Measures of Legal Formalism

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ABSTRACT

The formality of modern law is a constitutive element in its operation, but the "revolt against formalism" and the charge of mechanical jurisprudence are also as old as the law. This article focuses on formalism in legal decision making in hard cases and assumes that contemporary decision making in law combines formalistic with non-formalistic expressions as part of its routine operation. The research aims at developing a sensitive multidimensional measure that will be used to evaluate legal texts by examining various vectors of formalism. The paper proposes to examine the following parameters: (1) the introduction and framing of the legal question; (2) the use of extra-legal arguments; (3) reliance on policy arguments and on legal principles; (4) reference to discretion and choice; (5) the relationship between what is presented as facts and what is presented as norms; (6) preservation of traditional boundaries in law; (7) the use of professional judicial rhetoric; (8) judicial stability and reference to the gap between law in the books and law in action. Each of these parameters can be used to evaluate the level of formalism in a concrete text. The interplay between diverse evaluations of the same case is a subject for inquiry and contemplation. These parameters can also be redefined as variables for a quantitative content analysis, and legal decisions can be coded accordingly. This will enable an analysis of differences between justices, legal issues, legal jurisdictions and timeframes, as well as the correlation between the various parameters of formalism. The tendency to formalism, according to the analysis here, is never pure, and is part of a complex legal culture that usually combines formalistic elements with non-formalistic ones.
I INTRODUCTION

The formality of law is an inherent quality that is present in all its institutional manifestations.¹ Legal rules, legal decisions, legal fields and legal jurisdictions are all based on formal differentiations and mastering the order and reason underlying legal categories is an important component in the qualification of any lawyer. Although formal applications of the law are considered the rule, much of legal education focuses on problematic cases in which the formal application of law is a subject of controversy, and the question of the existence of one formal solution is in itself a subject of inquiry.² Legal decision making by judges, especially Supreme Court and appeal court judges, is one of the important areas in which the formality of law is questioned and debated, and will be the focus of this paper.³ In an interesting way, especially in hard cases when legal controversies and multiple interpretations exist, some systematic deviations from formal principles can be found in the writing of judges. These deviations are the focus of evaluation and inquiry in this research.

Every legal system addresses the tension between rules and values or other considerations beyond rules, and for more than a century, formalism has been the target of theoretical attacks. Legal Formalism, as an over emphasis on rules, has become more suspect and condemned as part of a broader modern attack on formalist thinking which pervades many academic disciplines such as philosophy, history and


² There are various definitions of the notion of formalism that will be analyzed in this paper. See e.g., H.L.A. HART, THE CONCEPT OF LAW 124-130 (1961); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 254 (1977); ROBERTO M UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1-2 (1986); Duncan Kennedy, Legal Formality 2 J. LEGAL STUD. 351, 355 (1973).

³ For a definition of legal formalism as referring to legal decision making, see Brian Leiter, Positivism, Formalism, Realism: Review of Legal Positivism in American Jurisprudence, by Anthony Sebok, 99. COLUM. LAW REV. (1999) 1138, 1144.: “Whereas positivism is a theory of law, formalism is a theory of adjudication, a theory about how judges actually do decide cases and/or a theory about how they ought to decide them.”
Within the legal context, the Legal Realist movements and other legal movements have developed a systematic critique of fundamental assumptions regarding legal decision-making, and the notion of formalism is used today in a pejorative way, signifying rigidity and lack of sophistication. At the same time, the aspiration for legal formality in decision-making has always remained an important ideal in legal practice. The notion of formal language, which is not contaminated by politics, morality or emotions, is central to teaching and practicing law and oscillation between formal and non-formal argumentation has been part of legal writing. In jurisprudential thought, there have been a number of efforts to reconstruct legal formalism by overcoming the critique of the Realist movement. Some scholars developed a new legal language of policies and purposive interpretation. Others have suggested substituting adherence to rules with coherence of principles in an interpretive quest for integrity. Some scholars have invoked external sciences such as economics, suggesting that objectivity can be achieved by following formal economics and imitating the market. Other theoreticians of law have defended legal formalism and emphasized the importance of certain of its tenets.

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4 See MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1947).
5 See H.L.A. Hart, Positivism and The Separation of Law and Morals, 71 HARV. LAW. REV. 593, 610. See also Frederick Schauer, Formalism 97 YALE L.J. 509, 510 (1989): “Indeed, the pejorative connotations of the word “formalism,” in concert with the lack of agreement on the word's descriptive content, make it tempting to conclude that “formalist” is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees.” 6 For a more detailed description of this phenomenon, see section II below. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994). 7 HART AND SACKS, id. 8 See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); RONALD DWORKIN, LAW’S EMPIRE (1986). For a depiction of this move of Dworkin as reconstructed formalism, see Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 Yale L.J. 949 (1988). 9 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. Aspen Law & Business, 2007) 10 For an account of the Law and Economics movement as formalist, see… 11 See, for example, Weinrib, supra note 8; Schauer, supra note 5.
The purpose of this research is not to promote or reject legal formalism, and not to evaluate it as an all or nothing phenomenon. The purpose is, rather, to examine the manifestations of formalist and anti-formalist expressions in precedential legal decisions. The claim in this paper is that the form-scale of typical hard cases in legal decision-making is inherently diverse, and judges combine formalistic with non-formalistic elements in order to produce legitimacy and communicability. In contrast to the divide between formalism and values, which often frames the debate on formalism as related to political struggles between right and left, the claim here is that only a nuanced report on the various measures of formalism and the interplay among them is a correct approach to the phenomenon of formalism.

The notion of formalism is analyzed in this paper as a social construct that contains diverse jurisprudential cultures. In contrast to more conceptual and analytic accounts of the formality of law, which focus on the characteristics of legal rules or of the legal system as a whole, formalism is analyzed here as a cultural phenomenon, which entails rigid adherence to basic professional tenets of modern law. Formalism includes rigid assumptions about fact-finding, relations between legal decision-making and reality, the level of discretion and creativity and style in decision making. The tendency to formalism, according to the analysis here, is never pure, and is part of a complex legal culture that usually combines formalistic elements with non-formalistic

12 Compare Adrian Vermeule, The Cycles of Statutory Interpretation, 68 U. Chi. L. Rev. 149 (2001). The author examined fluctuations in statutory interpretation, referring to changes in the Supreme Court's writing regarding the role of purposive considerations in interpretation, the use of extrinsic (or non-textual) sources, and the role of particular canons of construction. He develops an exogenous explanation for such fluctuations but refers only to one element of formalism as defined in this paper. For an empirical study of legal activism, see Lori A. Ringhand, Judicial Activism: An Empirical Examination of Voting Behavior on the Rhenquist Natural Court, 24 CONST. COMMENTARY 43 (2007). See also Margit Cohn and Mordechai Kremnitzer, Judicial Activism: A Multidimensional Model 18 Canadian Journal of Law and Jurisprudence 333 (2005).

13 On formalism and values, see HORWITZ, supra note 2, at 16-17. For a discussion of the connection between activism and formalism, see parameter 8 on section III.

14 See, for example, Summers, How Law is Formal, supra note 1.

15 For a detailed description of each characteristic, see section III.
ones. Legal culture is heterogeneous; it is carried by individuals who have their own personalities and multiple identities at play; it is distributed unevenly among the members of the group; it changes over time. Despite the nuanced mode in which any claim of formalism and anti-formalism should be addressed, mapping the interplay among jurisprudential cultures that are reflected in a legal text is a systematic inquiry that can produce significant insights and generalizations. Perceiving legal culture as a multi-dimensional phenomenon that should be measured according to parameters of form is a basic claim that this paper strives to promote.

The second part of the paper, which follows the introduction, will present its methodological framework, and explore the innovation in using qualitative research to analyze legal writing. The next part will briefly overview four jurisprudential traditions, and their definition of formalism. These versions of formalism represent the development of the notion along historical lines. It will refer to "classical formalism," as described by Max Weber. It will continue to examine the jurisprudence of Hans Kelsen and H.L.A Hart and its relation to formalism, and will discuss formalism as depicted by Legal Realism and as reconstructed after the development of the Legal Process school of law. The jurisprudence developed by Ronald Dworkin and Richard Posner will be discussed as reconstructed formalism in this section. All the versions of formalism are at play in legal decision-making today and one significant shift, which can be traced in legal writing as analyzed in the paper, is the shift to reconstructed formalism in some legal texts. The fourth part of

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16 The four attributes of legal culture brought here are taken from a description of six common inadequate ideas about culture offered by Kevin Avruch, Dispute Resolution and Culture (1998). They represent a non-stereotypical approach to legal culture.
17 MAX RHEINSTEIN, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (1954).
21 DWORKIN, supra note 8.
22 POSNER, supra note 9.
the paper will discuss claims and counterclaims of formalism while referring to the jurisprudential traditions that inspired them, as discussed before. The next part will stipulate the measure itself, which aims to evaluate the internalization of the claims and counter claims of formalism in the context of legal writing of hard cases. The following part will apply the measure to two hard cases, from different legal cultures, the US Supreme Court decision in Romer v. Evans,23 and the Israeli Supreme Court decision of El Al v. Danielowitz,24 in order to examine the operation of the measure in context. The last section will include some concluding remarks.

II. METHODOLOGICAL FRAMEWORK

Legal writing usually does not deal explicitly with questions of methodology, and typical law review articles generally consist of an analytical argument, supported by abstract assumptions and textual analysis. Legal authors usually do not reflect on their perception of truth or their idea of valid legal research. The validity and reliability of the arguments at stake are supposed to be self-evident and clear through the unfolding of the internal narrative of the texts. In contrast to this tendency, this paper tries to borrow methodological tools used in the social sciences and to apply them to legal reality. It is mostly inspired by qualitative research,25 which reflects a systematic approach to academic writing, combining elements from both the social sciences and the humanities. "Qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people

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24 HCJ 721/94 El-Al Israel Airlines v. Danielowitz.
25 For a broad preliminary definition of qualitative research, see Norman K. Denzin & Yvonna S. Lincoln, eds., The Landscape of Qualitative Research, 3rd. ed. 2008. 4: "Qualitative research is a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that make the world visible. These practices transform the world. They turn the world into a series of representations, including field notes, interviews, conversations, photographs, recordings, and memos to the self. At this level, qualitative research involves an interpretive, naturalistic approach to the world."

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bring to them.” The paper is also influenced by Law and Society research, which seeks to explore legal phenomena in context. In this research, the aim is first to map the debate on formalism in legal academia, and then to evaluate the extent of legal formalism in concrete written decision-making. The two stages of the research will include discourse analysis of jurisprudential writing and legal cases (consecutively), and both assume that legal formalism is a cultural phenomenon that calls for various methods of evaluation.

The use of research methodologies originating in the social sciences while trying to adapt them to legal culture and to legal writing in particular is, in itself, an interdisciplinary project that this paper is trying to establish. Measuring legal writing bottom-up using standard measures may contribute to a more systematic and accurate way of evaluating legal phenomenon than the methods that exist today. Schemes of formalism that will emerge through the evaluation of the writing of specific judges or in a particular area or jurisdiction will enable a richer perception of the legal phenomenon as a whole. The basic argument developed in this paper is that a multidimensional measure of formalism is a significant tool for evaluating legal decision-making texts and that assessing the varying degrees of formalism and the interplay among them within a certain context is an important intellectual endeavor.

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26 Id.
27 For an overview of the research method of Law and Society scholars, see Carroll Seron & Susan S. Silbey, 2004. “Profession, Science, and Culture: An Emergent Canon of Law and Society Research”, in THE BLACKWELL COMPANION TO LAW AND SOCIETY, A. Sarat (Ed.) (Australia: Blackwell Publishing), pp. 30-59. See, for example, p. 31: "By researching the gap between the claims of law and its practices, and importantly the space within that gap, law and society scholars have moved close to the mainstream of contemporary scientific and humanistic inquiry.”
29 For a critique of the "non professional" quality of legal scholarship and an offer to improve it by applying to the social sciences see RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999). In contrast to Posner's argument, which rejects several jurisprudential cultures and accepts others, the claim here is that any claims regarding the law is “real” so long as they receive a substantive supportive audience, become part of legal discourse and are internalized by judges and other legal actors.
that can produce new insights and encourage interesting research directions. The
suggested measure can be applied to cases from different legal historical periods; to
the writing of a specific judge; to a specific issue or field of law; to different
jurisdictions. It can be applied by using quantitative methods and grading legal texts
using numerical values and statistical guidelines. It can be done through a more
qualitative mode, as illustrated in this paper, by using the measured texts as resources
for interpretation and discussion, including re-evaluation and reframing of the
measure itself.

Following the methodological framework of qualitative research, the next section
provides a systematic reading of legal writing about formalism and tries to extract
four cultures of formalism that have emerged in legal culture throughout its
development. Then some eight claims of formalism are suggested as capturing the
distinct tenets that reflect the cultures of formalism. Finally, a measure based on these
tenets is suggested, and its application is demonstrated on two cases.

III Four Versions of Formalism

1. Formal Rationality as a Sociological Phenomenon: Weber

The description of formalism from a sociological perspective is strongly connected to
Max Weber and his discussion of law-creating and law-finding. Weber has
described four ideal type categories of legal thought, which can be formally and
substantively irrational, or rational. According to Weber, the most advanced category
of legal thought in western society is "formal rationality" that contains a system of
gapless rules, which may apply to any concrete fact situation and can be used to
evaluate any social conduct. Formalism as a descriptive phenomenon that reflects basic aspirations of the law informs the language of the law, which is professional and closed. Legal thought "expresses its rules by the use of abstract concepts created by legal thought itself and conceived of as constituting a complete system." Weber defines formalism in a descriptive way, and refers to German law in his time as a paradigmatic example of formal rationality. His interest in the application of legal rules during legal decision-making in hard cases seems to be quite limited. As a matter of principle, the finding that contemporary decisions contain the use of external arguments, emotional expressions and self-reflection is compatible with Weber’s descriptive attitude and may indicate a shift in modern legal thought.

Although Weber did not anticipate that legal thought would incorporate irrational and substantive elements in its operation, such a sequence might have been a focus of new sociological research. His description of formalism as an ideal type provides measures for evaluating contemporary legal phenomena in its transformations. In fact, Weber portrayed the ideal type of formalism at a time when this very notion was challenged in American legal culture. The various versions of formalism described here represent a gradual transformation of professional ideals in law which move from an idea of minor moments of hard cases, to a 'no easy case' perception (legal realism) and back to a revised version of professionalism in legal decision making, which is reconstructed formalism. All of these stages continue to play out in legal decision-

32 The postulates of legal formalism according to Weber are:
(1) that every decision of a concrete case consists in the 'application' of an abstract rule of law to a concrete fact situation; (2) that by means of legal logic the abstract rules of the positive law can be made to yield the decision for every concrete fact situation; (3) that, consequently, the positive law constitutes a "gapless" system of rules, which are at least latently contained in it, or that law is at least to be treated for purposes of legal practice as if it were such a gapless system; (4) that every instance of social conduct can and must be conceived as constituting either obedience to, or violation, or application, of rules of law." Weber supra note 17, at xliii

33 Weber, supra note 17, at xlii.

34 For the description of the detailed influence of each culture of formalism on the developed measure, see infra text to notes.
making in hard cases and judges reflect varying degrees of internalization of each stage.

2. Formalism as working in Most Cases: Kelsen and H.L.A. Hart

The most important figures in modern jurisprudential thought did not dig into the problematics inherent in rule application in legal decision-making. Their main inquiry aimed to describe the legal system as a distinct social phenomenon, separate from morality or politics. They perceived as irrelevant or as minor the question of formalism in legal decision-making by judges. They did not view it as affecting the positivist formal characteristics of the legal system as a whole. Both Hans Kelsen, who represents continental thinking, and H.L.A. Hart, who represents English analytic thought, described the legal system as consisting of rules, which derive from a formal source of authority, and their interest was in emphasizing the formal and conceptual characteristics of the system without referring to problematic cases as having much significance. In Kelsen's writing, the question of the application of norms is related to politics and to value judgments that are not "legal science." The norm is "a scheme of interpretation" and applying it in context always involves discretion. This discretion may entail political considerations; it is not bounded by legal rules and thus is not the concern of the legal scientist. In H.L.A. Hart's writing, applying legal rules may reach moments of discretion when the penumbra of the norm is at stake. In these cases, judges operate discretion that cannot be bounded by legal rules. They

36 See Bix at 62: "Both the idea of a (single) rule of recognition and a (single) Basic Norm derive from assumptions that societies' legal regulations occur or are viewed as occurring in systematic way -- all the norms fitting within a consistent hierarchical structure of justification."
37 See Kelsen , supra note 18.
38 See Kelsen, supra note 18, at 353: "The question which of the possibilities within the frame of the law to be applied is the "right" one is not a question of cognition directed toward positive law—we are not faced here by a problem of legal theory but of legal politics."
may use sociological, political or other consideration to determine the norm.⁴⁰

Formalism as a pejorative expression is refusal to acknowledge the necessity of choice in the rare moments of discretion in the penumbral area, according to Hart,⁴¹ but the general aspiration to formality as application of rules without choice can persist. Most of the time, legal norms are applied when the core meaning of the norm is involved. To summarize, Kelsen and Hart are not bothered by the marginal cases in which external considerations are involved in the application of legal norms. They perceive them as unproblematic in terms of the objectivity and formality of the system as a whole.

3. Formalism as Almost not Working: Legal Realism

American Legal Realism is considered a movement that was established as part of a larger social phenomenon of "Revolt against formalism."⁴² Most of the images of formalism as old fashioned, rigid, inaccurate and conservative derive from the way in which the Realists depicted the perception of law that they tried to challenge.⁴³ In fact, the characteristics of formalism in decision-making in law as a judicial phenomenon, which is broader than the strict application of rules, can be extracted from the critique offered by Legal Realists.⁴⁴ Although no formal system has necessarily ever followed these rigid lines systematically, it is clear that the Realists sharpened implicit formalist assumptions that were never before challenged. The implied assumptions of formalism as described by the Realists were:

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⁴⁰ H.L.A. Hart, at supra note 2. See also Hart, Positivism and the Separation, supra note 5., at 607-608.
⁴² White, supra note .4
⁴⁴ For an equivalent effort to construct legal formalism through reference to anti-formalistic claims, see ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998) 57-60. Sebok refers to formalism as a broad phenomenon and describes it through the philosophical attack on formalism as described by WHITE, supra note 4.
Legal rules and legal concepts can determine legal disputes without resorting to policy arguments or to any other external resource. Law provides a system without gaps, obscurities and ambiguities, and norms can be applied to legal reality by way of deduction of sub-rules; Legal rules can determine every dispute without resorting to policy considerations; There are no crossroads during legal decision-making in which choice between conflicting norms is needed; Legal concepts have inherent meaning and their application is pure deduction.

Judges can objectively determine the facts that are the grounds for the legal dispute before them. Judges do not suffer from biases from any kind – emotional, psychological, cognitive or other. They can objectively identify the facts brought before them and are not affected by the distorted reality that witnesses sometimes present.

Legal decisions affect reality in a direct way and can easily produce social changes. There is a strong connection between legal norms and social reality and the latter can be shaped by the former. The idea of correspondence between "law in books" and "law in action" reflects a perception of law as a rational instrument to resolve disputes and to regulate behavior in society.

Describing formalism as holding the above rigid assumptions, framed in an extreme way following the Legal Realists’ detailed refutation of each of them, is parallel to claiming that the aspiration to formality can almost never work, since its pure assumptions are detached and unrealistic. The strict logical and rational image of formalism under such an approach makes it a symbol of mechanical jurisprudence and of old-fashioned approaches to law.

45 The term "mechanical jurisprudence" is taken from Roscoe Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605 (1908).
4. Formalism Reframed and Reconstructed

The legal revolt against formalism has transformed legal language and thinking. The claim that "we are all realists now," which is so often quoted in theoretical legal discussions, reflects the broad consensus among American legal scholars who belong to the post-Realist era regarding the insufficiency of legal rules as determining legal outcomes. Alternative reconstructions of formalism that emerged during the 1950s and 1970s in response to the Realists' critique, to some extent, have transformed the debate on formalism. The Legal Process School of Law offered to view judicial decision-making as a reasoned elaboration of principles and policies in a purposive interpretation mode; Ronald Dworkin suggests viewing interpretation as a Herculean journey in search of coherence and integrity of legal principles; Richard Posner attempted to find objectivity and formality elsewhere and used economic theory of law and the social sciences in general as his frame of analysis. For some, these new versions became scholars’ new targets for attack or adherence.

Following these responses to the original revolt against formalism, a new version of formalism has emerged, which was captured by The Critical Legal Studies Movement (CLS). CLS scholars have defined formalism as the tendency to overestimate the

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46 For discussing this claim as becoming a truism, see LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 229.
49 POSNER, THE PROBLEMATICS, supra note 29.
capacity of norms, including policies and principles, to generate sub-rules by deduction. As Roberto Unger puts it:

Formalism in this context is a commitment to, therefore also a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.

According to this version, reconstructed formalism became the belief in the law as a closed system consisting of an internal language, which can be rules, polices or any other unique professional communication. Adherence to the formal rules of economics as guides to legal decision-making will be considered formalism according to this approach. Law as a formal system in this sense presents itself as having an immanent value and is not bounded by ideology or other external motives. CLS Scholars have criticized this new version of formalism as suppressing the ideological subtext of the law. Other critical scholars have pointed to the paradoxical nature of

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50 DUNCAN KENNEDY, CRITIQUE OF ADJUDICATION (Fin de Siecle) (1997) 105. Kennedy differentiates between two kinds of formalism: The first one is the classic formalism, which denies any use of policy arguments beyond rules. In one usage, formalism is a “theory of law,” though one invented by its adversaries rather than by any known American proponents. Formalism in this sense is the theory that all questions of law can be resolved by deduction; that is, without resort to policy, except for questions arising under rules that explicitly require policy argument.” The second one is the new reconstructed formalism as discussed here.


52 Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 561, 565: “A form of conceptual practice that combines . . . the willingness to work from the institutionally defined materials of a given collective tradition and the claim to speak authoritatively within this tradition, to elaborate it from within in a way that is meant, at least ultimately, to affect the application of state power.”


54 See Unger, id: "This formalism holds impersonal purposes, policies and principles to be indispensable components of legal reasoning. Formalism in the conventional sense—the search for a method of deduction from a gapless system of rules—is merely the anomalous, limiting case of this jurisprudence.”

all legal systems as producing self-referential terminologies and as detached from other social systems such as economy or politics.\textsuperscript{56}

From another perspective, Ernest Weinrib adopted this new version of formalism as defined by the CLS and celebrated it as the true representation of the inherent qualities of law.\textsuperscript{57} "Immanent moral rationality" is what formalism offers the law, according to Weinrib, and such a quality is central to any understanding of the functions and importance of law.\textsuperscript{58}

The four versions of formalism suggested here represent different periods in law and diverse theoretical frameworks. Weber represents a descriptive sociological effort to accurately describe the legal mode of rationality; Hart and Kelsen focus on describing law from the inside by insisting on formality as an inherent quality of law, even if not always achieved; Legal Realists attack formalism as the old dogmas of law and refute various aspects of it; Reconstructionists such as Dworkin and Posner try to go beyond rules in order to provide new modes of formality. Following the four versions of formalism as described here, which represent distinct legal cultures with their nuanced voices, the following section will extract claims of formalism and their theoretical challenges. The claims reflect the contested position of formalism in all its versions and the measure that follows them will be constructed as a form scale that contains adherence to a certain formalistic claim as well as deviation from it.

\textbf{IV \textit{LEGAL FORMALISM: CLAIMS AND COUNTERCLAIMS}}

1. \textit{Legal decision-making is based on formal authorization.} Within a formalistic legal culture, the question of formal authority for the decision and the legal framing of the


\textsuperscript{58} Weinrib at 950-957.
dispute receive paramount attention. Thus, judges present themselves as deciding according to the law by referring to the formal basis of their decision. Within this focus, questions of standing receive much attention, and issues of jurisdiction and procedural preliminary requirements are strictly observed. Contesting this claim, modern critique has marginalized questions of jurisdiction and of standing in certain legal contexts. The substantive question of the relevant legal rule that should apply in a case is considered more important than formal considerations of authority and jurisdiction.

2. Judicial decision-making involves the strict application of legal norms without reference to external elements in the legal environment in which decisions are made. Weber regards juridical formalism, the separation of legal institutions and legal rules from other rules in the social order, as the main distinctive feature of modern Western law.\(^59\) In his view, law understands itself as a systematic conceptual order such that decisions are made and rules understood according to abstract principles that are applied to the determination of specific cases. The focus on "formal rationality," which is a central quality of modern law according to Weber, differs from "substantive rationality" which is guided by the principles of an ideological system other than that of the law itself, such as ethics, religion, or politics.\(^60\) In a formal rational system, there is no room for other areas of evaluation; rather, formalism allows the legal system to operate as a technical rational machine. In contrast, the Legal Realism and Critical Legal Studies schools of law have pointed to the political

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59 Weber, supra note 17 at 224-255.
60 Id., at xlii-xliii. See also page 224: "The more rational the authority exercising the administrative machinery of the princes or hierarchs became, that is, the greater the extent to which the administrative "officials" were used in the exercise of the power, the greater was the likelihood that the legal procedure would also become rational."
and ideological considerations that determine legal decisions.\textsuperscript{61} Some writers within these movements have specifically emphasized the insertion of personal, political and ideological elements into legal decision-making.\textsuperscript{62}

3. \textit{Judges apply legal norms without reference to any policy argument or legal principle.} The assumption that legal decision-makers can rely on legal rules without reference to policy arguments\textsuperscript{63} or to any moral principles, is a derivative of the assumption of law as a closed unified rational system. In formalist terms, any appeals to policy considerations or to unwritten principles of the law are rejected.\textsuperscript{64} Legal positivists claim that law consists of a system of rules, and therefore, in "hard" cases, where no clear-cut rule exists, non-legal factors guide the judges in their decision.\textsuperscript{65}

Rejecting this claim, a large body of writing maintains that legal decisions are based on values, policy considerations and legal principles, which do not necessarily correspond to the definition of a rule, but are not political or subjective, by nature.\textsuperscript{66}


\textsuperscript{62} For a formula of statutory interpretation which inserts historical and political consideration into legal decision making see William N. Eskridge, Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987) See for example on page 1483: statutory interpretation involves the present-day interpreter's understanding and reconciliation of three different perspectives, no one of which will always control. These three perspectives relate to (1) the statutory text, which is the formal focus of interpretation and a constraint on the range of interpretive options available (textual perspective); (2) the original legislative expectations surrounding the statute's creation, including compromises reached (historical perspective); and (3) the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time (evolutive perspective).

\textsuperscript{63} For a definition of formalism as adherence to rules without reference to policy or instrumental reasoning, see Larry Alexander, "With Me, It's All er Nuthin": Formalism in Law and Morality 66 U. Chi. L. Rev. 530, 531 (1999): "By formalism I mean adherence to a norm's prescription without regard to the background reasons the norm is meant to serve (even when the norm's prescription fails to serve those background reasons in a particular case). A formalist looks to the form of a prescription--that it is contained in an authoritative rule--rather than to the substantive end or ends that it was meant to achieve. A norm is formalistic when it is opaque in the sense that we act on it without reference to the substantive goals that underlie it."


\textsuperscript{65} H.L.A HART, supra note 2 at 135.

\textsuperscript{66} HART & SACKS, supra note For denying the dichotomy between formalism as "the use of deductive logic to derive the outcome of a case from premises accepted as authoritative" and realism as policy
The most famous elaboration of such a claim has been presented in the writings of Ronald Dworkin. Dworkin claims that discretion in hard cases is limited because judges are bound by the principles and policies that are an inherent component of legal norms. While his interpretive ideal of "law as integrity" depicts law as a unified system, unlike classical scholars of formalism, he does not suggest that judges will find the "right answer" in the law by discovering the particular norm that solves the case. Rather, Dworkin views the correct legal solution as the one that reflects the most coherent and just order of principles and policies that underlie the norm.

4. Judges apply legal norms without discretion or choice. Discretion is an inevitable phenomenon in any decision-making, but formal legal writing ignores doubts and replaces them with sub-rules and procedures. In a formal legal system, judges will present the law as determining the decision, as if there was one true resolution to the legal problem, and will not allow the expression of emotions or self-reflection in the decision. In a mild version of this claim, judges will present moments of choice as very rare and exceptional in their writing.

In contrast, critics claim that legal decision-making entails a substantial degree of intuition, discretion and choice. This has been expounded extensively by the Legal
Realism movement, which pointed to the indeterminacies of rules, and to gaps and ambiguities that pervade legal decision-making.\textsuperscript{72}

5. Judges apply legal norms based on the objective determination of facts. Many legal disputes are about facts, and judges are considered professional fact finders who use the laws of evidence to distinguish fiction from truth in a definitive way. In a formal system, judges perceive themselves as professionals who are capable of overcoming any potential biases and who have the ability to differentiate real justice from the appearance of justice. Critics of formalism maintain that the legal determination of facts is biased and is influenced by a variety of factors, including the setting, the prejudgment, the emotions and the cultural background of the judges. Jerome Frank, a leading proponent of the legal realism school has pointed to the biased nature of fact finding in legal decision-making.\textsuperscript{73} According to Frank, not only are trial judges influenced by the biased way in which the witnesses present their evidence, but they themselves become biased witnesses. Contrary to the formalistic assumption that facts are determined and described and only later norms are applied, Frank claimed that norm application is already embedded in the descriptions of the facts in court, and that there is no non-judgmental determination of facts. Contemporary scholars of law and literature have continued to develop this critique by pointing to the close connection between storytelling and fact-finding and the importance of narrative theory for the understanding of the way courts decide facts.\textsuperscript{74}

6. The application of law maintains the boundaries between fields of the law.

According to formalism, the basic quality of law as a system of norms is related to the deductive relations between principles and rules and to the horizontal differentiations

\begin{itemize}
  \item \textsuperscript{72} Fisher et al., American Legal Realism, supra note 20 at 164-231.
  \item \textsuperscript{73} JEROME FRANK, LAW AND THE MODERN MIND (1930).
  \item \textsuperscript{74} LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks and Paul Gewirtz, eds., 1996).
\end{itemize}
among the various fields of the law. Law is a logical system in which coherence and systematization are paramount qualities, and each field of law is characterized by unique and distinct principles.\textsuperscript{75} The counter argument is that the boundaries of the law are flexible and given to new demarcations according to new needs and problems that arise. Critical legal movements such as CLS and feminism have criticized the ideological function of dichotomies such as public-private,\textsuperscript{76} tort-contract, which, it is claimed, exist only to preserve conservative judgments and to oppress the weak in society. Scholars who studied judicial activism emphasized the role of courts as influencing and controlling the other branches of government and as promoting progressive values.\textsuperscript{77} In this view, boundaries in law are set not on a substantive basis, but are established as a way to produce certain benefits for powerful groups and to sustain the illusion of objectivity in the realm of the law.

7. Judges must use a special professional language which consists of legal concepts and terminology in order to attain precision and predictability. "Legal language" refers to more than any particular practice and assumption of the law. It includes the use of legal terminology, special syntax, the avoidance of emotional and everyday language expressions, and the application of legal reasoning that is associated with a specific sequential structure.\textsuperscript{78} The use of professional language also defines the

\textsuperscript{75} Paul N. Cox, An Interpretation and Defense of Legal Formalism (Partial), 36 IND. L. REV. 57 (2003).
\textsuperscript{76} For a detailed description of the attack on the private-public distinction in legal thinking, see Fisher et al., American Legal Realism, supra note 20 at 98-129.
\textsuperscript{78} For an account of legal reasoning and its important role in terms of legal practice see Emily Sherwin, A Defense of Analogical Reasoning in Law 66 U. CHI. L. REV. 1179 (1999).
boundaries of legal practice and produces legitimacy and acceptability. However, as critics have pointed out, judges regularly deviate from professional language. They may quote poetry or literary texts;\textsuperscript{79} they may adopt elements from other registers and even humor in their decisions,\textsuperscript{80} or other unique stylistic devices.\textsuperscript{81} The interplay between these non-formalistic components with other dimensions of formalism will be analyzed in this study.

8. There is a direct connection between norm application and changes in reality. In formalistic thinking, there is an assumption that the statement and application of a norm will actually produce changes in reality, and that law in the books corresponds to "law in action."\textsuperscript{82} New waves of formalism that have developed in legal jurisprudence, such as Law and Economics, rephrase this claim by suggesting that legal norms can imitate the market and promote greater efficiency in society. Here too, a similar claim of formalism is made, and is related to the rationality of law as a mechanism to control reality. The counter-claim is that law in action is different from law in the books and that legal writing has, at best, only an indirect connection to social change. The origin of this critique goes back to the sociological jurisprudence movement developed by Roscoe Pound, which criticized legal studies for their emphasis on legal rules and decision making, while ignoring the social context and

\textsuperscript{79} Mary Kate Kearney, The Propriety of Poetry in Judicial Opinions, 12 WIDENER L.J., 597 (2003).
\textsuperscript{81} See Sherwin, supra note 78., who concedes that analogical reasoning is an unscientific practice with imperfect results and still defends it based on institutional and pragmatic reasons.
implications of decisions. Legal Realists have continued to challenge the overemphasis on norms and on court opinions and have developed a positivist approach based on empirical analysis of the interaction between norms and reality. Scholars of law and society and contemporary sociological jurisprudence have expanded this critique in debates and empirical research on the ability of legal rules and decisions to produce social change. Behavioral law and economics scholars have challenged the idea of the use of market principles for the rational management of reality by legal rules.

Weberian formalism informs claims one, two, six and seven above. Formalism as defined by Kelsen and Hart can be measured through parameter four. Formalism as depicted by Legal Realism is reflected in parameters three, five and eight. Reconstructed formalism is reflected in parameter seven. These claims and counterclaims about legal formalism have been the focus of much legal debate, but there have been no studies that have examined the claims empirically in a large number of decisions, nor has there been an effort to tease out the basic dimensions of formalism based on qualitative research. This research will begin to rectify this lack in scholarship.

V. MEASURES OF FORMALISM

Following the discussion in the previous sections, my claim is that contemporary legal decision-making will tend to reflect, on different levels, the existing critique against formalism, and diverse internalizations of the failure of the formalist aspiration will mirror the oscillation between new and old in legal writing of hard cases. Judges will

tend to combine diverse cultures of formalism, as posited above, with non-formalistic expressions, in order to convey legitimacy and sophistication. The eight parameters of formalism suggested above will become scales of formalism for the evaluation of concrete cases and "the measure of formalism" will be the mapping of the diverse scores each legal text attains in terms of aspiration to formality:

1. *The introduction and framing of the legal decision:* Does the case open with a presentation of the legal question? Are questions of jurisdiction invoked? Is the legal question presented as a semantic problem of definition or interpretation, or as depending on ideological considerations and value choice? Does the Court present the decision as a departure from current judicial practice, and are there other indications that the court is aware of the way in which the decision deviates from current societal norms? Opening the opinion with the legal question at stake, defining it as a matter of interpretation and referring to questions of jurisdiction signify formalism.

2. *Reliance on extra-legal arguments:* Does the judge use external arguments, such as sociological explanations, economic accounts, moral or common sense arguments, as opposed to formalistic legal ones? Is the use of external considerations presented as supplementing the formalistic argument or as substituting for it? Non-formalistic decisions would include and rely on extra-legal arguments.

3. *Reliance on policy arguments and on legal principles:* To what extent does the judge rely on open-ended legal concepts and principles? Does the judge refer to social policy considerations? Does the judge use purposive interpretation and

does s/he refer to the social aim of the norm? Does the judge refer to the balancing of legal principles that underlie the norms? Judges who use these concepts, principles and policy considerations are non-formalistic.

4. *Reference to discretion and choice:* Are moments of choice exposed within the legal decision-making, and does the judge reflect on the choices s/he has to make? Is there reference to difficulty in deciding the case? Are the complexities of paradoxical situations acknowledged? When choices are presented, on what basis does the judge claim to resolve them? For example, does the judge claim to choose on the basis of reason or of intuition? Clearly, acknowledgement of choice and personal reflection on choices made would characterize non-formalistic decisions.

5. *The relationship between facts and norms:* To what extent are the facts on which the legal decision is based presented as external and independent of the judgmental act? In some Supreme Court appeal cases, judges assume that there is no dispute concerning the way the lower court presented the facts and rather concentrate on rationalizing the judgment without reference to the facts. Sometimes, however, a judge may take issue with the way the facts were presented and suggest that there is an alternative way to view the story. The former instance would signify formalism, while the latter would indicate a non-formalist approach.

6. *Preservation of traditional boundaries in law:* Are the formal boundaries between the different areas of law preserved in the decision? Is there a distinction made between procedural and substantial, civil and criminal, public and private, in the decision? For example, the tendency to refrain from applying concepts and principles from contract law to cases of criminal responsibility is one way of
maintaining the traditional formal borders in law. On the other hand, the use of public law to overrule Labor Court judgments would be an example of the blurring of the distinction between the formal spheres.

7. *Professional judicial rhetoric*: One of the features suggested by Mautner as characteristic of a system of law based on values rather than formalism is that the language of the decision is geared to a non-legal audience. Evidence of breaking away from formalism would be the inclusion of non-legal registers in the decision, the use of poetry, or references to literature and art in the decision. On the other hand, the use of legal terminology, such as Latin terms or specialized legal terms, would characterize formal decisions.

8. *Judicial stability and the gap between “law in the books” and law in action*: Does the decision affirm or overturn previous decisions on the issue? Does the decision refer to the implementation of the new rule, does the judge produce an open-ended decision with no concrete operative order, does s/he signal a direction for the decision without making the decision itself, and does the judge mention ways of overcoming the hurdles that might prevent the decision from producing change? A formalist judge would refrain from overturning previous decisions, would not reflect on the problematics of implementing the rule and would decide cases in definitive ways without sharing the final operative stage with other institutions.

VI. APPLYING THE MEASURE: A CASE STUDY

1. *Applying the measure across cultures*

The measure suggested above can be applied to any legal decision-making text, in every legal culture, and the concrete implications of use of the measure should be the object of future inquiries and discussions. Since most of the claims and counter claims
of formalism are typical of any modern legal system, it is reasonable to expect that a comparative study will explore the concrete mixture of jurisprudential traditions that characterize each legal culture. Within global legal culture and considering comparative research principles, it is reasonable to expect any legal decision-making to reflect various degrees of challenges to formalism. In that sense, European high court of justice decisions regarding the application of constitutional norms, or a decision in commercial cases that incorporates various legal resources, require considerations of formalistic tenets. It is reasonable to expect innovative new decisions to borrow debates that have already developed in other legal cultures, while trying to use new frames of interpretation in order to answer some of the problems that formalistic assumptions have raised.

Cultures of Formalism in the US and Israel

In this paper, the legal texts I have chosen for the application of the measure are a US Supreme Court case and an Israeli Supreme Court case, both dealing with gay rights. The US case deals with the constitutionality of a ban on special protection for homosexuals. The Israeli case deals with the rights of a homosexual partner of a pilot to receive benefits for a "spouse" according to the collective agreement that defines the relationship between El Al airline and the pilot.

The Israeli legal culture is not a typical Anglo-American culture and contains diverse influences including continental and Hebrew ones. Nevertheless, in recent decades, it has been substantially influenced by American legal culture, which is
especially reflected in Israeli academic legal education and faculty hiring.\textsuperscript{90} As a relatively young legal system, Israel provides fertile ground for analysis, since legal traditions are not yet rigid and unique juridical styles of decision-making develop within a relatively short period of time. Israel is also a bridge between east and west, Europe and the US, and judges in Israel reflect these diverse influences, together with the Zionist dream to renovate ancient Hebrew law and to create a justice system based on biblical codes and universal Jewish values.\textsuperscript{91} In a relatively small period, Israel has managed to go through a number of judicial phases, and to respond to emergency situations that require innovative creative legal thinking.

The question of formalism and its role in the writing of the Supreme Court is in itself very popular and invokes numerous debates in Israeli legal culture. Is the Israeli Supreme Court more or less formalist today than it was in the fifties? Does it leave room for values and policy arguments? Is there an active broad judicial interpretation, one that allows the court to review legislative acts enacted by the parliament? How do other legal actors respond to the level of formalism held by the court? In 1993, a famous Law Review article defined a process called: "The Decline of Formalism and the Rise of Values in Israeli Law." Mautner, a Tel-Aviv law professor who wrote the article, claimed that while in the fifties, the Supreme Court was dominated by European-oriented judges and functioned as a "night guard," limiting collectivist state actions by using formal rules, in the eighties, a new informal values-oriented culture emerged. According to Mautner, this new culture, inspired by American Legal Realism, the Legal Process School of Law, and the writings of Ronald Dworkin, promoted a view of law as an instrumental device, which should be applied through

\textsuperscript{90} For an overview of the Israeli legal culture and the sources of influence on it, see Ron Harris, Alexandre Kedar, Pnina Lahav & Assaf Likhovski, eds., \textit{The History of Law in a Multicultural Society: Israel 1917-1967} (Ashgate, 2002).

\textsuperscript{91}
balancing its underlying conflicting principles. Policy arguments, the broad application of the duty of reasonableness and the duty of care, purposive interpretation and intense intervention in administrative acts were part of the transformation of Israeli legal culture during the 1980s. Mautner’s claim was that the Supreme Court was responding to the political and ideological changes in Israeli society, which became much more individualistic in the 1980s, and was also rebelling against old hegemonies, going against the Ashkenazi elite and the centralistic Labor party. The political victory of the Likud (right wing) party in the 1977 election, the rise of riots and protests by Mizrachi Jews from the periphery, combined with the development of a messianic right wing group of orthodox settlers, influenced the Supreme Court and it began to take a more active role in public life. According to Mautner, at this stage in Israeli society, the Supreme Court attempted to strengthen liberal values and began to take a more activist stance as the educator and leader of society. The role of Justice Barak as channeling this process was central.92 Mautner's views were attacked and debated by many Israeli scholars who claimed either that in the 1950s, the court also promoted values,93 that formalism promotes values,94 or that the transformation he described was not so extreme.95 Mautner himself changed his mind after he wrote his 1993 piece and, in 2002, claimed that the court should not serve as an educator and promote liberal values, but should rather let the various groups in society lead their own discussion and dialogue in order to reconcile

94 Daniel Friedman, Formalism and Values – Legal Confidence and Legal Activism 11 HAMISHPATIM (2007).
opposing values.\textsuperscript{96} To summarize, Israeli legal culture has gone through an anti-formalistic phase, inspired by American Legal realism, which is generally interpreted as inspired by political grounds, and is still highly controversial and debated.

\textit{Cases analysis}

The two Supreme Court cases chosen here deal with gay rights. In Romer v. Evans,\textsuperscript{97} the petitioners, the State of Colorado and State officials, appealed a decision of the Supreme Court of Colorado, which affirmed the district court's judgment that enjoined enforcement of an amendment to the Colorado Constitution that prohibited any action designed to protect a named class, homosexual persons or gays and lesbians. The court majority overturned the Amendment, condemning it as based on animosity,\textsuperscript{98} announcing that:

\textit{Amendment 2} classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.\textsuperscript{99}

El-Al v. Danielowitz\textsuperscript{100} was a case originally held before the Israeli Labor Court, where a flight attendant, a male employee of El Al, demanded benefits for his male partner. Danielowitz relied on the collective agreement between El Al and its employees that entitles any permanent employee to an airplane ticket for his/her spouse once a year. The petition was accepted by the National Labor Court\textsuperscript{101} and El Al applied to the Supreme Court, sitting as a high court of justice, and challenged the

\textsuperscript{96} Mautner, \textit{The 1990s: years of getting closer}, 26(3) EYUNEI MISHPAT 877 (in Hebrew).
\textsuperscript{98} Romer v. Evans, at 634.
\textsuperscript{99} Romer v. Evans
\textsuperscript{100} El-Al Israel Airlines v. Danielowitz, \textit{supra} note 24.
\textsuperscript{101} NLC 3-160/53 \textit{El-Al Airlines v. Danielowitz} IsrLC 26 339.
ruling. The Supreme Court majority rejected the petition and approved the rights of a gay partner under the collective agreement, declaring that: 102

Not giving the respondent a free ticket for his same-sex companion amounted to discrimination, since a distinction on the basis of the difference between a heterosexual and a homosexual relationship is unjustified in the context of employee benefits. 103

In Romer v. Evans, Justice Kennedy wrote the majority opinion and Justice Scalia wrote the dissenting opinion. In El Al v. Danielowitz. Justice Barak, then Vice-President of the Court, and Justice Dorner wrote the majority opinion. Justice Kedmi wrote the dissenting opinion. The following analysis applied the measure of formalism to the justices’ opinions in both cases:

1. the introduction and framing of the legal question

**Romer v. Evans:** Justice Kennedy opens the majority opinion with the following statement:

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens."… Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution. 104

Beginning the legal decision with a quote from the dissenting opinion of Justice Harlan in Plessy v. Ferguson, 105 and announcing the final outcome of the case before introducing the facts and before using any legal reasoning, implies a formalistic tendency to posit the case as an easy predetermined legal question which does not

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102 The quotes in this paper are taken from the official Supreme Court website, but they do not represent a full accurate translation of the official Hebrew version of the case. Some sections of the original ratio summary were dropped, formalities such as the procedures at the Labor Court and their outcomes were ignored. The gaps between the translation and the original is in itself a topic for contemplation and it seems that only the highlights of the case are brought to a foreign audience, and the translation is informal on several levels.
103 El Al v. Danielowitz, supra note. at 1.
104 Romer v. Evans, at 636
105 Plessy v. Ferguson 163 U.S. 537, 559, 41 L. Ed. 256, 16 S. Ct. 1138 (1896)
require any discretion or choice. On the other hand, using a dissenting opinion and referring to an unheeded truth, which changed in time, posits this case as an innovation, based on value judgment and not necessarily on legal form.

*Justice Scalia* opens his dissenting opinion with a critique of the majority opinion:

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, *ante*, at 634, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.¹⁰⁶

This opening implies a non-formalistic account of the legal dispute, depicting the amendment in question as reflecting a legitimate cultural preference. The basic controversy in the core of the debate in this case is presented as given to diverse interpretations and not as a question of law. Nevertheless, since the fundamental question is whether the Supreme Court has the authority to intervene, this opening emphasizes the independence and discretion of the enacting state.

*El Al v. Danielowitz:* *Justice Barak* opens his lead opinion with the following question:

A collective agreement and a collective arrangement confer a benefit on a ‘spouse’ (husband or wife) or a ‘companion recognized as a husband/wife’ of an employee. Is this benefit conferred also on an employee’s same-sex companion? That is the question before the court in this petition.⁰⁷

Opening the opinion with the legal question at stake and defining it as a matter of contract interpretation signifies a formalistic tendency. On the other hand, *Justice Barak* ignores questions of authority and jurisdiction completely and does not refer to the fact that the petition was brought against the Labor Court. The formal grounds for the Israeli High Court of Justice for intervening in decisions of the National Labor

¹⁰⁶ Romer v. Evans, at 636
¹⁰⁷ El- Al v. Danielowitz at 756.
Court are limited and strictly defined. They do not formally include substantial review of decisions of the court. Since, in this case, the Court only approved the Labor Court decision and ruled in the same way, there was actually no authority or room for intervening in the case at all and especially not for deciding it de novo, as if it had originally been brought before the Supreme Court. Dismissing the question of authority and jurisdiction and not even discussing it while focusing on the merits of the case has a non-formalistic tendency.

*Justice Kedmi* opens his opinion with a more narrow presentation of the interpretational question at stake:

The question we must decide in this case is: does the concept ‘spouse’ used in the employment agreements include same-sex companions or not?

In contrast to Justice Barak, Justice Kedmi does not inquire about the scope of the collective contract and the collective arrangement, and what they "confer." Instead, he focuses on the verbal interpretation of the word "spouse," assuming that the semantic definition of the term is enough to produce a yes or no answer to the legal question at stake. Defining the legal question on the narrow basis of semantic interpretation ascribes less authority and discretion to the court and thus can be defined as more formalistic than Barak's opening.

*Justice Dorner* opens her opinion with a quote from French philosopher Michel Foucault:

The French philosopher, Michel Foucault, discussed the influence of social norms — reflecting what is accepted, ‘normal’, and what changes from time to

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108 Basic Law: The Judiciary (1984) section 15(D)(3): "15 (d) Without prejudice to the generality of the provisions of subsection (c), the Supreme Court sitting as a High Court of Justice shall be competent … (3) to order courts (batei mishpat and batei din) and bodies and persons having judicial or quasi-judicial powers under law, other than courts dealt with by this Law and other than religious courts (batei din), to hear, refrain from hearing, or continue hearing a particular matter or to void a proceeding improperly taken or a decision improperly given."

109 El- Al v. Danielowitz at 768.

110 El- Al v. Danielowitz at 768-770.
time and from society to society — on the application of transcendental and formal laws…\textsuperscript{111}

After the quote and its translation, she declares that:

It seems to me that we cannot decide the petition before us without referring to the changes that have taken place with regard to social norms in Israel respecting homosexuality.

Defining the legal question as related to transforming social norms in Israeli society is very far from a traditional formalistic approach, which would focus on legal language and internal connections between various norms. It draws a link between ideological changes and judges’ decision making, as if judges, like legislators, should reflect the altering modes in society. This opening of the legal decision is the least formalistic among the three Israeli justices.

(2) The use of extra-legal arguments

\textbf{Romer v. Evans: Justice Kennedy} uses legal argumentation and case analysis without reference to any extra-legal argument.

\textit{Justice Scalia} portrays the ruling of the majority as the political imposition of a preference shared by a minority of the public and, in doing so, provides a sociological critique of the Justices:

This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality… is evil.\textsuperscript{112}

This argument is not the only basis for Justice Scalia's ruling; most of his opinion is dedicated to analogical reasoning supported by precedents and legal arguments. He continues to criticize the majority opinion for its lack of logic and coherence while

\textsuperscript{111} El- Al v. Danielowitz at 777-778.
\textsuperscript{112} Romer v. Evans, at 636.
listing his formal arguments. He criticizes the decision as being an emotive utterance, being political, and as hurting public faith in the court system. In fact, it seems that he criticizes the majority opinion for lack of formalism and, in doing so, he, too, deviates from formalism, since judges themselves are not expected to reflect on the way judges decide, according to formalism.

El Al v. Danielowitz: Justice Barak’s entire analysis is based on an examination of the principle of equality and the question of discrimination under the statutes of equal opportunities in the workplace. Although the principle of equality might be considered philosophical and external to legal language, Barak refers to it as a legal principle and uses arguments based on balancing legal principles and existing rulings of the court.

Justice Kedmi ascribes much meaning to the biblical meaning of the word "spouse" and, in that sense, refers to extra-legal arguments. Although the bible is not a dictionary, and thus Kedmi's reference to it cannot be considered a classic formalistic act, it is clear that Kedmi uses the bible as the ultimate original source of definition.

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113 “If merely stating this alleged ‘equal protection’ violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness” Id., at 639.
114 “The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation.” Id., at 639.
115 Striking it down is an act, not of judicial judgment, but of political will” Id., at 879.
116 Id. at 636.
117 Equal Employment Opportunities Law, 5748-1988, ss. 2, 2(a) 2(c); Equal Employment Opportunities Law (Amendment), 5752-1992; Equal Remuneration for Female and Male Employees Law, 5724-1964; Equal Retirement Age for Female and Male Employees Law, 5747-1987.
120 El-Al v. Danielowitz, at 768.
and as an important basis for social meaning in Israel. Thus, his level of formalism according to this measure is quite high.

*Justice Dorner* begins with a discussion of social norms, as presented above, and thus her entire legal argument is based on ideological and political arguments, which are external to legal language. She is the least formalistic under this parameter as well.

(3) *The reliance on policy arguments and on legal principles*

**Romer v. Evans:** Justice Kennedy considers the state’s claim that Amendment 2 puts gays and lesbians in the same position as any other person as weak and implausible. He refers to the structure and operation of modern discrimination law in order to justify the decision.¹²¹ He describes the insufficiency of common law protection for groups that suffer from discrimination and the need to enumerate the persons or entities subject to a duty not to discriminate.¹²² He continues to examine the existence of a rational relation to a legitimate and independent legislative aim in this case, and finds none. He describes Amendment 2 as at once too narrow and too broad.¹²³ It identifies persons by a single trait and then denies them protection across the board. His analysis is based on a policy analysis of a legitimate aim, a frame of analysis that is actually dictated by the terminology of the amendment itself, and he concludes that making homosexuals unequal to other people in society is the only aim in this case and "is born of animosity,"¹²⁴ and thus the amendment is void.

*Justice Scalia* relies in his legal argument mainly on the idea that treatment of homosexuality is not dictated by the constitution and thus any state is free to

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¹²¹ Romer v. Evans, at 624.
¹²² Romer v. Evans, at 628.
¹²³ Romer v. Evans, at 633.
¹²⁴ Romer v. Evans, at .. For an overview of the role of "animosity" within the writing of Justice Kennedy, see Steven Goldberg, Beyond Coercion: Justice Kennedy’s Aversion to Animus, 8 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW, 801 (2006).
implement its sexual morality by forbidding the protection of homosexuals through special antidiscrimination laws. The main arguments he uses is formal logic – singling out a group for not being singled out cannot be considered discriminating – combined with a formal support of the preference of the Coloradans as granted by the American constitution. He relies on the precedent of *Bowers v. Hardwick*, which was not mentioned by the majority opinion, and uses other formal resources. He considers the policy of the State of Colorado to be congruent with constitutional values. He is more formalistic on this measure than the majority opinion.

**El Al v. Danielowitz:** Justice Barak uses legal policies and principles as the main basis for his analysis and decision. He examines the principle of equality as it appears in the Israeli Declaration of Independence, in *The Basic Law: Dignity and Freedom of man and in court rulings*. His decision does not rely merely on legal rules, whether contract law or the rules stipulated by the agreement, which is the basis for the dispute. Instead, he uses principles and policies beyond the written law as determining the case. On this measure, Barak's ruling is very anti-formalistic.

**Justice Kedmi** does not use policy arguments or legal principles at all. His decision is based upon a linguistic analysis of the word "couple" as defined in the collective

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125 Romer v. Evans, at 636.
agreement (with the addition "husband/wife"), and its relation to the collective arrangement which expanded the notion to unmarried couples.\textsuperscript{129}

\textit{Justice Dorner} refers mainly to the transformations in society that affected the legal norms regarding homosexuality and thus focuses less on policy arguments and principles and the relations between them. She supports her decision by applying the principle of equality, and suggests an evaluation test for the existence of discrimination, but she is less anti-formalistic than Barak on this scale.

(4) The reference to discretion and choice

\textbf{Romer v. Evans}: Justice Kennedy does not evidence any moments of contemplation, reflection or personal expression. He delivers the opinion in the name of the majority and does not even use the pronoun “I.”

\textit{Justice Scalia} uses a personal voice but does not emphasize contemplation or discretion at all, except for condemning it in the majority opinion.

\textbf{El Al v. Danielowitz}: Justice Barak does not emphasize any moments of discretion in his decision.

\textit{Justice Kedmi} does not express moments of doubt or contemplation in his decision, though he sometimes emphasizes his choices as an interpreter, by using expressions such as "to my opinion" or "according to my view" and by noting that while this was his opinion, he respects the principle of majority rule.\textsuperscript{130}

\textit{Justice Dorner} explores the process of shaping social norms and exposes the relationship between ideology and law. In doing so, she refers to the value choice in the law, but does not discuss it explicitly.

\textsuperscript{129} See supra 97.
\textsuperscript{130} El-Al v. Danielowitz, at
(5) The relationship between what is presented as facts and what is presented as norms

**Romer v. Evans** and **El Al v. Danielowitz**: Like in many Supreme Court cases, in these cases, the Justices do not have direct dealings with determining the facts, since this role is given to the trial judges. The Justices assume that this was conducted properly in the trial stage.

(6) The preservation of traditional boundaries in law

**Romer v. Evans**: Justice Kennedy crosses the traditional boundary between State preferences and constitutional amendments. He implicitly overturns the decisions in Bower v. Hardwick,\(^\text{131}\) which acknowledged criminalizing homosexual conduct as constitutionally permissible for a State. In terms of traditional boundaries between the federal system and the states, Kennedy demarcates the lines referring to gay rights. Justice Scalia discusses the importance of acknowledging the rights of a State to promote traditional American values through legislation.\(^\text{132}\) He perceives the majority opinion as extreme boundary breaking and unfounded, based on "a constitutional theory heretofore unknown."\(^\text{133}\) This is problematic, especially since there is a facial challenge of the amendment, and not a concrete claim for denial. In such cases, according to Scalia, the challenger must establish that no set of circumstances exists under which the Act would be valid.\(^\text{134}\)

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\(^{131}\) See Bowers v. Hardwick, supra note 86.

\(^{132}\) Romer v. Evans, at 651.

\(^{133}\) Id.

\(^{134}\) Romer v. Evans at.. For a criticism of Romer as wrongly changing the existing Local Government Law, see Lawrence Rosental, Romer v. Evans as the Transformation of local government law. SSRN: http://ssrn.com/abstract=926376
El Al v. Danielowitz: As already mentioned, the decision is given without strict exploration of the questions of authority and jurisdiction. In fact, the Labor Court's unique role as protecting the workers and as responsible for developing a distinct Labor law legal regime is not acknowledged. The ruling crosses the boundaries between constitutional law and Labor law. The boundaries between contract law and constitutional law are further crossed in the opinions of Barak and Dorner, where they read constitutional principles into the agreement in question, which referred specifically to husband and wife.

Justice Kedmi aspires to preserve the traditional boundaries of law by insisting on interpreting the contract by searching for the linguistic meaning of its words, following the intention of its framers.

(7) The use of professional judicial rhetoric

Romer v. Evans: Justice Kennedy mainly uses professional language though he tends to emphasize the moral-philosophical analysis of the case and to focus less on precedents and analogical legal reasoning.

Justice Scalia uses professional legal language to analyze the case at hand but uses a personal style to attack the majority opinion, including portraying it as comical, illogical, and other such expressions:

This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected... I vigorously dissent.

[O]ur constitutional jurisprudence has achieved terminal silliness.

See discussion of the application of parameter one above.
See Danielovitz, supra text to note 107.
See also LOUIS MICHAEL SEIDMAN, Romer's Radicalism: The Unexpected Revival of Warren Court, 1996 Sup. Ct. Rev. 67 (1996)...
Romer v. Evans, at 645.
Romer v. Evans, at 636.
Romer v. Evans, at 639.
The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. Respondents (who, unlike the Court, cannot afford the luxury of ignoring inconvenient precedent)...142

**El Al v. Danielowitz:** Justice Barak uses only professional language without any personal, political or slang expressions. Justice Dorner is the least professional in her language, since she uses literature and historical events to support her claim. Justice Kedmi is more professional than Justice Dorner, but his use of the bible and method of analysis makes his writing less conventional and goes together with his labeling of the case as a "hard case," which requires strong discretion according to version II of formalism.143

(8) Judicial stability and reference to the gap between law in the books and law in action

**Romer v. Evans:** Justice Kennedy expresses the majority opinion, which changes the legal condition as defined in Bowers v. Hardwick,144 and redefines the equal protection analysis in cases involving discrimination based on sexual orientation.145 Although he does not do so explicitly, this contributes to judicial instability. In terms of acknowledging the gap between law in books and law in action, the court explains

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141 Romer v. Evans, at 639.  
142 Romer v. Evans, at 641.  
143 See the discussion of formalism as almost always working in section III above.  
144 Bowers v. Hardwick, supra note 126. See also Seidman, supra note 137., at 67-8: "By handing gay people their first major Supreme Court victory in the history of the republic, the opinion substantially alters the legal landscape."  
145 For an account of Romer as evolutionary see Leading Cases, 110 Harv. L. Rev. 155, 155-156 (1996) "The case revolutionizes the Court's equal protection analysis, raising new questions about the methodology and substance of equal protection jurisprudence." Compare Robert S. Chang and Jerome McCristal Culp, Jr., Symposium: Romer v. Evans: Nothing and Everything: Race, Romer, and Gay/lesbian/bisexual) rights 6 WM. & MARY BILL OF RTS. J. 229 (1997). The author claims that Romer was not progressive toward gay rights as portrayed by some scholar, but it was rather based on "sexuality-blind constitutionalism."
its ruling by reference to the insufficiency of a general prohibition on discrimination

to prevent de facto exclusions of homosexuals.\textsuperscript{146} Thus, the amendment is needed to
bridge law in books with law in action. Still, in general, he uses a moral voice that
claims a direct influence on reality, where animosity toward homosexuality will
disappear by court order.

\textit{Justice Scalia} defends what he considers the existing legal condition according to
Bowers v. Hardwick, and attacks the judicial reasoning that grounds the majority
opinion. He criticizes the court's decision as imposing the preferences of an elite
minority on a society that holds traditional values.\textsuperscript{147}

\textbf{El Al v. Danielowitz:} In terms of judicial stability, both Justice Barak and Justice
Dorner change the prevailing legal norm that defined a spouse as a heterosexual
partner. Their ruling is non-formalistic in this sense. Justice Kedmi is formalistic and
preserves the existing legal reality.

In terms of the gap between law in books and law in action, at first sight it seems that
Justice Dorner deals almost exclusively with the relationship between law in books
and law in action. On the other hand, she does not refer to the gap between norms
creation by the courts and social change, and thus assumes a more formalistic
approach to law as transforming reality, or as reflecting the ideal reality of an
"enlightened public."\textsuperscript{148} The fact that large Jewish ultra-orthodox groups in Israeli

society still condemn homosexuality and the public acknowledgement of their rights,
including pride parades,\textsuperscript{149} exposes the inaccuracy and generalization of the

\textsuperscript{146} Romer v. Evans , at 627.
\textsuperscript{147} Romer v. Evans , at 636.
\textsuperscript{148} The debate about the legitimacy of the court in representing "the enlightened public" is highly
debated in Israel following Justice Barak’s extensive use of this expression. See Gideon Sapir.\textsuperscript{149} 
\textsuperscript{149} See Haaretz…
development of social norms, as portrayed by Justice Dorner. Her level of formalism is thus relatively low on norm creation, and high with regard to the social change parameter.

Justice Barak and Justice Kedmi do not refer to the relation between law in books and law in action at all. Their writing uses legal concepts and legal analysis, without reference to the social reality.

Discussion: Formalism level of the cases

Applying the measure of formalism to Romer v. Evans reveals some correlations between the Justices, who do not use a lot of contemplation or self-reflection. Justice Scalia is less formalistic when examining social critique (parameter 1) and professional language (parameter 7). He is more formalistic in terms of policy arguments (parameter 3) and preservation of boundaries (parameter 6). The majority opinion (Justice Kennedy) is non-formalistic in terms of policy arguments (parameter 3) but preserves a much more professional self-referential style (parameter 7).

Overall, the two Justices deviate only slightly from formalism in this case, and Justice Kennedy's policy analysis is the only extreme deviation. He uses broad and opaque language, combined with modest reliance on precedents and doctrine. Such a

150 For a Supreme Court decision that reflects a slightly different attitude, see RCJ 273/97 Association for human rights v. The Minister of Education, as discussed in Alon Harel, Comments on RCJ 273/97 4 Law and Governance, 785 (1998) (in Hebrew).

151 Compare Seidman, supra note 137, at 69. The author portrays the majority opinion as anti-formalistic and as resembling the Warren Court style of writing. In terms of the analysis performed in this paper, which is performed through the use of concrete parameters and across cultures, such an extreme conclusion cannot be inferred. For an evaluation of the writing of Justice Kennedy at Romer as non-minimalist see Cass R. Sunstein, The Supreme Court 1995 Term: Foreword: Leaving Things Undecided, 110 HARV. L. REV. 6, 9 (1996):“Romer combined a degree of caution and prudence with a good understanding of the fundamental purpose of the Equal Protection Clause and a firm appreciation of law's expressive function. Thus understood, Romer was a masterful stroke - an extraordinary and salutary moment in American law. It was a masterful stroke in part because it left many issues open. Thus Romer provides an especially fruitful case for an exploration of the uses of minimalism.”
deviation can be accepted within one of the cultures of formalism, as explained above,\textsuperscript{152} that of reconstructed formalism, and thus is of only minor significance.

Applying the measures of formalism to the Danieolovitz case, results in more diverse findings. While Justice Barak is extremely anti-formalistic when he uses policy arguments (parameter 3); in all other measures, he scores very low. This finding locates Barak as promoting reconstructed formalism, which combines Legal Process purposive interpretation with Dworkin's theory of rights.\textsuperscript{153} Justice Kedmi is formalistic on all scales, and his writing reflects formalism as defined by the first two cultures of formalism.\textsuperscript{154} Justice Dorner is the least formalistic since she both defines the case as a sociological question (parameter 1), and uses external arguments (parameter 2). She still does not manifest self-reflection (parameter 4) nor does she acknowledge the gap between her writing and law in action (parameter 8). The three Justices are non-formalistic in terms of jurisdiction and the preliminary framing of the procedural question when a challenge to the Labor Court is at stake (parameter 1). This can be explained by the need to function as a real Supreme Court, which has discretionary power to choose significant cases in order to develop new norms. Legal reality in Israel still posits the Supreme Court as an appeals court as well and thus requires active informal construction of the "Supreme" quality of the court.\textsuperscript{155} Comparing the two cases that deal with gay rights, reveals interesting preliminary findings regarding the cultures of formalism in both societies. In terms of reality of discrimination, the Israeli case assumes a legal regime of special protection of gay rights and in this light interprets a contract that confers benefits on a spouse. No Justice denies this regime although it is inferred from a regular law and basic

\textsuperscript{152} See section
\textsuperscript{153} For Barak's self-description of his approach as a judge, see Barak, supra note 92.
\textsuperscript{154} See section..
principles and not through reference to a higher constitutional resource. The American case examines the constitutionality of banning a regime of special protection of gay rights and thus opens a discussion on the legitimacy of rejecting homosexuality as immoral or unacceptable. It begins from a more conservative point, which in the Supreme Court of Israel is not even considered. Such a position of the Israeli Supreme Court is based on a progressive interpretation of existing formal resources of law and of prevailing social norms in Israeli society although animosity toward homosexuality is common in large sections of the Israeli public. In terms of measures of formalism, the Israeli justices seem to deviate from formalism much more intensely than their American colleagues, relying on external sociological explanations and avoiding questions of jurisdiction and authority. This may indicate that young legal systems, such as the Israeli one, are more ready to acknowledge and incorporate a critique of formalism and to develop unique anti-formalistic expressions in hard cases. The Israeli majority uses policy arguments as a rule, and reflects a reconstructed formalist culture. Justice Barak’s use of policy arguments and legal principles in his writing has become a canon for other judges. He preserves an image of law that is a coherent immanent system containing its own rationality.

The dissenting opinions in both cases differ in the manner of formalism they convey: while Justice Kedmi adopts the classic formalism of both Kelsen and Hart, assuming that the word "spouse" has a core meaning that excludes homosexuals and thus the contract does not apply, Justice Scalia uses a mode of CLS critique of substantive formalism when referring to the majority opinion, while adhering to classic formalism when writing his own view.

156 See Haarets...
157 See Weinrib, supra note 57.
Discussion of the application of the measure on only one case, as suggested in this paper, can produce only limited and preliminary findings. It does not enable comparison with other Supreme Court Justices or according to changing historical periods;\(^{158}\) it does not include an analysis of the impact of the legal context and jurisprudence on the style of the opinions; there is no reference to the Justices' personal styles; and no comparative analysis is suggested. The idea behind the measure is that it can be applied to all the varieties above, and the results will have to be evaluated through concrete discussions each time. The advantage is in providing a bottom-up discussion of legal writing as it is, with the interplay between formalism and anti-formalism that it reflects. This interplay, which emerges in each context, has a unique significance that cannot be conceptualized in advance in general terms.

**VII CONCLUSION**

The debate over formalism in legal academia is a complex phenomenon that has evolved over time and contains diverse sub-cultures. This paper used qualitative research methodologies and textual analysis to analyze formalism in context and to explore the extent of the influence of a critique of formalism on legal writing in hard cases. By perceiving formalism as a multicultural phenomenon that can be evaluated through different measures, and by depicting the tenets of formalism as modes to be aspired to and not as definite constraints, legal research can focus on more nuanced reports on legal decision making in hard cases. This paper has only begun to

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demonstrate such a close reading, and it calls for a broader inquiry into the modes of concrete writing which develop across cultures, legal jurisdictions, historical eras, judicial personalities, and many other parameters which shape legal practice through personal expressions of case writing.