

TWEETING #JUSTICE:
AUDIO-VISUAL COVERAGE OF COURT
PROCEEDINGS IN A WORLD OF SHIFTING
TECHNOLOGY[♦]

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Abstract

The debate over whether to allow cameras into courtrooms refuses to fade away. In 2015 alone, U.S. federal courts completed a five-year experiment with cameras in courts, New Zealand published new guidelines for audio-visual coverage, and Scotland completely revised its former broadcast policy. These jurisdictions, and others around the globe, constantly struggle to design model practices that successfully balance freedom of the press, transparency, and public access to information, with rights to a fair trial and privacy. The constant need to rethink coverage policies can be attributed in large part to the advancement of technology, providing the media innovative tools to report from within courtrooms even when formal legal norms bar direct reports. These advancements often result in an unsettling disparity between formal norms and the reality of court coverage.

Drawing on the Israeli example, this Article seeks to address this timely issue, illustrating how social media and technological advancements can push regulators to re-evaluate legal regimes that seem to lag behind the law in action. The Article provides a systematic analysis of both doctrinal arguments and empirical data on the policies adopted by different common law jurisdictions, aiming to devise a policy framework for audio-visual coverage of courts in the age of hyper-technology. By synthesizing lessons from these jurisdictions, the

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Article first traces the evolution of the doctrine on audio-visual coverage across various jurisdictions, and its constitutional framing. Moreover, the Article exposes the politicization of constitutional law: how courts adopt flexible frameworks with regard to policies on constitutional issues that affect them. Second, the Article suggests that existing empirical data are generally supportive of coverage, showing almost no adverse effects resulting from the presence of cameras in courtrooms. Third, the Article provides practical tools for reaching balanced coverage policies, offering the first analytical framework for the design of coverage policies. The Article utilizes the Israeli case study—a country with currently no audio-visual coverage policy—in order to implement the suggested framework and offers a comprehensive coverage policy within Israeli courts.

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INTRODUCTION

“Justice Breyer: The toughest part about the question you posed is this – when I am deciding a case, I am deciding it for 315,000,000 people who are not in the courtroom. The rule of law and the rule of interpretation, it applies to everybody. But human beings, correctly and decently, relate to people they see. And they’ll see two lawyers and two clients. Will they understand the whole story? Will they understand what we are doing? Will there be distortion? That’s the arguments against you. The argument for you is that it will be a fabulous educational process.

Colbert: . . .and pretty entertaining.

Justice Breyer: mmm, well. . . NO.”

Justice S. Breyer interviewed on *The Late Show with Stephen Colbert*, Sept. 15, 2015¹

On September 15, 2015, Justice Stephen Breyer of the U.S. Supreme Court made an unusual public appearance on CBS’s *The Late Show with Stephen Colbert* for a short interview.² Out of a total of seven minutes, almost four minutes of the interview were devoted to Colbert’s attempts to understand the Court’s persistent refusal to allow live coverage of its hearings.³ Breyer’s answers represented the traditional—mostly negative—approach of the Court towards the presence of cameras in the courtroom, based on the fear of a distorted reality that will emerge from this coverage. Yet, somewhat inconsistently with the Court’s main argument against live coverage, Justice Breyer acknowledged the educational benefits of such coverage.⁴

This short interview not only provided an intriguing first-hand glimpse into the views of a Supreme Court Justice on the long-standing debate around audio-visual coverage of courts (i.e., live audio and video recordings and broadcast of court proceedings), but it also exposed the question’s complexity even when considered by some of its most

¹ The Late Show with Stephen Colbert, *Justice Stephen Breyer Interview*, CBS (Sept. 15, 2015), http://www.cbs.com/shows/the-late-show-with-stephen-colbert/video/YALV4CfP4Ig_BPcMI3JGFNZFAvaBN9YM/justice-stephen-breyer-interview/ (Justice Breyer’s response to a question from Stephen Colbert about why the U.S. Supreme Court refuses to allow cameras into the hearings).

² *Id.*

³ *Id.*

⁴ In fact, Breyer’s mere recognition of the positive effects that the presence of cameras in courts may have is surprising to anyone familiar with the traditional view of the Court’s justices on the issue; one of the most radical views was expressed by Justice Souter, who declared “I think the case [against cameras] is so strong that I can tell you that the day you see a camera coming into our courtroom, it’s going to roll over my dead body.” AP, *On Cameras in Supreme Court, Souter Says, ‘Over My Dead Body,’* N.Y. TIMES (Mar. 30, 1996), <http://www.nytimes.com/1996/03/30/us/on-cameras-in-supreme-court-souter-says-over-my-dead-body.html>.

persistent opponents. Moreover, this interview emphasized the disparity between the rhetoric of the Court—recognizing the potential social importance of audio-visual coverage—while barring the doors of its own fortress to such potential.

This debate goes beyond U.S. borders. The issue of audio-visual coverage, generally, and the tension between courts recognizing the social benefits of such coverage while expressing concern of allowing it in their own back yard, have been discussed around the globe in various contexts and circumstances for a few decades now, and continues to be revisited by judiciaries, policy makers, and the media in many societies. Jurisdictions keep aiming to find the silver bullet that allows for a balance of several paramount constitutional principles⁵—the freedom of the press, the public's access to information, the right to a fair trial, the rights of parties and victims to privacy, and the reputation of the justice system. For example, in 2013, England allowed cameras to enter its court of appeals in what was considered and examined as a historic decision.⁶ In 2015, Scotland decided to revise its broadcast policy, including the development of an innovative approach to the role of social media in covering courts.⁷ In the same year, the U.S. federal court system completed a five-year-long experiment allowing cameras in federal courts,⁸ while the state courts continued evaluating their own existing regimes.⁹ New Zealand published new guidelines for its audio-visual coverage policy.¹⁰ Most recently, in March 2016, the British

⁵ A. Wayne MacKay, *Framing the Issues for Cameras in the Courts: Redefining Judicial Dignity and Decorum*, 19 DALHOUSIE L.J. 139, 151-159 (1996), Kyu Ho Youm, *Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning from Abroad?* 2012 BYU L. REV. 1989, 2025-2027 (2012), Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1534-1541 (1995-1996). For a detailed discussion on the constitutional balance prompted by "the cameras in court" debate, see *infra* Part I.

⁶ *Proposals to allow the broadcasting, filming and recording of selected court proceedings*, BRITISH MINISTRY OF JUSTICE (May 2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217307/broadcasting-filming-recording-courts.pdf [hereinafter THE BRITISH MINISTRY OF JUSTICE REPORT OF 2012]; Joshua Rozenberg, *Televising the courts: the time has come*, THE GUARDIAN (October 23, 2013, 8:15 AM), <http://www.theguardian.com/law/2013/oct/23/televising-courts-live-broadcasting-joshua-rozenberg>.

⁷ *Review into Cameras in Courts*, JUDICIARY OF SCOTLAND, <http://www.scotland-judiciary.org.uk/24/944/Review-into-cameras-in-court> [hereinafter JUDICIARY OF SCOTLAND].

⁸ *Cameras in Courts*, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/cameras-courts> (last visited Nov. 21, 2016).

⁹ This is currently being done by the Florida Bar Media and Communications Law Committee. See 90(6) THE FLORIDA BAR JOURNAL 40 (2016), in which the chair of the committee refers to the ad hoc committee of Rules of Judicial Administration Committee's Subcommittee D to update and revise Rule 2.450(b), the technological coverage of proceedings, <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/8c9f13012b96736985256aa900624829/1df e74e571b6aa0d85257fbd0069ccb5!OpenDocument>.

¹⁰ *In-Court Media Coverage Guidelines 2015*, <http://courtsofnz.govt.nz/In-Court-Media-Review/In-Court-Media-Review/In-Court-Media-Coverage-Guidelines-2015-180315.pdf> (last visited Oct. 21, 2016) [hereinafter Draft In-Court Media Coverage Guidelines 2015].

Ministry of Justice announced another new pilot program, this time between England and Welsh Crown Courts.¹¹ This Article argues that the constant need to rethink and revise coverage policies can be attributed, in large part, to the evolvement of technology, providing the media with innovative tools to report from within courtrooms even when formal legal norms limit—or completely bar—direct reports. The result of such reality is an unsettling disparity between de jure policies and de facto coverage of court proceedings.

Such disparity is clearly evident in Israel. For sixty years, this issue has generally remained under-examined in the Israeli setting by academics, policy makers, and the media alike.¹² Audio-visual coverage of courts is controlled by one short provision, established by Title 70(b) of the Israeli Law of Courts,¹³ named “Prohibited Publications,” and is consistently interpreted as an attempt to forbid audio-visual coverage, thereby creating a de facto presumption against audio-visual coverage of courts.¹⁴ Despite the immobile legal framework around this issue, however, social and technological developments have adapted, managing to provide news media with new methods for reporting in courts. Some of these methods, such as reporters texting from within courts directly to external screens or constant tweets from within hearings, have in fact evaded the legal prohibition on live coverage of courts without meaningful—in fact without any—responses from Israeli Authority.¹⁵ This undesirable reality in which the legal norm is neither enforced nor challenged, has lasted for many years.

These technological developments, and the ways by which they were implemented in the Israeli setting, stripped the formal legal prohibition from its merits and the original intent of the legislator. Moreover, these developments called for a reevaluation of Israeli law on

¹¹ Clive Coleman, *Crown courts to allow filming for the first time*, BBC NEWS (March 20, 2016), <http://www.bbc.com/news/uk-35854485>.

¹² The research for this Article revealed that this issue has been under-examined in the Israeli setting, with the sole exception of the Beinisch Report (See Dorit Beinisch, *The Report of the Committee for the Examination of Electronic Coverage in Israeli Courts*, 79, <http://elyon1.court.gov.il/heb/doch%20electroni.pdf> [hereinafter *Beinisch Report*]). The only other related Israeli study is Emanuel Gross’s study on fact-finding processes of appellate courts, which includes a brief and anecdotal discussion on the potential effects of video recordings of court proceedings on appellate courts’ ability to reassess facts and reliability of witnesses determined by trial courts. See Emanuel Gross, *Truth Finding and Appellate Court’s Judicial Oversight – A Revised Critique*, in JUSTICE GABRIEL BACH BOOK (David Han, Dana Cohen-Lekach and Michael Bach, ed) 225, 276-279 (2010), see also Part IV (demonstrating there are also a small number of brief columns in the news media).

¹³ Law of Courts, 5744-1984, 112 SH No. 198 (Isr.).

¹⁴ *Beinisch Report supra* note 12, at 18-19.

¹⁵ See, e.g., Liat Ron, *Legal Ridicule*, GLOBES (May 14, 2014, 2:24 PM), <http://www.globes.co.il/news/article.aspx?did=1000938409> (providing an example to such method used by the media in the coverage of the Olmert trial and how it contradicts the logic behind Rule 70(b), while stressing the lack of official response from either Israeli courts or legislators). For an extensive discussion, see *infra* Part IV.

the books after more than sixty years of stagnation.¹⁶ An opportunity for the news media and Israeli society to disrupt this status-quo arose in September 2014 with a decision by the former minister of justice and the Chief Justice of the Israeli Supreme Court (“ISC”) to launch a pilot program in which—for the first time in Israeli history—two court hearings were broadcast under the pilot: one audio transmission and the other a video transmission.¹⁷ However, since November 2014, no other hearings have been broadcast. Moreover, the decision to launch the pilot neither preceded nor was followed by any formal administrative legislation or regulation, any clear and transparent guidelines, or any public discussion surrounding court coverage.

Indeed, one of the main challenges for Israel, and other jurisdictions around the globe aiming to design new policies or revisit existing policies, is the scarcity of a current systematic analysis of both legal doctrine and empirical data based on the experience of various jurisdictions struggling with similar dilemmas. Furthermore, a comprehensive synthesis of such data into a policy-oriented framework is also desperately needed. This study takes up the challenge. It generates such analysis by adopting a comparative approach for studying the legal and practical implications of coverage policies in five common law jurisdictions: the U.S., Canada, England, Scotland,¹⁸ and New Zealand. The study then leverages this analysis to suggest a framework for designing such policies.

Based on this analysis, this Article offers three main conclusions. First, it demonstrates how courts develop constitutional principles in similar ways across different jurisdictions. While *all* courts in the surveyed jurisdictions recognized the public value of audio-visual coverage, with most courts grounding such value in constitutional principles, none were willing to draw an explicit constitutional right to coverage. Nevertheless, most jurisdictions—some faster than others—were willing to allow audio-visual coverage within their courts only when *the judiciary itself was willing* to take that step. When courts refused to allow audio-visual coverage despite their own recognition of the constitutional justification to such coverage, policy makers surrendered.

This pattern illustrates what I consider the *politicization of*

¹⁶ *Id.*

¹⁷ See the official announcements of the Judicial Authority’s spokeswoman from September 9, 2014 and November 16, 2014 (on file with author). See also Yasmin Guetta, *For the First Time: An Experimental Video Transmission of Supreme Court Proceeding*, THE MARKER (November 16, 2014), <http://www.themarker.com/law/1.2486949> (reporting on the video transmission), Tova Tzimuki, *From Next Week: The Supreme Court Goes Live*, YNET (September 3, 2014), <http://www.ynet.co.il/articles/0,7340,L-4567064,00.html> (reporting on the audio transmission).

¹⁸ Scotland is considered a hybrid of the common and civil law traditions, with characteristics of both.

constitutional law, or the judiciary's inclination to maintain its institutional power by tailoring flexible frameworks when it comes to constitutional issues which pertain to judicial matters. Based on these conclusions, the Article argues that the constitutional debate around audio-visual coverage becomes somewhat marginal, and that attention should rather be given, first, to the views of the judiciary, second, to empirical data on the potential effects of such coverage on court proceedings, and finally, to the different mechanisms adopted by each jurisdiction to address the concerns of the judiciary.

As for empirical data, the second conclusion of this Article is that in the vast majority of evaluation studies surveyed—including lab experiments and pilot studies conducted in different jurisdictions utilizing surveys, interviews, observations and field experiments—a weak, or even non-existent, link was found between the introduction of cameras in courts and changes in the attitudes or behaviors of parties, attorneys, judges, and the public as a whole.¹⁹ The empirical data thus contradict most of the claims made by opponents of audio-visual coverage, most notably courts themselves.

The final conclusion is that when courts were willing to allow audio-visual coverage, jurisdictions were able to adopt various arrangements aiming to address some of the concerns expressed by lawyers, parties, juries, and judges instead of banning coverage altogether. Once again, by synthesizing the policies adopted by different jurisdictions, this Article offers the first analytical, policy-oriented framework for designing or revisiting policies of courts' audio-visual coverage. This suggested framework takes into account the idiosyncratic features of each jurisdiction, technological advancement, and the ways in which they may affect such policies.

This study uses the Israeli case study as an example of how this framework can be utilized to adopt a comprehensive and coherent policy. In conducting this application, I take into account both universal aspects of audio-visual coverage policies and distinctive features of the Israeli court system and legal culture, such as the lack of a jury system, the large number of courts in which testimonies are not given, and the unique Israeli judicial selection mechanism, alongside the specific ways in which social media and technology are utilized by Israeli news media. This application also provides the foundation for other jurisdictions around the globe that are grappling with the legal and practical implications of allowing audio-visual coverage within their courts in the era of hyper-technology.

The Article proceeds as follows. The first section discusses the arguments for and against audio-visual coverage of court proceedings as

¹⁹ For a detailed discussion on the empirical findings, see *infra* Part II.

discussed in the literature, and offers both analysis and critique of their theoretical grounds and empirical support. This section shows that the empirical data gathered by different jurisdictions undermines the arguments brought by those opposing audio-visual coverage. The second section explores the ways in which different common law judiciaries around the globe—the U.S., Canada, New Zealand, England, and Scotland—frame the legal debate. It discusses the similarities in the ways by which the judiciary in these jurisdictions initially recognized the constitutional issues stemming from such coverage, leaving the ultimate balance responsibility in their own hands. Second, it illustrates how these jurisdictions have chosen to balance the two fundamental principles: freedom of the press and the right to a fair trial. The third section then discusses lessons to be learned from the comparative analysis, in terms of the doctrine’s legal development, the empirical findings on the effects of cameras, and the specific policies adopted in each jurisdiction. By synthesizing all of the data, the Article then offers a framework for designing audio-visual coverage policies. The fourth and last section is devoted to the Israeli case study; it focuses on the current Israeli legal regime according to which audio-visual coverage of courts is conducted. It provides a brief historical overview of the evolution—or lack thereof—of audio-visual policies, focusing on changes that occurred in recent years due to technological developments and the ways in which they have de facto affected live coverage of Israeli courts. It then implements the conclusions of the comparative analysis in the context of the new pilot launched in Israel, offering policy recommendations for the Israeli administration.

I. THE “CAMERAS IN COURTS” DEBATE – THEORETICAL AND EMPIRICAL FOUNDATIONS

Both supporters and opponents of audio-visual coverage of courts take wide arrays of considerations into account.²⁰ While at the theoretical level there is a reasonably rich discussion on the matter, such discussion is incomplete without the empirical component. Over the years, studies were conducted in different jurisdictions in an attempt to move beyond the abstract politicized discussions and to assess the actual effects of live coverage on legal proceedings and the actors involved in them²¹—lawyers, judges, parties, and the public. Although

²⁰ For a discussion on some of these considerations, see, for example, Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1501–02 (2012).

²¹ Sager & Frederiksen, *supra* note 5, at 1543–1544; Susan E. Harding, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, Note, 69 S. CAL. L. REV. 827, 834–838 (1996) (discussing U.S. based experiments at both the federal and state levels); *Beinisch Report*, *supra* note 12, at 49–51, 54–55, 66–67 (discussing experiments in Canada, New Zealand, and a general discussion, respectively); *See also infra* Part II.

some of these studies suffered from methodological challenges, there is no doubt that most studies found that allowing cameras into courtrooms had *no effects*, positive or negative, on the legal proceedings.²² Moreover, even the few studies that found such effects lacked rigorous design,²³ and in any event all jurisdictions agreed that potential dangers can be addressed through appropriate policy design.²⁴ With this observation in mind, this section presents the theoretical foundations of the arguments supporting and opposing audio-visual coverage of courts and provides a critique of some of their underlying assumptions, alongside empirical findings to support or refute them.

A. *Arguments Supporting the Expansion of Audio Visual Coverage*

1. Strengthening Public Access to Courts

The main argument supporting the expansion of audio-visual coverage is that allowing the coverage will strengthen public access to court proceedings.²⁵ According to this argument, simply allowing the public to attend trials in person is insufficient, due to physical and other limitations that prevent civilians from actually reaching courtrooms.²⁶ These limitations would not stand in the way of the public if hearings were transmitted through radio or television—the latter being one of the

²² Sager & Frederiksen, *supra* note 5, at 1547 (claiming “in sum, the extensive empirical evidence that has been collected on the impact of electronic coverage has established that such coverage is not detrimental to the parties, jurors, counsel, or courtroom decorum”); Roland L. Goldfarb, TV OR NOT TV; TELEVISION, JUSTICE AND THE COURTS 76 (1998) (“In state after state, the results were similar. Initial skepticism was replaced by general acceptance after actual experiences with television”); Marder, *supra* note 20, at 1516 (discussing that despite concerns of opponents to audio-visual coverage, there have been few studies to date showing any effects on participants, and if they exist, they “are more likely to be of concern in the trial court than the appellate court”); *see also* Harding, *supra* note 21, at 839. As Stepniak contends, such findings were not confined to the U.S., and were also evidenced in Canada, England, New Zealand and Australia. Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RTS. J. 791, 802 (2004). Even though the evaluation study in New Zealand supported the proposition that allowing cameras in courts did not affect participants, surveys revealed witnesses’ discontent from taking such a step.

²³ See, for example, the critique on Hoyt’s study, James L. Hoyt, *Courtroom Coverage: The Effects of Being Televised*, 21 J. BROADCASTING 487 (1977), as expressed by scholars such as Borgida et al., emphasizing that “the essential comparison group was not included in the experimental design: a condition in which subjects recalled information in the presence of conventional media coverage” Eugene Borgida, Kenneth G. DeBono & Lee A. Buckman, *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions*, 14 L. & HUM. BEHAV., 489, 490-493 (1990).

²⁴ Stepniak, *supra* note 22, at 802.

²⁵ Harding, *supra* note 21, at 853; Clara Tuma, *Open Courts: How Cameras in Courts Help Keep the System Honest*, 49 CLEV. ST. L. REV. 417, 420 (2001). Tuma was a Texas-based reporter for COURT TV for ten years; Kyu Ho Youm, *supra* note 5, at 2025.

²⁶ THE BRITISH MINISTRY OF JUSTICE REPORT OF 2012, *supra* note 6, at 11; Kyu Ho Youm, *supra* note 5, at 2025-2026.

main channels through which the public processes information in the modern era.²⁷ In other words, audio-visual coverage is an expansion—and a completion—of the public trial principle.²⁸ This idea is reflected in court decisions such as *Richmond Newspapers*,²⁹ in which Justice Burger of the U.S. Supreme Court, being aware of the limitations of the public to actually attend trials, stated:

What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. “For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.”³⁰

The same idea was also clearly expressed in 2011 by Chief Justice McLachlin of the Canadian Supreme Court when discussing the role of television in promoting the openness principle.³¹

Regardless of the constitutional foundations of this argument, whether it is an extension of the right to a fair trial, freedom of the press, or neither, there is no real doubt that by allowing audio-visual coverage, courts will become more accessible to the public, and thus will potentially expose larger portions of society to the legal process, making it more transparent.³² The tough questions that still remain are first, whether audio-visual coverage should be recognized as a constitutional extension of the public trial or freedom of the press, and second, how one balances any potential effects of such coverage on rights and principles such as fair trial, privacy of parties to the legal process, and rights of victims. All of these concerns will be addressed

²⁷ Sager & Frederiksen, *supra* note 5, at 1534. Sager and Frederiksen provide one of the most constitutionally compelling cases for allowing cameras in courts in the U.S. context, and offer nuanced and tailored suggestions to allow cameras in federal courts and the Supreme Court; *see also* Harding, *supra* note 21, at 829–32.

²⁸ Kyu Ho Youm, *supra* note 5, at 2025–26; Dolores K. Sloviter, *If Courts Are Open, Must Cameras Follow?* 26 HOFSTRA L. REV. 873, 874 (1998). Sloviter, a former Circuit Judge of the United States Court of Appeals for the Third Circuit, discusses the literature supporting this idea, but suggests there is no constitutional basis for this argument, making it a policy issue more than a constitutional one.

²⁹ *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)); *see also* *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (upholding the First Amendment right of access to jury voir dire and stating that this right is said to promote fairness).

³⁰ *Richmond Newspapers*, 448 U.S. at 555.

³¹ “Television, as a medium, has the power to place the public inside the court room and actually observe the proceedings. If openness is the objective, this is about as good as it can get.” Beverley McLachlin, *The Relationship Between the Courts and the News Media*, in *THE COURTS AND THE MEDIA: CHALLENGES IN THE ERA OF DIGITAL AND SOCIAL MEDIA* 24, 32 (Patrick Keyzer et al. eds., 2012).

³² Kyu Ho Youm, *supra* note 5, at 2025.

later on.

2. Supporting Freedom of Speech and of the Press

According to this argument, the prohibition on audio-visual coverage infringes unlawfully on the freedom of the press. First, it limits the press's ability to collect data and transmit it to the public.³³ Second, it unfairly favors the written press and discriminates against the broadcasting press (primarily television), granting the former information that adheres better to the needs of the written medium.³⁴ Forbidding audio-visual coverage, on the contrary, limits the ability of the broadcasting press to perform their public role utilizing their maximum technological strengths and capabilities.³⁵

3. Open Government Policies and the Availability of Information

According to this argument, it is imperative to lift the veil of mystery off the work of courts, as has been done for most other governmental branches as part of open government policies.³⁶ As I suggest here, the general arguments in support of open government policies can be employed on the issue of courts as well.

First is the argument of supervision and control. This is an instrumental argument according to which secrecy is a fertile ground for corruption and inefficiency.³⁷ Providing members of the public with transparency and information that allow them to supervise the government, therefore, will improve the work of governments—including courts—and will eliminate concerns of failure, mistakes, and corruption.³⁸ There is no better tool than the audio-visual coverage of courts to maximize the transparency of their daily work.

Moreover, the public's ability to supervise the government will increase accountability³⁹ and public trust in the authorities.⁴⁰ This in turn will strengthen citizens' belief in the democratic process and will

³³ Sager & Frederiksen, *supra* note 5, at 1535–6.

³⁴ Sager & Frederiksen, *supra* note 5, at 1535–36 (exploring the rich case law emerging in the 1990 which restricted the government's ability to arbitrarily discriminate between different media).

³⁵ *Id.*

³⁶ Tony Mauro, *Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism*, 1 REYNOLDS CT. & MEDIA L. J. 259, 270–71 (2011).

³⁷ Steven L. Katz, *Transparency in the U.S.: Towards Worldwide Access to Government*, THE J. OF PUBLIC INQUIRY 55, 55–59 (Fall/Winter 2001).

³⁸ Tehilla Shwartz Altshuler, *Open Government Policy in Israel in the Digital Age*, Policy Paper No. 91, THE ISRAELI DEMOCRACY INSTITUTE 26 (2012); Tuma, *supra* note 25, at 420.

³⁹ Jay C. Carlisle, *An Open Courtroom: Should Cameras Be Permitted in New York State Courts?*, 18 PACE L. REV. 297, 304 (1998) (providing data on a survey conducted in the state of New York among 350 judges, from which sixty-three percent agreed television coverage fosters public scrutiny of judicial proceedings); see also Marder, *supra* note 20, at 1501–02.

⁴⁰ Altshuler, *supra* note 38, at 27.

increase public participation in this process.⁴¹ These ideas are not new—especially in reference to courts—and are repeatedly discussed by supreme courts around the globe. Chief Justice Burger’s opinion in *Richmond*, for example, emphasized how open access to judicial proceedings enhances the integrity of the legal process: “A trial courtroom is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.”⁴²

Recently, the ISC repeated these same ideas in a decision that allowed an Israeli newspaper to access information on pending cases in the ISC and district courts, along with the names of the judges handling those cases.⁴³ The ISC emphasized the importance of providing the Israeli public with as much information as possible regarding the work of the judiciary, in order to increase the courts’ accountability and improve public trust.⁴⁴ These arguments are particularly relevant for Israel, where the public’s trust in the judicial system is constantly decreasing.⁴⁵ Allowing live audio-visual coverage provides even more unmediated exposure to the court’s work and might narrow the gap between the Israeli public and its judiciary.⁴⁶

Second is the ownership/trustee argument, which purports that the public owns the information that is held by the government.⁴⁷ As merely a trustee of the information, the government is obliged to deliver it to

⁴¹ George Kopits and Jon Craig, *Transparency in Government Operations*, Occasional Paper No. 158, INT’L MONETARY FUND 1–2 (1998), <http://www.imf.org/external/pubs/ft/op/158/op158.pdf>; Bart W. Édes, *The Role of Government Information Officers*, 27(4) J. GOV’T INFO. 455, 455–57 (2000), <http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan006567.pdf>; Altshuler, *supra* note 38, at 27.

⁴² *Richmond Newspapers*, 448 U.S. at 572–73, 587. Justice Brennan echoed similar ideas, stating that the First Amendment “has a structural role to play in securing and fostering our republican system of self-government” and noted its importance in fostering informed debate and meaningful discussion of government affairs, enabling people to “resolve their own destiny”; Richard P. Lindsey, *An Assessment of the Use of Cameras in State and Federal Courts*, 18 GA. L. REV. 389, 393–94 (1984); *see also* Sloviter, *supra* note 28, at 877–78.

⁴³ AdminA 3908/11 State of Israel, Courts Administration v. The Marker – Ha’aretz Newspaper (2014) (Isr.) (not yet published).

⁴⁴ *Id.* at 62

⁴⁵ Yael Hadar, *The Israeli Public Trust in Institutions in the Last Decade*, ISRAELI INSTITUTE FOR DEMOCRACY (Parliament 63), <http://www.idi.org.il/אמוץ-63-גיליון/פרלמנט/מאמרים-ספרים>; Tamar Hermann et al, THE ISRAELI DEMOCRACY INDEX 117, 124, http://www.idi.org.il/media/3987340/democracy_index_2014.pdf; *see also* Revital Hovel, *The Public Loses Trust in the Law Enforcement Agencies*, HA’ARETZ (Aug. 4, 2013), <http://www.haaretz.co.il/news/law/premium-1.2089326> (detailing a study conducted by Haifa University from 2013, which exposed that only thirty-six percent of the Jewish population and thirty-seven percent of the Arabic population trust the Israeli courts).

⁴⁶ This approach is relevant not only to the Israeli setting. Surveys of public perceptions of the judicial process revealed correlations between low levels of confidence in the judiciary and a lack of public knowledge of the legal system. Stepiak, *supra* note 22, at 806.

⁴⁷ Altshuler, *supra* note 38, at 28.

the public, unless it can provide valid reasons for not doing so.⁴⁸ In my view, no valid reasons justify excluding the work of the courts from this principle. Courts are, after all, the main source of interpreting the law and normative order. In effect, courts generate a moral code for citizens within a society, and therefore are obligated to share with the public information concerning their actions, decisions, and perspectives alongside the mere exposure to legal proceedings. On the other hand, much of the information disseminated in courtrooms actually belongs to private parties rather than the government. This could potentially weaken the ownership argument regarding courts, which, if used to formulate a specific policy governing audio-visual coverage, must be carefully balanced with the right to privacy.

Third is the participation argument, which puts forward the idea that informed participation in the democratic process—mostly through elections—can only take place if the citizens are receiving accurate information on their government’s activities.⁴⁹ Without such information, citizens’ decisions may not be fully informed, thereby calling the legitimacy of the democratic regime into question.⁵⁰ In regimes where judges do not stand for public elections (such as Israel), the argument of direct participation becomes weaker. However, the transparency of information regarding the courts is a crucial element in the structure and legitimacy of the democratic regime, and its absence may certainly affect citizens’ ability—or incentive—to participate fully in the democratic process.

4. Educational Benefits

The main argument here is that allowing audio-visual coverage will expose the public to courts and legal proceedings, fostering and enriching the public with an understanding of the legal system, legal processes, and the ways in which judges, lawyers, and parties think and behave.⁵¹ This view was implied in Breyer’s interview presented earlier.⁵² The exposure to legal proceedings might also increase public awareness of the values of the law and of pivotal issues dominating public discourse.⁵³ According to many proponents of this argument, preference should be given to visual platforms—television or Internet—

⁴⁸ *Id.*

⁴⁹ *Id.* at 30; Carolyn Bingham Kello, *Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act*, 69 BROOK. L. REV. 345 (2003).

⁵⁰ *Id.*

⁵¹ Sager & Frederiksen, *supra* note 5, at 1540–41; Marder, *supra* note 20, at 1496–1500; *see also* Justice Breyer’s view as expressed in the *Late Show* interview mentioned in the introduction, providing the educational argument as the only counterargument to the Court’s refusal to allow cameras. *Justice Stephen Breyer Interview*, *supra* note 1.

⁵² *See* INTRODUCTION.

⁵³ Sager & Frederiksen, *supra* note 5, at 1540–41.

rather than radio due to the dominance of these platforms in the daily lives of the public and high exposure to this medium.⁵⁴ One of the most recent examples supporting this argument can be found in a report submitted by the U.S. Federal Judicial Center (“FJC”) in March 2016, summarizing the findings emerged from a pilot project on video recording of courtroom proceedings conducted in fourteen federal district courts between 2011 and July 2015.⁵⁵ The second FJC report (“FJC II”) stated that 21,530—a significant number of viewers—accessed the video recordings of the hearings that were uploaded to the court’s website.⁵⁶ Moreover, some of those accessing the website completed a “pop-up” survey, which revealed that most viewers were not members of the media, but rather students, librarians/educators, members of the general public, lawyers, or other law firm employees.⁵⁷ They reported accessing the recordings due to general interest in viewing federal court proceedings or because they had an educational reason to do so.⁵⁸ These findings emphasize the potential educational use that audio-visual coverage contains.

It should be mentioned, however, that a meaningful counterargument exists; that allowing audio-visual coverage will actually hinder the educational potential of courtroom activities due to rating considerations by the media, who will provide a selective and distorted picture of the legal system and emphasize sensational hearings whose educational contribution is minimal.⁵⁹ I will elaborate on this counterargument below.

5. Optimizing the Court System

Proponents argue that audio-visual coverage can assist in

⁵⁴ Tuma, *supra* note 25, at 420 (“With so many people relying on television as their primary source of information, televised coverage of trials exposes greater numbers of citizens to our justice system.”); Marder, *supra* note 20, at 1496–1500.

⁵⁵ The pilot was originally intended to last three years, but was extended until July 2015. It was the first pilot conducted in federal *trial* civil courts—allowing a better assessment of the potential effects of cameras on witnesses. The participating courts: Alabama Middle, California Northern, Florida Southern, Guam, Illinois Northern, Iowa Southern, Kansas, Massachusetts, Missouri Eastern, Nebraska, Ohio Northern, Ohio Southern, Tennessee Middle, and Washington Western. Three districts at the Ninth Circuit requested to continue the pilot: Guam, Washington Western and California Northern. The request was granted. For the full report, see MOLLY TREADWAY JOHNSON, CAROL KRAFKA & DONNA STIENSTRA, VIDEO RECORDING COURTROOM PROCEEDINGS IN UNITED STATES DISTRICT COURTS: REPORT ON A PILOT PROJECT: REPORT ON A PILOT PROJECT: SUBMITTED BY THE FEDERAL JUDICIAL CENTER TO THE COURT ADMINISTRATION AND CASE MANAGEMENT COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2016), [http://www.fjc.gov/public/pdf.nsf/lookup/Cameras-in-Courts-Project-Report-2016.pdf/\\$file/Cameras-in-Courts-Project-Report-2016.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Cameras-in-Courts-Project-Report-2016.pdf/$file/Cameras-in-Courts-Project-Report-2016.pdf) [hereinafter FJC II]. The first FJC report, submitted in 1993, will be discussed shortly.

⁵⁶ FJC II, *supra* note 55, at ix.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Carlisle, *supra* note 39, at 306; *see also* *Estes v. Texas*, 381 U.S. 532 (1965).

optimizing the court system in various ways. First, the presence of cameras in courts will incentivize judges to run hearings efficiently and in a more courteous manner.⁶⁰ Second, lawyers will be incentivized to impress their clients—current and potential—and thus will be motivated to better prepare.⁶¹ Third, based on a lab experiment conducted by Hoyt at the end of 1970s, witnesses will tend to provide more comprehensive testimony when in front of cameras.⁶²

Although these arguments seem compelling, supporters of audio-visual coverage, including myself, encounter meaningful challenges when pinning their hopes on these; analysis of the relevant literature reveals that it is in fact hard—if not impossible—to provide empirical evidence to support them.⁶³ A few studies, conducted mostly in the U.S. (but also in Canada, New Zealand and England) and aimed at assessing the potential effects of cameras in courts on legal actors, have concluded that cameras do not affect lawyers, judges, or litigants, *not even in a positive manner*.⁶⁴ This is, for example, the conclusion of the first FJC report (“FJC I”), which evaluated a pilot program occurring between 1991 and 1993, in which cameras in six district courts and two courts of appeal were allowed.⁶⁵ In FJC I, a questionnaire was circulated among judges—once before the pilot and once after.⁶⁶ The questionnaire asked about the potential effects of cameras in courts on different parties involved in the legal process.⁶⁷ The majority of judges reported that cameras did not affect the preparedness of lawyers arguing before the court.⁶⁸ The effects were lower in the questionnaire that was circulated after the pilot.⁶⁹ Similarly, on the questionnaire that was circulated among lawyers, fifty-four percent of the lawyers reported that cameras had little to no effect on the attentiveness of judges and sixty-two percent reported that the cameras had no effect on judges’ level of courtesy.⁷⁰ The current FJC II mirrored similar findings, where the

⁶⁰ Mauro, *supra* note 36, at 271–72; Marder, *supra* note 20, at 1500.

⁶¹ See, e.g., *Beinsich Report*, *supra* note 12, at 81.

⁶² Hoyt, *supra* note 23.

⁶³ See *supra* note 22.

⁶⁴ *Id.*

⁶⁵ Molly Treadway Johnson & Carol Krafka, *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals*, FED. JUDICIAL CTR. (1994), [http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/\\$file/elecmediacov.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf) [hereinafter FJC I]. This study is considered by some scholars as the best empirical study conducted on the effects of cameras in courts. See, e.g., Marder, *supra* note 20, at 1510–11.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 11–15. The majority of judges rated the effects of the cameras on lawyers either as “to some extent” or as “little or no extent,” which were the two lowest possible grades on the questionnaire.

⁶⁹ *Id.*

⁷⁰ *Id.* at 20–21.

majority of judges and attorneys participating in the pilot reported—in a questionnaire circulated after the implementation of the pilot—that most hypothesized effects on witnesses, jurors, attorneys, or judges occur to little or no extent.⁷¹ Having said that, FJC II reported that if judges were willing to point out any effects of the audio-visual coverage, it would be a “positive” effect, improving public access to federal courts and educating the public.⁷²

It is true that both FJC’s studies, and others that were conducted within and outside the U.S. that also reported a lack of effect from the presence of cameras in courts, should be examined carefully due to their methodological challenges (e.g., relying more on perceptions of the respondents and less on actual effects, selection biases, non representative samples and more).⁷³ Still, these results are certainly worth consideration, first, since the “no-effect” results are overwhelmingly the dominant conclusion of these studies, and, second, since the very few studies that have suggested otherwise (such as Hoyt’s study) also suffered from methodological hurdles and were later refuted. For instance, a lab experiment conducted by Eugene Borgida and colleagues in 1990, which acutely criticized Hoyt’s study for its lack of a relevant control group, has reached a different conclusion concerning the effects of cameras on witnesses.⁷⁴ That experiment compared the testimonies of witnesses with and without the presence of cameras and revealed that the presence of cameras did not affect—either positively or negatively—witnesses’ ability to recall the details of the event they reported and to efficiently provide information on that event.⁷⁵

6. The Technical Arguments

Beside these conceptual arguments, one can also find another group: the “technical” arguments, which are somewhat related to the

⁷¹ FJC II, *supra* note 55, at vii–viii.

⁷² *Id.* at 28.

⁷³ See Marder, *supra* note 39, at 1546–47; see Dan Slater & Valerie P. Hans, *Methodological Issues in the Evaluation of “Experiments” with Cameras in Courts*, 30 COMM. Q. 376 (1982). The authors argue that the evaluations of the effects of cameras in courts based on survey research as done in the U.S. have been inadequate, and suggest that future evaluations should be based on field experimental research design. The FJC evaluation study also suffered from methodological limitations, such as self-selection bias, by involving only judges who wanted to participate in the pilot and not a randomly selected group of judges. See also FJC II, *supra* note 55, at 2–4 (describing the limitations of the findings, including but not limited to selection bias of judges who were willing to participate, relying only on full consent of parties in order to participate in the pilot, reporting on perceptions and not actual effects and more). Borgida et al., provide another overview of some of these studies and their limitations, see Borgida et al., *supra* note 23 at 490–493.

⁷⁴ Borgida et al., *supra* note 23 at 489.

⁷⁵ *Id.* In fact, no differences were found in the ways testimonies were given for a group delivering the testimony in front of a camera, a group delivering the testimony with the “regular” presence of a reporter in the room but no cameras, and a group that provided testimony without a camera or a reporter. *Id.*

arguments regarding the optimization of the legal system. According to the technical arguments, media teams, and their massive recording equipment, crowd courtrooms and physically disrupt court hearings; this results in psychological distraction to trial participants and obstruction of the defendant's right to due process.⁷⁶ This was the main rationale behind the U.S. Supreme Court decision in *Estes v. Texas*, in which the Court declared that the camera coverage intrinsically violated the defendant's right to a fair trial.⁷⁷ The reality criticized by the court in *Estes* is essentially the current reality in Israel where, adhering to the restrictions of Title 70(b), fully equipped media teams enter courtrooms solely to take a still photo of the judges entering the courtroom, then are asked to leave.⁷⁸ Ironically, allowing cameras into Israeli courts will pave the way for modern technological means to minimize the disruption, with, for example, smaller and quieter devices.⁷⁹ As will be suggested later, technical arguments have technical solutions adopted by different jurisdictions in different settings.

⁷⁶ Mauro, *supra* note 36, at 262 (referring to *Estes* and the claims raised by the Supreme Court). See also DANIEL STEPNIAK, AUDIO-VISUAL COVERAGE OF COURTS: A COMPARATIVE ANALYSIS 357-58 (2008) (drawing on Goldfarb and describing trials, such as the Nuremberg trials, in which lighting equipment used to film the trial was so intrusive that it forced defendants to wear dark glasses).

⁷⁷ *Estes v. Texas*, 381 U.S. 532 (1965). Justice Clark, writing for the majority, stated:

These initial hearings were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled . . . Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.

Id. at 536. It should be mentioned though that Justice Harlan, the fifth vote of the majority in *Estes* suggested that the decision might not hold in the future: "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process." *Id.* at 595. Beyond Harlan's rationale, with today's technological developments and the ability to locate miniature cameras in courts, *Estes'* rationale can hardly hold. Indeed, and not surprisingly, two decades later—in *Chandler v. Florida*, 448 U.S. 560 (1981)—the Supreme Court diverted from *Estes*, without formally declaring so. See also James M. Jennings II, *Is Chandler a Final Rewrite of Estes?*, 59.1 JOURNALISM Q. 66 (1982). For a detailed description of the evolution of the U.S. law, see discussion *infra* Part II.

⁷⁸ *Beinisch Report*, *supra* note 12, at 17 (describing the permission given to media teams to bring in their still cameras into courtrooms in order to take photos of the judges entering the courtroom).

⁷⁹ Sager & Frederiksen, *supra* note 5, at 1542-43.

B. *Arguments Opposing the Expansion of Audio-visual Coverage*

1. Does the Media have a Constitutional Right to Live Video Coverage of Courts?

The first—and main—argument of those opposing audio-visual coverage of courts is that the media cannot infer a constitutional right to audio-visual coverage from the public trial principle, the freedom of the press, or the public's right to access information about the courts.⁸⁰ Proponents of this argument claim that these rights and principles are already satisfactorily upheld by the current legal regime in most Western democracies, where courts are generally open to the public and reporters are welcome to enter most of the hearings.⁸¹ They reject the main constitutional argument of audio-visual coverage supporters mentioned above, that without allowing such coverage full access to courts cannot be achieved. The decisions of the U.S. Supreme Court over the years seem to support the opponents' view, with the court's unwillingness to view aspects of the First and Sixth Amendments as proof of a constitutional right to allow cameras in courts.⁸² This is evident, for example, in the decisions given in the *Chandler* case⁸³ or in the *Nixon* case⁸⁴ where the court upheld:

In the first place . . . there is no constitutional right to have [live witness] testimony recorded and broadcast. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is 'a safeguard against any attempt to employ our courts as instruments of persecution,' it confers no special benefit on the press. Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.⁸⁵

⁸⁰ Daniel Stepniak, *A Comparative Analysis of First Amendment Rights and the Televising of Court Proceedings*, 40 IDAHO L. REV. 315, 327-28 (2003-2004); Sloviter, *supra* note 28, at 874, 885-886, 889.

⁸¹ Sloviter, *supra* note 28.

⁸² *Id.* at 879, 888.

⁸³ *Chandler v. Florida*, 448 U.S. 560, 565 (1981); Sloviter, *supra* note 28, at 879. In *Chandler*, the U.S. Supreme Court supported the view of the Florida Supreme Court, as expressed in *In re Petition of Post-Newsweek Stations, Fla., Inc.*, 370 So.2d 764, 774 (Fla. 1979):

While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings *per se*, by the same token, we reject the argument of the [Post-Newsweek stations] that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings.

Chandler v. Florida, 448 U.S. 560 (1981). For most scholars, the *Chandler* case, which declared that the U.S. Constitution does not prohibit a state from experimenting with televising criminal trials, represents the revolution in the Court's approach towards televising courts.

⁸⁴ *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 610 (1978).

⁸⁵ *Id.*

Under similar circumstances, U.S. federal courts have also concluded that the freedoms of speech and the press, recognized under the First Amendment, do not include the right to film or record court hearings.⁸⁶ For example, see the decision given in the *Westmoreland* case:

There is a long leap . . . between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history. It is a leap that we are not yet prepared to take.⁸⁷

For the purposes of this article, there is no real need to investigate this constitutional issue further, not because it lacks merit, but rather because the comparative survey reveals that while such a constitutional right was not recognized in any of the jurisdictions discussed in this paper, this lack of recognition did not prevent these jurisdictions from adopting coverage policies when the judiciary was willing to do so.⁸⁸ Adopting a legal realist view of the normative realm surrounding audio-visual coverage of courts reveals that the micro questions are far more dominant than the macro ones. It is not the mere recognition of a right to audio-visual coverage, but rather the willingness of the judiciary to allow it and the specific balance between other competing rights adopted under each regime. The comparative analysis thus emphasizes that the core questions in the context of audio-visual coverage may not necessarily be constitutional ones.

2. The Integrity of the Legal Process and the Fear of External Influences

The main argument of opponents to camera coverage in courts revolves around the potential influence cameras might have on those involved in the legal process: witnesses, lawyers, parties, and judges. According to this argument, these external influences might harm the integrity of the legal process, the right of the parties to a fair trial, and the independence of the legal system.

i. Effects on Witnesses

Among all of the groups involved in the legal process, witnesses

⁸⁶ Sloviter, *supra* note 28, at 885; Stepniak, *A Comparative Analysis of First Amendment Rights*, *supra* note 80 at 327 (2003–2004); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983); *see* *United States v. Kerley*, 753 F.2d 617, 620–622 (7th Cir. 1985).

⁸⁷ *Westmoreland v. Columbia Broad. Sys. Inc.*, 752 F.2d 16, 23 (2d Cir. 1984). Though declining to extend the public's right of access to a presumptive right of camera coverage, the Second Circuit Court of Appeals did mention that the additional experience with broadcasting could vindicate in the future a presumptive right to televise proceedings. *See also* Stepniak, *A Comparative Analysis of First Amendment Rights*, *supra* note 80, at 328.

⁸⁸ For discussion, see Part III.

are probably the most susceptible to the effects of cameras.⁸⁹ Witnesses are typically invited for the concrete purpose of the trial, they lack experience with legal procedures, and are under a meaningful amount of emotional stress.⁹⁰ There are several concerns at play when it comes to witness susceptibility. Witnesses may refrain from testifying due to fears that their right to privacy will be violated.⁹¹ Potential witnesses may refrain from reporting criminal incidents to the police out of fear of delivering testimony in front of cameras. The presence of the media may enhance the tension of witnesses and distract them from the testimony itself, making it harder for judges to form opinions about their reliability.⁹² Moreover, the presence of the media may cause witnesses to overdramatize their testimonies.⁹³

Indeed, public opinion polls demonstrate the common assumption that cameras may *potentially* affect witnesses.⁹⁴ But the empirical literature, despite some methodological difficulties,⁹⁵ unanimously supports the opposite finding—that cameras in courtrooms *have little* effect on witnesses and, in any event, these potential effects can be mitigated if the proper arrangements are made.⁹⁶

One such finding appears in FJC I report on the study conducted in the U.S. federal court system, whereby the majority of judges reported that cameras had little to no effect on witnesses' tension, on their refusal to testify, or on their fears about privacy.⁹⁷ FJC II yielded similar results, with the majority of judges suggesting no effects of cameras on

⁸⁹ Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1552–55 (1985); Marder, *supra* note 20, at 1513; Stephen A. Metz, *Justice Through the Eye of the Camera: Cameras in the Courtrooms in the United States, Canada, England and Scotland*, 14 DICK. J. INT'L L. 673, 696–98 (1996); *see also* THE BRITISH MINISTRY OF JUSTICE REPORT OF 2012, *supra* note 6, at 20–21.

⁹⁰ *Id.*

⁹¹ THE BRITISH MINISTRY OF JUSTICE REPORT OF 2012, *supra* note 6, at 20–21; Kyu Ho Youm, *supra* note 5, at 2021–22 (reporting on Chief Justice McLachlin's awareness of the potential effects of cameras on witnesses).

⁹² *See* Sager & Frederiksen, *supra* note 5, at 1544–45 (referring to such concerns as were raised by different states, and rejected later on); THE BRITISH MINISTRY OF JUSTICE REPORT OF 2012, *supra* note 6, at 20–21.

⁹³ *Beinisch Report*, *supra* note 12, at 79.

⁹⁴ *See, e.g.*, *Beinisch Report*, *supra* note 12, at 79 (discussing a poll that was conducted in New York and showed that fifty-four percent of the respondents mentioned they would be deterred from delivering testimonies in front of TV cameras in criminal cases, and forty-five percent provided similar responses with regard to civil cases); *see* Carlisle, *supra* note 39, at 305 (reporting that forty percent of the judges responding on the survey conducted by the Feerick Commission to review audio-visual coverage of court proceedings in New York observed “that witnesses appeared more nervous when cameras were present in the courtroom”).

⁹⁵ *See* discussion *infra* Part I.A.5.

⁹⁶ Stepniak, *supra* note 22, at 802; Sager & Frederiksen, *supra* note 5, at 1543–44; Susanna Barber, *News Cameras in the Courtroom: A Review of the Empirical Literature*, 8 PROGRESS IN COMM. SCIS. 177 (1987); Marder, *supra* note 20, at 156–62.

⁹⁷ FJC I, *supra* note 65, at 16–17.

witnesses.⁹⁸ It did report, though, that one third of the pilot judges believed that witnesses may be distracted to a moderate or great extent by the presence of the cameras.⁹⁹ Borgida's experiment revealed that witnesses who were asked to testify in front of cameras did report an increase in their tension levels, but as mentioned, their ability to remember the details of their testimony was no different than that of witnesses who gave their testimony without cameras present.¹⁰⁰ Similar results were reported in the experiment conducted in California, which is considered one of the most comprehensive studies on cameras in courtrooms.¹⁰¹

In sum, although the arguments that point to the potential effects of cameras on witnesses seem plausible, there is no convincing empirical evidence of these effects, and in any event, there is substantial proof that specific arrangements can be adopted to mitigate the potential effects. Moreover, given modern technology, these potential effects on witnesses can be further minimized by placing small cameras in courtrooms and reducing the intimidating presence of the media.¹⁰²

ii. Effects on Parties

The next set of arguments claim that allowing cameras into courtrooms will deter potential claimants in civil cases from filing suit and will push them towards making compromises in order to avoid appearing before the cameras.¹⁰³ If this is true, then cameras might infringe on the right of parties to approach courts and prosecute their legal proceedings as they see fit.¹⁰⁴ In criminal cases, it is argued that the presence of cameras would deter defendants from delivering testimony in open court and push defendants into accepting a plea bargain in order to avoid having their trials broadcast.¹⁰⁵ It is also

⁹⁸ FJC II, *supra* note 55, at viii.

⁹⁹ *Id.* at viii.

¹⁰⁰ Borgida et al., *supra* note 23, at 503–504.

¹⁰¹ Sager & Frederiksen, *supra* note 5, at 1545 (noting that “[n]ot only did California’s survey results mirror those of other states and federal courts—namely, finding that there was virtually no impact upon jurors, witnesses, judges, counsel or courtroom decorum when cameras were present during judicial proceedings—but the “observational” evaluations completed in California further buttressed these results.”); *see also* Harding, *supra* note 25, at 835–36. Borgida et al, *supra* note 23 at 491–492, emphasizing that the Californian field study had “the fewest methodological flaws” compared to other studies conducted by US states.

¹⁰² Compare Sager & Frederiksen, *supra* note 5, at 1542, with Lindsey, *supra* note 42, at 424 (suggesting the “anachronistic assumption” that mere presence of cameras disrupting the trial process be abandoned, and replaced by judicial discretion on a case-by-case basis).

¹⁰³ *Beinisch Report*, *supra* note 12, at 80–81.

¹⁰⁴ *Id.*

¹⁰⁵ On potential disadvantages to defendants from audio-visual coverage, see Susanna Barber, *Televised Trials: Weighing Advantages Against Disadvantages*, 10 THE JUST. SYS. J. 279, 282–286 (1985) (emphasizing fears expressed by defense lawyers that televised trials would appeal to public’s voyeuristic instincts and increase prejudice against the defendants).

argued that the audio-visual coverage of proceedings, due to the sensational nature of electronic press outlets and their tendency to adopt prosecutorial positions, will affect the public's opinion of specific defendants.¹⁰⁶

These arguments are hardly persuasive. In the U.S., most court proceedings are open to the public, and many judicial decisions can be found online.¹⁰⁷ Although it is not enough in order to allow the public the full scope of coverage of court proceedings as discussed above, it limits the reasonable expectation of certain litigants that their cases will remain confidential. As for the effects on defendants in criminal cases and the fear of prejudiced public opinion, emotional reactions to cases on the part of the public can be substantially mitigated by the judge. This is even truer in legal systems without juries, such as in Israel, where judges' opinions hold even more prominence.

iii. Effects on Lawyers

The main concern here is that lawyers will abuse their access to the media in order to attract publicity in hopes of gaining potential clients. This could lead to over dramatization of the legal process, longer arguments, and hampered discretion—especially regarding lawyers' willingness to compromise, which may reduce their “fifteen minutes of glory.”¹⁰⁸ The lawyers' personal stake and motivation may exacerbate conflicts of interest between lawyers and their clients.¹⁰⁹

FJC I found no meaningful support for these fears,¹¹⁰ nor did most of the other empirical studies. In FJC II, judges' views were evenly split on the extent to which video recordings make lawyers behave in a more theatrical way.¹¹¹ In any event, I believe most of the potential threats to lawyers' integrity and respect for the process can be mitigated by the judges handling the cases and hearings, since judges are already responsible for keeping the parties' arguments short and relevant.¹¹²

¹⁰⁶ Barber, *supra* note 105, at 282; Ralph E. Roberts, Jr., *An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings*, 51 SMU L. REV. 621, 635–36 (1998) (reporting on a Gallup poll conducted from October 19 to October 22, 1995, in which individuals were asked to share their perceptions of the actors in the O.J. Simpson trial. The public perception seemed to favor most of the participants in the trial, except for two of the defense participants—O.J. Simpson, himself and Johnnie Cochran, his attorney).

¹⁰⁷ See, e.g., THE U.S. SUPREME COURT, <https://www.supremecourt.gov/> (last visited Dec. 20, 2016), THE U.S. COURTS FOR THE NINTH CIRCUIT, <https://www.ca9.uscourts.gov/opinions/> (last visited Dec. 20, 2016), and THE NORTH CAROLINA COURT SYSTEM, <https://appellate.nccourts.org/opinions/#> (last visited Dec. 20, 2016).

¹⁰⁸ Marder, *supra* note 20, at 1514–15; Charley Roberts, *He's Expert on Celebrity Cases*, L.A. DAILY J. (June 23, 1995); *Beinisch Report*, *supra* note 12, at 8.

¹⁰⁹ *Id.*

¹¹⁰ FJC I, *supra* note 65, at 16–17.

¹¹¹ FJC II, *supra* note 55, at viii.

¹¹² Canadian Chief Justice McLachlin exemplified this, as she only once got “the sense that a lawyer was grandstanding for the cameras” and then “told him to sit down.” Mauro, *supra* note

Moreover, there are other, more salient, issues encouraging lawyers' to push for compromises, such as the overwhelming workload,¹¹³ personal codes of ethics, and professional responsibility surrounding the circumstances of a case.

iv. Effects on Judges

Not surprisingly, some of the most vocal opponents of cameras in courtrooms are the judges themselves.¹¹⁴ The main argument here is that the presence of cameras will distort judicial independence and divert judicial discretion so that considerations of public popularity, previously outside the realm of the judiciary, will become the leading force in the judicial decision-making process. A rare example supporting this argument is a survey conducted in New York after the pilot allowing cameras to be present in courts there, in which thirty-seven percent of the judges claimed that the decision they had reached in the presence of cameras was different than the decision they would have reached in the absence of such cameras.¹¹⁵ These findings, however, do not represent the majority of the empirical data, and are even less representative of judicial systems in which judges are not elected by the public and thus are less susceptible to public opinion. This is, for example, the case of Israel where a professional committee nominates judges and the public has no direct say in this process.¹¹⁶

It is helpful to turn again to FJC I's investigation of federal judges in the United States who, as in the Israeli system, are nominated and do not stand for public elections. As mentioned above, neither the judges nor the lawyers litigating before them reported any effect on the judiciary caused by the presence of the cameras.¹¹⁷ For instance, sixty-

36, at 272.

¹¹³ This is a known problem in the Israeli legal system. For instance, a study conducted in 2004 comparing the burden on Israeli courts to courts in 16 countries ranked Israel as the country with the highest ratio of cases per population and second highest in terms of burden on judges. See Ra'anana Socialiano-Kenan, Amnon Reichman and Eran Vigoda-Gadot, *THE BURDEN ON JUSTICE SYSTEMS — A COMPARATIVE PERSPECTIVE* (The Center for Public Management and Policy, Haifa University, 2004), available at pmpc.haifa.ac.il/images/nappa_and_more/Courts_burden_Final_report_5.07.pdf. See also Itay Ravid, *No Lawyers in the Living Room*, in *A TRANSNATIONAL STUDY OF LAW AND JUSTICE ON TV* 131, 132-133 (Peter Robson and Jennifer L. Schulz, eds. 2016).

¹¹⁴ Marder, *supra* note 20, at 1534-1539 (discussing the underlying motivations behind judges' opposition for allowing cameras in the courtrooms, such as maintaining control in the courtroom, being camera-shy, viewing the court as a workplace and more); see also Mauro, *supra* note 36, at 263-264 (focusing on the Supreme Court's resistance); Stepniak, *supra* note 22, at 804-814.

¹¹⁵ See Carlisle, *supra* note 39, at 305 (reporting on survey results conducted by the Feerick Commission, appointed by the NY legislator in order to evaluate the efficacy of the experimental camera program taking place in NY between 1987 and 1997).

¹¹⁶ Law of Courts, *supra* note 13, at tit. 6. For more on the nomination process, see the official website of the Israeli Judicial Authority. *THE JUDICIAL AUTHORITY OF THE STATE OF ISRAEL*, <http://elyon1.court.gov.il/eng/system/index.html> (last visited Dec. 20, 2016).

¹¹⁷ FJC I, *supra* note 65, at 16-17.

five percent of judges reported that cameras had little or no effect on the emphasis or content of questions asked by judges during oral arguments.¹¹⁸ Similar views were expressed by Justice Diarmuid F. O'Scannlain, a former judge on the United States Court of Appeals for the Ninth Circuit, who wrote, “[m]y personal experience, fortunately, has been that as a general rule my colleagues and practitioners have acted with the civility and decorum appropriate to a federal appellate courtroom, by and large resisting the temptation to play to the television audience.”¹¹⁹ Similar experiences were reported in other jurisdictions as well—for example, Chief Justice McLachlin of the Canadian Supreme Court reported little consequential impact of cameras on her fellow justices.¹²⁰ The findings of FJC II failed to suggest otherwise.¹²¹

3. Infringing on Courts’ Prestige and Decrease in Public Trust

Another argument, raised mostly by judges, is that allowing cameras into courtrooms will turn the process into a public circus while simultaneously disgracing the legal process.¹²² Part of this argument is that the public will adopt a specific conceptual understanding concerning the legal process that will conform to the codes of the broadcast media, which may misunderstand the ways in which the judiciary functions and overlook the complexities involved in the decision-making process.¹²³ Another part of the argument is that pivotal elements of judicial work apart from hearings—such as reading and writing—will be eliminated from the public eye and paint an inaccurate picture of judicial consideration of the case.¹²⁴ This gap between the ways in which courts will be perceived by the public, and their actual daily conduct, might therefore harm public trust in courts and promote misunderstanding of the legal process and the judicial role. Such claims were made in the U.S. after the O.J. Simpson trial, when studies revealed that public trust in the judiciary was severely damaged by the trial’s extensive coverage.¹²⁵ Although the O.J. Simpson trial was,

¹¹⁸ *Id.*

¹¹⁹ Diarmuid F. O'Scannlain, *Some Reflections on Cameras in the Appellate Courtroom*, 9 J. OF APP. PRAC. AND PROCESS 323, 327 (2007).

¹²⁰ Kyu Ho Youm, *supra* note 5, at 2022–23. A similar view was also common among the Supreme Court justices of the United Kingdom. Both Sir John Dyson and Lady Hale emphasized the unawareness of the justices to the presence of cameras.

¹²¹ FJC II, *supra* note 55, at viii.

¹²² Marder, *supra* note 20, at 1517–19; Stepniak, *supra* note 22, at 810.

¹²³ Stepniak, *supra* note 22, at 810.

¹²⁴ *Id.* at 809 (referring to an interview with Justice Sandra Day O'Connor broadcast on ABC on July 6, 2003, in which she expressed such concerns). Interestingly, such views may in fact imply that under the current non-coverage regime of the Court, the public—who is only allowed to watch the hearings from the public gallery—is already unaware of the Court’s work. Allowing coverage can only improve this situation.

¹²⁵ Tuma, *supra* note 25, at 420; Roberts, *supra* note 106, at 622–23, 644–45. Roberts provides some results from polls conducted throughout and after the Simpson trial indicating that parts of

admittedly, not the most impressive moment in the history of U.S. courts, its impact on public opinion does little to sustain the argument against audio-visual coverage of courts. Studies in other common-law countries, in fact, suggest that lack of knowledge around courts is the main reason for the public's low level of confidence in the judicial system.¹²⁶ Moreover, the FJC II findings imply that if judges and attorneys agree that cameras have any effect, it is a positive effect on the public and its perception of the courts.¹²⁷ In any event, it is hard to accept the "infringing on the courts' prestige" argument when it comes directly from the judiciary. Would we accept a similar line of argument from other state authorities, claiming that the information they hold might, if exposed, create a more negative image of them in the eyes of the public?

Most of these arguments lack empirical support, and the evidence that exists surrounding audio-visual coverage supports an opposing view: judges who participated in pilot studies allowing cameras into courtrooms supported the continued presence of cameras after the pilots have been concluded.¹²⁸ This implies that judicial rejection of cameras in courts stems from fear of change more than of perceived effects of coverage. This is especially true in the Israeli setting where the status quo forbidding cameras is strictly maintained.¹²⁹ It is reasonable to assume that the judiciary would like to maintain an air of mystery about its work and thus preserve its authority.¹³⁰ I believe, though, that this anachronistic approach belongs to the past and cannot justify the

the public lost confidence in defense attorneys, police, and jurors, but these findings do not represent a rigorous and systematic analysis of public views, and even Roberts himself describes them as "superficial." *Id.*

¹²⁶ Stepniak, *supra* note 22, at 806–10. Moreover, those supporting these arguments, like most of the literature, focus on "high profile celebrity cases" when expressing their fears about the integrity of the judiciary. Ideally, cameras in courts will cover not only high profile cases, but other cases as well, as in fact occurred in the United States Court of Appeals for the Ninth Circuit, according to Judge O'Scannlain. See O'Scannlain, *supra* note 119, at 325–26.

¹²⁷ FJC II, *supra* note 55, at 24–30.

¹²⁸ FJC I, *supra* note 65, at 7; FJC II, *supra* note 55 at 33–36; Roberts, *supra* note 106. This might be one of the few examples to suggest different empirical results, but Roberts himself has admitted the superficiality of the data gathered and that "it is dangerous to make any policy decision based upon evidence obtained in one trial." Roberts, *supra* note 106, at 645.

¹²⁹ For more on the Israeli status quo, see Part IV.

¹³⁰ Mauro, *supra* note 36, at 270–71. Mauro offers a similar argument with regards to the Supreme Court. See also Lisa T. McElroy, *Cameras at the Supreme Court: A Rhetorical Analysis*, 2012 BYU L. REV. 1837, 1839 (2012) (suggesting an even more radical approach, according to which the Supreme Court prefers to preserve its mystique over satisfying public interest in seeing government at work. According to McElroy, "[t]he Justices deny the need for cameras, arguing that the court is transparent and accessible even without them. They create an image of educating the public about their work by writing books, appearing on television and creating websites. They purport to deconstruct the mysticism of the Court with occasional peeks into limited aspects of the institution. But what Justices allow the public to see is nothing more than a façade; the Justices' outreach barely scratches the surface, allowing the public to see only what the Justices offer and nothing more").

decision to not allow audio-visual coverage of courts.

In the current age of transparency and open government policies—policies that are constantly reaffirmed by nations and courts in many societies—it is not trivial that only the judiciary can maintain its resistance to audio-visual coverage. This is seen in the U.S., where the Supreme Court keeps resisting audio-visual coverage of its hearings.¹³¹ It is also true for the Israeli setting.¹³² In Israel, arguments calling for the “protection of the institution” and warnings of the media’s effects on the judiciary should remind us of arguments that were brought by other administrative bodies in the past and rejected by Israeli courts themselves.¹³³

4. The Lack of an Actual Educational Role

This group of arguments runs counter to the educational argument

¹³¹ See Part II for a detailed discussion on the coverage policies of the U.S. Supreme Court.

¹³² See *infra* Part IV.

¹³³ See, e.g., CA 1412/94 The Hadassah Medical Organization v. Gilad, 49(2) PD 512, 526–527 (1994) (Isr.). In this case, the Supreme Court rejected the request of an internal medical audit committee not to disclose its protocols. The committee claimed that keeping the protocols under wraps was in the public interest, assisted in maintaining the integrity of the medical audit committees, and allowed doctors to freely express their opinions before these committees. The court rejected these arguments, stating that doctors had ethical commitments to disclose information to these committees regardless of the confidentiality—or lack thereof—of the information. The same goes for judges, who are expected to fulfill their judicial role under their code of ethics regardless of whether court hearings will be broadcast live. Though the internal audit committees are not completely analogous to court hearings, the principles embedded in Hadassah provide a good example of the approach adopted by Israeli courts—especially at a moment when judges have not yet been asked to open their internal meetings to the public. In 2015, the Israeli Supreme Court rendered another important decision, this time directly related to the importance of transparency within Israeli courts. In the *Marker* case, the court rejected the state’s appeal not to provide an Israeli newspaper with information on the pending cases in the district and supreme courts, the dates on which they were opened and the names of the judges who were handling them. The Hon. Judge E. Arbel (Ret.) ordered the state to provide this information, while emphasizing the public trial principle, freedom of speech, and freedom of the press. She also discussed how transparency in government operations has become a pivotal principle in the Israeli legal regime, especially since the Freedom of Information Act was promulgated, and highlighted the connection between increasing such transparency and strengthening public trust in Israeli courts. The court has also rejected the arguments presented by the state that providing the data will infringe on judicial independence and that it will disrupt the functioning of the court:

The decision in this appeal was difficult, especially due to the fear it will harm judges who are currently serving and god forbid they’ll be embarrassed. I’m aware of the fact that some of my friends to the judiciary and maybe even some segments of the public will fear my decision might harm judicial independence. I personally believe the judicial system is strong enough and delivering the information would eventually contribute to strengthening the public trust in the judiciary and the court system, a trust that is essential to their functioning and vividness. I could not find any meaningful justification not to allow the public access to the information on pending cases, and I don’t think it’s appropriate.

Both of these important decisions are consistent with the view that the revolution in transparency of government operations should also be expanded to the judiciary, encompassing audio-visual coverage of court hearings. Moreover, it aligns with the idea that exposure to the work of courts would eventually improve the status of those courts in the eyes of the public.

discussed above,¹³⁴ instead claiming that the format of television broadcasting is not suitable for educational purposes. As the argument goes, in real life the media tend to chase after sensational material, and thus the cases chosen for examination will deliver a partial and distorted picture of judicial activity, thereby undermining any civic benefit of introducing the public to the work of courts,¹³⁵ and damaging both the image of the judiciary and public trust in the institution. The media will choose to broadcast only a small number of trials, or a small fraction of the actual judicial process. This argument is based, *inter alia*, on reports from pilot studies that took place in various countries, during which most requests for live broadcasting of trials were for specific criminal cases, and on studies that explored the total time devoted by television networks to the actual coverage of cases.¹³⁶

In response to these arguments, the first and foremost point to consider is that even today, in the absence of live court coverage, the media provide distorted reports on court proceedings and partial interpretations of the decisions.¹³⁷ One way in which courts deal with this problem nowadays is by sending a summary of the decisions to the media that explains each decision's core elements.¹³⁸ To minimize the distortion caused by inaccuracy in media reports, courts could issue these summaries in more cases.¹³⁹ Courts could also improve their lines of communication with journalists, initiating more meetings to discuss and explain decisions or proceedings. Moreover, if the courts' main fear is that the media will selectively transmit court hearings, they could establish and broadcast all hearings through a live streaming platform.¹⁴⁰ That won't make court hearings more popular, but it will grant the courts more control over the material being broadcast and minimize the effects of the media's translation of events. In Israel, as mentioned, television channels have already found creative ways to establish a *de facto* live platform for reporting on courts, without *de jure*

¹³⁴ See discussion *infra* Part I.A.4.

¹³⁵ Mauro, *supra* note 36, at 273.

¹³⁶ That was, for example, the situation in Canada, where between 1995 and 1998, while the pilot study at the federal courts was taking place, only four criminal appeals—out of more than 1,000 occurring in these years—were broadcast. *Beinisch Report*, *supra* note 12, at 49. Marder, *supra* note 20, at 1496–97 (providing information on a study of local television coverage of litigation which showed that thirty-seven percent of the stories were between twenty and thirty seconds long, twelve percent were less than twenty seconds and twenty-five percent were sixty seconds or more). Herbert M. Kritzer & Robert E. Drechsel, *Reporting Civil Litigation on Local Television News*, in WILLIAM MITCHELL COLLEGE OF LAW, LEGAL STUDIES RESEARCH PAPER SERIES, Paper No. 96, Version 2a, (Sept. 25, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133510.

¹³⁷ Stepniak, *supra* note 22, at 808–09.

¹³⁸ *Id.* at 820–23.

¹³⁹ *Id.*

¹⁴⁰ This was similarly done in Canada and the UK. See *id.*

disrespecting the legal prohibition.¹⁴¹

5. The Technical Arguments

This group of arguments reveals a fear that overcrowding the courts with media presence would disturb courtroom order and create a more heated environment. The main solution to this problem is simple: installing small cameras in the courtrooms. This would diminish the need for a constant media presence, and would make the cameras “just part of the scenery, barely worth a mention,” as occurred in Canada.¹⁴² This group of arguments also includes fears around the scale of budget required for increased coverage, adding extra work to the plate of already busy judges by asking them to approve broadcast requests, and the potential security risk camera coverage might pose for judges.¹⁴³ None of these arguments make a convincing case for forbidding audio-visual coverage of courts. When the names of judges, their pictures, and CVs can be found online easily—and in Israel at the official website of the Judicial Authority—the latter argument simply does not hold water.¹⁴⁴

C. *Interim Summary*

As described above, there is a wide array of considerations both supporting and opposing the idea of allowing cameras into courtrooms. While those supporting audio-visual coverage connect their support to the expansion of the public trial principle, transparency of government operations, the freedom of the press, educational benefits, and maintaining the status of courts among the public,¹⁴⁵ those opposing it refer to the potential negative effects of cameras on court proceedings, the importance of preserving the integrity of the legal process, the right to a fair trial, respecting judicial independence, and litigants’ right to privacy.¹⁴⁶ The main challenge—faced by both groups, but mostly by opponents—is to provide empirical support for their arguments.

¹⁴¹ See *supra* note 15.

¹⁴² Kyu Ho Youm, *supra* note 5, at 2006.

¹⁴³ LORRAINE H. TONG, CONG. RESEARCH SERV., RL33706, TELEVISIONING SUPREME COURT AND OTHER FEDERAL COURT PROCEEDINGS: LEGISLATION AND ISSUES (Nov. 8, 2006), <https://www.fas.org/sgp/crs/secretary/RL33706.pdf>.

¹⁴⁴ O’Scannlain, *supra* note 119, at 328. Even U.S. judges do not find this argument convincing for the purposes of banning audio-visual coverage. As Judge O’Scannlain has written:

Another possible criticism is that the broadcasting of oral arguments in controversial case . . . may present an additional security risk to appellate judges. Although I recognize that there is such a potential, appellate judges, no less than district judges or legislators, are public officials who must stand behind their decisions. I think better overall response to security concerns than banning media access to appellate courtrooms is to provide a more comprehensive approach to judicial security.

Id.

¹⁴⁵ See discussion *infra* Part I.A.

¹⁴⁶ See discussion *infra* Part I.B.

Although empirical data from different countries exists, most studies suffer from methodological challenges that undermine their validity. Still, if one seeks a general trend arising from the data, it is that introducing cameras in courts does not have an effect on witnesses, lawyers, judges, or the public. At a minimum, this should lead to the conclusion that cameras should be allowed in courts, especially in jurisdictions in which these are completely banned, like Israel.

At the core of generating an effective audio-visual coverage policy is striking the balance between the competing interests described in this section. This is the task that many jurisdictions are facing, including the U.S. federal court system, states such as Florida, the British Ministry of Justice and Israeli policy makers. These jurisdictions can of course learn from each other's experience. A systematic, comprehensive comparative analysis and an analytical policy-oriented framework derived from it can induce such learning. Therefore, the study now turns to discuss the ways in which other countries have dealt with this issue. This comparison will then allow us to assess the legal frameworks that gave rise to the respective policies, the specific arrangements designed in each jurisdiction, and how these arrangements balance the different competing interests.

II. AUDIO-VISUAL COVERAGE OF COURTS – THE COMPARATIVE PERSPECTIVE

A. *The U.S.*

The debate surrounding this issue is by far the most extensive in the U.S.—from academic writing through court decisions and, importantly, pilots conducted in federal and state courts. For the purposes of summarizing the various strategies adopted in the U.S., it is essential to consider state and federal courts separately, and among the latter to examine the Supreme Court separate from the rest of the federal courts.

1. Federal Courts

In 1946, Rule 53 of the Federal Rules of Criminal Procedure banned photography in criminal courtrooms.¹⁴⁷ The courts have interpreted this rule to include the broadcast of criminal hearings.¹⁴⁸ In 1972, the Judicial Conference of the United States banned “broadcasting, televising, recording, or taking photographs in the

¹⁴⁷ Lindsey, *supra* note 42, at 413–14; Stepniak, *supra* note 86, at 321–22; Mauro, *supra* note 36, at 262.

¹⁴⁸ Stepniak, *A Comparative Analysis of First Amendment Rights*, *supra* note 80, at 321, Kyu Ho Youm, *supra* note 5, at 1995.

courtroom and areas immediately adjacent thereto.”¹⁴⁹ This rule applies both to criminal and civil hearings.¹⁵⁰

After 1965, in the after-math of *Estes*, most states banned cameras from entering their courtrooms.¹⁵¹ Such ban reached its peak in the mid-1970s.¹⁵² Interestingly so, and despite the overall strict anti-coverage approach, a few U.S. states—in which similar prohibitions were in place—decided to experiment again with camera usage in their courtrooms.¹⁵³ The *Chandler* case is a product of such a decision adopted in Florida.¹⁵⁴ In *Chandler*, the Supreme Court refused to recognize a constitutional right to audio-visual coverage stemming from the freedom of the speech and press, but also declared that the presence of cameras in criminal cases is constitutionally permissible and did not infringe on the defendant’s right to a fair trial.¹⁵⁵ This decision provided a “green light” to allow cameras in state courts.¹⁵⁶ Moreover, after *Chandler*, rule 3A(7) was revised by the American Bar Association to allow judges to authorize filming and recording in criminal cases under specific criteria.¹⁵⁷ With *Chandler*, all constitutional hurdles for audio-visual coverage have been released, and the issue moved to the political arena of both the judiciary and U.S. policy makers.¹⁵⁸

At the federal level, even after *Chandler*, it took longer for a change to arrive, i.e., for the judiciary to take off their gloves and allow some experimentation with audio-visual coverage. In 1984, the Judicial Conference of the United States appointed the first ad hoc committee to address the issue of audio-visual coverage.¹⁵⁹ The committee suggested that no changes be made to the legal regime.¹⁶⁰ In 1988, after public pressure intensified, backed by political pressure from Congress, the

¹⁴⁹ CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 35, renumbered 3A(7). <http://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies> (last visited Dec. 20, 2016).

¹⁵⁰ *Id.*

¹⁵¹ STEPNIAK, AUDIO-VISUAL COVERAGE OF COURTS, *supra* note 76, at 80–81.

¹⁵² *Id.*

¹⁵³ Stepniak claims this can be explained by the ABA’s willingness to relax the absolute ban expressed in Canon 3A(7) by approving the admission of cameras into courts for “specific non-news gathering purposes.” *See id.*; *See also* Goodwin, *A report on the latest rounds in the battle over cameras in the courts*, 63 JUDICATURE 74–77 (1979); Ruth Ann Strickland & Richter H. Moore Jr., *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128, 132 (1994) [hereinafter Strickland & Moore].

¹⁵⁴ *Chandler v. Florida*, 449 U.S. 560 (1981) (which many refer to as the key decision in promoting the change in state courts).

¹⁵⁵ *Id.*

¹⁵⁶ Sager & Frederiksen, *supra* note 5, at 1527.

¹⁵⁷ Stepniak, *A Comparative Analysis of First Amendment Rights*, *supra* note 80, at 325–326; FJC I, *supra* note 65, at 3.

¹⁵⁸ Strickland & Moore, *supra* note 153, at 133.

¹⁵⁹ FJC I, *supra* note 65, at 3.

¹⁶⁰ *Id.* at 3.

Judicial Conference nominated another ad hoc committee.¹⁶¹ This committee chose to cancel rule 3A(7) and conduct a three-year pilot study in *civil courts*—a few trial courts and some courts of appeals in the Second and Ninth Circuits.¹⁶² The pilot ended in 1994.¹⁶³

From the perspective of those supporting the expansion of audio-visual coverage in courts, the pilot was extremely successful, with most of the participating judges and lawyers expressing views in favor of coverage.¹⁶⁴ With the judiciary in the courts participating in the pilots supporting the coverage, the FJC recommended adopting new rules to expand the presence of cameras in federal *civil* courtrooms.¹⁶⁵ The Judicial Conference rejected these recommendations, and matters stagnated until 1996.¹⁶⁶ Only in 1996—fifteen years after Chandler—the Judicial Conference softened its position somewhat and permitted the federal courts of appeals to use their discretion in deciding whether or not to allow cameras in civil cases.¹⁶⁷ Based on this new position, both the Second and Ninth Circuits have decided to adopt new policies allowing audio-visual coverage in their court of appeals. Interestingly, these are the circuits in which the pilot took place.¹⁶⁸ The other U.S. federal courts continue to ban cameras from their courtrooms.

The Second Circuit has decided that all hearings except those on “criminal matters” can receive live coverage.¹⁶⁹ The definition of “criminal matters” is wide and includes not only criminal appeals but any proceedings that are somewhat related to criminal cases.¹⁷⁰ Pro se proceedings may not receive live coverage either—both in criminal and civil matters.¹⁷¹ The panel assigned to hear the oral argument holds the

¹⁶¹ *Id.* at 4.

¹⁶² Audio-visual coverage of criminal court hearings was not part of the pilot. In criminal cases, the prohibition on audio-visual coverage remained. The courts participating in the pilot were selected from courts that volunteered to participate in the experiment. It should be noted that these circuits—containing New York and Los Angeles—deal with the largest number of media cases. *See* FJC I, *supra* note 65, at 4–5.

¹⁶³ FJC I, *supra* note 65, at 5; *Beinisch Report*, *supra* note 12, at 35.

¹⁶⁴ FJC I, *supra* note 65, at 7; *Beinisch Report*, *supra* note 12, at 35.

¹⁶⁵ FJC I, *supra* note 65.

¹⁶⁶ Some argue that the rigid objection to allowing live coverage was partially a backlash resulting from the O.J. Simpson trial experience. *See, e.g.*, Roberts, *supra* note 108 (arguing that the O.J. Simpson trial negatively affected the public’s perceptions of courts and discouraged the expansion of audio-visual coverage). *See also* Stepniak, *supra* note 22, at 799–801.

¹⁶⁷ Marjorie Cohn & David Dow, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE 116 (2002).

¹⁶⁸ Indeed, the FJC reported that the majority of judges participating in the experiment expressed positive views toward the presence of cameras within their courtrooms after the experiment took place. *See* FJC I, *supra* note 65, at 7. For a “first impression” report, see O’Scannlain, *supra* note 119.

¹⁶⁹ CAMERAS IN THE COURTROOM - SECOND CIRCUIT GUIDELINES, *Second Circuit Guidelines*, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (adopted Mar. 27, 1996), <http://www.ca2.uscourts.gov/Docs/CE/Cameras.pdf>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

sole discretion of whether to allow live coverage; the objection of one of the panel members is enough to reject a request to broadcast.¹⁷² Although no direct presumption supporting audio-visual coverage was adopted, the guidelines imply that requests to broadcast generally should be approved.¹⁷³ Requests to broadcast must be submitted two days in advance.¹⁷⁴

The Ninth Circuit has adopted somewhat different guidelines.¹⁷⁵ On the one hand, all proceedings have been cleared for broadcast unless the law forbids it, which appears to include far more cases than the broadcast policies of the Second Circuit.¹⁷⁶ On the other hand, the court has sole discretion of whether or not to allow coverage, with no clear instructions embedded in the guidelines as to the preferred choice.¹⁷⁷ Furthermore, the Ninth Circuit's Court of Appeals operates a YouTube channel through which some oral hearings can be viewed.¹⁷⁸

Public debate around the issue continues. In 2010, the Judicial Conference decided to implement another pilot, again only in civil cases, but this time only among fourteen federal district courts.¹⁷⁹ Rule 53 prohibits broadcasting criminal hearings, and the pilot clearly excludes cases presided over by bankruptcy or magistrate judges.¹⁸⁰ The pilot began in 2011, and though originally planned as a three-year project, it was extended until July 2015.¹⁸¹ Three districts in the Ninth Circuit requested to continue the pilot: Northern California, Western Washington and Guam.¹⁸² The FJC submitted an evaluation report in March 2016 ("FJC II"), but didn't recommend any changes in the

¹⁷² *Local Rules Appendix Part B: Second Circuit Guidelines Concerning Cameras in the Courtroom*, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (1996), http://www.ca2.uscourts.gov/clerk/case_filing/rules/appendix/appendix_b.html.

¹⁷³ The guidelines state that "[c]amera coverage is allowed for all proceedings conducted in open court, except in criminal matters" and informs the judges that "[t]he panel assigned to hear oral argument will retain the authority, in its sole discretion, to prohibit camera coverage of any proceeding," thus suggesting that the default is approving such requests for coverage. (emphasis added) SECOND CIRCUIT GUIDELINES, *supra* note 169.

¹⁷⁴ *Id.*

¹⁷⁵ *Guidelines for Broadcasting, Recording, and Still Photography in the Courtroom*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (2014), http://cdn.ca9.uscourts.gov/datastore/uploads/news_media/camera.guidelines.pdf.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Audio and Video*, U.S. COURTS FOR THE NINTH CIRCUIT (Aug. 3, 2016), <http://www.ca9.uscourts.gov/media>.

¹⁷⁹ *History of Cameras in Courts*, U.S. COURTS, <http://www.uscourts.gov/Multimedia/Cameras/history.aspx> (last visited Nov. 5, 2016) (the pilot discussed in FJC Report II).

¹⁸⁰ FJC II, *supra* note 55, at 2.

¹⁸¹ *Cameras in Courts*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/cameras-courts> (last visited Dec. 1, 2016). See also *Case Video Archive*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/cameras-courts/case-video-archive> (last visited Dec. 1, 2016).

¹⁸² See *History of Cameras in Courts*, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/cameras-courts/history-cameras-courts> (last visited Dec. 20, 2016).

policy.¹⁸³ As mentioned earlier, it did however mirror most of the FJC's previous findings from the 1993 report ("FJC I"), according to which the majority of judges and attorneys believe that positive or negative effects of cameras on witnesses, jurors, attorneys, or judges occur to little or no extent.¹⁸⁴

2. The U.S. Supreme Court

The U.S. Supreme Court does not allow cameras or recording devices into its courtrooms.¹⁸⁵ It is one of the few Supreme Courts, especially among common law jurisdictions, which persistently rejects this option.¹⁸⁶ Since 1955, however, hearings have been recorded and sent to the National Archive.¹⁸⁷ Throughout the years, while not allowing cameras into its own courtrooms, the Court decided some cases referring to state courts in which it took a somewhat more liberal position.¹⁸⁸ In fact, the Court basically formed the constitutional platform that allowed audio-visual coverage both in state and federal courts, but refused to follow that platform in its own backyard.

Since the year 2000, there has been a clear shift in the Court's policies, with the establishment of the Court's website which allows greater access to the Court's decisions.¹⁸⁹ In the same year, and in response to a request from the C-SPAN television channel, the Court allowed audio recordings of a few hearings to be transmitted immediately after they occurred (both in *Bush v. Gore*¹⁹⁰ and *Bush v. Palm Beach County Canvassing Board*¹⁹¹), while rejecting requests for a live broadcast.¹⁹² Due to the positive feedback it received after the transmission of the audio recordings, the Court allowed transmittal in more cases. In 2004, members of the Bar of the Court were given permission to listen to hearings from their designated room at the court.¹⁹³ In 2006, the Court began releasing oral arguments transcripts a few hours after hearings occurred, a decision that has significantly shortened the waiting time for these decisions.¹⁹⁴

¹⁸³ FJC II, *supra* note 55.

¹⁸⁴ *Id.* at viii.

¹⁸⁵ See Kyu Ho Youm, *supra* note 5, at 2030.

¹⁸⁶ *Id.* at 1989–1990, 2030.

¹⁸⁷ *Transcripts and Recordings of Oral Arguments (October 2010)*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/oral_arguments/availabilityoforalargument/transcripts.aspx (last visited Dec. 20, 2016).

¹⁸⁸ See *Chandler v. Florida*, 449 U.S. 560 (1981), see also Mauro, *supra* note 36, at 262–263; Stepniak, *A Comparative Analysis of First Amendment Rights*, *supra* note 80, at 325–326; Sager & Frederiksen, *supra* note 5, at 1527.

¹⁸⁹ Mauro, *supra* note 36, at 266.

¹⁹⁰ *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁹¹ *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000).

¹⁹² Mauro, *supra* note 36, at 266.

¹⁹³ *Id.* at 267.

¹⁹⁴ *Id.*

Despite these positive changes, however, some suggest that in recent years the Court has taken a few steps back, becoming increasingly opaque in its proceedings.¹⁹⁵ Between 2009 and 2010, the court rejected all requests to release protocols on hearing days, and since 2011, a new policy has allowed the release of recordings only on the Friday after they are heard.¹⁹⁶ Since court hearings are scheduled only on Mondays, Tuesdays, and Wednesdays, none of the hearings are accessible on the day they take place.¹⁹⁷ Most academics attribute the Court's reluctance to allow live coverage mostly to the way the Court views itself—as a different and unique institution, and an ideology of exceptionalism. For the Court's justices, this exceptionalism justifies the limitations on the Court's live coverage even at a time of open government policies and even when there are no constitutional hurdles to allow such coverage; as Justice Kennedy wrote, “[w]e teach, by having no cameras, that we are different.”¹⁹⁸ Such a decision—opting to distinguish the Court from other U.S. courts as well as other high courts around the globe—can be left at the discretion of the Court only under a flexible legal regime of audio-visual coverage, a regime defined by the Court itself.

3. State Courts

As opposed to the federal courts, *all* U.S. state courts currently allow audio-visual coverage in their courtrooms, subject to various regimes and limitations.¹⁹⁹ The process by which state courts opened their gates to the presence of cameras took many years, followed by various decisions from the Supreme Court. First came the *Estes* case,²⁰⁰ rendered in the mid-1960s, which declared that audio-visual coverage had infringed on the right to a fair trial.²⁰¹ This decision led to a wave of state bans on such coverage, and, by 1974, all states but Colorado had banned cameras.²⁰² Towards the 1980s, this trend was reversed,²⁰³ with a pivotal change after the release of the *Chandler* decision,²⁰⁴ That decision led to the change in rule 3A(7) and dismantled the legal constraints impeding audio-visual coverage of court hearings.²⁰⁵ As a

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*, Kyu Ho Youm, *supra* note 5, at 2030.

¹⁹⁸ Mauro, *supra* note 36, at 270; *see also* McElroy, *supra* note 130, at 1853–1855 (discussing the Court's narrative and its attempts to preserve its mystique).

¹⁹⁹ Some of these states have only recently allowed such coverage.

²⁰⁰ *Estes v. Texas*, 381 U.S. 532 (1965).

²⁰¹ *Id.*

²⁰² Stepniak, *supra* note 22, at 325.

²⁰³ Strickland and Moore, *supra* note 153, at 133.

²⁰⁴ *See* Metz, *supra* note 89, at 693–695. The *Chandler* decision is discussed above. *See infra* Part II.A.1.

²⁰⁵ *Id.*, Strickland and Moore, *supra* note 153, at 133–134.

result, many states adopted new, permissive coverage policies, or at least pilots to assess their feasibility.²⁰⁶ Most states found that the presence of cameras had little to no effect on legal proceedings.²⁰⁷

The O.J. Simpson trial put a temporary halt on states' willingness to allow cameras in courtrooms, but with time, most states regained their willingness to adopt policies allowing coverage.²⁰⁸ The policies adopted by each state vary significantly, both in the types of cases in which coverage is allowed,²⁰⁹ and the amount of discretion given to the presiding judge in deciding whether or not to permit coverage.²¹⁰ However, to this day, states continue to evaluate and redesign their coverage policies, as the Florida Bar Media and Communications Law Committee is currently doing in Florida.²¹¹

Particularly interesting is the coverage policy adopted in California, which asks judges to consider a wide array of factors when deciding on whether to allow coverage.²¹² The policy sets a good example of an arrangement that allows audio-visual coverage but takes into consideration the potential issues stemming from this coverage. Originally, these rules were part of Rule 980 in the California Rules of Court, and today they are all included in Rule 1.150 in the California Rules of Court (2015).²¹³ Rule 1.150 applies to civil and criminal proceedings and clearly declines to create a presumption either for or against audio-visual coverage.²¹⁴ When deciding whether to allow coverage, judges are asked to consider, for instance, the importance of maintaining public trust and confidence in the judicial system, the importance of promoting public access to the judicial system, privacy rights, effects on victims, witnesses, and other participants, the parties'

²⁰⁶ Strickland & Moore, *supra* note 153, at 133–134; Metz, *supra* note 89, at 693–694; Sager & Frederiksen, *supra* note 5, at 1527; Mauro, *supra* note 36, at 263.

²⁰⁷ See discussion *infra* Part II. Marder, *supra* note 20, at 1509–1510; Strickland & Moore, *supra* note 153, at 135; *Beinisch Report*, *supra* note 12, at 39; *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 66, 73 (2005) (statements of Seth Berlin, Partner, Levine Sullivan Koch & Schultz, LLP, and Barbara Cochran, President, Radio-Television News Directors Association & Foundation).

²⁰⁸ Debra Cassens Weiss, *50 state supreme courts allow cameras, but not the U.S. Supreme Court; is it a 'fragile flower'?*, ABA JOURNAL (October 28, 2013, 3:11 PM), http://www.abajournal.com/news/article/50_state_supreme_courts_allow_cameras_but_not_the_us_supreme_court_is_it_a_/; Metz, *supra* note 89, at 695.

²⁰⁹ Some states allow all cases while others only civil cases, first instances courts, courts of appeals, etc. See Goldfarb, *supra* note 22, at 189–191.

²¹⁰ Some states have a presumption in favor of electronic coverage, while others do not. Goldfarb, *supra* note at 22. Lindsey, *supra* note 42, at 402–413; Strickland & Moore, *supra* note 206, at 134. In general, out of 50 states (D.C. not included), 36 approve audio-visual coverage of both trial and appellate courts, and 37 approve audio-visual coverage in both civil and criminal cases.

²¹¹ See 90(6) THE FLORIDA BAR JOURNAL, *supra* note 9, at 40.

²¹² See CAL. R. CT. 1.150.

²¹³ *Id.*

²¹⁴ See CAL. R. CT. 1.150(a).

support of or opposition to the request, and administrative issues such as financial burden to courts or participants.²¹⁵ Aside from these considerations, the rule lays out technical demands and limitations, thus mitigating the technical concerns held by opponents of audio-visual coverage.²¹⁶

B. *England and Scotland*

Broadcasting images and sound recordings from courts in England and Wales is prohibited by section 41 of the Criminal Justice Act of 1925,²¹⁷ and section 9 of the Contempt of Court Act of 1981.²¹⁸ British courts, at least in rhetoric, have been relatively supportive of public trials and their importance in promoting the efficient and impartial administration of justice,²¹⁹ but in reality have done little to change the legal norm. After years of rich public debate, the English General Council of the Bar decided in the late 1980s to appoint a committee to

²¹⁵ See CAL. R. CT. 1.150(e)(3) (outlining factors to be considered by the judge).

²¹⁶ See CAL. R. CT. 1.150(e)(7)–(8) (Equipment and Personnel, and Normal Requirements for Media Coverage of Proceedings, respectively).

²¹⁷ Criminal Justice Act, 1925, Section 41 (Eng.) (stating that “[n]o person shall: a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge or a witness in, or a party to, any proceedings before the court whether criminal or civil; or b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof . . .”).

²¹⁸ Contempt of Court Act, 1981, Section 9 (Eng.) (stating that “(1) Subject to subsection (4) below, it is a contempt of court—(a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court; (b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication; (c) to use any such recording in contravention of any conditions of leave granted under paragraph (a). (2) Leave under paragraph (a) of subsection (1) may be granted or refused at the discretion of the court, and if granted may be granted subject to such conditions as the court thinks proper with respect to the use of any recording made pursuant to the leave; and where leave has been granted the court may at the like discretion withdraw or amend it either generally or in relation to any particular part of the proceedings. (3) Without prejudice to any other power to deal with an act of contempt under paragraph (a) of subsection (1), the court may order the instrument, or any recording made with it, or both, to be forfeited; and any object so forfeited shall (unless the court otherwise determines on application by a person appearing to be the owner) be sold or otherwise disposed of in such manner as the court may direct. (4) This section does not apply to the making or use of sound recordings for purposes of official transcripts of proceedings.” See also Mark Hanna & Mike Dodd, MCNAE’S ESSENTIAL LAW FOR JOURNALISTS 113–114 (21st ed., 2012); DEPARTMENT OF CONSTITUTIONAL AFFAIRS, BROADCASTING COURTS, 13–15, (CP 28-04 2004) (giving an overview on UK broadcasting court proceedings).

²¹⁹ See, e.g., *Scott v. Scott* [1913] AC 417 (HL); *R v. Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 265; *Harman v. Secretary of State for Home Office*, [1983] 1 AC 280. Lord Atkinson stated in *Scott v. Scott* more than 100 years ago, “[t]he hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses. But all this is tolerated and endured, because it is felt that in public trial to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means of winning for it public confidence and respect.”

discuss the matter.²²⁰ The committee submitted its conclusions in 1989 in what is known as the Caplan Report, and chief among them was “that the benefit of televising outweighs the arguments against it.”²²¹ These recommendations, however, did not result in a change in the existing law, which stayed the same for the following two decades. Interestingly, most of those opposing the idea of allowing cameras into courts based their arguments on the American experience of courtroom coverage,²²² while those supporting coverage expansion argued that English contempt laws could maintain coverage at acceptable levels for the British public without slipping into what some called “U.S. style trial by media.”²²³

Eventually, as in the U.S., a pilot was launched in 2004; it was extremely narrow and consisted of the British Court of Appeals allowing cameras into one criminal hearing.²²⁴ The hearing was recorded but never presented to the public; instead, government and judicial representatives viewed the hearing.²²⁵ The pilot was deemed successful, with its representatives concluding that recording and broadcasting of such cases should be allowed as a tool to strengthen the accessibility of courts to the public.²²⁶ Yet, meaningful changes did not occur until 2013, when audio-visual coverage was permitted in the court of appeals—both in civil and criminal cases, on the condition that specific limitations were upheld. One such limitation stipulated that the lawyers’ arguments and the judges, but never witnesses or victims, be video recorded.²²⁷ It was also decided that live broadcasts would be delivered with a delay of 70 seconds.²²⁸ Moreover, the right to record was given to one person. That person is employed by the media groups sponsoring the project, but is bound by the court’s demands.²²⁹ Official government reports and a wealth of accounts in the media celebrating this change implied that its main purpose had been to make the British courts more transparent in the eyes of the public.²³⁰ These reports also

²²⁰ The Public Affairs Committee of the General Council of the Bar, *Televising the Courts: A Report of a Working Party* (May 1989) (“The Caplan Report”).

²²¹ Metz, *supra* note 89, at 684–685; see also *Beinisch Report*, *supra* note 12, at 58–59.

²²² These opponents were mostly affected by the negative responses to the coverage of trials such as that of O.J. Simpson.

²²³ Metz, *supra* note 89, at 686; Grania Langdon-Down, *LAW: Trial by media: watching for prejudice* INDEP. (Oct. 10, 1995), <http://www.independent.co.uk/life-style/law-trial-by-media-watching-for-prejudice-1577021.html>.

²²⁴ “The Speechley Appeal,” a case in which a public figure was convicted for inappropriate behavior and was sentenced to eighteen months in prison. See also Kyu Ho Youm, *supra* note 5, at 2009–2010.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Rozenberg, *supra* note 6.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ THE BRITISH MINISTRY OF JUSTICE REPORT OF 2012, *supra* note 6.

confirm that the change—which demanded an amendment in the current law—was strongly supported by the judiciary, who believed a time for a change arrived. Recently, the Ministry of Justice has announced the introduction of another pilot, this time in the England and Welsh Crown Courts. In this three-month pilot, sentencing remarks of senior judges will be video recorded, but no other court personnel. At this stage, the footage will not be broadcasted.²³¹

Although the law banning cameras in British courts has existed since 1925, it did exempt the House of Lords, which was not considered a “court” but rather part of the government.²³² Based on this institutional distinction, several proceedings were filmed at the House of Lords from as early as 1989, and over the years the audio-visual coverage of these proceedings has expanded.²³³ Although the different broadcast policies can be justified by this institutional/legal formalism explanation, the policies clearly indicate that the strict ban on cameras was in practice more of an informed decision than an actual resistance to the idea of audio-visual coverage. On the contrary, it seems as though the House of Lords in fact recognized the social benefits of allowing such broadcast and thus applied a softer policy on itself. Therefore, it is not surprising that in 2005, when the House of Lords was replaced by the British Supreme Court, part of the constitutional amendment that followed fully exempted the Court from the government and from the prohibition found in section 41.²³⁴ Moreover, the Court permitted Sky News—a British television channel—to broadcast live hearings.²³⁵ Since 2011, the channel’s website has broadcast a live stream of the court’s hearings.²³⁶ It should also be noted that permission to use live-text communication from mobile phones—including Twitter—during the conduct of a court case at the British Supreme Court was granted to journalists and legal commentators already in 2011.²³⁷

The British arrangements differ from those in the Scottish legal system, which started a pilot in 1992 to allow coverage of hearings in the court of appeals for both civil and criminal matters.²³⁸ Allowing audio-visual coverage was also contingent on obtaining permission from the attorney and/or the client.²³⁹ Moreover, the presiding judge

²³¹ Owen Bowcott, *Judges to be filmed in English and Welsh crown courts*, THE GUARDIAN (April 25, 2016, 1:12 PM), <http://www.theguardian.com/global/2016/apr/25/judges-to-be-filmed-in-english-and-welsh-crown-courts>.

²³² Kyu Ho Youm, *supra* note 5, at 2009–2010.

²³³ *Id.*

²³⁴ THE BRITISH MINISTRY OF JUSTICE REPORT OF 2012, *supra* note 6, at 9–10.

²³⁵ *Id.*, see also Kyu Ho Youm, *supra* note 5, at 2010–2011.

²³⁶ *Supreme Court Live*, SKY News, <http://news.sky.com/supreme-court-live> (last visited Nov. 30, 2016).

²³⁷ THE BRITISH MINISTRY OF JUSTICE REPORT OF 2012, *supra* note 6, at 11.

²³⁸ *Id.*, at 13, Metz, *supra* note 89, at 690–91

²³⁹ Metz, *supra* note 89; James Cusick, *Scotland’s appeal courts to let in TV cameras*, INDEP.

held the editing rights on the recordings, and witnesses were allowed to mandate that recordings of their testimony be omitted.²⁴⁰ The effect of these limitations has been that only a small number of cases have been broadcast. In 2012, the Lord President of the Scottish Courts and Tribunals Service Board announced that the policy relating to audio-visual coverage would be suspended for the purposes of reevaluating it.²⁴¹ In January 2015, a report was submitted to the Lord President recommending that cameras be allowed into Scottish courts under the following guidelines: filming of civil and criminal appeals, and legal debates in civil first instance proceedings, should be allowed for live transmission; criminal trials could be filmed for documentary purposes in certain circumstances; no live transmission or filming should be allowed for criminal first instance business or for civil proceedings involving witnesses; and journalists who register in advance with the Scottish Court Service should be permitted to use live text-based communications, such as Twitter, from court.²⁴² The Lord President has announced that he will accept all recommendations, and will prepare guidelines for their implementation.²⁴³

C. Canada

The Canadian Charter of Rights and Freedoms²⁴⁴—protecting both the freedom of expression and the freedom of the press (under section 2(b)) and the right to a fair trial (under section 11(d))—is the main source of legal norms governing the question of whether to allow audio-visual coverage of Canadian courts.²⁴⁵ The Supreme Court of Canada held in 1994, in the *Dagenais* case, that the pre-charter common law rule favoring the right to a fair trial over freedom of expression is inappropriate—no hierarchy exists between these principles and a balance must be struck should they clash, with the attempt of creating a fair but open judicial process.²⁴⁶ The Court did not, however, recognize a per se constitutional right to audio-visual coverage.²⁴⁷ With the

(Aug. 6, 1992), <http://www.independent.co.uk/news/scotlands-appeal-courts-to-let-in-tv-cameras-1538862.html>.

²⁴⁰ *Id.*

²⁴¹ JUDICIARY OF SCOTLAND, *supra* note 7.

²⁴² *Cameras could be allowed in Scottish courts*, BBC NEWS (Jan. 28, 2015), <http://www.bbc.com/news/uk-scotland-31020869>.

²⁴³ *Id.*

²⁴⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

²⁴⁵ MacKay, *supra* note 5 (claiming that due to section 2(b) audio-visual coverage of courts in Canada could only be banned as part of a total publication ban and after a careful analysis).

²⁴⁶ *See Dagenais v. Canadian Broad. Corp.*, [1994] 3 SCR 835 (affirming the lack of hierarchy between the rights embedded in the charter and calling for a more sophisticated approach to balancing them. The court also stated that publication bans may be in breach of the Charter's protection of freedom of expression).

²⁴⁷ *Id.*

Dagenais decision, the Court followed the lead of jurisdictions such as the U.S. and England, i.e., opening the door for de jure audio-visual coverage, while preserving the courts' authority in deciding whether or not to allow it *de facto*.²⁴⁸ Indeed, the ways in which sections 2(b) and 11(d) are implemented differ between the various Canadian courts.

First, the Canadian Supreme Court is considered a pioneer in terms of audio-visual coverage, with the first case broadcast as early as 1993 as part of a pilot.²⁴⁹ Interestingly, *Dagenais* was decided immediately after the pilot, setting the legal ground for future arrangements to come. Indeed, shortly after *Dagenais*, and due to the pilot's success, in 1995, an agreement was signed between the Canadian Supreme Court and the Cable Public Affairs Channel (CPAC), which allowed CPAC to broadcast hearings—at first only appeals—as long as they were broadcast in full, in English and French, and with no interpretations or explanations.²⁵⁰ In 1997, the Supreme Court agreed to broadcast partial hearings as well.²⁵¹ Since 2009, appeals have been broadcast on the Court's website, with a presumption in support of broadcasting—all proceedings can be viewed unless legal limitations such as privacy disallow the broadcast.²⁵² The cameras are located inside the courtrooms, they belong to the court, and a court employee is responsible for their operation.²⁵³

At the federal level, the situation is different. Between 1995 and 1997, after the Supreme Court clarified the legal situation, a pilot study was conducted²⁵⁴ during which specific regulations were written to allow the president of the Federal Court of Appeals wide discretion in providing permits, and forbidding broadcast permits to be granted at first instance courts that hear witnesses and evaluate evidence.²⁵⁵ Although most judges seemed to favor broadcasting after the pilot, the final report of 1998 recommended that the experiment be concluded,²⁵⁶ which could relate to how few hearings were actually broadcast while the experiment took place. This position seems to align with the formal position of the Canadian Judicial Council, which steadfastly opposes the

²⁴⁸ See, for example, the decision in *R. v. MacDonnell*, [1996] 147 N.S.R. 2d 302, 307 (Can.), illustrating the effects of *Dagenais*, lifting the bar on the prohibition of audio-visual coverage while leaving the court wide discretion in reaching a final decision on the matter).

²⁴⁹ Stepniak, *supra* note 22, at 334; Kyu Ho Youm, *supra* note 5, at 2006.

²⁵⁰ Kyu Ho Youm, *supra* note 5, at 2007.

²⁵¹ *Id.*; *Beinisch Report*, *supra* note 12, at 48.

²⁵² See *Archived Webcasts*, THE SUPREME COURT OF CANADA, <http://www.scc-csc.ca/case-dossier/info/webcasts-webdiffusions-eng.aspx?ya=2015&ses=03&submit=Search> (last visited Dec. 20, 2016).

²⁵³ Kyu Ho Youm, *supra* note 5, at 2007–2008.

²⁵⁴ Stepniak, *A Comparative Analysis of First Amendment Rights*, *supra* note 80, at 334.

²⁵⁵ *Beinisch Report*, *supra* note 12, at 49.

²⁵⁶ See STEPNIAK, AUDIO-VISUAL COVERAGE OF COURTS, *supra* note 76, at 151–152 (discussing the Court's committee on cameras in the courtroom).

idea of allowing cameras in Canadian courts.²⁵⁷ With time though, the strict ban on cameras in Canadian federal court has slowly been eroded. Currently, and since in most of its proceedings the Canadian Federal Court acts as a court of judicial review—without witnesses and under rules similar to those applicable to appeal courts—the policy is to generally grant request for audio-visual coverage.²⁵⁸

The courts of the various provinces in Canada have implemented policies, which differ from province to province; generally speaking, the arrangements provide a narrow window in which audio-visual coverage is permitted.²⁵⁹ In British Columbia, for example, video recording is generally prohibited,²⁶⁰ and in Nova Scotia a broadcasting exists only in the court of appeals.²⁶¹

D. *New Zealand*

New Zealand has one of the most liberal live broadcast policies among common law jurisdictions. The New Zealand Bill of Rights Act of 1990 appears to have the most influence on the issue, containing both a “freedom of expression” section²⁶² and a “fair trial” section²⁶³, with no hierarchy established between them.²⁶⁴ More generally, and like most other common law jurisdictions, support for transparency in the legal system and open courts dominates the legal discourse,²⁶⁵ and courts have clearly recognized that presumption in favor of openness does in fact exist.²⁶⁶ As in other jurisdictions, the principle of open justice is

²⁵⁷ Stepniak, *A Comparative Analysis of First Amendment Rights*, *supra* note 80 at 334.

²⁵⁸ *Policy on Public and Media Access*, FEDERAL COURT (last modified Nov. 23, 2015), http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/MediaPolicy (explaining that the Chief Justice is the one permitting the coverage, after consulting with the presiding judge).

²⁵⁹ STEPNIAK, AUDIO-VISUAL COVERAGE OF COURTS, *supra* note 76, at 150.

²⁶⁰ *Media*, THE COURTS OF BRITISH COLUMBIA, http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD-48-Video_Recording_or_Broadcasting_of_Court_Proceedings.pdf (last visited Dec. 20, 2016).

²⁶¹ *Nova Scotia Court of Appeal Rule Re: Webcasting and the Use of Cameras During Proceedings*, THE COURTS OF NOVA SCOTIA, http://www.courts.ns.ca/Media_Information/media_docs/NSCA_cameras_in_courtroom_rules_14-10-08%20.pdf. In October 2016, a new policy regarding the use of Tweeter and electronic devices was implemented. *Policy Re: Use of Electronic Devices*, THE COURTS OF NOVA SCOTIA (Oct. 11, 2016), http://www.courts.ns.ca/Media_Information/documents/UseofElectronicDevicesPolicy_10_11_16.pdf.

²⁶² New Zealand Bill of Rights Act 1990, s 14 (N.Z.).

²⁶³ New Zealand Bill of Rights Act 1990, s 25 (N.Z.).

²⁶⁴ New Zealand Bill of Rights Act 1990 (N.Z.); Stepniak, *supra* note 86, at 339.

²⁶⁵ *See, e.g.*, *Attorney-General v. Leveller Magazine, Ltd.* [1979] A.C. 440 (As Lord Diplock wrote, “The application of this principle of open justice has two aspects: as respects proceedings in the court itself requires that they should be held in open court to which the press and public are admitted As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.”).

²⁶⁶ *R v. Liddell* [1995] 1 NZLR 538 (CA) (“What has to be stressed is that the prima facie presumption as to reporting is always in favor of openness.”).

never absolute and needs to be balanced with other competing interests and principles, such as “doing justice . . . preserving the integrity of justice and the administration of justice.”²⁶⁷ Despite the fact that audio-visual coverage of New Zealand courts was constitutionally de facto permitted, and rhetorically encouraged for many years, most judges used their discretion to disallow such coverage.²⁶⁸

The seeds of change in this policy were planted in the middle of the 1990s, with the judiciary’s recognition that such change is inevitable.²⁶⁹ Audio-visual coverage of courts was then expanded through the implementation of a pilot in which all courts were covered contingent on two main principles. The first is that media outlets commit to an accurate, impartial and balanced coverage of the proceedings and the parties involved. Any such coverage was to be of at least two minutes, and without editorial comments. The second is that the data received from the court be used in normal news programs or articles unless prior approval for a different use has been given by the trial judge.²⁷⁰

The pilot lasted from 1995 to 1998, and covered more than twenty main cases.²⁷¹ In 1996, the Department for Courts commissioned an independent research team from Massey University to evaluate the pilot. Its main conclusion was that expanding audio-visual coverage had a small effect on juries and witnesses, but cameras in courtrooms created tension among judges.²⁷² Alongside this team, a committee was formed in order to monitor whether the media stood behind their commitments.²⁷³ The committee affirmed the media’s overall compliance.²⁷⁴

It was decided, therefore, that the expansive coverage based on the rules formed in the pilot, as approved in 1999, would continue. In 2003, the rules were reexamined due to concerns that the media was not following them verbatim and that there was a lack of sufficient protection for witnesses. As part of these amendments, the time frame to submit requests to cover hearings was expanded, rules relating to

²⁶⁷ Stepniak, *A Comparative Analysis of First Amendment Rights*, *supra* note 80, at 338–39; *see also* *Police v. O’Connor* [1992] 1 NZLR 87 (HC).

²⁶⁸ Justice Raynor Asher, Justice Ron Young, & Judge Russell Collins (Media Review Panel), *Report to Chief Justice on In-Court Media Coverage* 7–8 (2015), http://www.courtsofnz.govt.nz/In-Court-Media-Review/In-Court-Media-Review/ReporttoChiefJusticeonincourtmediacoverageF6_7_15_20150720.pdf [hereinafter: *The New Zealand Report*].

²⁶⁹ Stepniak, *A Comparative Analysis of First Amendment Rights*, *supra* note 80, at 339 (As Chief Justice Eichelbaum’s approach implies, the subject should “thoroughly [be] studied and to evolve a set of guidelines which would provide as much control as reasonably possible, and preserve the tenet of a fair trial to the greatest extent . . .”).

²⁷⁰ *The New Zealand Report*, *supra* note 268, at 7–9.

²⁷¹ *Id.*, at 7.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

witness protection were clarified, and a rule was created that allowed broadcasting to occur no sooner than ten minutes after the recording of the hearing.²⁷⁵ The rule requiring at least two consecutive minutes of broadcasting, however, was revoked.²⁷⁶

In 2012, more amendments to the rules were implemented, with attempts made to accommodate modern technological developments and expand the rules to all forms of broadcasting.²⁷⁷ In 2013, after criticism arose about the potential risk posed by the current rules to the principle of fair trial, the Chief Justice of New Zealand ordered another reexamination of the rules, specifically to determine whether they sufficiently protected parties to the legal proceedings and society as a whole.²⁷⁸ Based on this decision, another committee was established, which submitted its recommendations in 2015.²⁷⁹ The committee recommended no meaningful changes to the current regulations.²⁸⁰

Generally speaking, judges in New Zealand have wide discretion in deciding whether to allow audio-visual coverage, though most permits are approved in proceedings and courts.²⁸¹ Nevertheless, the rules clearly state they have no bearing on legal expectations or rights, nor should they affect legal prohibition.²⁸² The main purpose of the rules is to promote quick and equal proceedings in response to requests to allow audio-visual coverage. The rules emphasize the commitment of those who broadcast to delivering balanced, precise, and fair coverage that cannot be used out of context. The rules clarify that they are a balance between several considerations, such as the need to maintain fair trials, aspirations toward open justice, recognition of the important role of the media in reporting on the events occurring in courtrooms, the court's commitment to victims, and the reasonable expectations and fears of parties to legal proceedings, victims and witnesses.²⁸³ The rules appear to allow witnesses to prohibit the filming of their testimonies. The rule that allows broadcasting only ten minutes after hearings take place has not changed. However, since 2012, it is limited to certain issues in which immediate broadcast will be permitted.²⁸⁴ The New

²⁷⁵ See *id.* at 9 (stating that, in the past, the media was requested to wait one hour between filming/recording and broadcasting).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 9.

²⁷⁸ Chief Justice Sian Elias, *2013 Review of In-Court Media Coverage: Terms of Reference* (Aug. 9, 2013), <http://courtsfnz.govt.nz/In-Court-Media-Review/In-Court-Media-Review/In-Court-Media-Review.pdf>.

²⁷⁹ *Draft In-Court Media Coverage Guidelines 2015*, *supra* note 10.

²⁸⁰ The New Zealand Report, *supra* note 270, at 3.

²⁸¹ *Draft In-Court Media Coverage Guidelines 2015*, *supra* note 10, at 2 (Section 4: Discretion of the Court).

²⁸² *Id.* at 1 (Section 1. Application of Guidelines).

²⁸³ *Id.* at 1, 4 (Section 2. Guiding Principles, section 11. Witness Protection as of Right in Criminal Trials, and section 12. Additional Discretionary Witness Protection).

²⁸⁴ *Id.*

Zealand judicial authority has established a committee whose members are representatives of the judicial authority and media outlets, and which is responsible for ensuring compliance with the rules and arbitrating when controversies arise.²⁸⁵

III. LESSONS LEARNED—ON THE POLITICS OF CONSTITUTIONAL LAW, EMPIRICAL EVIDENCE AND CREATIVITY

The previous section systematically analyzed audio-visual coverage policies implemented by different common law jurisdictions. Although each policy has its own unique features and can be differentiated based on its level of “openness,” as explained below, the comparative analysis revealed surprising similarities in the ways in which audio-visual coverage has evolved constitutionally and was ultimately permitted in those jurisdictions.

As was seen, neither the U.S., England, Scotland, Canada, or New Zealand recognized an explicit constitutional right to allow cameras in courtrooms.²⁸⁶ Moreover, some jurisdictions, like the U.S., clearly refused to acknowledge such a right.²⁸⁷ Still, and regardless of such recognition, all of these jurisdictions experienced, and are still experiencing, a massive growth in the presence of cameras within their courtrooms. The process by which such expansion occurred in these jurisdictions also bears similarities—it is characterized by patterns which allow courts to control the implementation of policies pertaining to constitutional matters that directly affect them, thus preserving their institutional strength. I refer to this behavioral pattern as the politicization of constitutional law.

As illustrated in each of the jurisdictions, the refusal to recognize a constitutional right to audio-visual coverage of courts clearly maintained courts’ ability to exercise their discretion when deciding whether to support or allow such coverage.²⁸⁸ On the one hand, courts had a meaningful role in declaring the importance and benefits stemming from audio-visual coverage, while, on the other hand, preserving their institutional power in deciding whether to actually allow it by establishing discretionary balancing frameworks. The mere legal acknowledgment in the public benefits of audio-visual coverage and its role in strengthening rights such as freedom of speech and public trials was therefore of little practical value, since it was contingent on courts’ discretion in allowing coverage in practice. Sometimes, closing the gap between courts’ official acknowledgment of the importance of audio-visual coverage, and the de facto implementation of coverage

²⁸⁵ *Id.* at 1–6.

²⁸⁶ See discussion *supra* Part II.

²⁸⁷ See discussion *supra* Part II.A.

²⁸⁸ See discussion *supra* Part II.

policies, took over a decade.

That was the case in the U.S., where the Supreme Court recognized the importance of allowing coverage as early as 1980,²⁸⁹ and unleashed constitutional limitations on audio-visual coverage in 1981—in *Chandler*—but it took more than a decade for federal courts to effectively allow coverage. The Supreme Court still precludes such coverage today. Similarly, declaration by New Zealand courts of the importance of audio-visual coverage can be dated to the late 1970's, but only when the courts decided in 1995 to allow such coverage²⁹⁰ was it de facto implemented. The Supreme Court of Canada followed a similar pattern. While general views of the importance of audio-visual coverage can be traced to decisions preceding *Degenais*, de facto coverage was only allowed after *Degenais*.²⁹¹ In *Degenais*, the court declared that freedom of the press should be horizontally balanced with the right to a fair trial and that publication bans may be a breach of the Charter's protection of freedom of expression, declarations that came *during* the time in which a pilot within its walls has been conducted.²⁹² Even in England, despite a legal ban on the books, courts were rhetorically supportive of audio-visual coverage.²⁹³ Moreover, the House of Lords and later the Supreme Court, were both officially exempted from that law, and both chose to permit coverage with the belief it could serve interests of transparency and strengthening the public trust in the legal system.²⁹⁴ Needless to say, being exempt from the law did not mean the exempted courts *had* to allow such coverage, and for many years the House of Lords did not in fact allow such coverage. Deciding to allow the coverage thus “exposed” the courts’ views on the merit of such legal ban, i.e., that the advantages of coverage outweighed its disadvantages. Other courts, such as the court of appeals, followed similar patterns by

²⁸⁹ See *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980) (acknowledging the important role the media have in providing information about trials to the public); see also Stepniak, *supra* note 22, at 325–327 (noting that some claim that in *Richmond* the Court had declared an absolute right of access to the media, a notion that the court itself rejected later in *Globe Newspapers v. Superior Court*, 457 U.S. 596 (1982)). In any event, it is clear that *Richmond* favored openness and access to the media—both print and electronic.

²⁹⁰ It was believed such coverage would improve transparency and public trust. See *The New Zealand Report*, *supra* note 270, at 7-9.

²⁹¹ *Dagenais*, *supra* note 248.

²⁹² The pilot took place between 1993 and 1995. See STEPNIAK, AUDIO-VISUAL COVERAGE OF COURTS, *supra* note 76, at 150–151. More support to my claim on the self-involvement of the court in de-facto allowing audio-visual coverage can be found in Stepniak's book, mentioning that Canadian SC judges started recognizing the value of courtroom recordings during 1990, after installing closed circuit cameras which they found “Helpful in simplifying and improving their note-taking, and even capable of enabling absent judges to view recordings of missed argument”. During that time, so Stepniak claims, the judges started recognizing the educational value of covering court proceedings. *Degenais* was decided under such pro-coverage environment.

²⁹³ See *supra* note 219.

²⁹⁴ THE BRITISH MINISTRY OF JUSTICE REPORT OF 2012, *supra* note 6, at 9. Stepniak, *supra* note 22, at 20-21.

exempting themselves from the legal norm.²⁹⁵ This implied that the law was not necessarily such a meaningful barrier, but the barrier was rather the judiciary itself.

Hardly a surprise to the legal realist, the comparative analysis reveals that when it comes to audio-visual coverage of courts, the law, and specifically constitutional law, is not a mathematical-like formula, but rather serves as a tool in the hands of judges to preserve their institutional power. It allows courts flexibility in exercising their discretion on when and how to apply legal principles. The global development of the audio-visual coverage doctrine discussed above suggests that this is especially the case in constitutional issues that influence courts themselves. The said regimes allow courts, on the one hand, to avoid recognizing a constitutional right that will subjugate them to expansive audio-visual coverage, and, on the other hand, to preserve their power to allow coverage when desired.²⁹⁶

Indeed, when courts decide that the time has come, either because of external pressure from the public or due to internal pressure from within the judiciary or other branches of government, they are willing to allow coverage, under different criteria and limitations. The contested issue is thus not whether audio-visual coverage is a constitutional right, or even if coverage should be constitutionally permitted given the fluidity of such permission as discussed earlier. The main question is rather whether courts are willing to adopt coverage policies and if so what sort of policies. Put more simply, when jurisdictions aim to discuss audio-visual coverage, the constitutional questions seem to be of secondary importance, and the main focus should be on the views of the judiciary. If the jurisdictions acknowledge the importance of such coverage, it will most likely be adopted.²⁹⁷

²⁹⁵ *Id.*, at 19.

²⁹⁶ In this sense, this view echoes neo-institutional models of judicial decision making. Neo-institutionalists would agree that judges' own attitudes (the attitudinal model) and strategic consideration (the rational choice model) affect their decision making process but would also add the importance of institutional variables—including the characteristics of the court as a political institution—in that process. See Cornell W. Clayton and Howard Gillman, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in *Supreme Court Decision Making: New Institutional Approaches* 1-14 (C.W. Clayton & H. Gillman eds. 1999). The evolution of the audio-visual coverage doctrine is a good illustration of the institutional considerations dominating the judicial decision making process of common law judiciaries discussed in this Article.

²⁹⁷ While it seems like Stepniak also recognizes the pivotal role of the judiciary in the implementation of coverage policies, we divert as for the role of legal norms in establishing such regimes. See STEPNIAK, AUDIO-VISUAL COVERAGE OF COURTS, *supra* note 76 at 35–352 (2008). Stepniak's view considers the recognition of an enforceable right for those aiming to cover courts or gain access to such recordings and the culture of rights to be a separated *determinative* factor in the process. I argue that if aiming to understand how and when coverage policies were adopted, the legal recognition in and of itself is subordinate to judges' decision to de facto adopt coverage policies. That is due to, on one end of the spectrum, the slow turnaround from legal acknowledgment of audio-visual coverage and de-facto adoption of coverage policies and, on the

Even assuming the focus should be diverted away from constitutional towards policy considerations, the comparative analysis continues to serve an important role. It gets at the core of the practical implementation of coverage policies—the experiences of jurisdictions that adopted such policies. First, it can answer crucial questions on the potential effects coverage may have on the legal process. The comparative survey provides a real-life perspective to the theoretical arguments proponents and opponents of audio-visual coverage can endlessly throw at each other. The results seem fairly clear; in the vast majority of studies conducted in different jurisdictions it was hard to directly link the introduction of cameras in courts and changes in attitudes or behaviors of parties to the legal process.²⁹⁸ The empirical data thus contradict claims made by opponents of audio-visual coverage—most notably courts themselves—and generally support expansion of audio-visual coverage.²⁹⁹

This is not to say that all arguments against audio-visual coverage of courts should be ignored. On the contrary, given some of the limitations addressed in this Article, each jurisdiction aiming to enable audio-visual coverage should be mindful of the disadvantages of allowing cameras in courts. These jurisdictions should adopt policies with internal checks and balances that minimize the potential infringement on the right to a fair trial while allowing an open, transparent, and accessible court system. Deciding what sort of balance should be struck is the third contribution of the comparative analysis.

This Article provides data on a wide array of policies, with each jurisdiction characterized by unique elements embedded within its idiosyncratic features. Each approach is located on a spectrum of “openness” to media coverage. On one side of the spectrum we find policies completely prohibiting audio-visual coverage of courts, sometimes accompanied by a limited permission to film the judges entering the courtroom or the announcement of the parties’ names. This characterizes the Israeli regime and the approach taken by the U.S. Supreme Court. From this restrictive end, the policies move towards a more permissive approach, with various limitations and constraints, based on different criteria. Figure 1 illustrates the spectrum of policies analyzed in this Article by their level of openness to audio-visual coverage, from the least to the most open:

Figure 1: Openness to Audio-Visual Coverage by Jurisdiction*

other end, the willingness to adopt such policies even under limited legal recognition (or lack thereof).

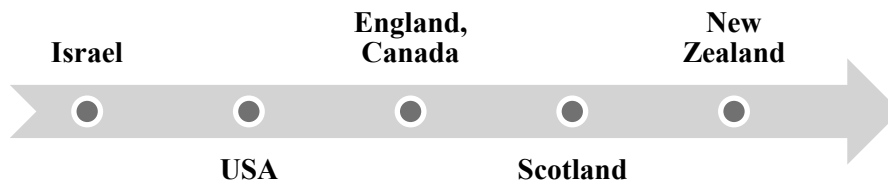
²⁹⁸ See *infra* Part I and accompanying text.

²⁹⁹ *Id.*

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* Excludes U.S. states and Canadian provinces.

The location of each jurisdiction on the spectrum reflects a weighted sum of several criteria considered by these policies. These criteria will form my suggested framework for audio-visual coverage policy design. The synthesis of the data emphasizes the questions policy makers should address in order to fully engage with the complexities of audio-visual coverage in courtrooms when aiming to strike a balance that fits their view of audio-visual coverage. Needless to say, implementing the suggested framework in each jurisdiction is a delicate task, which demands a careful understanding of the legal structure and legal culture of each jurisdiction. I therefore conclude the Article with an example of how to implement this framework in the Israeli setting.

Below is the list of criteria which comprise the analytic framework to be used when designing or reevaluating coverage policies.

A. *Types of Cases*

Cases typically are differentiated between criminal and civil. In the U.S., cases in “criminal matters” that come before the Second Circuit cannot be broadcast.³⁰⁰ The definition of criminal matters is wide and may also include some civil matters. In some jurisdictions, only civil cases can be broadcast and in others, like New Zealand and the British Court of Appeals, both civil and criminal cases can be broadcast.³⁰¹ The main distinction here relates to the potential effects of cameras on each of these types of cases, with the majority of jurisdictions leaning towards considering the rights of defendants in criminal cases more likely to be jeopardized by audio-visual coverage and protecting them more restrictively. In some jurisdictions the right to a fair trial is constitutionally recognized only at the backdrop of criminal cases,³⁰²

³⁰⁰ “Camera coverage is allowed for all proceedings conducted in open court, except for criminal matters.” (citing Fed. R. Crim. P. 53, 54(a)). *Second Circuit Guidelines*, *supra* note 169.

³⁰¹ *See infra* Part II.B (England and Scotland) and II.D (New Zealand).

³⁰² This differs from the U.S., where the right to a fair trial is rooted in the Sixth Amendment in criminal cases, but has been read into the Seventh Amendment in civil cases. *See Marder*, *supra* note 20, at 1539.

which may explain the desire to protect these defendants so stringently.

B. *Type of Courts*

First instance, or trial, courts are usually differentiated from courts of appeal. At the heart of this distinction lies the fear of the potential effects of cameras on witnesses and testimonies, which is more relevant in trial courts, in which witnesses provide their testimonies, as opposed to a court of appeals, where witnesses are usually not called to the stand. Here again, some jurisdictions, like New Zealand, do not differentiate between types of courts and allow coverage in all proceedings.³⁰³ In others, like England, coverage is limited to the court of appeals.³⁰⁴ Many jurisdictions choose to first implement coverage policies in courts of appeals, and decide whether to expand it based on an evaluation of these policies.

C. *The Scope of Judicial Discretion*

1. Allowing Judicial Discretion

Jurisdictions vary in the ways they allow judicial discretion in deciding requests to record court proceedings. State policies may determine a presumption for or against coverage, or refrain from including such determination. Determining a specific presumption clearly affects judicial discretion while refraining from stating a clear presumption provides more judicial leeway. As discussed, this decision is first grounded in the specific legal regime, and second, in the approach favored by the authorities in each jurisdiction. Some jurisdictions take a general approach to determining how closely judicial discretion will be shaped by statutes, so it is recommended that the design of an audio-visual coverage policy be consistent with this general approach.

2. The Different Considerations

Judges should take into account a variety of different considerations between jurisdictions. In California, the law is particularly detailed.³⁰⁵ Providing a long list of considerations guarantees that the judge will do a thorough job without overlooking any of the relevant issues. But it also restricts judicial discretion—usually not a recommended policy to adopt since it can potentially infringe on judicial independence.

³⁰³ See *infra* Part II.D (New Zealand).

³⁰⁴ See *infra* Part II.B (England and Scotland).

³⁰⁵ See CAL. R. CT. 1.150(e)(3) (factors to be considered by the judge).

D. *The Position of the Parties*

Some jurisdictions allow parties to veto the decision, while others take the parties' position only as one consideration among many in deciding whether to permit or refuse a request to broadcast.³⁰⁶ Another question is who is entitled to respond? Should it only be the parties themselves or should their lawyers be entitled to independently express their views too?³⁰⁷ The answer to these questions depends on the balance between, on the one hand, the parties' right to privacy and the potential damage they will incur if the trial will be broadcast and, on the other hand, the social advantages stemming from the coverage. Assuming that the overwhelming majority of the empirical studies on the potential effects of audio-visual coverage support a "no effects" conclusion, the decision as to the weight carried by the privacy rights of parties to the legal process is mostly contingent on the status of privacy rights and rights of parties to criminal trials within each jurisdiction.

E. *Differences in the Technical Elements of the Coverage*

1. Direct or Delayed Broadcast

The broadcast can either be direct or delayed. The delay can be of different lengths; from seventy seconds, as adopted in England to ten minutes as adopted in New Zealand. The period of time in which broadcast is delayed provides a "safe zone" to fix urgent matters, such as a testimony that should not have been filmed. However, this delay does not necessarily mitigate fears of how the mere presence of cameras within courts may affect the proceedings. The delayed broadcast adds an administrative burden, as it is necessary to constantly scan the broadcast for "glitches."

2. The Location and Number of Cameras

Jurisdictions either prefer to permanently locate cameras within the courts or to allow the media to bring them when needed. As previously discussed,³⁰⁸ cameras located within the courtrooms, as seen in Canada, provide the court with more control over the coverage and minimize disturbances in the flow of the trial.

3. Who is Broadcasting?

There are a few options to the methods of broadcasting. A jurisdiction may require individual permits for each channel requesting

³⁰⁶ Compare Metz, *supra* note 89, at 690 (discussing the Scottish policy), with CAL. R. CT. 1.150(e)(3) (the policy in California).

³⁰⁷ This view was offered in the original Scottish policy. See Metz, *supra* note 89, at 690-691.

³⁰⁸ See discussion *infra* discussion Part I.B.5.

to broadcast,³⁰⁹ providing exclusive rights to a specific channel,³¹⁰ or alternatively, a jurisdiction may open a direct channel of broadcast, such as streaming court hearings through the court's website³¹¹ or YouTube channel.³¹² These alternatives are described above in ascending order of the court's control over the content of the broadcast, with the court-owned broadcast channel providing the most reassuring solution for those fearing that the media will distort reality by disseminating fragmented reports of the legal proceedings. Courts can also opt for a combination of the alternatives; for instance courts can allow individual permits while taking a more proactive role in providing the media with data on the proceedings, such as sending briefs of decisions or scheduling meetings with the media to explain decisions.

4. Requests to Broadcast

Some jurisdictions created clear procedures for: how to apply for permits; when requests should be submitted; the time frame for decisions to be reached; the entity that reaches the decision (a judge, a clerk or the registrar), and whether or not an oral argument will be held.³¹³ The procedures can also include ways to appeal a decision—if allowed—and the time frame for these appeals. Some jurisdictions³¹⁴ do not provide a detailed account of these proceedings, leaving the legal situation somewhat vague and unpredictable.

F. *Evaluation Tools*

In most jurisdictions, the decision to launch a pilot has been followed by the establishment of a committee responsible for evaluating it and its effects on the legal system.³¹⁵ Different methods have been used in different countries, most of which involved interviews or surveys among participants in the proceedings, such as lawyers, judges, and parties.³¹⁶ Unfortunately, most of these evaluation schemes suffered from methodological weaknesses, which undermined the validity of their reports. As this Article clearly shows, these evaluations are as

³⁰⁹ See Part II.D *supra* for a discussion of New Zealand policy.

³¹⁰ Canada utilized this method until 2009, and the British Supreme Court continues to use this method.

³¹¹ Canada's Supreme Court currently streams court hearings through its website.

³¹² The U.S. Court of Appeals for the Ninth Circuit has its own Youtube channel to stream court hearings.

³¹³ See, for example, New Zealand's guidelines and Nova Scotia's rules for cameras in court of appeals.

³¹⁴ See, e.g., *Policy on Public and Media Access, Appendix A: Guidelines, Electronic Media Coverage of Federal Court Proceedings*, FEDERAL COURTS, http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/MediaPolicy (Can.).

³¹⁵ See *infra* Part II.A.2 for a discussion on the U.S Federal Experiment, and *infra* Part II.A.4 for a discussion on New Zealand.

³¹⁶ See e.g., FJC I, *supra* note 65, FJC II, *supra* note 55.

crucial as they are rare since they provide an empirical database for understanding the actual effects of audio-visual coverage on legal proceedings in different jurisdictions.

This Article now turns to illustrate how this suggested framework can be implemented in a real life scenario. For these purposes, I utilize the Israeli setting, a common law jurisdiction with currently no policy of audio-visual coverage of courts.

IV. AUDIO-VISUAL COVERAGE OF COURTS IN ISRAEL—THE LEGAL REGIME

Title 70(b) to the Israeli Law of Courts is a short and concise legal rule that summarizes the Israeli law regarding audio-visual coverage of courtroom proceedings.³¹⁷ According to this rule, entitled “Prohibited Publications,” one may not take pictures in the courtroom and/or publish these pictures, unless the court grants permission.³¹⁸ Disobeying this rule is a criminal offense whose maximum punishment is six months’ imprisonment. Recording and broadcasting are not directly mentioned in the statute, but the Israeli Supreme Court ruled in 1989 that courts have an inherent authority to forbid both from taking place.³¹⁹ Based on this legal regime, it is not surprising that audio-visual coverage of courts in Israel is relatively infrequent, and throughout the years courts have rarely allowed it. This is also the reality described in the report of a special ad-hoc committee founded in 2000 to consider the opening of Israeli courts to audio-visual coverage.³²⁰ The chairwoman of the committee was Hon. Justice Dorit Beinisch, who later became the Israeli Supreme Court Chief Justice.³²¹

This legal regime and its implementation effectively formed a legal presumption *against* audio-visual coverage of courts in Israel such that permits to record and broadcast hearings have been granted only sporadically in a limited number of cases: a total of only *five* cases over a period of more than *sixty years*.³²²

The first permission to broadcast was given in the 1960s with the trial of the Nazi commander Adolf Eichmann.³²³ This trial, which some

³¹⁷ See *supra* note 13.

³¹⁸ *Id.*

³¹⁹ HCJ 305/89 Simcha Nir, Adv. v. The Transportation Court 45(3) PD 203, 241–215 (Isr.) (1989).

³²⁰ See *Beinisch Report*, *supra* note 12.

³²¹ *Id.*

³²² *Beinisch Report*, *supra* note 12, at 19–20. Anat Peleg, *Broadcast the Verdict*, HA’ARETZ (April 26, 2014, 8:00 PM), <http://www.haaretz.co.il/opinions/.premium-1.2305424>.

³²³ Criminal Case 40/61 The Attorney General v. Adolf Eichmann (27) District PD 169 (Isr.) (1961) and Criminal Appeal 336/61 Adolf Eichmann v. The Attorney General 16(3) PD 2033 (Isr.) (1961)

claim to be the most important trial in the history of Israeli courts, was broadcast due to its public importance.

The second permission was given in the 1970s by an Israeli district court, which allowed the recording and broadcast of the *decision* in the Mizrachi case—a defamation lawsuit filed against one of the leading Israeli newspapers. *Ha'aretz*.³²⁴

Permission was not granted again until the end of the 1980s, this time for broadcasting another trial related to the Holocaust live on TV and radio.³²⁵ John Demjanjuk had been accused of committing war crimes as an accessory to the murder of 27,900 Jews while serving as a guard at the Nazi extermination camp near Sobibór in occupied Poland.³²⁶ The trial came before both the district court and the ISC.

The fourth occasion on which an Israeli trial received live coverage was in 1996, on the day in which the verdict of Yigal Amir, charged with the assassination of the Israeli Prime Minister, Yitzhak Rabin, was rendered. It was discovered after the fact that permission had actually been granted only to film the judges entering the courtroom, but due to a mistake the recording and broadcasting were extended to the complete reading of the verdict.³²⁷

The fifth instance of permission was in 1999 when the Jerusalem District Court allowed the decision given in the criminal case of Arye Deri, a former Israeli minister who recently returned to the public life, to be broadcast.³²⁸

Aside from these five cases, permits to cover events in honor of retiring judges have been granted throughout the years, as have permits to broadcast the hearings of quasi-judicial committees.³²⁹ As is evident, permits to broadcast Israeli court hearings have been few in number since the 1960s, revealing the de facto presumption against live broadcast that endures in Israel.

It is important to clarify, however, that Israeli courts do not

³²⁴ Anat Peleg, *Broadcast the Verdict*, HA'ARETZ (April 26, 2014, 8:00 PM), <http://www.haaretz.co.il/opinions/.premium-1.2305424>. In 1977, Ha'aretz published what was then the first series of articles publicly discussing the existence, leadership and course of action of organized crime groups in Israel. One of these articles focused on Mizrachi, a successful businessman, describing his pivotal role in the overall scheme of things. The outraged Mizrachi filed a defamation suit against the newspaper, which was one of the largest and most complex trials ever held in Israel. *Id.*

³²⁵ *Beinisch Report*, *supra* note 12, at 19-20.

³²⁶ Robert D. McFadden, *John Demjanjuk, 91, Dogged by Charges of Atrocities as Nazi Camp Guard, Dies*, N.Y. TIMES (Mar. 17, 2012), <http://www.nytimes.com/2012/03/18/world/europe/john-demjanjuk-nazi-guard-dies-at-91.html>.

³²⁷ *Beinisch Report*, *supra* note 12, at 19.

³²⁸ Peleg, *supra* note 324. Aryeh Deri was convicted in 1999 for a series of felonies including bribery, fraud, and breach of trust while serving as the Minister of Interior and served three years in Israeli prison. See Nissim Leon, *Fundamentalism, Popular Media and Political Mobilization: The Case of Shas*, 14 DEMOCRATIC CULTURE 201, 201-202 (2012).

³²⁹ *Beinisch Report*, *supra* note 12, at 17.

completely ban media coverage. On the contrary, the constitutional principle according to which court hearings are public, mentioned in Title 3 of the basic law of adjudication,³³⁰ is well rooted in the Israeli legal regime. In accordance with this principal, most Israeli court hearings are open to the public, including the media, which can report on the events occurring in court using any instrument or method, as long as the limitations on audio-visual coverage mentioned in Title 70(b) are enforced. The freedom of the press and the public's right to information are respected—at least partially—in the Israeli legal regime. Moreover, it should be noted that Title 70(b) does in fact leave courts the discretion to permit recording and broadcasting, and thus, constitutionally speaking, one can claim that audio-visual coverage can be introduced even under the current legal regime.³³¹

In practice, though, as mentioned, a *de facto* presumption against audio-visual coverage has evolved over the years. Currently, courts allow the media to photograph the judges entering the courtrooms, but request the media to stop recording before hearings begin.³³² The media may also conduct and broadcast interviews with lawyers and their clients outside of courtrooms and, along with the Israeli public, can also find meaningful data on court hearings—sometimes including transcripts of oral arguments—and decisions online, at the relevant courts' websites. The transcripts are often made available to the parties involved, and the media may request permission to review them. The media can access judicial proceedings on a regular basis, subject to the limitations of Title 70(b). This incoherent regime of mediated permission and qualified freedom of the press has characterized the Israeli reality for many years without any changes or public debate. The year 2000 marks the first change to this reality.

A. *The Beginning of a Change in 2000 and the Beinisch Report*

Troubled by the limited number of permits to broadcast court hearings issued by Israeli courts over the years, a few members of the Israeli parliament, the Knesset, attempted to promote a legal change by submitting a proposal to amend Title 70(b). Originally, the proposal was radical and sweeping and recommended that the presumption against audio-visual coverage be reversed, allowing it unless otherwise decided by the court. With time, and after much political compromise, the proposal was narrowed down and focused mainly on a two-year pilot

³³⁰ Basic Law of Adjudication, 5774-1984, 1110 SH 78 (Isr.)

³³¹ Jonathan Klinger and Ido Keinan, *To Record in Courts? It is Desirable and Allowed*, THE SEVENTH EYE (Nov. 9, 2014) <http://www.the7eye.org.il/125527> (claiming that the current Israeli legal regime allows audio recordings of court proceedings. The authors' rationale can also be applied to video recordings).

³³² *Beinisch Report*, *supra* note 12, at 17.

program in which court hearings of the ISC—sitting as the High Court of Justice (“HCJ”)—would be broadcast live.³³³

In response to this proposal, the then minister of justice appointed a public committee to study the question of whether to open Israeli courts to audio-visual media coverage.³³⁴ The Beinisch committee, as it was known, submitted its conclusions in 2004, in which it seemed to oppose universal audio-visual coverage, recommending a more narrow and limited pilot—both in scope and in duration. The committee proposed that the pilot would be implemented only at the HCJ, which would be granted full discretion around the choice of whether to allow the broadcast, according to vague criteria. “[R]equests to broadcast should be considered favorably when allowing the coverage serves the public interest and might contribute to the public knowledge of the court’s work.”³³⁵ The committee further recommended that no changes be made to the legal regime regarding audio-visual coverage of other cases brought before the Supreme Court or any other court, and that the presumption *against* audio-visual coverage be preserved. It also proposed the establishment of a professional steering committee to address the financial and technical issues that might arise during execution of the pilot.³³⁶

B. *The Days After the Beinisch Report and the Gap Between Law and Technological Development*

Though more than a decade has passed since the Beinisch report, none of its recommendations have been implemented.³³⁷ Israeli courts continue to receive zero to minimal live coverage.³³⁸ During those years, several parliament members have submitted proposals whose structure and content are nearly identical to those of their predecessors, seeking to amend the law and revoke the current presumption against audio-visual coverage. The most recent of these proposals was submitted in 2015 and has yet to be considered by the Knesset.³³⁹

Life outside of the Knesset walls, however, has been much more dynamic. Immense technological developments in the years since the Beinisch report have made a significant impact not only on the role of the media in covering Israeli courts, but also on the techniques by which

³³³ For background on the establishment of the Beinisch Committee, see the *Beinisch Report*, *supra* note 12, at 20-21.

³³⁴ *Id.* at 128.

³³⁵ *Beinisch Report*, *supra* note 12, at 114–115.

³³⁶ *Id.*

³³⁷ Ron, *supra* note 15. *See also* A Proposal to Amend the Law of Courts (Transparency of Legal Proceedings - Petitions of Public Matters) 2013, <http://www.knesset.gov.il/privatelaw/data/19/521.rtf> (page 2 to the explanatory notes) (Isr.).

³³⁸ This does not include the 2014 decision to implement a pilot as discussed below.

³³⁹ A Proposal to Amend the Law of Courts (Transparency of Legal Proceedings - Petitions of Public Matters) 2013, <http://www.knesset.gov.il/privatelaw/data/19/521.rtf> (Isr.).

these courts are covered. Despite the prohibition by Title 70(b) of live broadcasts from courtrooms, media outlets have found creative ways to overcome the limitations of the law.

For instance, media reporters inside courtrooms have started the practice of sending their counterparts—sitting outside—text messages or tweets describing courtroom events, remarks made by the judges, questions asked by the attorneys, and any other salient details. Their counterparts immediately broadcast these messages to viewers.³⁴⁰ During the trial of the former Israeli President, Moshe Katzav, a reporter from Channel 10 used this method by sitting inside the courtroom and delivering direct information to the public.³⁴¹ During the criminal trial of former Israeli Prime Minister Ehud Olmert, a reporter from Channel 2 provided a full live description of the verdict from within the court, which was immediately transmitted to viewers at home.³⁴² To facilitate this detailed live report, the channel hired a typist to sit in court and type a full description of events as they occurred.³⁴³

The media's ability to harness modern technology through methods that *formally* fall within the boundaries of Title 70(b), though in practice divert from its original intent, constantly challenges the legal prohibition to record and film court proceedings. It establishes an inappropriate reality in which the formal legal norm and the principles embedded within it are improperly enforced while no actual attempts are made to consider amendments to the existing legal regime, since the law is allegedly not being challenged.³⁴⁴ This gap between the formal written norm and the law in action calls for the adoption of a new regime for audio-visual coverage of courts in Israel. This new regime should bridge the disparity between current law and the media's behavior, which currently does not conform to the essence of the normative order, but instead makes it look somewhat ridiculous. The public importance of the issue is evident: the media's creative solutions to an inconvenient legal prohibition clearly demonstrate the importance of audio-visual coverage of Israeli courts, and the need to restore order to a chaotic situation.

Israeli authorities' attempt to launch a new pilot in 2014 ("the Pilot") provided a fresh opportunity to engage with this issue. As

³⁴⁰ Peleg, *supra* note 324.

³⁴¹ Niv Shtendel, *The Katzav Case—The Saddest Party in Town*, ACHBAR HA'IR (Nov. 10, 2011, 12:15 PM), http://www.mouse.co.il/CM.television_articles_item,790,209,64440,.aspx (discussing the ways by which the media covered the sensational trial of the former Israeli President).

³⁴² *See id.*; Ron, *supra* note 15 (criticizing the gap between the formal legal norm and its actual implementation).

³⁴³ *Id.*

³⁴⁴ As mentioned, proposals to amend the law are being submitted over and over again by parliamentary members, but they are not being discussed by the Knesset. *See also* Ron, *supra* note 15.

mentioned, in September 2014 the former Israeli minister of justice and chief justice launched a limited pilot to allow live coverage of court hearings at the ISC. Two hearings were broadcast—one through audio and one through video.³⁴⁵ Since November 2014, no other hearings have been broadcast. The only guidelines for the application of the pilot were that the cases covered concern matters of public importance—civil, criminal, administrative, and constitutional issues. Besides this vague definition, the authorities did not craft any clear or coherent arrangement or provide any explanation of these criteria.³⁴⁶ Moreover, no public debate either preceded or followed the decision to launch the pilot. On top of that, it seems that the Israeli authorities overlooked the complex set of legal, social, and practical issues that revolve around audio-visual coverage and failed to erect a framework that balanced the different considerations. Another challenge for the Israeli pilot is the lack of formal mechanisms to evaluate the pilot.

The pilot's failure to engage with the complexities of live courtroom coverage and the lack of any clear standards or guidelines in its approach emphasize the importance of utilizing the framework suggested in this Article. Indeed, suggesting an Israeli policy on audio-visual coverage is a challenging task. The main challenge stems from the fact that the Israeli legal regime on the matter has not evolved over the years. There are no clear guidelines that govern it and no public debate exists on the issue. In fact, one can hardly find any internal sources—legal or otherwise—on which Israeli policy makers can count when assembling new policy recommendations. There follows, therefore, a careful import of external normative and practical arrangements, relying on rich and nuanced comparative data.

C. Implementing the Framework: Suggested Policy in the Israeli Context

I would like to offer a new audio-visual coverage policy for Israeli courts.³⁴⁷ Such a policy is consistent with those adopted by many high courts around the globe, especially in common law countries. It clearly strengthens the principle of public trials by making courts accessible—at least virtually—to parts of the population who are unable to physically attend hearings. Moreover, a decision to allow audio-visual coverage minimizes the distance between Israeli society and the Supreme Court, with the potential to expose many parts of society to the most prominent issues dealt with by the Israeli legal system. The decision also has the potential to increase public trust in the courts

³⁴⁵ See Part I.

³⁴⁶ *Id.*

³⁴⁷ When offering that policy, and when appropriate, I will refer to the challenges of the Pilot suggested by the Israeli authority and suggest ways to tackle these challenges.

system and promote judicial transparency. This decision narrows the gap between the formal norm—which led to a de facto presumption against live transmission from courtrooms—and the reality in which the media use modern technologies to produce de facto coverage without any formal permission from the Israeli authorities.

This suggested policy is also an important step for media outlets, since it expands the ways in which they can fulfill their social role. It puts a burden on their shoulders, however, with heightened responsibility to accomplish their educational role. It will be interesting to see how Israeli media behave under a new audio-visual coverage policy. Clearly, their behavior will affect any future decisions concerning audio-visual coverage of Israeli courts.

1. Point of Departure—Establishing a Presumption For Audio-Visual Coverage

I suggest implementing the policy framework in the following manner. As previously mentioned,³⁴⁸ there are a few strong considerations supporting the idea that court hearings should be broadcast live. I believe that these considerations outweigh—both theoretically and practically—the opposing considerations, especially under the current Israeli legal regime in which Title 70(b) does not ban audio-visual coverage but rather requires the approval of the court.³⁴⁹ This is especially true in the Israeli setting, where principles of open government and transparency are uniformly promoted by legislation and case law in other settings. Consistent with the analysis of the constitutional evolution of audio-visual coverage in other common law jurisdictions, this legal framework is by all means sufficient in order to allow the coverage. Any arguments that clear acknowledgment in a constitutional right to audio-visual coverage should precede the implementation of coverage policy should be rejected, given that such recognition was proven not to be essential for the purposes of allowing audio-visual coverage in other common law jurisdictions. This is especially true given the decision of the Israeli Ministry of Justice to launch the pilot allowing live coverage of court hearings, which emphasizes the judiciary's "ripeness" to take that step. Moreover, given the fact that judges in Israel receive tenure from their first day on the job and usually retire only when they are 70,³⁵⁰ and since Israel does not use the jury system, the arguments that call for limiting audio-visual coverage due to its potentially harmful effects on judges and juries are

³⁴⁸ See discussion *infra* Part II.

³⁴⁹ Law of Courts, *supra* note 13.

³⁵⁰ *Id.*, at tit. 11–13. See tit. 13–14 for exceptions to the rule.

significantly weakened.

As a point of departure, I suggest changing the existing burden of proof³⁵¹ and adopting a positive presumption for audio-visual coverage—that can be contradicted—according to which the Israeli judiciary permits coverage of trials, unless specific circumstances or legal constraints disallow it. I suggest applying permission to cover all cases in all instances, so that the party that opposes the coverage must submit a request to restrict it. However, due to the importance of establishing this new regime carefully and cautiously, being conscious of the potential costs it might bear on the judicial process, I suggest first adopting a pilot only at the ISC, with intent to expand it to other courts at later stages, including trial courts in which witnesses are heard.³⁵² The decision on when to expand the policy should be reached after a careful systematic evaluation, using rigorous social science methods.

2. Types of Cases

The decision of the Pilot to cover only cases of “public importance” demands some clarification. For instance, it is not clear who decides if a case is of “public importance”—is it the judge? And, if so, what are the criteria used to reach this decision? Would the mere fact that a request to broadcast was submitted suffice to define a matter as publically important? Would the burden be on the media to convince the court that a case is of “public importance?”

Given the advantages of adopting a presumption for audio-visual coverage, the rationale behind the limitations imposed by the pilot seems unconvincing at best, and so I suggest omitting the demand for public importance as the main—and only—justification for live broadcast of a hearing. Instead, the public importance of a case should be only one of many other considerations to be weighed when reaching a decision about whether or not to disallow coverage.

3. Types of Courts

Generally speaking, there is no justification for limiting audio-visual coverage only to the Supreme Court on a permanent basis—as suggested by the Pilot. If the Supreme Court was chosen because it doesn’t hear witnesses or evaluate evidence—hence eliminating the fear of affecting witnesses—other courts in Israel that fulfill these criteria should receive coverage as well. If the underlying assumption is that the Supreme Court receives more cases of “public importance,” there are

³⁵¹ Currently placed on those requesting the coverage, who must convince the court why their request should be granted. *See* Law of Courts tit. 70(b).

³⁵² For the sake of argument, and as opposed to most of the studies, I am willing to assume here that the presence of cameras might somewhat affect witnesses, and therefore agree that, at least during the first stage, trial courts should be excluded from the policy.

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other courts in Israel that handle matters at the same level of importance and should receive the same exposure. Criminal cases in which important public figures are standing for a trial—usually before the district or even the magistrates' courts—are such cases.

In practical terms, though, I suggest that at this stage the pilot will be implemented only at the Supreme Court so that it will be carefully evaluated before expansion. Implementation would also be easier since it is only one court with a relatively small number of courtrooms and judges.

4. Judicial Discretion

The policy should include clear criteria that can assist judges reaching a decision when asked not to permit audio-visual coverage, and a clear statement regarding the adoption of positive presumption supporting such coverage. A model close to the Californian model should be adopted due to its comprehensiveness.³⁵³ A clear statement of the interests that should be considered is especially important at these early stages of the pilot in which judges address these issues for the first time.

5. Position of the Parties

Since it is suggested to adopt a positive presumption supporting audio-visual coverage, there should not be an inherent necessity in receiving the positions of the parties before a case is covered. For the same reason, under the suggested policy, parties should not get a veto right on the decision not to broadcast, but rather their opinion should be considered as one of many considerations. This is especially true with regards to parties who choose to go to court. With the lack of any formal legal constraints, these parties don't have a reasonable expectation that their hearing would remain private. Moreover, parties might have personal interests in not broadcasting their trials, which shouldn't supersede other important interests protected by the decision to allow live broadcast. The same logic should be applied when considering the opinions of the parties' lawyers.

6. Technical Elements

i. Location of Cameras

Given that the new policy should be first implemented at the ISC, locating cameras within the Supreme Court courtrooms would be the best solution for the time being. First, it is the least intrusive solution and cameras can be safely located within the courtroom, as was done in

³⁵³ See *supra* note 216 (factors to be considered by the judge).

the November 2014 broadcast. Second, this solution is not difficult to implement given its limited scope. Third, this solution will in fact improve the current situation where media teams—and their equipment—crowd over Supreme Court courtrooms before hearings begin in order to take still photos in ways that cause nuisance to parties, lawyers, and judges. Given the evaluation of the pilot, future decisions should be made as for the location of cameras in other courts.

ii. Who is Broadcasting?

An ideal scenario would be for the Israeli Supreme Court to establish a direct streaming channel of its proceedings. This would provide the public direct and non-mitigated access to court hearings. Since putting this channel in place might take a while, and due to the fact that the Israeli TV market is relatively small—comprised of only three news channels³⁵⁴—I suggest that initially, each media team will be allowed to enter the courtrooms. The presence of the media and its potential effects could then be evaluated as part of the overall pilot evaluation scheme. Moreover, if during the pilot the physical presence of media teams could be replaced with cameras located within the courtroom, an intriguing opportunity for an evaluation of the effect of physical media presence versus cameras within the courtroom will arise.

iii. Clear Procedures on How to Submit Requests Not to Broadcast

Clear regulations that govern the procedure of how to submit a request to prevent broadcast of a specific hearing are in order. The regulations should provide a time frame for the submission—how many days in advance of the hearings should one request to prevent the coverage? Who is the relevant figure to reach the decision—the Judge? The Court's Registrar? When should decisions be given and what is the procedure to appeal if someone is displeased with the decision given in her matter? Due to the heavy workload of judges in Israel,³⁵⁵ I believe that requests to prohibit coverage should be submitted at least ten days in advance, to allow ample time for the authority deciding the issues to reach a decision, get the response of the parties, and hold a hearing if need be.

7. Evaluation Scheme

The decision to launch the pilot in Israel was not followed by a decision to appoint a committee that will be responsible for evaluating the pilot. Clearly, no criteria according to which the pilot should be evaluated have been decided, nor the methods of evaluation-polls,

³⁵⁴ See Ravid, *supra* note 113, at 133–137.

³⁵⁵ See Socialiano-Kenan et al, *supra* note 113.

experiments, etc. In order to maximize the ability to withdraw conclusions as for the effects of the pilot on the legal proceedings in Israel and to decide whether the pilot should be changed, expanded, or cancelled, an evaluation committee should be appointed. It is believed it should include representatives from the ministry of justice, a Supreme Court justice, a social scientist well versed with methods to evaluate policy effects, and a representative of the media.

V. CONCLUSION: BEST DISINFECTANT INDEED

Precisely because I'm familiar with the heavy workload of the courts, because of the transparency that is inherent to the work of courts and the duty to maintain the public trust in the courts, a decision not to provide the requested data – data that the public has the right to receive – sends a bad message of an attempt to hide and leave the courts in the dark. I believe the judicial system has nothing to hide. I believe that the public should be exposed to the hard and Sisyphean work of the courts and the unimaginable workload. Precisely because of the perception that judges work in the open, under the sun, it will be wrong not to deliver the information based on reasoning that mostly reflects mistrust in the judiciary's strength and their full commitment to their mission.³⁵⁶

This intriguing quote, taken from a recent decision in an Israeli case,³⁵⁷ could have been written in many other jurisdictions around the globe. It represents what seems to be the consensus among supporters of transparency of the legal system and public trials. For some reason, when the issue of allowing cameras into courtrooms is brought up—undoubtedly a powerful tool in promoting transparency—these loud supporting voices suddenly fade away.

Unfortunately, most of the debates surrounding audio-visual coverage tend to take a populist, non-systematic approach, neglecting rigorous academic discussions and empirical evidence. This Article addressed this problem. Through an analysis of the doctrine on cameras in courts, empirical findings, and comparative analysis of five different common law jurisdictions and their audio-visual coverage policies, the Article was able to suggest a coherent, overarching perspective on such policies.

As I suggested, the need to address audio-visual coverage policies

³⁵⁶ AdminA 3908/11 Israel Courts' Administration v. The Marker Newspaper (2014) (Isr.) (not yet published).

³⁵⁷ *Id.*

intensifies in the current era of hyper-technology. There is no real doubt that technology challenges legal systems in a variety of settings and contexts. Audio-visual coverage of courts is yet another example of how policy makers need to constantly adapt to changes within the digital world. As this Article illustrated, a main concern for policy makers should be the gap between coverage policies—located on a wide spectrum of permissiveness—to the media’s creative ability to detour formal restrictive rules by allowing de-facto audio-visual coverage. This occurs, for example, in the Israeli setting where news reporters tweet from within courtrooms or even use typists to send comprehensive reports through text messages, despite a formal ban on audio-visual coverage. This represents an unwarranted gulf between the formal legal norm—aiming to strike a delicate balance between rights to free trial and privacy and free speech, free press, and open trials—and the de facto coverage that can potentially stager this balance.

In suggesting a policy-oriented framework for audio-visual coverage of court proceedings that takes into account technological developments, three main arguments were presented. First, the Article illustrated how constitutional principles evolve in similar ways by courts across different jurisdictions. Simultaneously, it showed how these constitutional principles became somewhat secondary to the implementation of policies relating to the courts by courts themselves. As argued, while *all* courts in the surveyed jurisdictions recognized the public importance of audio-visual coverage, none were willing to draw a direct constitutional right to coverage. Regardless of such inclination, most jurisdictions were willing to allow audio-visual coverage within their courts only when the judiciary itself was willing to take that step. This highlighted what I referred to as the politicization of constitutional law, *i.e.*, the power of the judiciary in tailoring flexible constitutional balancing tests when it comes to judicial matters and by so doing, preserving their institutional power. I thus argued that the constitutional debate around audio-visual coverage is in fact marginal in the overall scheme of things, and that main attention should be given to the views of the judiciary, existing empirical data on the potential effects of coverage, and different mechanisms adopted around the world to address the concerns of the judiciary.

The Article showed that the vast majority of evaluation studies conducted in different jurisdictions were not able to directly link the introduction of cameras in courts to changes in attitudes or behaviors of parties to the legal process. The empirical data thus contradict most of the claims made by opponents of audio-visual coverage, most notably courts themselves. Moreover, the Article showed that whenever courts were willing to allow audio-visual coverage, jurisdictions were able to adopt a varied host of arrangements aiming to address some of the

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concerns of lawyers, parties, juries, and judges without banning coverage altogether. I then offered the first analytical framework for those interested in designing anew or modifying existing policies of audio-visual coverage of courts, while taking into account the idiosyncratic features of each jurisdiction, and the challenges and benefits set forth by technological advancements.

Building on these conclusions, the study was the first to embark on an academic discussion regarding audio-visual coverage in Israeli courts. A minor, unsatisfying pilot program to allow audio-visual coverage of ISC hearings held in 2014 opened the gate for such a discussion. By analyzing the current Israeli legal regime, legal and policy limitations that are unique to the Israeli setting, and the comparative perspective, the Article suggested the first comprehensive coverage policy of Israeli courts, offering a balanced arrangement that will strengthen fundamental principles of Israeli democracy. Such policy, it was argued, will provide Israel with the opportunity to create a thorough and detailed arrangement that will not only set an example to other countries, but will also allow Israel to keep up with technology advancements.

But the findings of this Article go well beyond the Israeli setting. First, the policy oriented framework provided can be used by other jurisdictions going through changes in their audio-visual coverage policies. More broadly, and equally important, the Article offered a case study through which one can understand and discuss the politicization of constitutional law, think of how courts can adapt and design flexible legal frameworks that conform to the interests of the judiciary, and thus ironically turn the law to be somewhat marginal in the overall development of policies. The Article showed this holds true for audio-visual coverage of courts. I do not see a reason why this should not be the case when it comes to other judiciary-centered policies.