in less than 2% of the opinions.¹¹⁵ In other words, in their writing judges exclusively rationalize their decisions within the inner logic of the legal sphere.

112. See *infra* Table 9.

113. See *infra* Table 9.

114. Data is file with the authors.

115. See *infra* Table 10.

Table 10: Means and Standard Deviations of Formalism in the Rationalism and the Inner Logic of the Legal Sphere over Time

I. <i>Rationalism and the inner logic of legal spheres [no/yes] to indicate formalism</i>					
	1948-79 (n=711)	1980-95 (n=437)	1996-07 (n=451)	2008-13 (n=487)	F
(Var48)	0.99	1.00*	0.98	0.99	3.32*
Does the decision mention that it is a departure from current legal norms and practice? [No]	(0.08)	(0.05)	(0.15)	(0.10)	
(Var49)	1.00	1.00*	0.98**	1.00	4.85**
Does the decision mention that it is an innovative or boundary—breaking decision? [No]	(0.05)	(0.05)	(0.13)	(0.05)	

*P<0.05, **P<0.01, ***P<0.001

J. *The Gap between “Law in the Books” and “Law in Action”*

In accordance with formalist legal rhetoric, judges are unconcerned with the application of their decisions, taking for granted the convergence of social reality with legal opinions.¹¹⁶ A move away from formalism would be found in references to the application of the norm. We found high levels of formalism on all three items in this construct.¹¹⁷ Judges addressed the difficulties of implementing their decisions or ways of overcoming these difficulties in less than 10% of the opinions,¹¹⁸ and thus they appeared to take for granted that there was no gap between their decision and reality. In only a few more cases, 10% to 14%, were judges slightly less formalistic and delegated the implementation of their decision to other parties or institutions.¹¹⁹ What is interesting is that the third period—1996-2007—as the least formalistic of the four time frames, and on two variables (the difficulty of implementation, and ways of overcoming these difficulties) was significantly, if only slightly lower, than the previous period.¹²⁰ It is tempting to attribute this finding to the tenure of Justice Barak as Chief Justice during this period.

116. See *supra* notes 59-63 and accompanying text.

117. See *infra* Table 11.

118. See *infra* Table 11.

119. See *infra* Table 11.

120. See *infra* Table 11.

Table 11: Means and Standard Deviations of Formalism in the Gap between “Law in the Books” and “Law in Action” over Time

J. <i>The Gap between “Law in the Books” and “Law in Action”</i> [no/yes] to indicate formalism					
	1948-79 (n=711)	1980-95 (n=437)	1996-07 (n=451)	2008-13 (n=487)	F
(Var50)	0.98	0.98*	0.94	0.95	4.47**
Does the decision refer to the difficulty of the implementation? [No]	(0.15)	(0.15)	(0.23)	(0.21)	
(Var51)	0.88	0.89	0.86	0.90	0.85
Is the decision forwarded to other institutions for implementation? [No]	(0.32)	(0.31)	(0.34)	(0.31)	
(Var52)	0.97	0.98***	0.91	0.93***	9.44***
Does the decision mention ways of overcoming hurdles that might prevent implementation? [No]	(0.18)	(0.15)	(0.28)	(0.25)	

*P<0.05, **P<0.01, ***P<0.001

IV. DISCUSSION

Although law students who study hard cases are often exposed to creative and anti-formalist modes of decision-making, we found that in Israel, when using a representative sample of routine legal opinions, formalism is the prevailing mode of legal rhetoric. Legal rhetoric does not rely on extra-legal arguments (Var28),¹²¹ does not include references to art or popular culture (Var42),¹²² does not refer to the emotions of parties in describing the facts of a case (Var38),¹²³ and does not address the difficulties of applying legal norms (Var50).¹²⁴ These anti-formalist forms of legal rhetoric rarely appeared in our analysis over the entire time period (see Figure 3a).

Notwithstanding this high level of formalism, our data reveal patterns of both increase and decline over time on other aspects of formalism. We present these trends in Figure 3b.¹²⁵ In terms of the increase in formalism, judges tend to use fewer personal expressions as their rhetoric becomes more professional (Var34),¹²⁶ and, surprisingly, are less likely to intervene in the decisions of other institutions (Var45).¹²⁷

121. *See supra* Table 1.122. *See supra* Table 1.123. *See supra* Table 1.124. *See supra* Table 1.125. *See infra* Figure 3b.126. *See infra* Figure 3b.127. *See infra* Figure 3b.

These results are interesting for two reasons. First of all, these variables were fairly low to begin with, and despite their increase over time, in the last period they still were less formalistic than the others. Moreover, the fact that even in the period which is generally accepted as part of the formalist era, there is some personal expression and institutional intervention seems to indicate that contrary to formalist theory, these deviations are acceptable, at least to a limited degree.

Figure 3a. A Schematic Representation of the Trajectories of the Formalism Variables that Remained Static Over Time

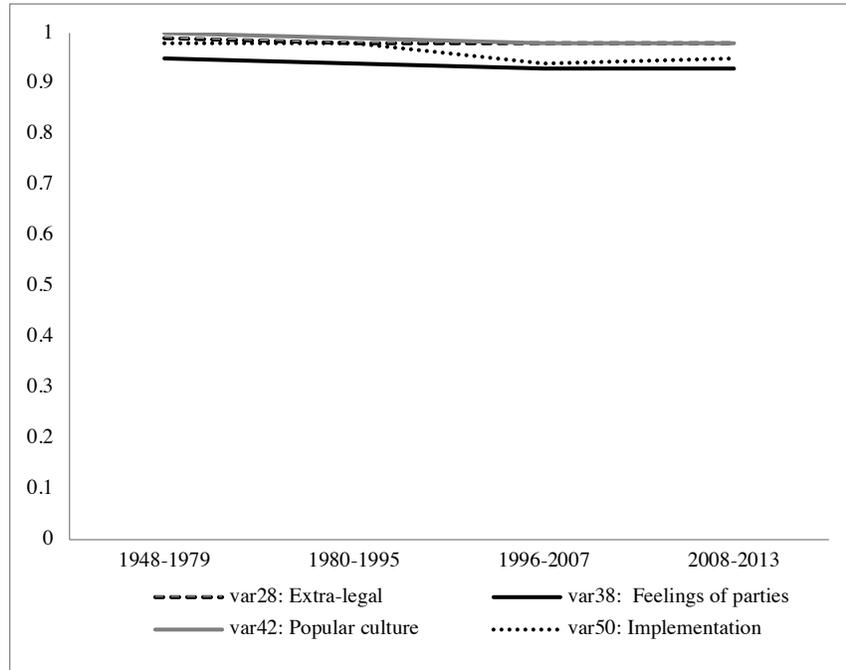
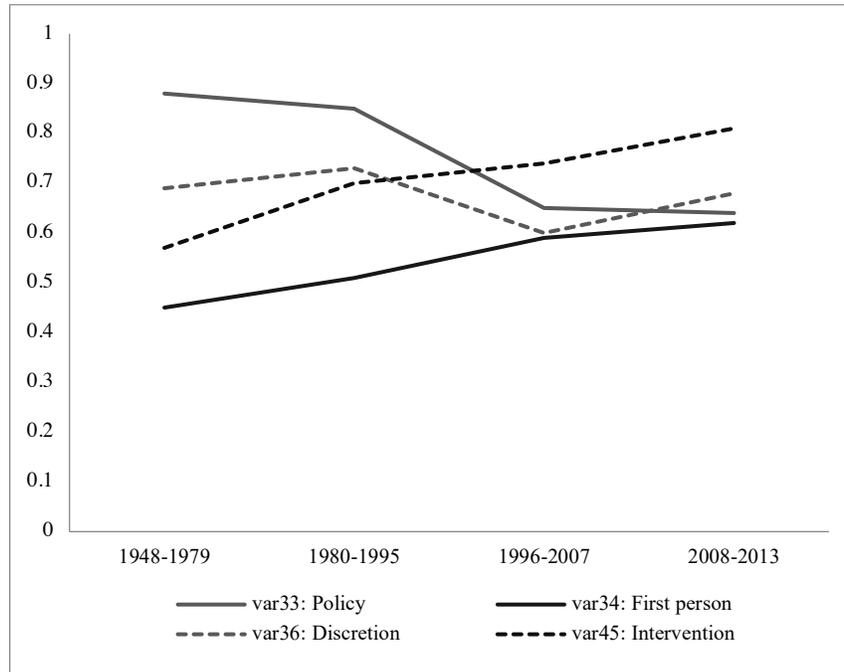


Figure 3b. A Schematic Representation of the Trajectories of Main Formalism Variables that Changed Over Time



One explanation for the increase of these two variables (intervention and personal expression)¹²⁸ may be that the criticism of Chief Justice Barak, and the activist tendencies he was associated with, put pressure on justices to refrain from obvious anti-formalistic rhetoric, even if in essence the outcomes were not restrained or if other aspects of formalism were contravened in their decision writing. This may also tie into our previous suggestion that justices will balance the formalistic and anti-formalistic tendencies within a particular decision so that their opinion as a whole does not stray too far from formalist tendencies.

In terms of the decline of legal formalism, we found that over time judges' opinions include more references to policy (Var33)¹²⁹ and legal discretion (Var36).¹³⁰

The most significant and stable decline in formalism was found in the use of policies, legal principles, and purposes.¹³¹ Legal rhetoric has shifted dramatically on this parameter since 1948, when 12% of the opinions used the language of policies, to the most recent period when

128. See *supra* Figure 3b.

129. See *supra* Figure 3b.

130. See *supra* Figure 3b.

131. See *supra* Table 4.

one-quarter of the judges included references to policy and social purposes when writing their decisions.¹³² Is this a sign of the decline of formalism? Can claims about the decline of formalism be justified by this finding? We would like to suggest a different interpretation that is consistent with the theoretical development of this parameter in legal literature. We find that while the trend to greater policy and principles rhetoric reflects a decline of one type of formalism, at the same time it points to the emergence of a new phase that can be defined as formalistic in a different sense. The use of policy arguments or legal principles reflects a particular reconstruction of the critique of formalism in reference to the indeterminacy of legal rules as promoted by Legal Realism.¹³³ It introduces an instrumental perspective to legal decision-making that may be regarded as domesticating the Legal Realist critique while developing new legal rhetoric.¹³⁴ Some have already suggested that the introduction of policy and principles do not reflect an anti-formalist perspective, but view it, instead, as a more developed stage of formalism.¹³⁵ Ernest Weinrib adopted this new version of formalism and celebrated it as the true representation of the inherent qualities of law.¹³⁶ According to Weinrib, “immanent moral rationality” is what formalism offers the law, and such a quality is central to any understanding of the functions and importance of law.¹³⁷ Weinrib regards formalism in this new phase as the law’s aspiration to be clean of politics, values, ideology, and emotions.¹³⁸ Using policy arguments and purposive language thus keeps judicial writing within the realm of law. Our research suggests that legal writing reflects the emergence of a formalism described by Weinrib,¹³⁹ which we term Stage II Formalism.

Stage II Formalism is also evident in the reference to discretion and choice, which as we found also increased over time, indicating a decline of formalism.¹⁴⁰ We can see that the decline in formalism appears particularly when we look at judges’ tendency to acknowledge the very

132. See *supra* Table 4.

133. Frank, *supra* note 18, at 208.

134. Garry Peller, *Neutral Principles in the 1950’s*, 21 U. MICH. J.L. REFORM 561, 608-09, 617 (1988).

135. Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL’Y 583, 548, 592 (1993).

136. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 953-57 (1988).

137. *Id.* at 950-57.

138. For a critical view of the use of policies and purposes as only pretending to escape politics and external arguments, see ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 77-79 (1986). “Formalism in this context is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.” *Id.*

139. See *supra* Figure 3.

140. See *supra* Table 6.

fact that they have discretion. The concept of judicial discretion has undergone various transformations in legal literature, moving from a perception of unbounded authority, such as Weber's Khadi-justice,¹⁴¹ in which decisions are influenced by a range of legal, moral, political, and emotional considerations¹⁴² to weaker notions of discretion, such as the one defined by Dworkin.¹⁴³ Recent writers assume that "[t]he thesis of judicial discretion does not claim that in cases where discretion may be exercised anything goes."¹⁴⁴ Such cases are governed by laws "which rule out certain decisions."¹⁴⁵ While acknowledging the dangers of absolute discretion,¹⁴⁶ contemporary judges perceive structured discretion and reasoned elaboration as important aspects of their role.¹⁴⁷ It seems that Israeli justices feel that acknowledging discretion and choice in their opinions does not challenge the legitimacy of the formal decision.¹⁴⁸ In other words, judges' references to discretion reflect a perception of legal decision-making that does not equate discretion with an escape outside the boundaries of law. Indeed, the fact that from the earliest period, discretion was mentioned in about one-quarter of the decisions¹⁴⁹ seems to indicate that it was also legitimate to a more limited extent in rule-governed formalism.

When examining the various trends of formalism, it is apparent that formalism does not decline significantly on all its dimensions. On the contrary, many forms of formalism remain stable and high, while others increase over time. However, even on those parameters in which formalism remained high, there was often a slight decline in the period of 1996–2007 (variables 29, 40, 48, 49, 50, 52),¹⁵⁰ that coincides with Barak's tenure as Chief Justice of the Supreme Court of Israel. Thus, on

141. MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 13, at 227-29.

142. Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2226-27, 2248 (1991).

143. DWORKIN, LAW'S EMPIRE, *supra* note 4, at 125; Dworkin, *supra* note 35, at 628, 634-35; Ronald Dworkin, *No Right Answer*, 53 N.Y.U. L. REV. 1, 1-2 (1978). Jurisprudential writing has dealt with discretion in relation to hard cases. The most famous debate was between H.L.A. Hart and Ronald Dworkin, who disagreed about whether judges had discretion in the strong or weak sense in hard cases. HART, *supra* note 15, at 272-76; Dworkin, *supra* note 35, at 626-27. Dworkin's "one right answer" thesis has been challenged by HART, *supra* note 15, at 272-76 and others (see, for example, JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 58-59, 72-74 (1979)). They assume that not every legal question has a right answer, and in difficult cases at least two alternative decisions are possible. See HART, *supra* note 15, at 147-48; RAZ, *supra*, at 58-59, 73-77.

144. Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 843 (1972).

145. *Id.*

146. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 12-14, 27 (1969).

147. G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 291-98 (1973).

148. See MAUTNER, *supra* note 11, at 57-67.

149. See *supra* Table 6.

150. See *supra* Tables 3, 7, 9 & 11.

some indicators, despite the very formalistic nature of judicial writing, the trend was in line with those who spoke of a decline in formalism.¹⁵¹

It is compelling to ask, in light of our surprising finding about legal impersonality and impartiality, whether judges seek to maintain a balance in the use of different elements of formalism. For example, do judges balance a decline in formalism at the policy level, with an increased formality in professional rhetoric? Do judges balance their emphasis on discretion with a growing frame of formalism in the introduction? Do judges use more personal language when rule-based formalism is their style? It may be suggested that the formalist ship of law sails safely when one or two tenets are declining, but it cannot release itself altogether from all formalistic bonds.

What our research has not resolved, and what can be viewed as a limitation of this study, is the question of what weight should be assigned to each measure of formalism. Claims against formalism have developed at different stages of legal history, and some of the characteristics attributed to formalism have become more popular and familiar, and therefore more significant in classifying legal decisions as formal or not. It seems that Mautner's depiction of the decline of formalism in Israeli judicial decisions is based largely on three features: the insertion of liberal political ideas into law, the rise of purposive interpretation and policy discourse, and the increased acknowledgment of judicial discretion.¹⁵² Our findings support the decline of formalism on the last two parameters.¹⁵³

Nonetheless, other parameters, such as the use of impersonal language associated with an objective detached perception of law, the preservation of institutional boundaries, and the legalistic framing of the text of decisions, have always been considered distinctive traits of a functioning, formal legal system. On these, we did not find the expected decline over time, and at this stage we can only suggest that there is a possible interplay between the various features of formalism, so that judges do not completely diverge from the formalistic mold.

In this study, we viewed formalism as a complex multidimensional phenomenon, and thus we did not seek to determine the relative importance of its various components. Now that there is a clearer empirical picture of the trends of each parameter of legal formalism in Israeli legal rhetoric, the floor is open for various interpretations about the relative weight of each measure.

151. See *supra* notes 65-71 and accompanying text.

152. Mautner, *supra* note 11, at 90-95.

153. See *supra* Tables 4 & 6.

V. SUMMARY AND CONCLUSION

This Article examined the extent to which critical claims about the formalism of law are implemented in the legal rhetoric of Israeli Supreme Court decisions. Our findings suggest that, on most measures, there was little evidence of the much-debated decline in formalism.¹⁵⁴ However, the rise in the reference to judicial discretion and the incorporation of policy goals as a basis for decision-making do follow the expected change in judicial rhetoric. We argue that these findings may indicate a reconstructed genre of formalism, which we termed Stage II Formalism.¹⁵⁵ Thus, although legal rhetoric adheres to the “Stage I Formalism,” i.e., the aspects traditionally associated with formalism, on most measures, it seems that the deviations and decline discussed in the literature can, in fact, reflect a reconstruction of formalism that incorporates policy and discretion into the formal legal realm. In other words, Legal Realism and other critical schools have not replaced formalism but have changed it in significant ways.

This research presents the findings of a four-year empirical study that sought to examine the extent to which claims about the decline in formalism were evident in legal writing in routine cases. Like other research that relies on content analysis, it provides a way of systematically and objectively analyzing legal phenomena in a large number of opinions. Thus, unlike other work that has studied anti-formalistic trends mainly in relation to a small number of “hard” or “precedential” cases, our analysis encompasses a large number of routine cases decided by the Supreme Court. However, as others have noted, research based on content analysis cannot provide the deeper understanding of individual opinions that comes from traditional interpretive techniques.¹⁵⁶ Moreover, the main aim of this study was to determine whether the features that have been said to indicate formalism in legal opinions do indeed act in a similar way and to trace the trajectory over time of each of these elements of formalism.¹⁵⁷ We acknowledge that there are many case characteristics that may also potentially influence the formalism of legal opinions, and we anticipate conducting further research to identify patterns of formalism among, for example, the different fields of law represented in the data (criminal cases, public law, and civil cases) and between hard cases (frequently quoted in other cases) and routine cases. Future research could also analyze the relationship of the parameters of formalism to other independent variables such as the number of opinions quoted, the length of decisions, and the

154. See *supra* Parts III–IV.

155. See *supra* notes 135–40 and accompanying text.

156. Hall & Wright, *supra* note 64, at 99.

157. See *supra* Parts I.B, II.

particular judges who wrote the decisions. It would thus be possible to provide profiles of Supreme Court justices in relation to formalism.

Understanding the formalisms of law is important in order to understand law in action. Contrary to current notions of formalism, our research demonstrates that it is not so much the case that formalism exists or not, but that there is an intricate interplay between the various aspects of formalism. Legal texts today, and even in the past, reflect both the aspiration for formalism, as well as its deviations, and judges may attempt to balance these in their opinions. The fluctuating paths of legal rhetoric are therefore neither completely in the direction of formalism or away from it but reflect the trends in social and jurisprudential development in negotiation with formalistic aspirations.