WHAT'S WITH FORMALISM? AN EMPIRICAL STUDY OF VARIOUS PREDICTORS AND PROFILES OF SUPREME COURT RHETORIC

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ABSTRACT

This Article identifies the concomitants of legal formalism in Israeli Supreme Court decisions by analyzing 2,086 opinions from 1950-2013. The Article is the first to present an empirical, multi-faceted approach to formalism that examines patterns of legal rhetoric in relation to the nature of the case and the type of decision. Our findings suggest that reliance on legal rules still remains the most common expression of legal reasoning. However judicial rhetoric is constantly changing and fluctuates in time and in relation to fields of law, as well as in reference to other textual elements. The deviation from formalist rhetoric in terms of references to judicial discretion and rationales based on policy were more prevalent in public law cases handled by the High Court of Justice and in criminal appeals than in civil cases. In addition, we found an intricate interplay between the various aspects of formalism. It is the emphasis on formalism—rather than a single binary view of formalism, or its lack thereof—and on a large number of predictors gleaned from a variety of empirical approaches, that is the unique contribution of this study.

I. INTRODUCTION

The common view of law, which legal professionals often promote, is that law is a formalistic, internally valid, autonomous, objective, and self-justifying system in which one "correct" answer to legal problems can be reached using rules and precedents, without reference to external sources.[1] In this view, law is presented as dispassionate, rational, rulebound, and very different from the political realm.[2] Judicial opinion writing is expected to

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[1] Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608–09 (1999); *see* Tun-Jen Chiang, *Formalism, Realism and Patent Scope*, 1 IP THEORY 88 (2010); David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Rules and Standards*, 46 CONN. L. REV. 415 (2013); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); *see generally* THOMAS C. GREY, FORMALISM AND PRAGMATISM IN AMERICAN LAW (2014); Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138 (1999); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

[2] Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging 3 (2010); Frederick Schauer, *Formalism*, 97 YALE L. J. 509 (1988); Max Weber, Law in Economy and Society (Max Rheinstein ed. & trans., 1954); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949 (1988).

reflect this central claim of formality and "to emphasize the logical, impersonal, objective, constrained character of legal reasoning."[3] "Legal reasoning typically refers to making decisions according to rules, treating certain sources as authoritative, respecting precedent even when it appears to dictate the wrong outcome, being sensitive to burdens of proof, and being attuned to questions of decision-making jurisdiction."[4] It is widely accepted, however, that judges often deviate from formalism in their written opinions. Judges may include rationales based on principles or policy, rather than adhering to the application of existing rules, or they may refer to alternative outcomes and the discretion involved in their decision-making.[5] They may express their own feelings in the decision, thus deviating from the expectations of impartiality and detachment that are intrinsic to the concept of formalism in judicial writing.[6]

The question of legal formalism has been a central element of modern jurisprudential thought, including fierce debates about the true nature of judicial decision-making.[7] In our study, we concentrate on the text of written opinions, rather than trying to account for the reasons for the decision. We recognize that legal opinions stand at the center of the common law system and that these decisions are "essential window[s] into the legal culture of the judges . . . [and] of what counts as sound legal reasoning . . . ."[8]

In this Article, we seek to account for the factors that are associated with formalism, or alternatively, with the deviation from the rhetoric of formalism in judicial opinions. Is it a matter of the prevailing legal culture at a particular time, or do certain types of case outcomes elicit greater deviation from formalism? Can we identify other features that characterize opinions that deviate from formalism, such as the number and type of citations in the opinion or its length? Are majority opinions more formalistic than consenting or dissenting opinions? This Article combines the theoretical insights of research on formalism with contemporary empirical research on

[3] Richard A. Posner, *Judges' Writing Styles (And Do They Matter)?*, 62 U. CHI. L. REV. 1421, 1432 (1995).

[4] *See generally* Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning (2009).

[5] RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 42–241 (1999); Christopher J. Peters, *Legal Formalism, Procedural Principles and Judicial Constraint in American Adjudication*, *in* GENERAL PRINCIPLES OF LAW: THE ROLE OF THE JUDICIARY 23, 36–40 (Laura Pineschi, ed., 2015); GREY, *supra* note 1, at 46–99.

[6] Posner, *supra* note 5; Grey, *supra* note 1, at 46–99; Peters, *supra* note 5, at 25; Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory (2004); *see generally* William D. Popkin, Evolution of the Judicial Opinion: Institutional and Individual Styles (2007); Adam G. Todd, *An Exaggerated Demise: The Endurance of Formalism in Legal Rhetoric in the Face of Neuroscience*, 23 Legal Writing: J. Legal Writing Inst. 84 (2019).

[7] Pildes, *supra* note 1, at 608–09; Posner, *supra* note 3, at 1432–33; TAMANAHA, *supra* note 2, at 3. Tamanaha claims that legal culture as a whole has been indoctrinated with the formalist-realist divide, and in order to deal with inconsistencies, legal scholars are busy developing new legal formalisms and new legal realism; Pildes delves into the underlying assumptions about different types of formalism, and Posner sees formalistic writing as a masquerade for policy decision making, and claims that policy considerations affect the interpretation of unclear statutes and constitutional provisions.

[8] Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 773 (1981). The authors argue that while interpretative or policy-oriented approaches provide insights into how and why judges do or should interpret the law in a certain way, they use insights that are outside the decision itself. *Id. at* 797.

the legal rhetoric of judicial decisions to determine what case characteristics and opinion features are associated with a deviation from the common rhetoric of formalism and which elements of legal formalism are most susceptible to nonconformity.

While some previous research has addressed the relationship between one type of formalism with either case or opinion characteristics, this Article includes three separate parameters that characterize the deviation from formalism, as well as a variety of case and opinion features that are tested as explanatory variables. It is the emphasis on formalism, in terms of personal expression, judicial discretion, and rationales based on policy—rather than a single binary view of formalism or its lack thereof—and the large number of predictors gleaned from a variety of empirical approaches, that are the unique contributions of this study.

A. FORMALISM AND ANTI-FORMALISM

The extensive academic debate about formalism in law is still a mainstay of law journals and legal treatises, involving claims by critics and defenders about the nature, function, and realization of formalism in legal decisions.[9] The contrast between the policy, goal-centered approach of anti-formalism and the formalistic application of rules based on an autonomous, self-contained body of coherent concepts and forms of reasoning has been a central focus of this debate.[10] While formalists maintain that the strict application of rules and precedent leads to predictability, stability, and constraint of decisions and decision-makers,[11] anti-formalists maintain that the law is indeterminate, that legal decision-making was never removed from prevailing social attitudes and values, and that the law could not be separated from political or ideological stands.[12] However, despite the prevalence of the legal realist position, the essence of law as a system in which rules constrain judicial discretion retains a powerful hold on legal thought.[13] Hence, even when decisions are based on policies or principles that justify particular indeterminate rules, they are often presented as the outcome of the rules themselves,[14] including references and citations to legal rules and scholarly literature. Similarly, citations to precedents may cover judicial doubts, discretion, or the possibility of alternative solutions that may not be overtly

[9] Schauer, *supra* note 2, at 514; Pildes, *supra* note 1, at 608–09; John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 772–75 (2003); TAMANAHA, *supra* note 2, at 3; *see generally* Peters, *supra* note 5, at 24–26; Michael Lobban, *Legal Formalism*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY 419 (Markus D. Dubber & Christopher Tomlins eds., 2018).

[10] Taylor, *supra* note 1, at 423; *see generally* Scott L. Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT'L L. & FOREIGN AFFS. 1, 39–40 (2008) (contrasting a formalist application of legal rules and an antiformalist policy-oriented approach); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Dan Priel, *The Return of Legal Realism*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY, *supra* note 9, at 457.

[11] Schauer, *supra* note 2, at 514; Taylor, *supra* note 1, at 423–24; Lucas S. Osborn, *Instrumentalism at the Federal Circuit*, 56 ST. LOUIS U.L. J. 419, 424–25 (2012).

[12] Priel, *supra* note 10, at 472; Taylor, *supra* note 1, at 424.

[13] Priel, *supra* note 10, at 470–71.

[14] Osborn, *supra* note 11, at 426; Peters, *supra* note 5, at 39; Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts- One Judge's View*, 51 DUQ. L. REV. 3, 6–7 (2013); Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 849 (2006).

expressed for fear of causing the opinion to be regarded as less credible or legitimate.[15]

A corollary of the rule-based formalist approach is that no *personal expression* is expected to appear in judicial opinions, in order to create the impression that there is "a government of laws, not men."[16] Richard Posner[17] states that "the aim of such drafting is to make . . . the outcome seem to follow ineluctably from prior authoritative pronouncements with no addition from the writer, who pretends merely to have displayed the authorities that make the outcome an inevitability."[18] Posner contrasts the "impure" writing style with the "pure" style of judicial opinions, and suggests a link between "pure" and "impure" writing styles and "formalist" and "pragmatist" judicial approaches.[19] He describes "pure" opinions (or in Ryan Benjamin Witte's terminology, "traditional" opinions)[20] as serious, impersonal, and matter-of-fact formal legal opinions written with technical legal terms and a high tone of professional gravity.[21] By contrast, the "impure" or "non-traditional" style is more conversational in tone, with simple and accessible language that may utilize humor or references to popular culture and reflect the author's personality.[22]

Our study draws on these distinctions in analyzing the expressions of formalism in Israeli Supreme Court decisions. We address three forms of the deviation from formalistic rhetoric: rationales based on policy; references to judicial discretion; and personal expressions. These specific forms of the deviation from formalism were not randomly chosen. A recent Israeli study found these parameters to demonstrate the most variation and sensitivity to the socio-legal culture, whereas in others, there was very little change over time.[23] In Figure 1, we present our analytic strategy to patterns of legal rhetoric in relation to the nature of the case and the type of decision.

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[15] *See* Nina Varsava, The Citable Opinion: A Quantitative Analysis of the Style and Impact of Judicial Decisions (Oct. 18, 2018) (on file with the University of Wisconsin Legal Studies, Research Paper No. 1494); Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, U. ILL. L. REV. 489, 507 (2010).

[16] TAMANAHA, *supra* note 6, at 122; Lorenz Kaehler, *First-Person Perspectives in Legal Decisions*, *in* 15 LANGUAGE AND LAW: CURRENT LEGAL ISSUES 533, 548–51 (Michael Freeman & Fionaj Smith eds., 2013).

[17] Posner, *supra* note 14, at 29.

[18] On rare occasions the Court may issue a *per curiam* decision, in which the Court issues the decision as a whole rather than signed as an individual justice. *See, e.g.*, HCJ 7052/03 Adalah et al. v. Minister of Interior (2006) (Isr.). In this case it was suggested that the Court used this rare procedure as a signal to the government that it should take its decision into account when reexamining the citizenship law which was at the center of this case. DAVID SCHARIA, JUDICIAL REVIEW OF NATIONAL SECURITY 53 (2015).

[19] Posner, *supra* note 3, at 1426–30; Priel, *supra* note 10, at 460–64 (noting that in current debates, legal realism refers to the view of law in its social context, the indeterminacy of legal language, and an emphasis on empirical research. Legal realists have also been referred to as modernists, instrumentalists, pragmatists, and skeptics.).

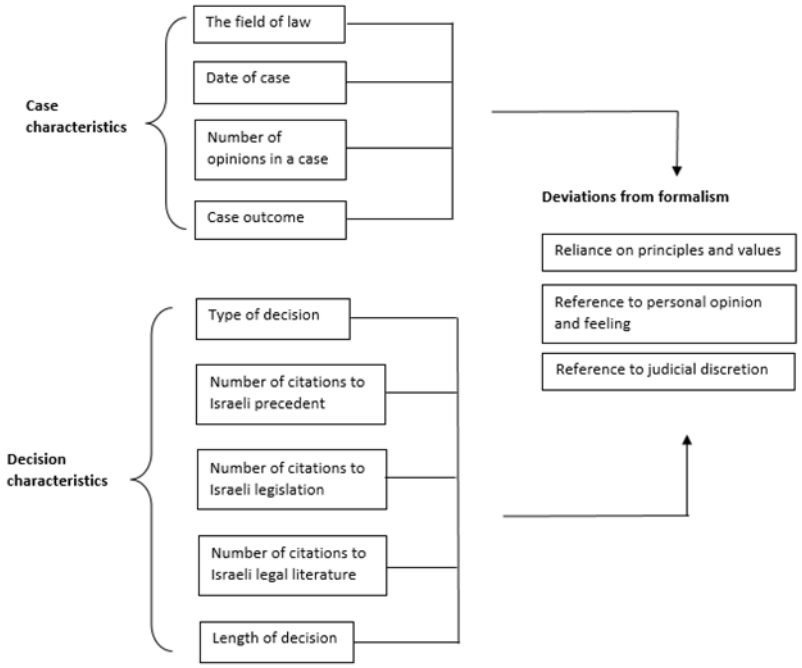
[20] Ryan Benjamin Witte, *The Judge as Author/The Author as Judge*, 40 GOLDEN GATE U.L. REV. 37, 47 (2009).

[21] Posner, *supra* note 3, at 1426.

[22] *Id.*; Witte, *supra* note 20, at 46; Varsava, *supra* note 15.

[23] Michal Alberstein et al., Between Formalism and Discretion: Measuring Trends in Supreme Court Rhetoric, 47 HOFSTRA L. REV. 1103, 1121 (2019).

Figure 1: The concomitants of legal formalism in Israeli Supreme Court decisions: analytic strategy



B. DEVELOPMENTS IN ISRAELI LAW

Before presenting our hypotheses regarding deviations from formalism and various case and opinion characteristics, we will briefly describe several unique features and important developments in Israeli law and its legal system over the past 70 years.

The Israeli legal system has common law foundations as an inheritance from the British mandate, yet it also includes influences from the Ottoman Empire, continental Europe, and Hebrew law. Therefore, like many other legal systems, it cannot be reduced to the standard divisions among legal families.[24] In particular, Israeli civil law is influenced by continental legal thinking and is characterized by clear written rules, which have gradually developed into a comprehensive code.[25] Thus, it is considered to be more formalistic than other fields of law. The criminal penal code is inspired by British law as developed in the colonies, and throughout the years has become more formal and structured.[26] At the same time, the unique development of Israeli public law has produced a more open-ended common

[24] Aharon Barak, *Some Reflections on the Israeli Legal System and Its Judiciary*, 6 ELEC. J. OF COMPAR. L. (April 2002), http://www.ejcl.org/61/art61-1.html.

[25] Elgar Encyclopedia of Comparative Law (Jan M. Smits ed., 2d ed. 2012).

[26] See generally Mordechai Kremnitzer, Forty Years of Criminal Law – Further Comments, 24 ISR. L. REV. 580 (1990).

law system. With the establishment of the State of Israel, a heated debate raged regarding the need for a constitution. Like other debates that involved the clash between religious and secular political parties, it ended with a compromise.[27] The compromise, also known as the Harari Resolution, held that there would be a gradual accumulation of basic laws, which would be combined into a constitution at a later stage. This constitutive stage has to date not yet materialized. Therefore, Israeli public law has been developed by the judiciary following common law traditions, including discretion and creativity. Justices used principles and public policies gleaned from constitutional-like documents (such as the Declaration of Independence) and former precedents. In 1992, according to mainstream legal academics,[28] a constitutional revolution occurred in Israeli public law when two new basic laws were enacted, which were interpreted by the Supreme Court as endorsing judicial review over primary legislation by the Knesset. In fact, these two basic laws—"human dignity and liberty" and "freedom of occupation"—are framed according to a formula of proportionality, stipulating that "[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."[29] These expressions in essence endorse in a formal manner discretion which is more nuanced than in ordinary norm application.

Another development of relevance to this research concerns the role of the High Court of Justice ("HCJ"). The justices of the Supreme Court sit as the HCJ, which is the initial and final arbiter primarily in matters regarding the legality of the decisions of the State, government, and other public bodies, including judicial review of parliamentary conduct and Israel Defense Force activities. By contrast, the Supreme Court is the final appellate court in criminal and civil law cases, which are appealed from the second level District Court. Cases that originated in the first level Magistrate's Courts and have been denied by the District Court may also be heard by the Supreme Court.[30] In 2000, a reform of administrative procedure transferred certain types of cases that were previously handled by the HCJ to the District Court. The Supreme Court, rather than the HCJ, now hears appeals of these administrative law decisions made by the District Court. These characteristics and developments are relevant for analyzing our sample, which included criminal, civil, and public cases from 1950 until 2013.

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[27] On June 13, 1950, the compromise, known as the "Harari Resolution," was sponsored by Knesset Member Yizhar Harari and stipulated that instead of a single document, the "constitution" of Israel would be composed of a series of Basic Laws to be created over time by a special committee and approved by the Knesset.

[28] *See generally* Barak, *supra* note 24; Antonios E. Platsas, *The Enigmatic but Unique Nature of the Israeli Legal System*, 15 POTCHEFSTROOM ELEC. L. J. 11, 19 (2012).

[29] *See* Basic Law: Human Dignity and Liberty of the Person, 5752-1992, SH No. 1391 (1992) (Isr).

[30] The distinction between mandatory and discretional appeals was found to have significance in the reversal rate of appeals in both the US and Israel. Theodore Eisenberg et al., *Israel's Supreme Court Appellate Jurisdiction: An Empirical Study*, 96 CORNELL L. REV. 693, 696–97 (2011); Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U.L. REV. 1451, 1454, 1462, 1471, 1500 (2009).

C. CASE AND OPINION CHARACTERISTICS AND THE DEVIATION FROM FORMALISM

Socio-legal research has revealed that various case and opinion characteristics are related to formalistic rhetoric (or the lack thereof) in legal decisions. These characteristics include the legal culture of the specific time period, the field of law dealt with by the case, the number of opinions and their nature (i.e. whether main, concurring or dissenting), the number and type of citations, and the length of the opinion.[31] In the following section, we present theoretical and empirical findings that have led us to formulate hypotheses regarding the relationship between these variables and the deviations from formalism. Although empirical research on the expressions of legal formalism in judicial rhetoric per se is lacking, we have based our hypotheses on studies that examined some aspects of judicial writing associated with formalism. Given the pioneering nature of this study, we have framed our hypotheses with caution.

1. Changes Over Time and the Deviation from Formalism

Despite the revolt against formalism[32] and "the contemporary aversion to formalism,"[33] there is still some controversy about the extent to which formalism retains a hold on judicial legal writing. Posner states that "the formalist opinion is in the ascendant" in American appellate courts, due to the increased role of law clerks and the heavier caseload.[34] On the other hand, Livermore, Riddell, and Rockmore point to a trend of greater reliance on value-oriented language at the U.S. Supreme Court over time, indicating a shift toward anti-formalism—a view shared by David Taylor regarding federal courts.[35] Similarly, others have suggested that over time judges' styles have become more personal and less formal.[36] In one of the most important essays in Israeli law, Menachem Mautner claimed that since the 1980s there has been a rise in values in judicial rhetoric and a decline in formalism in many aspects of the law, from value-based decisions to a more popular language style, and references to judicial discretion within the text.[37] However, Alberstein, Gabay-Egozi, and Bogoch, in the first empirical study of formalism in Israeli Supreme Court opinions, found variation in the trends and patterns of the trajectories of different forms of formalism over time. They conclude that some elements of formalism are more susceptible to the

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[31] *See generally* Posner, supra note 14; Michael A. Livermore et al., The Supreme Court and the Judicial Genre, 59 ARIZ. L. REV. 837 (2017); Ryan J. Owens & Justin P. Wedeking, Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions, 45 L. & SOC'Y REV. 1027, 1037, 1046 (2011).

[32] *See generally* Morton White, Social Thought in America: The Revolt Against Formalism (1947).

[33] Schauer, *supra* note 2, at 511.

[34] Posner, *supra* note 14, at 29. *Accord* Thomas, *supra* note 9; Osborn, *supra* note 11 (regarding patent law cases in the Federal Courts).

[35] *See* Livermore et al., *supra* note 31, at 851–52; Taylor, *supra* note 1 (deals with patent law in Federal Courts, claiming that these courts have an on-going policy debate with the Supreme Court).

[36] POPKIN, *supra* note 6; *see* Keith Carlson et al., *A Quantitative Analysis of Writing Style on the U.S. Supreme Court*, 93 WASH. U.L. REV. 1461, 1480 (2016).

[37] Menachem Mautner, The Decline of Formalism and the Rise of Values in Israeli Law, in Law and the Culture of Israel 75 (2011).

cultural ethos of the time, while others are less so.[38] In this Article, we seek to provide a more comprehensive account of the influence of time on each type of formalism by controlling for other case and opinion characteristics. Hence, based on previous research in Israel and elsewhere, we hypothesize that *there will be an increase over time in three indicators of the deviation from formalism: reliance on policy, personal expression by the judges, and references to judicial discretion*.

2. Field of Law and the Deviation from Formalism

Ostensibly, the aspiration for formality in the criminal law context should be stronger than in other fields of law. The functions of law as controlling behavior and as imposing sanctions are usually considered the most coercive and intrusive in terms of interfering with basic freedoms. Therefore, it would seem that the use of criminal law to interfere with the liberty of citizens is presented as bounded and restricted by very formal rules which ensure that innocent citizens are not mistakenly subject to the law's force. There are also certain principles in criminal law, like the principle of legality (*nullum crimen sine lege*), the absence of retroactivity, and other constraints, which specifically make criminal law more circumspect than other areas.[39] Similarly, rules regarding interpretation in criminal law encourage a narrow restrictive interpretation of statutes in order to avoid false convictions and situations of over inclusiveness that may interfere with the liberty of citizens.

Despite the preference for formalism in criminal law, in Israeli academic writing there is the claim that "the decline of formalism and the rise of values" have had consequences in the criminal sphere as well.[40] A number of cases decided by retired Chief Justice Aharon Barak have deconstructed crucial concepts in criminal law and have furthered an interpretation which is purposive and not strictly in accordance with formal legal criteria.[41]

Clarity and prediction are also important in civil law because parties who engage in commercial and contractual activities expect clear normative guidelines regarding the implementation of their contract. However, there are still claims that some flexibility is necessary for civil conduct that may require reliance on standards rather than rules and the exercise of discretion by judges.[42] The tension between formal rules and flexibility have been part of a longstanding debate in civil law.[43]

In constitutional and administrative law, when public disputes are at stake and broad distributive and ideological questions may be addressed, the expectation is for the least formal decisions. Judges are expected to balance

[38] Alberstein et al., *supra* note 23, at 1131–38.

[39] *See generally* Peter K. Westen, *Two Rules of Legality in Criminal Law*, 26 L. & PHIL. 229, 231 (2007).

[40] Mautner, *supra* note 37, at 93.

[41] *See* CivA 165/82 Kibbutz Hatzor v. Rehovot Tax Assessor, 39(2) PD 70 (1985) (Isr.).

[42] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 86 HARV. L. REV. 1685, 1769 (1976).

[43] GRANT GILMORE, THE DEATH OF CONTRACT (2d ed. 1995); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 803, 813 (1941).

between conflicting values; to deal with issues and concepts like proportionality, which are uncertain and vague; and to address public policies in their decisions on constitutional questions.[44] In fact, constitutional legislation both at the national and international level is often used to provide a framework for balancing values and assessing proportionality in a way that "formalizes" the anti-formalist policy discourse.[45] Nevertheless, some would argue that neutrality and formality are crucial in maintaining the legitimacy of constitutional and administrative law and that the function of judge-made constitutional law is to interpret the written constitution.[46]

Thus, on a theoretical basis, the lowest level of formality would be expected in public law, followed by civil law, with criminal law the most formal. That said, however, empirical studies that have examined the differences between the fields of law and various elements of judicial writing commonly associated with formalism or its absence often tell a different story. In studies of the complexity or clarity of the decision, researchers have analyzed the extent of the use of professional and academic language, which is associated with formalism and its relation to various case characteristics. For example, an empirical study of U.S. Supreme Court opinions found that complexity of the language of the opinion varied by types of case, and over time.[47] Specifically, administrative law opinions issued during the 2009-2011 were the most difficult to read compared to earlier periods and to other case types, followed by statutory law opinions, constitutional law opinions, and finally criminal law opinions, which increased in complexity over time but were still the most readable in the last period.[48] Similarly, Ryan Owens and Justin Wedeking, using a different measure of opinion clarity, found that opinions in criminal procedure cases were the clearest.[49] While it is impossible to make a one-to-one connection between complexity and formalism, there is definitely a perception that the two are related, and importantly, that the purpose of both complexity and formalism is to convey the legitimacy of the court and present the judge as an impartial arbiter who renders opinions that are consistent with the law.[50] Nevertheless, aspects of

[44] *See generally* PROPORTIONALITY IN ACTION: COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE (Mordechai Kremnitzer et al. eds., 2020) (for a discussion of various international approaches and judicial practices regarding proportionality).

[45] This is, for example, the case in Israeli constitutional law, where in 1992 the Basic Law: Dignity and Liberty of The Person was enacted, stipulating in a formal way a flexible proportionality formula to decide whether certain actions should be considered appropriate even if they infringe the rights granted by this law. Basic Law: Human Dignity and Liberty of the Person, 5752-1992, SH No. 1391 (1992) (Isr).

[46] But see Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179 passim (1986).

[47] Stephen M. Johnson, *The Changing Discourse of the Supreme Court*, 12 U.N.H.L. REV. 29, 66 (2014).

[48] While the Court's criminal law opinions are still the most readable of the types of opinions examined in this study, they have become increasingly less readable than they were during the 1930s and constitute a much greater percentage of the Court's opinions today than they did during the 1930s. *Id.* at 59–61.

[49] Owens & Wedeking, *supra* note 31, at 1053–54.

[50] Posner, *supra* note 3, at 1429–30; Posner, *supra* note 14, at 4–6; Witte, *supra* note 20, at 46. Another approach to empirically testing the relationship between certain aspects of formalism (or the lack thereof) and the type of case in written decisions is what Czarnezki and Ford term interpretive tools. Thus, they coded decisions for the frequency with which judges used eight interpretive tools, including a preference for rules and the plain meaning rule, that are usually associated with formalism, and balancing tests which are related to anti-formalism. They found that in general, there was little effect of interpretive philosophy

the concept of anti-formalism include rationales based on policy and references to judicial discretion that are not included in the studies of judicial rhetoric that measure language complexity or the readability of decisions. Thus, we have been cautious in using these results in formulating hypotheses in this research. Based largely on the theoretical claims, we hypothesize that *there will be least deviation from the measures of formality in criminal law, with public law cases (HCJ) demonstrating the highest tendency for deviation from formality. Civil law opinions are expected to be characterized by an intermediate level of formalism*.

3. Outcome of the Case, Number of Opinions, and the Deviation from Formalism

A number of empirical studies have examined the extent to which the outcome of the case is associated with elements of the language of written opinions that are indicative of formalism. Opinions that overruled precedent or exercised judicial review were found to be more complex,[51] longer,[52] and with more references to legal scholarship,[53] thus providing formalistic, rule-based rationales for the decisions. Based on Owens and Wedeking, [54] we would expect more formalistic elements in decisions that overruled precedent. In our study, outcomes were coded as rejecting or accepting the petition or appeal. Since accepting an appeal is usually associated with the reversal or change of a previous decision,[55] we hypothesize that *there will be fewer deviations from formalism in decisions that reject appeals and petitions than in decisions that accept them*.

Complexity is also related to a larger number of opinions in a particular case, and to a greater majority coalition size.[56] According to these studies, separate opinions can call into question the legal reasoning of the majority decision and may even weaken the perceived legitimacy of the opinion. Thus, we would expect *more deviation from formalism in cases in which there are a large number of opinions.*

even in the cases in which one might predict it to be important. Czarnezki & Ford, *supra* note 14, at 876–78.

[51] Owens & Wedeking, *supra* note 31, at 1050, 1053–54.

[52] Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 666 (2008).

[53] Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U.L. REV. 995, 1013 (2015).

[54] Owens & Wedeking, *supra* note 31, 1034–35.

[55] Criminal appeals are mostly by the defendants who want to change the decisions or the sentence. Thus, rejecting the appeal would leave the previous decision intact. In fact, about 80 percent of appeals by defendants are rejected; that, in effect, maintains the previous decision. *See* BRYNA BOGOCH & RACHELLE DON-YECHIYE, GENDER AND THE LAW: DISCRIMINATION AGAINST WOMEN IN ISRAELI COURTS (1999). *See also* Assaf Meydani, *The Intervention of the Israeli High Court of Justice in Government Decisions: An Empirical, Quantitative Perspective*, 16 ISR. STUD. 174, 174, 185 (2011). Meydani also found that in HCJ cases, the Court rejected petitions against the government in 50 percent of the cases, and only accepted 18 percent of the decisions (the rest were postponed or retracted), again maintaining the status quo in most cases. *Id.*

[56] Owens & Wedeking, *supra* note 31, at 1050, 1053–54.

4. Type of Opinion and the Deviation from Formalism

The difference between majority, dissenting, and concurring opinions has been found to affect the rhetoric of opinions, although there have been mixed results regarding the various elements of formalism of each type of decision. For example, Carlson, Livermore, and Rockmore[57] found that there was a difference in writing style between majority and dissenting opinions, and that the same justice would write differently if they were writing for the majority or a dissenting opinion. Stephen Johnson,[58] who compared opinions from 1931-1933 with those written from 2009-2011, found that concurring opinions were the least complex (most readable), followed by dissenting and majority opinions, whereas the order of dissenting and majority opinions was reversed in the later period, so that dissenting opinions were the most complex.[59] Using a measure of cognitive complexity, rather than readability, Owens and Wedeking[60] found that dissenting opinions were clearer than majority opinions.[61] Looking at another aspect of language associated with the formalism debate, Cross and Pennebaker[62] suggested that justices would use more cautious language in majority opinions, whereas they would be freer to express emotions and individual opinions in minority opinions. Indeed, Carlson, Livermore, and Rockmore[63] suggest that the growing prevalence of dissents over time may explain why judicial writing styles have become less "friendly" over the years, with more negative words and a less complex, "non-judicial" style of writing. Given the sometimes contradictory findings regarding the elements of the language of decisions associated with formalism and the type of opinion, we suggest that *deviation from formalism as measured by the use of personal feelings, policy considerations, and rhetoric will occur most frequently in dissenting opinions, whereas majority opinions would be the most formalistic, with fewer policy rationales or references to personal feelings or judicial discretion*.

5. Citations and the Deviation from Formalism

Judges cite precedent to justify the decisions they reach, and greater reliance on precedent is commonly associated with judicial constraint.[64] However, there is some controversy about whether precedents actually guide judges' decisions, or whether, as legal realists have maintained, justices select precedents that coincide with their decisions or support their policy

[57] *See* Carlson et al., *supra* note 36, at 1480, 1497.
[58] Johnson, *supra* note 47, at 56.
[59] *Id*. at 59.
[60] Owens & Wedeking, *supra* note 31, at 1038.
[61] Owens & Wedeking, *supra* note 31, at 1040 (measuring cognitive complexity using ten variables of the Linguistic Inquiry and Word Count program, including causation, insight, discrepancy, inhibition, tentativeness, certainty, inclusiveness, exclusiveness, negations, and percentage of words containing six or more letters). Studies that use readability scores take into account sentence structure and word length. These studies all seek to determine the clarity of the opinion.
[62] *See* Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 MICH. STATE L. REV. 853, 877 (2014).
[63] *See* Carlson et al., *supra* note 36, at 1480.
[64] Cross et al., *supra* note 15, at 516–17.

choices. William Landes and Richard Posner[65] suggest that an activist court, inclined to ignore precedent, "might cite few cases" in support of its agenda. Others[66] claim that "courts faced with uncertainty surrounding the adoption of new legal doctrines . . . can be expected to employ citations most intensively when, in fact, acceptance is most problematic." In other words, judges use more citations to legitimize controversial decisions. In a similar vein, Cross et. al claim that constitutional cases receive more citations than non-constitutional criminal cases, and that First Amendment, due process, and civil rights cases, which are more politically controversial than other types of law in the United States, have more citations than, for example, taxation cases.[67] Similarly, they also found that when it overrules precedent, the Court cites an average of 26.9 prior Court opinions, while only citing 12.3 cases on average when it does not overrule precedent.[68] *We expect that the use of citations will be greater in decisions in which there is a deviation from formalism especially in reference to policy and values and within High Court (public law) decisions.*

What is the role of references to legal scholarship in legal opinions? Although in the formalistic European civil law tradition, academic research is considered indispensable to the work of judges, and references to legal scholarship appear frequently in decisions, this is not currently the case in common law countries.[69] In fact, both empirical studies and judicial writing have criticized the irrelevance of legal scholarship for judicial decision making,[70] and have suggested that the advent of legal realism may have contributed to the gap between legal scholarship and judicial practice.[71] However, David Schwartz and Lee Petherbridge[72] maintain that the citation of legal scholarship has been on the rise in common law jurisdictions since 1980 (until 2008) in both the absolute number of citations and in the proportion of opinions in which there are citations to academic work.[73] Meanwhile, Brent Newton found that citations to law review articles declined in the 21st century compared to the early 1970s.[74] Both of these empirical studies found that references to legal scholarship were influenced

[65] William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 274 (1976).

[66] David J. Walsh, On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases, 31 L. & SOC'Y REV. 337, 340 (1997).

[67] Cross et al., *supra* note 15, at 547.

[68] Cross et al., *supra* note 15, at 544.

[69] *See generally* Karen J. Alter et al., *Law, Political Science and Legal Studies: An Interdisciplinary Project?*, 3 EUR. UNION POL. 113, 124–25 (2002); RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY, 32–33 (2016); Diane P. Wood, *Legal Scholarship for Judges*, 124 YALE L.J. 2592, 2600, 2605–06 (2015); Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483 (2015).

[70] David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1348–58 (2011); POSNER, *supra* note 69.

[71] Wood, *supra* note 69, at 2600.

[72] Schwartz & Petherbridge, *supra* note 70, at 1361–62.

[73] Schwartz & Petherbridge, *supra* note 70, at 1360. *But see* POSNER, *supra* note 69, at 28 n.27 (arguing that the fact that judges cite scholarship does not mean that they had any influence on the actual decision that was made.).

[74] Brent E. Newton, Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis, 4 DREXEL L. REV. 399, 404 (2012).

by judicial ideology: liberal justices cited more academic work. While Newton suggests that the reason for this is that law review articles, particularly those written by law professors, are more likely to reflect the ideology of liberal justices, Schwartz and Pethbridge add another reason.[75] They propose that conservative justices in common law jurisdictions are more likely to be legal formalists, who rely on the legal rules rather than legal scholarship in their decision making. In our study, which examines judicial opinions in a common law country with some continental influences,[76] we will look at the relationship between the various indicators of legal formalism and citations to academic legal literature. We hypothesize *that cases that deviate from formalism will contain more references to legal literature than more formalist opinions*.

6. Length of Decision and Deviation from Formalism

There is another feature of judicial rhetoric that has received recent research interest, and which skirts the issue of formalism: the length of the decision. Theoretically, if formal legal decisions apply the law in a mechanical way (with little discretion), they may be expected to be shorter. However, if formal legal decisions emphasize grounding the authority for the decision by citing rules and precedents, we might assume that formalism is associated with longer decisions. Still, another point of view suggests that when judges devote space to musing about the decision and personal reflection about alternative solutions,[77] these non-formalist opinions may be longer.

Empirical research is almost unanimous in its conclusion that judicial decisions, whether the researcher looks only at majority opinions[78] or includes dissenting and concurring opinions,[79] are longer now than they were in the past.[80] Johnson suggests a number of reasons for longer opinions: the tendency to include citations and footnotes, to address the opinion to various audiences, and to include the views of the justices joining in the opinion. He found that there was a clear relationship between the complexity of the decisions (as measured by two different readability tests) and their length, such that more professional and academic (i.e. formalistic) opinions were longer in all cases.[81]

Yoram Schachar conducted one of the few investigations which looked at opinion length in Israeli Supreme Court decisions over time.[82] Based on a sample of 40 percent of the published (printed) decisions from 1948 to 2004, Schachar found that after a sharp increase in decision length (up to the year 2000), there was a complete turnabout followed by an even sharper decline

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[75] *Id.* at 404; Schwartz & Petherbridge, *supra* note 70, at 1368.

[76] Barak, *supra* note 24; Platsas, *supra* note 28, at 17.

[77] *See* POPKIN, *supra* note 6, at 162; Posner, *supra* note 14, at 33–35.

[78] Black & Spriggs, *supra* note 52, at 626.

[79] Johnson, *supra* note 47, at 37.

[80] Although sometimes there were periods of a decline in length, the general trend to longer decisions is clear. Black & Spriggs *supra* note 52, at 680–81.

[81] Johnson, *supra* note 47, at 57.

[82] See Yoram Schachar, The Area of Jurisdiction of the Supreme Court, 1950-2004, 1 Hapraklit 29 (2008) (Isr.).

in decision length. However, he suggests that the shorter decisions he found between 2000 and 2004 may not be part of a trend but, rather, a short-term change. Indeed, he notes that the common perception among Israeli scholars seems to be that Israeli opinions, like their American counterparts, are getting longer over time. This study will examine whether opinion length is also related to measures of formalism, or its absence. Based on the above theoretical claims and empirical research, we posit that *longer decisions are associated with a deviation from formalism, and that there will be differences between the fields of law in the relationship between the length of the decision and anti-formalist rhetoric*.

D. RESEARCH GOAL

Using the characteristics associated with different aspects of formalism in the studies of the U.S. Supreme Court and in Israel, we examine the factors related to the deviation from legal formalism in Israeli Supreme Court decisions in the three general fields of law dealt with by the Court: public law, in which the HCJ is both the first and ultimate decision maker; and criminal and civil law, in which the Supreme Court is the final appellate court.[83] In recent Israeli research, three indications of the deviation from formalism were found to be most prevalent in Israeli Supreme Court decisions: the reliance on policy arguments and legal principles, the reference to judicial discretion, and the reference to the judges' personal feelings.[84] In line with these findings, we analyze the variation in each of these three aspects of the deviation from the rhetoric of formalism in relation to characteristics of the case and features of the opinion.

II. METHODOLOGY

A. DATA AND SAMPLE

Using data from the legal database Nevo, the most comprehensive commercial database of legal opinions in Israel, we identified our population of all Israeli Supreme Court decisions based on the following criteria: (1) the decisions were labelled "judicial opinions," as opposed to those labelled technical decisions; (2) they were longer than two pages, in order to eliminate decisions that did not include at least some reasoning; and (3) the decisions were handed down between the years 1950 and 2013. We based our sample strategy on the proportion of decisions each year in each field of law that was handled by the Israeli Supreme Court, namely, ultimate appellate decisions in civil and criminal cases and public law cases dealt with by the HCJ. We sampled from that pool of all judicial decisions every four years, for three consecutive months each year in the early years, and two consecutive months each year from 1986 on, beginning with a different month each year. There were two reasons for oversampling in the earlier

[83] *See supra* Section I.B.

[84] Alberstein et al., *supra* note 23, at 1131, 1136.

years. For one, in these years, selected decisions of the Supreme Court were published by the Bar Association, based on the editors' assessments of their importance and precedential natures. Only in 1985 did the 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. The most comprehensive one, Nevo, has also added opinions which were previously unpublished in print form to current decisions. The problem is that, unless we go through court files, there is no way of knowing how many of the early unpublished decisions were included in Nevo. In addition, there is a large gap between the number of decisions made by the Supreme Court in the early years compared to current numbers, and we sought to achieve a relative balance 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 fields of law, with a slight over-sampling of the early years. Altogether, there were 2,086 opinions in our sample, including 664 criminal, 849 civil and 573 public law (HCJ) cases.

B. INDEPENDENT VARIABLES: THE CHARACTERISTICS OF THE CASE AND THE FEATURES OF ITS OPINIONS

Six trained law students coded the characteristics of each case, including fields of law (civil appeals, criminal appeals, and High Court of Justice cases, coded as three dummy variables), the year of the decision, the number of opinions in the case, and its outcome (three dummy variables, fully or partially accepted, denied, and other). In the analysis, we set the earliest year in the data (1950) to zero, with the latest year (2013) coded as 63, and we added its squared term ($year^2$) to test the shape of the change over time in our data. Additionally, for each separate opinion in a case, five ***decision features*** were coded: the type of decision (majority, dissenting, or concurring); the number of citations to Israeli precedent, Israeli legislation, and Israeli legal literature; and the length of the opinion, coded by the number of words.[85]

C. DEPENDENT VARIABLES: FORMS OF DEVIATION FROM FORMALISM

Three parameters of the deviation from formalism were coded for each opinion: the reliance on principles and values, the reference to the judge's personal opinion and feelings, and a reference to judicial discretion. ***Reliance on principles and values*** was based on the following four binary (yes/no) items: (1) Does the decision refer to the purpose of the relevant statute? (2) Does the decision present principles such as equality, freedom, security, without direct reference to legislation? (3) Does the decision refer to the balancing of principles and/or rights? and (4) Is the decision presented as

[85] The number of words was divided by 1000 to simplify the analysis.

geared to the fulfillment of social purposes or based on social policy considerations? Reliance on principles and values was measured as the mean of these four items presenting a continuous scale from 0 (formalistic) to 1 (non-formalistic). ***Reference to personal opinion and feelings*** was coded as 1 if the decision explicitly mentioned personal reflection and deliberation (non-formalistic), and 0 if it did not. ***Reference to judicial discretion*** is also a dummy variable coded 1 if the judge mentioned the need for judicial discretion or referred to difficulty in deciding the case (non-formalistic), and 0 if no such mention was made.

To ensure accurate coding and inter-coder reliability, sixty decisions were coded by all six coders in order to determine the reliability of the coding scheme and the clarity of the measurement instructions. The Cohen's Kappa test of reliability among the coders ranged from 0.71 to 1.00, with an average of 0.825 across the coders and coded items. Full descriptive statistics of our variables for all the cases in our sample and by fields of law are presented in Appendix A.

D. ANALYTICAL APPROACH

To estimate how the characteristics of a case and a decision affect forms of deviation from formalism, we estimated ordinary least squares ("OLS") linear probability models. First, we used a multivariate regression analysis to determine the effect of all the features of the case and the opinion on principles and values (model A), reference to personal opinion and feelings (model B), and reference to judicial discretion (model C). Models A-C are presented in Table 1. To facilitate comparison of the effects of the continuous independent variables within the models, we standardized them to a mean of zero and a unit standard deviation (z-scores). Dummy variables retained their original metric. In Table 2 we present a summary of these results and present them in reference to our confirmed and refuted hypotheses.

We then examined the two-way interactions for all of the case and decision features included in Table 1 with the measurement of field of law. Thus, Table 3, presents the effects of the characteristics of a case and the features of decisions on the three different measures of the deviation from formalism, and indicates whether they significantly differ in criminal appeals, civil appeals and HCJ cases. We retained the effects that reached statistical significance and omitted those interaction terms that yield no significant effects for all three forms of deviation from formalism.

III. RESULTS

Figure 2 presents the means and proportions of case and opinions characteristics and deviations from formalism by fields of law.[86] The descriptive statistics displayed in Figure 2 show that there are indeed differences between each of the fields of law handled by the Israeli Supreme

[86] For full descriptive statistics, including range of measurements and all sample statistics, see Appendix A.

Court both in the patterns of the deviation from formalism, as well as in the characteristics of the case and features of the judges' decisions. For example, while 47 percent of all decisions referred to personal opinions and feelings, judges in civil appeals diverged from formalism more frequently on this parameter than did judges in criminal appeals and HCJ (65 percent, 39 percent, and 28 percent, respectively). In fact, most opinions in civil cases are informal in terms of personal expressions. Conversely, the deviation from formalism by reference to judicial discretion appeared in only 7 percent of all decisions and was more frequent in HCJ cases (11 percent) than in the two other fields of law. Similarly, HCJ justices are also most likely to use values and principles in their opinions (0.34 scale points on average), with the lowest reference to values found in civil appeals (0.12 scale points on average).

Figure 2 further shows that, on average, there are more separate opinions in each case in civil appeals than in criminal appeals and HCJ (1.19, 1.14 and 1.12, respectively). Moreover, although the majority of cases tend to be resolved with a denied verdict (6 percent of all cases)—i.e. retaining the status quo—there are more rejections in HCJ cases (81 percent) than in the other fields of law (58–61 percent). On the other hand, there are more acceptances in criminal and civil appeals than in HCJ petitions (36 percent of criminal, 37 percent of civil, and 16 percent of HCJ cases).

Overall, dissenting and concurring opinions are rare in all fields of law, and most cases often contain only one judicial voice expressed in the main opinion. This contrasts most precedents studied by law students in all fields of law, which usually feature a range of opinions. Looking at each field of law separately, we find that there are more dissenting decisions in civil appeals than in other fields of law (6 percent compared with 2–3 percent), Moreover, the opinions in civil appeals are longer (an average of 2340 words in civil appeals, 1920 words in HCJ decisions, and only 1590 words in criminal appeals). While judges in HCJ and civil appeals are more likely to cite Israeli precedents (about 5 citations on average) and Israeli legal literature (2-3 citations on average), judges of criminal appeals tend to cite Israeli legislation (with 7.7 citations on average, compared to 2-3 citations in the other decisions). The relationship between these differences and their effects on deviations from formalism will be presented in the following Section.

Figure 2: Means and proportions of case and opinions characteristics and deviation from formalism by fields of law

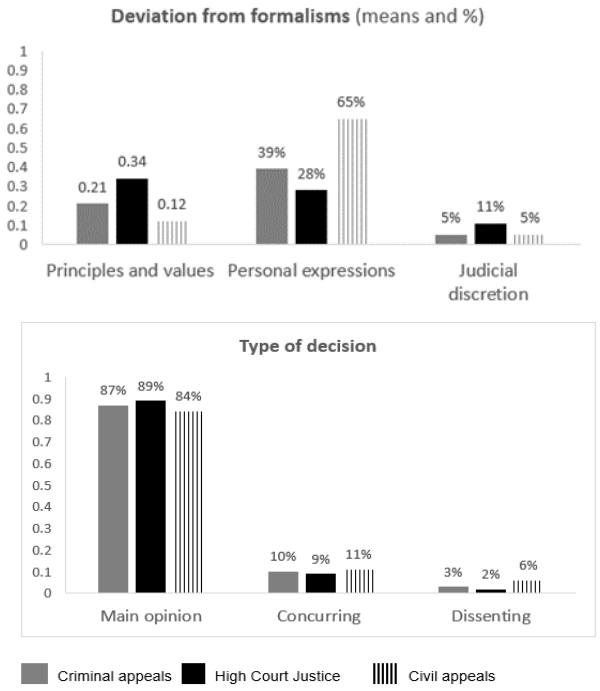
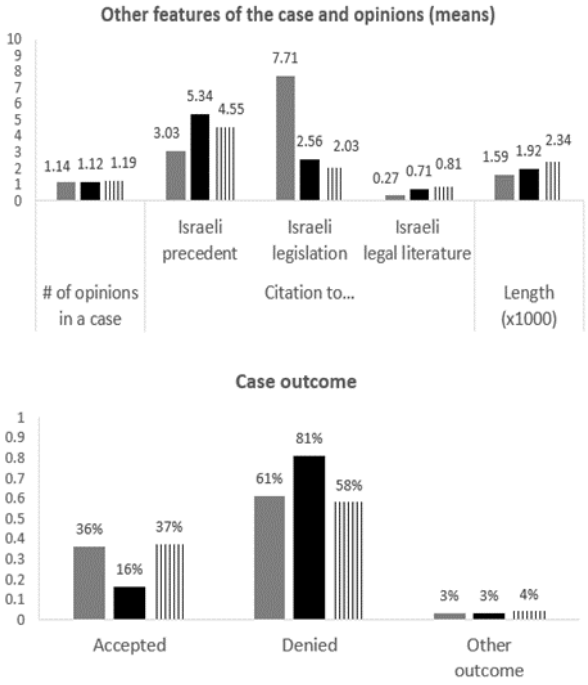


Figure 2 (continued)



A. MULTIVARIATE REGRESSION: THE EFFECTS OF CASE AND OPINION CHARACTERISTICS ON THE FORMS OF DEVIATION FROM A RHETORIC OF FORMALISM

To explore what features of the legal case and judges' decisions are associated with forms of deviation from the common rhetoric of formalism, we apply OLS linear probability models for each of the three indicators of the deviation from formalism—i.e., reliance on principles and values (Model A), personal opinion and feelings (Model B) and reference to judicial discretion in judges' decisions (Model C). First, we present the effect of each of the independent variables on each of the three deviations from formalism (Table 1). We then summarize these findings in relation to our hypotheses (Table 2) and, lastly, test whether these effects "work differently" within each of the three fields of law using interaction terms in Models A-C (Table 3).

1. Reliance on Principles and Values in Judges' Decisions

Starting with Model A in Table 1, we found that the case characteristics of the field of law, the number of opinions, and the outcome are associated with the tendency of judges to rely on principles and values in their decisions. Judges of HCJ cases were more likely than judges of criminal appeals to rely on principles and values, with the lowest policy justifications by judges in civil appeals (for criminal appeals $B = -0.083$ with $p < 0.001$, and for civil

appeals $B = -0.183$ with $p < 0.001$). This is in line with our expectation that there would be the lowest level of formality in public law. Moreover, as we anticipated, a greater number of opinions, and the acceptance of a petition or appeal, were more likely to include deviations from formalism on this dimension than decisions that contained fewer opinions ($B = 0.046$ with $p < 0.001$) and were either rejected ($B = -0.035$ with $p < 0.05$) or resulted in another outcome ($B = -0.063$ with $p < 0.05$). Our hypothesis was also affirmed in our finding that there was a greater reliance on principles and values over time ($B=0.056$ with $p<0.001$). This trend, however, is not linear, but has a parabolic shape. This indicates that, with the passage of time, the use of principles was about 0.06 points higher on average each year, with an even greater increase in recent years ($B =(0.056 + 0.021)$ with $p < 0.05$). This finding enables us to refine previous results on changes in legal rhetoric over time.[87]

Contrary to our prediction, we find no significant differences between majority and concurring or dissenting opinions ($B = -0.032$ with $p > 0.05$, and $B = 0.013$ with $p > 0.05$, respectively) on the use of policy and principles. Similarly, policy and principles rhetoric was not significantly related to the number of references to Israeli legal literature ($B = 0.014$ with $p > 0.05$). However, as expected, those decisions that were based on principles and values had more citations to Israeli precedents and Israeli legislation ($B = 0.038$ with $p < 0.001$, and $B = 0.045$ with $p < 0.001$, respectively), and were also longer ($B = 0.026$ with $p < 0.05$).

Thus, to summarize, in line with our expectations, reliance on policy and values in judicial writing increases both over time and in cases in which there are a large number of opinions, and is mostly pronounced for public law, rather than in civil law and criminal law. Also, reliance on policy and values is most likely to appear in decisions that: 1) accept appeals and petitions, rather than reject them; 2) are based on more citations of Israeli precedents and legislation; and 3) are longer. Contrary to our hypotheses, deviation from formalism in terms of reliance on policy was not associated with the type of decision or with citations to Israeli legal literature.

2. Reference to Personal Opinion and Feelings in Judges' Decisions

The second indication of the deviation from formalism is the use of personal expressions and reference to emotions in judges' writing. Contrary to our expectations, Model B in Table 1 shows that HCJ judges are the *least* likely to display personal expressions and feelings, whereas judges in civil appeals were the *most* likely to be personal in their decisions ($B = 0.311$ with $p < 0.001$), with judges in criminal appeals adopting an intermediate position ($B = 0.109$ with $p < 0.001$). Interestingly, this pattern is the opposite of the pattern we found for reliance on principles and values (Model A in Table 1), where judges of HCJ were the most likely to diverge from formalism, followed by criminal appeals judges, and least by civil appeals judges. Moreover, unlike Model A, as time progressed, the use of personal

[87] Alberstein et al., *supra* note 23, at 1129–34.

expressions was, on average, about 3 percent lower each year, with a continuing stronger decline in recent years ($B = (-0.033 + -0.043)$ with $p < 0.01$).

The results for the effect of the number of opinions and the outcome of the case on the judges' use of personal expressions were similar to those found in Model A. In cases with more opinions and those in which the claim was accepted, judges were more likely to express personal opinions and feelings compared to cases with fewer opinions ($B = 0.064$ with $p < 0.001$) and those that were rejected ($B = -0.091$ with $p < 0.001$).

As we expected, there were more personal expressions in dissenting or concurring opinions than in majority decisions ($B = 0.195$ with $p < 0.001$, and $B = 0.119$ with $p < 0.01$, respectively). Moreover, personal expressions were more likely to appear with a higher number of citations to Israeli legislation ($B = 0.048$ with $p < 0.001$), and with longer opinions ($B = 0.074$ with $p<0.001$). Neither the number of Israeli precedents cited nor the reference to Israeli legal literature had a significant effect on the personal expressions of judges ($B = 0.021$ with $p > 0.05$; $B = -0.006$ with $p > 0.05$).

Table 1: OLS regression coefficients (standard errors in parentheses) of features of the case and opinions on forms of deviation from rhetoric of formalism (*N = 2,086*)

	Reliance on principle and values (A)	Reference to personal opinion and feelings (B)	Reference to Judicial Discretion (C)
Case characteristics			
Field of law [HCJ as ref. group]			
Criminal appeals	-0.083***	0.109***	-0.062***
	(0.019)	(0.027)	(0.017)
Civil appeals	-0.183***	0.311***	-0.088***
	(0.019)	(0.028)	(0.020)
Year	0.056***	-0.033*	-0.001
	(0.008)	(0.014)	(0.007)
Year^2	0.021**	-0.043**	0.007
	(0.007)	(0.014)	(0.007)
Number of opinions in a case	0.046***	0.064***	0.017
	(0.011)	(0.014)	(0.011)
Case outcome [case accepted as ref. group]			
Case denied	-0.035*	-0.091***	-0.046**
	(0.014)	(0.024)	(0.015)
Other outcome	-0.063*	-0.102	-0.050
	(0.029)	(0.054)	(0.026)
Opinion characteristics			
Type of decision [main opinion as ref. group]			
Concurring	-0.032	0.119**	0.064*
	(0.020)	(0.041)	(0.028)
Dissenting	0.013	0.195***	0.074
	(0.034)	(0.044)	(0.045)
Citations of...			
Israeli precedent	0.038***	0.021	-0.003
	(0.011)	(0.015)	(0.011)
Israeli legal literature	0.014	-0.006	0.029*
	(0.010)	(0.014)	(0.014)
Israeli legislation	0.045***	0.048***	-0.001
	(0.009)	(0.011)	(0.007)
Length	0.026*	0.074***	0.029*
	(0.012)	(0.017)	(0.013)
Constant	0.319***	0.391***	0.139***
	(0.020)	(0.031)	(0.020)
F (13, 1783)	46.01***	55.82***	3.79***
R^2	0.263	0.221	0.082

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Note: To facilitate comparison of the effects of the continuous independent variables within the models, we standardized them to a mean of zero and unit standard deviation (z-scores). Dummy variables retained their original metric.

To recapitulate, contrary to our expectations, the use of personal expressions in judicial writing decreased over the years, and judges in civil and criminal appeals were more likely to refer to their own thoughts and emotions than HCJ judges. These patterns are the opposite of those we found for reliance on principles and values. Furthermore, and in accordance with our hypotheses, references to personal deliberations and subjective expressions were more likely to appear in cases with a large number of opinions, in decisions that accept appeals and petitions, in dissenting or concurring opinions, in longer opinions, and in decisions with a higher number of citations to Israeli legislation. Contrary to our hypotheses, the use of Israeli precedents and legal literature was not related to the judges' use of personal expressions.

3. Reference to Judicial Discretion in Judges' Decisions

The third aspect of the deviation from the rhetoric of formalism is the reference to judicial discretion. The fields of law coefficients in Model C in Table 1 show that judges of the HCJ are more likely to reflect on their use of discretion compared with judges in criminal and civil appeals ($B = -0.062$ with $p < 0.001$, and $B = -0.088$ with $p < 0.001$, respectively). Similar to Model A and Model B, there were more references to discretion in cases in which the claim was accepted compared to cases that were rejected ($B = -0.046$ with $p < 0.01$). However, there is no pattern of change in the judges' reference to discretion over time ($B = -0.001$ with $p > 0.05$) nor is it affected by the number of opinions in the case ($B = 0.017$ with $p > 0.05$).

A judge's reference to discretion is also more likely to appear in a concurring than a main opinion, ($B = 0.064$ with $p < 0.05$), with no significant differences between a main and a dissenting opinion ($B = 0.070$ with $p > 0.05$). Similarly, more citations to Israeli literature are also associated with references to judicial discretion ($B = 0.029$ with $p < 0.05$), although citations to Israeli precedents and legislation are not significantly related to discretion ($B = -0.003$ with $p > 0.05$, and $B = -0.001$ with $p > 0.05$, respectively). Finally, and as expected, the longer the opinion, the greater the number of references to discretion ($B = 0.029$ with $p < 0.05$).

Taking Models A through C all together, we found support for our hypothesis that there would be more deviation from formalism in cases in which there are a large number of opinions, cases that are accepted, those with more citations, in particular to Israeli legislation, in dissenting or concurring rather than majority opinions, and in longer decisions (see summary in Table 2). However, the expected increase over time in the deviation from formalism occurred only in the reliance on policy and values, whereas there was a decline over time in judges' personal reflections. Moreover, our expectation that public law cases would be the least formalistic was confirmed for the reliance on principle and values and for references to judicial discretion, but, contrary to our suggestion, civil law cases were the most formalistic, rather than criminal cases. Further, and contrary to our expectations, the order was reversed when deviation from formalism was characterized in terms of reference to personal expressions. On this indication of the deviation from formalism, the fewest personal

expressions occurred in the rhetoric of judges of HCJ cases, and the most occurred in civil appeals.

Table 2: Summary of findings (Table 1, Models A–C)

	Reliance on principle and values	Reference to personal opinion and feelings	Reference to Judicial Discretion	Going back to our hypotheses
Case characteristics				
Time	+	-	no effect	Complex trend
Fields of law	HCJ > Criminal > Civil	Civil > Criminal > HCJ	HCJ > Criminal > Civil	Complex trend
Case outcome	Accept > Reject	Accept > Reject	Accept > Reject	Confirmed
Number of opinions	+	+	no effect	Confirmed
Opinion characteristics				
Type of opinion	no effect	Diss./Conc. > Majority	Conc. > Majority	Confirmed
Citations to Israeli...				
Precedents	+	no effect	no effect	Weakly confirmed
legal literature	no effect	no effect	+	Weakly confirmed
Legislation	+	+	no effect	Mostly confirmed
Length	+	+	+	Confirmed

B. DIFFERENCES IN THE EFFECT OF CASE CHARACTERISTICS AND DECISION FEATURES ON THE DEVIATION FROM FORMALISM BY FIELDS OF THE LAW

In the next stage of our analysis, we sought to determine whether the various case and opinion characteristics operated *differently* on the tendency to diverge from formalism in each of the three fields of law. Table 3 presents the best fitting model for each aspect of the deviation from the rhetoric of formalism based on case and opinion characteristics by fields of law.[88] The following sections detail these results.

1. Reliance on Principles and Values in Judges' Decisions

Results of Model A in Table 3 reveal new insights about judges' tendencies to rely on principles and values in their decisions in each field of law. As previously demonstrated, Model A shows that in the early years HCJ judges were most likely to rationalize their decisions based on principles and values, followed by judges in criminal appeals ($B = -0.156$ with $p < 0.001$), and least of all in civil appeals ($B = -0.206$ with $p < 0.001$). Moreover, with the passage of time, judges in HCJ cases and criminal law increasingly relied on principles and values with an average increase of 0.12 points on the scale each year ($B = 0.116$ with $p < 0.001$ and the interaction term $B = -0.036$ with $p > 0.05$). These trends of increase over time, however, are non-linear; in criminal law this increase became even steeper in recent years ($B = (-0.037 + 0.092)$ with $p < 0.001$), while in HCJ cases the increase in the use of principles and values in judges' writing attenuated ($B = -0.037$ with $p < 0.05$). For civil appeals, however, we see little change over time if at all ($B = (0.116$

[88] We tested for all possible two-way interaction terms of case and opinion characteristics with the fields of law. Table 3 presents best fitted models with the interaction terms who reached significant statistical level ($p<0.05$). The formal model selection tests are available from the authors on request.

+ -0.098) with $p < 0.001$). In other words, although the use of principles and values among HCJ judges compared to other cases was higher in the early years (Table 3) and is higher on average (Figure 2 and Table 1), over the years, judges in HCJ cases and criminal law increasingly relied on principles and values in their decisions. However, while this tendency has weakened in recent years for HCJ cases, within criminal law cases the reliance on principles and values is growing stronger. The use of principles and values in civil cases is relatively lower on average and remains constant over time.

Another aspect in which the fields of law differ is the effect of the number of opinions in a decision on the deviation from formalism. While a greater number of opinions in HCJ and civil appeals is associated with the tendency of judges to rely on principles and values in justifying their decisions ($B = 0.088$ with $p < 0.001$, and the interaction term $B = -0.036$ with $p > 0.05$), in criminal appeals we find that the number of opinions has no effect on the deviation from formalism with coefficients reaching almost zero ($B = (0.088 + -0.087)$ with $p < 0.001$).

The judges' reliance on principles and values is also associated with longer opinions in HCJ cases ($B = 0.093$ with $p < 0.001$) and with a positive yet weaker association in civil appeals ($B = (0.093 + -0.044)$ with $p < 0.05$). For criminal appeals, however, the association between length of opinion and anti-formalism is weak and in the opposite direction ($B = (0.093 + -0.096)$ with $p < 0.001$), so that longer opinions in criminal appeals are less likely to rely on principles and values if at all.

All other case and decision characteristics show no differential effect by fields of law, and the association of the acceptance of the petition or appeal, and the higher number of citations to Israeli precedents and legislation, with a reliance on principles and values occur to the same extent in all cases.

2. Reference to Personal Opinion and Feelings in Judges' Decisions

Next, we examine whether fields of law make a difference to the judges' use of personal expressions or references to feelings in their opinions. Previously we saw that the use of personal expressions in judicial writing decreased over time, with fewest personal expressions and feelings in HCJ opinions, and more personal writing in criminal and especially in civil appeals (Table 1). Model B in Table 3 demonstrates that the pattern of decline in the use of personal expressions occurred mostly in HCJ petitions ($B = -0.108$ with $p < 0.001$). In criminal and civil appeals, we find a marginal decline in personal expressions over time, if at all ($B = (-0.108 + 0.100)$ with $p < 0.01$, and $B = (-0.108 + 0.093)$ with $p < 0.01$).

Another statistically significant difference between the fields of law was found in the relationship between the citation to Israeli legislation and the use of personal expressions. While within HCJ cases and criminal appeals references to Israeli legislation increased with the use of personal expressions ($B = 0.050$ with $p < 0.001$ and the interaction term $B = 0.033$ with $p > 0.05$), for civil appeals, the more citations to Israeli legislation, the less likely the decision was to include personal expressions ($B = (0.050 + -0.067)$ with $p < 0.001$).

All other case and opinion features do not differ by fields of law (i.e., judges' opinions in cases with more opinions and in which the petition or appeal was accepted were associated with a greater use of personal expressions in all fields of law). Similarly, non-majority opinions and longer opinions were also characterized by more references to personal feelings in each of the three legal fields.

3. Reference to Judicial Discretion in Judges' Decisions

The tendency of judges to refer to judicial discretion in the early years was greater in HCJ cases than in civil appeals (Model C in Table 3 ($B = -0.065$ with $p < 0.01$). These HCJ judges also increasingly referred to discretion over time ($B = 0.056$ with $p < 0.01$), while decisions in criminal and civil appeals showed no substantial change over the years in this respect ($B = (0.056 + -0.063)$ with $p < 0.01$ and $B = (0.056 + -0.060$ with $p < 0.05$).

Similar to the results of other indications of a deviation from formalism, a greater number of opinions was associated with references to judicial discretion in HCJ cases and civil appeals ($B = 0.065$ with $p < 0.05$, and the interaction term $B = -0.058$ with $p > 0.05$), while in criminal appeals the pattern was reversed; more opinions were associated with a more formalistic writing containing fewer references to discretion ($B = (0.065 + -0.081)$ with $p < 0.01$). Furthermore, in HCJ cases longer decisions are more likely to be anti-formalist ($B = 0.116$ with $p < 0.001$), and to display a much weaker relationship between length and the reference to discretion in civil and criminal appeals ($B = (0.116 + -0.088)$ with $p < 0.001$, and $B = (0.116 + -0.102)$ with $p < 0.001$).

Our analysis here reveals an interesting relationship between the use of citations, opinion length, and the reference to judicial discretion. While in Table 1 we found a greater number of citations to Israeli legal literature was associated with more references to judicial discretion, once we controlled for differences by field of law (Table 3, Model C) this effect becomes statistically insignificant. In a separate analysis (unreported), we found that the use of citations, especially to Israeli legal literature, and decision length were positively correlated, and both were associated with references to judicial discretion. Once decision length is included in the model explaining references to judicial discretion that differentiates between fields of law, it fully mediates the effect of the citations to Israeli legal literature on references to discretion. The remaining case and opinion features exhibit patterns similar to those in Table 1 and do not differ by fields of law; thus, judges' opinions in which the petition or appeal was accepted and non-majority opinions were also characterized by more references to discretion in the three legal fields.

In conclusion, in Models A through C in Table 3 we showed that in the early years *judges of the HCJ* are the least formalist in relying on principles and values and in referencing judicial discretion, yet they show a high preference for formalism in terms of personal expressions and feelings. *Judges in civil appeals*, on the contrary, tend to deviate from the rhetoric of formalism in terms of personal expressions, yet are relatively formalist in

terms of refraining from justifications based on principles and values and referring to judicial discretion. Furthermore, we found that over the years *HCJ judges* were increasingly integrating principles and values and references to discretion into their written opinions, while they were less likely to write in personal terms in their decisions. By contrast, the rhetoric of opinions in *civil appeals* has largely remained constant over the years. The pattern of anti-formalism in *criminal opinions* is basically in between those of the other two legal fields. Criminal appeals judges in the early years were less likely to rely on principles and values than HCJ judges, although as time progressed, they followed a similar increase in the use of principles and values as their HCJ colleagues. Criminal appeals judges also resembled HCJ judges in their writing, with relatively fewer personal expressions on the one hand and more reference to discretion on the other hand, compared to civil appeals judges. However, with the passage of time, while *HCJ judges* were increasingly integrating references to discretion and decreasing their use of personal expressions, criminal appeals judges did not change their rhetoric and maintained the same level of anti-formalism over time.

The influence of the number of opinions on the three elements that indicate a deviation from formalism also differed between fields. In *HCJ cases and civil appeals* a greater number of opinions were related to a tendency to rely on principles and values, to refer to personal expressions, and to judicial discretion. In *criminal appeals* we find, once again, an intermediate pattern between the two other legal fields; according to which, a greater number of opinions were related to a tendency to refer to personal expressions, with fewer references to judicial discretion, and no effect on the tendency to rely on principle and values.

The length of a decision was also found to have a differential effect on the deviation from formalism by the fields of law. In all fields of law, longer opinions were related to more personal expressions by the judges. However, the association between decision length and a reliance on principles and values, and on references to judicial discretion, was much stronger in HCJ decisions than for civil appeals, whereas in opinions in criminal appeals the length had only a marginal effect. Finally, the greater number of citations to Israeli legislation in HCJ and criminal appeals is associated with more references to personal expressions, while in civil appeals, more citations were related to fewer personal expressions.

Table 3: OLS regression coefficients (standard errors in parentheses) of features of the case and the opinions on deviation from rhetoric of formalism by field of law (*N=2,086*)

	Reliance on principle and values (A)	Reference to personal opinion and feelings (B)	Reference to Judicial Discretion (C)
Case characteristics			
Field of law [HCJ as ref. group]			
Criminal appeals	-0.156***	0.059	-0.047
	(0.030)	(0.050)	(0.025)
Civil appeals	-0.206***	0.347***	-0.065**
	(0.027)	(0.045)	(0.024)
Time by Field of law [HCJ as ref. group]			
Year	0.116***	-0.108**	0.056**
	(0.016)	(0.030)	(0.017)
Year X Criminal appeals	-0.036	0.100**	-0.063**
	(0.020)	(0.033)	(0.019)
Year X Civil appeals	-0.098***	0.093**	-0.060**
	(0.020)	(0.035)	(0.021)
$Year^2$	-0.037*	0.004	0.005
	(0.019)	(0.033)	(0.018)
$Year^2$ X Criminal appeals	0.092***	0.003	-0.003
	(0.023)	(0.041)	(0.021)
$Year^2$ X Civil appeals	0.041*	-0.077*	-0.002
	(0.021)	(0.039)	(0.020)
Number of opinions in a case by Field of law [HCJ as ref. group]			
Number of opinions	0.088***	0.062***	0.065*
	(0.020)	(0.014)	(0.030)
Number of opinions X Criminal appeals	-0.087***		-0.081**
	(0.022)		(0.030)
Number of opinions X Civil appeals	-0.036		-0.058
	(0.023)		(0.031)
Case outcome [case accepted as ref. group]			
Case denied	-0.032*	-0.089***	-0.043**
	(0.014)	(0.023)	(0.014)
Other outcome	-0.058*	-0.096	-0.048
	(0.029)	(0.053)	(0.027)
Opinion characteristics			
Type of decision [main opinion as ref. group]			
Concurring	-0.023	0.118**	0.067*
	(0.020)	(0.041)	(0.029)
Dissenting	0.003	0.207***	0.074
	(0.033)	(0.044)	(0.042)

Table 3 (continued)

	Reliance on principle and values (A)	Reference to personal opinion and feelings (B)	Reference to Judicial Discretion (C)
Opinion characteristics (continue)			
Citations to...			
Israeli precedent	0.034**	0.020	-0.011
	(0.011)	(0.015)	(0.012)
Israeli legal literature	0.004	-0.001	0.016
	(0.010)	(0.014)	(0.012)
Israeli legislation by Field of law [HCJ as ref. group]			
Israeli legislation	0.036***	0.050***	-0.010
	(0.009)	(0.014)	(0.006)
Israeli legislation X Criminal appeals		0.033	
		(0.027)	
Israeli legislation X Civil appeals		-0.067**	
		(0.025)	
Length by Field of law [HCJ as ref. group]			
Length	0.093***	0.076***	0.116***
	(0.022)	(0.017)	(0.024)
Length X Criminal appeals	-0.096***		-0.102***
	(0.022)		(0.022)
Length X Civil appeals	-0.044*		-0.088***
	(0.021)		(0.025)
Constant	0.342***	0.387***	0.119***
	(0.027)	(0.041)	(0.024)
F (21, 1783)	F (21, 1783) 39.06***	F (19, 1783) 45.00***	F (21, 1783) 3.86***
Adjusted R^2	0.304	0.233	0.132

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Note: To facilitate comparison of the effects of the continuous independent variables within the models, we standardized them to a mean of zero and a unit standard deviation (z-scores). Dummy variables retained their original metric.

IV. SUMMARY AND DISCUSSION

Using data on 2,086 judges' opinions handed down between 1950 and 2013, this research sought to identify those case and opinion features of Israeli Supreme Court decisions that are associated with a deviation from formalism. Our research is the first to present an empirical, multi-faceted approach to formalism, that examines patterns of legal rhetoric in relation to the nature of the case and the type of decision. It is unique in presenting formalism not as a binary variable, but rather as a variety of different attributes, which can be differentially affected by many case and decision features.

We can summarize our findings as follows. First, the results suggest that a deviation from formalistic rhetoric—in terms of rationales based on policy

and references to personal expression and judicial discretion—was accounted for by the characteristics of the case as well as by features of the decision. The results confirm our expectations that deviation from formalism in judicial writing would appear in decisions that *accept* appeals and petitions rather than reject them, in longer opinions, in opinions with more citations to *Israeli legislation* (in two of the three indicators of a deviation from formalism) and in cases with a higher *number of opinions*. These results essentially validate our hypotheses that judicial intervention in prior decisions, writing at length, and referring to more legal resources, are associated with a less mechanistic, formal use of legal language. It seems that when judges decide on complex cases that require extensive exercising of their judicial skills, they deviate from formalism and augment their application of the legal rules with alternative rhetoric, expanding rule-based mechanical classification with references to discretion, policy, and their own persona. In fact, it has been contended that some non-formalist expressions like the use of discretion and policy talk have been already institutionalized as a stage II formalism;[89] therefore, judges may regard them as acceptable legal ways of solidifying the legitimacy of troublesome and difficult decisions.

Second, and consistent with our expectations, *majority opinions* were found to be more formalistic on two dimensions: (1) there were fewer references to personal expression in majority opinions than in both concurring and dissenting opinions; and (2) fewer references to discretion in concurring opinions. However, there were no differences between each type of decision on the deviation from formalism measured by the reliance on policy and values. The main judicial opinion, therefore, is presented as objective and impersonal—as "speaking the law"—while those that either add to or challenge the main opinion are more expressive and present the personal, human aspect of the author judge. Why then, are there no differences on the policy dimension? We suggest that this is related to the stage II formalism mentioned above. Judges will use policy considerations and will explicitly refer to their exercise of discretion in majority opinions since they represent the new formal and institutionalized forms of legal rhetoric that emerged in response to the challenges of the Legal Realists. Thus, despite the use of policy considerations and references to discretion, the main legal opinion is still regarded as embodying the detached and dispassionate nature of the law. Personal expressions remain external to the professional language of law, and therefore, their use is avoided in majority opinions. In concurring and dissenting opinions, the human emotional aspect of law is allowed to appear, sometimes exposing the personality of the judges and their unique voices.

Another finding also proved to be more complex than anticipated. Although our results confirmed our hypothesis about the relationship between the deviation from formalism and *citations*, we found that there were different patterns of the use of citations in opinions with each of the

[89] *See* Alberstein et al., *supra* note 23, at 1132–35; Weinrib, *supra* note 2, at 956.

non-formalistic elements. Thus, citations to Israeli precedents and to legislation were associated with the reliance on principles and values, whereas only Israeli legislation was cited more frequently when judges expressed more personal expressions. The only type of deviation from formalism in which a relationship was found to citations to legal literature was with judicial discretion, with more references to Israeli legal literature occurring with open mentions of judicial discretion.

We can only speculate on these puzzling results. Regarding the more frequent reference to legal precedents when policy considerations are argued, we suggest that the nature of the citations to precedents is different in policy-grounded decisions than when legal rules determine the case. When applying rules in a formalist setting, citations to precedent are geared to enlisting the appropriate norms. However, when precedents are used in policy considerations, they are used to provide the values, principles, and rationales for the decision, rather than finding and applying a specific norm. Thus, it seems reasonable that more precedents would be cited when policy is a basis for the decision.

We also suggest that when judges diverge from formalism and make personal statements, they want to balance these personal statements with more references to legislation and hardcore legal rules. But why is there a significant relationship between legal literature and discretion, and why is legal literature not related to the other forms of the deviation from formalism? These are questions for future research.

Interestingly, the relationship between *time* and *fields of law* and *the deviation from formalism* reveal a more complex pattern than we hypothesized. We had expected greater deviation from formalism over time and mostly in public law, with most formality in criminal law. We found that this was mostly true in terms of the reliance on policy and values and in references to judicial discretion, whereas the opposite pattern emerged for references to personal expressions. Earlier on, p*ublic law judges* were not as formalistic, integrating principles, values, and references to discretion into their writing, yet most formalist in terms of not revealing their own persona. This tendency increased as time progressed. In civil appeals, on the other hand, judges were most formalistic in terms of excluding rationales based on principles, values, and references to judicial discretion, but least formalistic in recurring references to personal opinions and feelings. This pattern of rhetoric largely remained constant over the years. A different pattern emerged for criminal appeals, which had elements of the trends in both HCJ and civil appeals. Criminal appeals judges were initially less likely to rely on principles and values compared to HCJ judges, but as time progressed, their use of principles and values increased at the same pace as it did in HCJ opinions. However, their use of personal expressions and references to discretion, which earlier were similar to those of the HCJ, namely fewer personal expressions and more discretion, did not change over time and, similar to civil appeals, remained constant. The contrasting patterns of deviation from formalism in the fields of law and over time suggest the complex interplay between different types of formalism in Supreme Court decisions. Patterns and trends of formalisms do not simply exist or not exist

in judges' writing, instead there is an intricate interplay between the various aspects of formalism.[90] We see that legal writing over time and across fields of law reflects both the aspiration for formalism as well as its deviations, and judges may attempt to balance these in their opinions. For example, our findings demonstrate that judges balance the formality of civil cases (in terms of the avoidance of the use of policy rationales and references to judicial discretion) with a more personal rhetoric which appears in the majority of civil cases. In other words, judges in civil law cases were formalistic in their decision-making but tempered this with a personal writing style. In public law cases, which in Israel are largely based on creative common law-like judicial rules rather than civil codes, the use of policy and principles rationales is balanced by impersonal language, which conceals the discretional element in relying on these legal resources. Criminal cases have their own formula for balancing aspects of formalism, where the personal expression of judges and references to their discretion remain constant over time. Nevertheless their legal writing reflects a decision-making that over the years has become more policy and principles oriented.

We suggest that the increase in the rhetoric of policy and values in opinions in criminal appeals may be related to recent changes in the criminal code. A large proportion of appeals in criminal cases are against the severity of the sentence.[91] Sentencing guidelines from 2012[92] have required considerations of policy and balancing to be factored into the determination of the sentence. It seems that legal opinions in the Supreme Court reflect these instructions even when they do not specifically refer to the guidelines themselves.

Following these findings, it can be argued that the legitimacy of the court decision is in some sense achieved through the balance between the legal resource and its level of formality on the one hand, and the human expression of the judge as the author of the text on the other. Personal expressions that represent human involvement external to legal rhetoric are significantly more prevalent when the legal framework for the decision is clearer. The use of formalism on one parameter is in a sense a compensation for the deviation from formalism on others.

There is another puzzling result that requires explanation. As mentioned earlier, we found that a greater *number of opinions* were positively related to a tendency to deviate from formalism in HCJ cases and civil appeals, but by contrast, in criminal appeals, a greater number of opinions were only marginally related to references to judicial discretion. This difference may be explained by the fact that in complex criminal cases, when more judges

[90] Alberstein et al., *supra* note 23, at 1133.

[91] Bogoch & Don-Yechiye, *supra* note 55.

[92] *See* Penal Law Amendment No. 113, 5773–2012. The proposed bill tries to find the golden mean between discretion and rigid rules, aiming to construct the discretion of judges in sentencing while leaving them enough leeway to accommodate for special circumstances. Ruth Kannai, *Sentencing in Israel*, 22 FED. SENT'G REP. 223, 224 (2010). The bill was finally passed in 2012. *See* Julian V. Roberts & Oren Gazal-Ayal, *Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012*, 46 ISR. L. REV. 455, 456 (2013).

choose to write their own opinion, they still may prefer not to bring attention to the element of discretion in their decision when freedom and punishment are at stake.

We also found that *longer opinions* overall were related to a greater use of each of the three types of deviation from formalism. This effect happened mainly in HCJ decisions, with only a marginal association in civil and criminal appeals. This may reflect the greater need for judges to legitimize their decisions when deciding complex constitutional questions. While they do not refrain from addressing the indeterminacy and discretion involved in all types of cases, in constitutional cases they take extra efforts to convince the reader that their decision is well grounded in law; both musing about the alternatives involved and efforts to persuade the reader result in longer decisions. This difference may be related to the fundamental difference between public law and criminal and civil law. While the former deals with constitutional and administrative matters, addressing overarching questions of democracy and public boundaries, the latter deal with concrete disputes related to individuals. In some legal systems, this difference manifests itself in a separate constitutional court. In the Israeli system where such a separation does not exist, longer decisions may still reflect this substantial difference and emphasize the expressive role of the Supreme Court in reflecting and reshaping public values.

Finally, a greater number of *citations to Israeli legislation* in HCJ and criminal appeals is associated with more references to personal expressions, while in civil appeals more citations to Israeli legislation is only marginally associated with personal expressions. It seems that when judges diverge from formalism and make personal statements, they seek to balance this with more references to legislation and hard-core legal rules. But why is this pattern valid for HCJ cases and criminal appeals, and why does legislation not play the same role in providing supplementary justification in civil appeals? We did not anticipate that the positive association between citations to legislation and personal references would diverge by fields of law. We can only suggest that it is related to the fact that, on average, personal expressions appeared in about two-thirds of the civil opinions, which is almost double the proportion in HCJ or criminal cases. However, this finding is puzzling and requires further research.

When reflecting on our findings and the strong connection between case and opinion characteristics and the deviation from legal formalism, it becomes clear that the notion of the legal reasoning assumed in the law—and especially in judicial writing—is a much more nuanced and contextualized activity than applying a rule or using sophisticated syllogisms and demonstrating analytic power. Legal rhetoric as reflected in Supreme Court opinions—the canonical expressions of legal reasoning—is constantly changing and fluctuates in time and in relation to fields of law, as well as in reference to other textual elements. The various deviations from formality manifested in legal rhetoric are also inherently different. While reference to personal expressions and feelings is indicative of a strong shift outside the dispassionate, universal realm of law and represents the human individuality of the judge, the shift to policy rhetoric and to bounded legal discretion

reflects a different type of change, which in a sense remains within the legal boundaries. In a recent paper, Alberstein, Gabay-Egozi, and Bogoch defined the reliance on policy and the open reference to bounded judicial discretion as "stage II formalism."[93] This is a formalism that remains committed to the separation of law from politics and other institutions and is associated with notions of the eminence, coherence and integrity of the law. In other words, as Ernest Weinrib[94] and Ronald Dworkin[95] suggest, this is a more open-ended instrumental and discretional formula for legal reasoning. Our findings demonstrate the ways in which legal rhetoric is significantly influenced by the emergence of this reconstructed judicial reasoning and indicates the areas in which this reconstruction has become very common. Nevertheless, our empirical findings suggest that reconstructive legal rhetoric is not the norm, and reliance on legal rules still remains the common expression of legal reasoning. It may be argued then, that the interplay between the different versions of legal formalisms (traditional formalism and stage II formalism) combined with the use of personal nonformal expressions to balance formality, is a more accurate reflection of legal reasoning within current Israeli legal culture. Supreme Court decisions legitimate the authoritative applications of legal rules using a variety of judicial genres, balancing formalistic elements with the deviations from formalism. We suggest that writing these opinions is certainly not mechanical jurisprudence, yet it is also not a chapter within a serial novel.[96] Legal opinions are bounded, affected by various structural and contextual elements, balanced in the ways in which they deviate from formalism, and maintain the aspiration for formality in one form or another.

V. CONCLUSIONS AND FUTURE RESEARCH

The multifaceted study of legal formalism in this paper has revealed the fascinating interconnections among various case and opinion features and the different forms of deviation from formalism. We have demonstrated that legal rhetoric in Supreme Case decisions is shaped and influenced by these case and opinion characteristics. In particular, and in reference to the aspiration of law for formality, our findings offer the following general conclusions:

1. Reliance on legal rules still remains the most common expression of legal reasoning, although there is a constant balancing between formal and anti-formal elements.
2. The rhetoric of legal decisions is constantly changing and fluctuates in time and in relation to fields of law, as well as in reference to other textual elements.

[93] Alberstein et al., *supra* note 23, at 1132–35.
[94] Weinrib, *supra* note 2, at 956.
[95] DWORKIN, *supra* note 1.
[96] *Id.*

3. There is a marked trend to certain types of informal rhetoric, yet time does not affect all measures of formalism to the same extent, and is also dependent on the field of law.
4. There are differences between legal fields in the types and extent of the deviation from formalism in legal opinions. Public law cases handled by the High Court of Justice and criminal cases were more likely to evidence deviations from formalism than civil cases and were also more susceptible to factors that were associated with realist rhetoric.
5. There appears to be a difference in the relationship of case and opinion characteristics to the deviations from formalism that are external to the law (personal expressions) and those that are part of the internal reconstructions of formalism (stage II) such as the reliance on policy and the reference to discretion.
6. The structure of a legal decision (i.e., whether it is a single opinion or part of many) and its role in the decision (i.e., main, dissenting or concurrent) has a significant influence on legal rhetoric. While main judicial opinions were more objective and impersonal, embodying the detached and dispassionate nature of the law, concurrent and dissenting opinions were more expressive and presented the personal, human aspect of the author judge.
7. Judicial intervention in prior decisions, writing at length, and referring to more legal resources are associated with a greater use of non-formal legal language.

This research is an exploratory preliminary empirical study of legal rhetoric from the perspective of legal formalism and should be further elaborated and expanded by combining qualitative and analytical studies in each of the different fields of law and by taking into account the unique doctrines and traditions that have developed within them. It can be also expanded by examining the judicial styles of individual justices and measuring the fluctuations of the different types of deviations from formalism in their legal writing. Each case and opinion characteristic can be further contextualized and examined using case studies across legal fields and periods. The prevalence of the different types of formalism should be validated and debated, including the examination of legal formalism in other legal cultures and in different legal instances. Further developments in legal technology may enable automated mechanisms to mine legal texts and analyze these and other measures of legal formalism. We believe that such projects will further the empirical study of the law and enable the comparison between different legal cultures.

Appendix A: Means (standard deviations) and proportions of case and opinions characteristics and deviation from formalism by fields of law

	Scale range	All	By fields of law		
			Criminal appeals	High Court Justice	Civil appeals
Deviation from formalism					
Reliance on principles and values	0-1	0.21 (0.31)	0.21*** (0.26)	0.34*** (0.39)	0.12*** (0.24)
Reference to personal opinion and feelings	0, 1	0.47 (0.50)	0.39*** (0.49)	0.28*** (0.45)	0.65*** (0.48)
Reference to Judicial Discretion	0, 1	0.07 (0.25)	0.05*** (0.23)	0.11*** (0.32)	0.05 (0.22)
Case characteristics					
Number of opinions in a case					
# number of opinions	0-3	1.16 (0.4)	1.14 (0.42)	1.12* (0.40)	1.19 (0.48)
Case outcome					
Case accepted (fully/partially)	0,1	0.31 (0.46)	0.36*** (0.48)	0.16*** (0.37)	0.37 (0.48)
Case denied	0,1	0.65 (0.48)	0.61*** (0.49)	0.81*** (0.40)	0.58 (0.49)
Other outcomes	0,1	0.04 (0.19)	0.03 (0.18)	0.03 (0.18)	0.04 (0.20)
Opinion characteristics					
Type of decision					
Majority (main opinion)	0,1	0.86 (0.35)	0.87 (0.33)	0.89* (0.32)	0.84 (0.37)
Concurring	0,1	0.10 (0.30)	0.10 (0.30)	0.09 (0.29)	0.11 (0.31)
Dissenting	0,1	0.04 (0.19)	0.03 (0.17)	0.02** (0.14)	0.06* (0.23)
Citations to...					
Israeli precedent	0-61	4.28 (7.25)	3.03*** (6.67)	5.34 (7.96)	4.55*** (7.04)
Israeli legislation	0-32	2.07 (2.58)	7.71*** (1.99)	2.56*** (3.73)	2.03* (1.91)
Israeli legal literature	0-23	0.61 (1.80)	0.27*** (0.97)	0.71 (2.15)	0.81*** (1.99)
Length (in thousand)	0.035-39.8	1.98 (2.75)	1.59 (2.93)	1.92* (2.55)	2.34*** (2.71)
Observations (opinions)		2,086	664	573	849
# of cases		1,789	580	508	710

*p<0.05, **p<0.01, ***p<0.001

Note: asterisks in Column 4 (criminal appeals) indicate statistically significant differences between the means shown in Columns 4 and 5 (HCJ). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 6 (civil appeals). Asterisks in Column 6 indicate statistically significant differences between the means shown in Columns 6 and 4.