16
ADAM MICKIEWICZ UNIVERSITY LAW BOOKS

AMERICAN LAW AND AMERICAN JURISPRUDENCE: INTERPRETATIONS, CHALLENGES, PROCEDURES

Edited by
Łukasz D. Bartosik
Michał Urbańczyk
Damian Szlingiert

WYDAWNICTWO NAUKOWE UAM

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PREFACE AND ACKNOWLEDGEMENTS

The book the reader is holding in his hands is titled *American Law and American Jurisprudence: Interpretations, Challenges, Procedures*. It is already the sixteenth title in the Adam Mickiewicz University Law Books series, in which the scholars of the Faculty of Law and Administration, alone or together with other invited scholars from all over the world, present the effects of their research. Among them, a prominent place is occupied by comparative legal studies and analyses of the legal systems of selected countries. Thus, volume XIV of the discussed series dealt with selected aspects of collaboration of agricultural producers and was titled *The Legal and Economic Aspects of Associations of Agricultural Producers in Selected Countries of the World*.[1] Volume XII, the subject of which was an analysis of the application of civil law in the public sector, was titled *Constitutional Barriers to the Applicability of Private Law in the Public Sector. A Comparative Study with Particular Emphasis on Polish and German Law*.[2] Volume VII, entitled *Legal and Socio-Economic Changes in New Zealand*,[3] dealt with legal, economic and social changes in New Zealand.

This time, researchers from the Law and Administration Faculty of Adam Mickiewicz University in Poznan, together with invited guests present their research on American law and American legal theory. It is worth emphasizing at this point that this is not the first publication on American law written under the leadership of the Poznan Americanists. The emerging university research center of American law, with the active support of the Center For American Studies (CFAS),[4] has published several books on American law in recent years: *Idea godności człowieka w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych Ameryki*,[5] *American*

[1] *The Legal and Economic Aspects of Associations of Agricultural Producers in Selected Countries of the World,* Aneta Suchoń (ed.), Poznan, 2020.

[2] *Constitutional Barriers to the Applicability of Private Law in the Public Sector. A Comparative Study With Particular Emphasis on Polish and German Law*, Rafał Szczepaniak (ed.), Katarzyna Kokocińska, Marcin Krzymuski, Poznan, 2020.

[3] *Legal and socio-economic changes in New Zealand*, Mieczysław Sprengel (ed.), Poznan, 2019.

[4] https://cfaspoland.org.

[5] Michał Urbańczyk, *Idea godności człowieka w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych Ameryki*, Poznan, 2019.

& European Intellectual Property Law: Theoretical Reflections & Contemporary Challenges,[6] *In Search of the Euro-Atlantic Doctrine of Freedom of Speech*,[7] *Stany Zjednoczone Ameryki a polityka zagraniczna i prawo międzynarodowe*,[8] *Konstytucja USA. Ze studiów nad amerykańskim systemem politycznym*,[9] *Amerykańska myśl polityczna, ekonomiczna i prawna (Tom I)*,[10] *Ostoja wolnej republiki czy relikt przeszłości? Prawo do posiadania broni w perspektywie interdyscyplinarnej*.[11]

* * *

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[6] *American & European Intellectual Property Law: Theoretical Reflections & Contemporary Challenges*, Łukasz D. Bartosik, Szymon Curyło, Michał Urbańczyk (eds.), Poznan and Lodz, 2020; [online] https://www.archaegraph.pl/lib/l231bv/IP_ebook-kav7camm.pdf [10.10.2020].

[7] *In Search of the Euro-Atlantic Doctrine of Freedom of Speech*, Michał Urbańczyk, Łukasz D. Bartosik, Natalia Zagórska (eds.), Poznan and Lodz, 2019; [online] https://www.archaegraph.pl/lib/l231bv/Wolnosc-Slowa_Tresc_ebook-jtrfr7vi.pdf [10.10.2020].

[8] *Stany Zjednoczone Ameryki a polityka zagraniczna i prawo międzynarodowe/The United States of America: Foreign Policy and International Law*, Michał Urbańczyk, Łukasz D. Bartosik, Aleksandra Ratajczak (eds.), Poznan and Lodz, 2018; [online] https://l231bv.webwavecms.com/lib/l231bv/Polityka-zagraniczna-i-prawo-miedzynarodowe_ebook-jtrfplau.pdf [10.10.2020].

[9] *Konstytucja USA. Ze studiów nad amerykańskim systemem politycznym/The United States Constitution. From the Studies of the American Political System*, Michał Urbańczyk, Łukasz Bartosik, Marcin Tomczak (eds.), Poznan and Lodz, 2018; [online] https://l231bv.webwavecms.com/lib/l231bv/Konstytucja_Ebook_calosc-jtrh5kv8.pdf [10.10.2020].

[10] *Amerykańska myśl polityczna, ekonomiczna i prawna (Tom I)/American Legal, Political & Economic Thought– Selected Problems (Volume I)*, Michał Urbańczyk, Łukasz Bartosik, Marcin Tomczak (eds.), Poznan and Lodz, 2018; [online] https://l231bv.webwavecms.com/lib/l231bv/Amerykanska-mysl-polityczna_-Ebook2-jtrf0645.pdf [10.10.2020].

[11] *Ostoja wolnej republiki czy relikt przeszłości? Prawo do posiadania broni w perspektywie interdyscyplinarnej/An Anchor of a Free Republic or a Relict of the Past? Gun Rights in Interdisciplinary Perspective*, Łukasz Bartosik, Marcin Tomczak (eds.), Poznan and Lodz, 2018; [online] https://l231bv.webwavecms.com/lib/l231bv/Prawo-do-posiadania-broni_ebook-jtrfmvri.pdf [10.10.2020].

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Foreword

THE IMPORTANCE OF AMERICAN SOLUTIONS FROM THE PERSPECTIVE OF EUROPEAN RESEARCH OF PHILOSOPHY OF LAW, POLITICAL AND LEGAL THOUGHT, AND GENERALLY APPLICABLE LAW

Łukasz D. Bartosik and Michał Urbańczyk

It might be said that for a European researcher of political and legal thought or a theoretician or philosopher of law who conducts his work in the field of statutory law—especially one who analyzes the legal systems of particular nation-states—direct reference to American solutions is both an impractical and theoretically idle undertaking. What would be the ostensible value of analyzing American ideas on political and legal institutions of such a historically and structurally distant origin? After all, there is no doubt that the implementation of these American ideas and institutions—although often attractive from a purely conceptual point of view—is an extremely difficult task within the legal systems of European states (and often a completely impossible one).

The first insurmountable barrier lies in the glaring ontological differences in the structure of both legal systems: the flexible and sometimes unpredictable American common law on the one hand, and the more rigid but relatively predictable continental law on the other. It is those differences that cause practical difficulties in attempts to "transplant" solutions from the United States in Europe without violating the fundamental systemic and legislative principles developed on the basis of the continental theory of law.

Apart from these difficulties standing in the way of practical adaptation of solutions from the field of American jurisprudence in European states, there are also obvious differences in the historical conditions of the functioning of both legal systems. In the American political and legal system, the role of the state is determined by the constitutional principles of limited government, federalism, and the unalienable natural rights and freedoms of the individual, which have maintained

their political magnitude uninterruptedly since the adoption of the Constitution of the United States of America in 1787 until this day.

In the systems of continental European law—allowing for some generalization—the role of political authority, and consequently legal institutions, is already more active already on the basis of the constitutional principles of individual nation states, while the implementation of the ideals of the welfare state often requires a higher degree of interference in the sphere of private and economic life of individuals.[1] This does not mean, of course, that there have not been (sometimes effective) attempts to implement solutions developed on the European legal ground in the United States (this was the case, for example, in the context of universal healthcare). However, there are still profound differences between the two theoretical approaches and their practical aspects, which do not allow for "transplantation" of legal-political solutions from both sides of the Atlantic in a simply cross-functional manner.

For example, there are no serious reasons for us to expect in the near future the adaptation of such solutions characteristic to the American legal system as the election of the President by the Electoral College, universal participation of juries in deciding the defendant's guilt in criminal and civil cases, or the legality of publicly propagating anti-democratic views in the exercise of freedom of speech (as guaranteed by the First Amendment to the U.S. Constitution). Does this mean, then, that researching American political and legal ideas and institutions and their functioning is in practice an intellectual whim? Not so. The editors of this volume take a firm position that it is quite the opposite.

First, it should be noted that, despite the various structural and historical differences between the legal orders of the United States and particular European states, the United States is the first constitutional republic in the world to implement—from the very beginning of its existence—the ideal of the rule of law guaranteeing respect for rights and freedoms to its citizens endowed with the inalienable feature of dignity common to all human beings.[2] Right now, at the threshold of the third decade of the twenty first century, it is the issue of the rule of law—concerning its underlying ideas, institutions, and theoretical disputes about the

[1] This statement, of course, concerns the philosophical ideas underlying the construction of both legal systems. There are many far-reaching solutions in American legislation limiting the right to privacy or personal freedom, e.g., in the field of combating terrorism. One example of such a solution is the so-called PATRIOT ACT (*An Act to deter and punish terrorist acts in the United States and across the globe, to enhance law enforcement investigatory tools, and for other purposes*). 115 Stat. 272 (2001).

[2] It warrants mention that it is beyond the scope of this introduction to refer to the turbulent history of violations of these rights on the American population of African descent from colonial times to the Civil War, and the almost 100-year history of racial segregation. For more on dignity as a concept which was fundamental already in the founding era of the United States please refer to the first chapter of Michał Urbańczyk, *Idea godności człowieka w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych Ameryki*, Poznan, 2019.

limits of exercising democratically legitimized public authority—that is the most topical and burning question, both from a theoretical and practical perspective.

At this point, it does not seem exaggerated to say that almost the entire Euro-Atlantic legal and political tradition shaped after World War II is based precisely on the search for solutions that will ultimately lead to the implementation and preservation of both the material and formal requirements of the functioning of a democratic state of law. While the European theory of law from the nineteenth century until the mid-twentieth century was consistently on its way toward formalization, gradually moving from positivism to normativism (in which it reached the apogee of its "purity," breaking away from the social and ethical role of the state in the law's basic constructional layer), in American jurisprudence the variety of legal institutions and the functions assigned to them have never, even for a moment, broken away from the material—social and ethical—aspects of key importance for the realization of the ideals of the rule of law. One would like to say: the execution was American, but the goal remained common at both sides of the Atlantic.

It is for the above-mentioned reason that American legislation (both at the federal and state level) and law-making activities of American courts provide source material for doctrinal, theoretical and comparative research to European legal researchers. Although in the layer of detailed solutions and the ontological structure of the legal system, the differences between the European legal orders and the legal order of the United States are often insurmountable in terms of legal dogmatics and application of law, the findings made within the philosophical or social premises justifying individual legal or political U.S. institutions are a vital point of reference for considering the ideological foundations of the legal and political system also in Europe.

This is especially true in countries which, after the fall of the Berlin Wall, adopted the model of liberal democracy guided by principles such as freedom and dignity of all men, individualism, equality before the law, or the freedom to undertake economic activity and participate in economic transactions unhampered by the state. Not only on the pages of the American Constitution and ordinary statutes these principles have received their supreme status from a legal and political point of view. All American legal theory and practice, collectively referred to as jurisprudence, was intended—from the dawn of the American state—to pursue the values underlying these principles. They served as foundations of the most important American institutions and the most important theoretical and political disputes have continuously revolved around them. Let one of the evidence for this be the fact that it is difficult to distinguish any clear line between legal theory and practice in the U.S. legal system. The great American experiment in which the knowledge (*episteme*) about law and the practice (*praxis*) of law have remained in a constant feedback loop for over two centuries, depending on the context of par-

ticular historical social and economic circumstances, could often provide people living in the Old Continent with more clues on how to cope with challenges facing Europe and the legal systems of individual European states than many formal solutions developed on the basis of continental legal theories.

The importance of research of American jurisprudence and the undertaking of legal comparative studies by scholars from Europe requires one more additional comment. While in the countries of the Eastern Bloc/ real socialism it was not possible to reconcile the obviously contradictory fundamental ideas of the theory of the state and law with the ideas on which the United States was founded (take, for example, individualism *versus* collectivism, free market economy *versus* centrally planned economy), today, when almost all European countries to a greater or lesser extent pretend to advance the model of liberal democracy, analyzing the long, two-hundred-year tradition of functioning of democratic political and legal solutions in the United States can be both a positive inspiration and a warning in implementing similar ideas and institutions in Europe. Taking into account the common ideological premises constituting the entire Euro-Atlantic legal and political tradition, it should not be surprising that European readers are increasingly interested in undertaking research on American law and American jurisprudence.

Both the editors of this volume and the authors of the chapters included in it adopted the optics of considerations focused around those ideological foundations of the legal system that are common to the entire Euro-Atlantic tradition in thinking about law and politics, developed in Western countries after World War II and in the countries of Central and Eastern Europe after 1989.

Although the publication covers a wide range of detailed legal solutions and theoretical issues—from abortion, through the judicial system and freedom of speech, to the interpretation of the law—the core of the considerations remains common to all texts. It is an attempt to show the values and shortcomings of the ideas, institutions and practical procedural solutions functioning in the United States, together with an attempt to answer the conclusive question of the entire publication: to what extent does the political and legal system of the United States, with all its described experiences, realizes (and realized) the ideals of freedom, equality and justice, together defining the essence of the rule of law as the common Euro-Atlantic ideal?

The considerations delineated above point to the belief in the great importance of American solutions and their great value for the European reader. At the same time, however, they prove that European researchers of American law face a real challenge each time they attempt to study it. For what is the most appropriate way to study American jurisprudence and American law? The most straightforward way is a simple description of selected problems (ideas, institutions or procedures), without any reference to European experiences. Such method, how-

ever, is the least productive due to the already demonstrated differences between the two traditions.

The second possible method is that of comparative legal studies: the selection of ideas or institutions appearing in both legal orders (or those which show some similarities or differences) and their analysis. In such a case, European researchers can draw analogies between institutions and procedures, look for common elements in political and legal thought, emphasize the connectivity and indissolubility of the Euro-Atlantic tradition, and do so often in opposition to the legal traditions of other cultures and civilizations. They can, of course, also go in the opposite direction: indicate the uniqueness and distinctiveness of American law and jurisprudence, and emphasize the separation between the two Western traditions.

There is, however, a third method, and not necessarily an intermediate one: using tools and methodological instruments characteristic of European law and legal sciences in order to research American problems and their solutions. In other words, applying European tools to American legal challenges and their solutions, and *vice versa*—using the instruments of American jurisprudence to draw attention to possible solutions (often innovative or surprising) of classically European problems. And although such research on American law from a European perspective cannot escape the usual characteristics of the first approach (descriptive method) and also at least some form of comparative studies, the third method seems to be the most intellectually attractive and capable of producing the most fruitful outcomes of academic work. It is precisely in this way that the authors of the individual texts of this publication have decided to look at selected issues which they considered to be the most important, current and cognitively valuable for the European reader. What is worth emphasizing, and what seems to be an added value of the publication, each of the authors slightly differently balanced the proportions of the usually descriptive characteristics, the comparative layer, and the use of the typically European legal and political science research methodologies when analyzing American legal and political ideas, challenges, and institutions.

In order to link the selected research problems with each other, the authors specified that the works would be conducted in three legal and political contexts, an idea which is reflected in the division of topics and their arrangement in the publication. Part I is entitled *Ideas and Interpretations*, and its leitmotif is the presentation of selected American political and legal concepts and ideas and their interpretation from the perspective of the research apparatus of the European legal sciences. To start from the very core of the theory and philosophy of law, the first discussed topic is American concepts of legal interpretation, which are characterized from the point of view of one of the European concepts of legal interpretation, namely the derivative theory of legal interpretation developed by Zygmunt Ziembiński and Maciej Zieliński. To see how the concepts of legal interpretation

discussed above are applied in practice, one should refer to case-law and jurisprudence. This is why the second chapter in this section presents the American understanding of human dignity in the judgments of the U.S. Supreme Court. The field of research exploration was the idea of human dignity in the American political and legal tradition, with particular emphasis on the judgments of the U.S. Supreme Court. The author decided to choose dignity as one of the key ideas of contemporary liberal democracy (recognized today, next to freedom and equality, as the fundamental value of the democratic order and the foundation of human rights).

However, in order not to deal only with the sphere of human rights, the third text presents the characteristics of a selected concept of commercial law. The chapter, although dealing with a specific legal concept, shows the role of doctrine and theoretical reflection on the law, which must invariably involve solving consequential practical problems. It is worth mentioning that the sphere of economic freedom constitutes a significant value for the entire American legal order (as evidenced, for example, by the role of the constitutional trade clause—Commerce Clause—contained in Article I, section 8 of the U.S. Constitution). This part of the publication ends with a text presenting Richard Rorty's approach to interpretations of the truth. Due to its philosophical nature, it brackets the considerations presented thus far. Also in this text, American ideas are dealt with using the European methodological toolset.

After considering the ideas, their interpretation and their impact on the sphere of law and politics, Part II presents selected institutions and procedures of American law. The main idea of this part is the analysis of selected legal institutions, ranging from those that function in the immediate environment of an American citizen, to those institutions that are the crowning of the political and legal system of the United States. Therefore, Part II, entitled *Institutions and Procedures*, opens with a text on juries. It is worth recommending it to the attention of the European reader, for whom this institution is mostly not exactly foreign, but of relatively little practical importance.[3] While it is well-rooted in the Anglo-Saxon tradition (and therefore also partly in Europe), in the so-called continental law the participation of the civic factor is realized in a wholly different way.[4] Nonetheless, it is an institution of procedural law that is crucial for guaranteeing human rights (secured at the constitutional level in the United States) and omitting it would make incomplete any considerations about American law and jurisprudence. If the first text dealt with jury issues, then the next participant in U.S. procedures—the judge—is just as close to an average American citizen

[3] Apart from Great Britain (the cradle of the common law system), a jury functioned or still functions in such countries as Belgium, France, Spain, Ireland, Norway, Russia, and Sweden (in selected cases, especially in criminal cases involving offenses threatened with the most serious sanctions).

[4] An example from Poland is the constitutionally guaranteed institution of lay judges—non-professional judges who participate in the process of adjudicating in selected civil and criminal cases.

and therefore deserves equally careful study. Again, we are dealing with procedures that may astonish many European citizens (for example, it is difficult to imagine that judges in Poland would be elected in general elections). The third text shows the procedural threats present in the American legal system on the example of the SLAPP institution which involves taking legal action purpose of which is not to win the trial, but to end critical conduct in the public sphere as a result of instituting court proceedings. In this context, the author shows the similarities between the procedural practice in the United States and the cases of such actions in Poland. The fourth text once again returns to an institution specific to the U.S. legal system. It discusses the election of the U.S. President by the Electoral College—a topic that in the context of problems with holding presidential elections in Poland caused by the COVID-19 pandemic in 2020 has gained unexpected relevance.

The Third Part provides an overview of the challenges, problems and debates that the authors found to meet the criteria of topicality and importance on both sides of the Atlantic. In the era of the coronavirus pandemic, state aid for people who lose their jobs or at risk of losing their jobs has become one of the most burning problems. Meanwhile, on both sides of the Atlantic the welfare system is structured in radically different ways. That is why Part III, entitled *Challenges and Debates*, opens with a text presenting selected American social policies. Due to the fact that its content does not focus on the current challenges related to COVID-19, but presents their evolution in the twentieth and twenty first centuries, the European reader has the opportunity to learn about the path that led the United States to adopting a very different approach to social assistance and fighting unemployment than the one adopted in Europe.

Another social problem, which is the right to terminate pregnancy, should be considered equally topical and important. Despite its regulation in law and numerous changes to this law, its essence and scope is highly controversial, as evidenced by protests of both supporters of the broadest right to abortion and opponents of killing unborn children. The author, characterizing the American experience, provides valuable comparative material for European considerations.

There is no doubt that the temperature of the dispute is similarly high when it comes to debates related to the possible threat to democracy from populist antidemocratic and authoritarian movements, or even explicit calls for the return of totalitarianism. This particular issue—in the context of the limits of freedom of speech—found its place in the next text of this part of the book. It is worth paying attention to the fact that these questions are treated completely differently in the United States and in Europe (both at the supranational level and at the level of legal systems of individual states). And although this may raise doubts as to the possibility of comparing such different factual and legal situations, the authors concluded that the importance of these issues spoke in favor of taking up this topic.

The importance of freedom of speech is manifested in the fact that the problem of determining the appropriate limits of this right relates to many branches of positive law. It concerns not only human rights, but, for example, copyright, or more broadly speaking—intellectual property law. This is the issue in the penultimate text of this part, which presents the impact of the regulations on freedom of expression on the shape of the institution of fair use. In the era of digital civilization, where the Internet has become the primary communication channel, it is hard to find a more important problem than the proper structure for this type of institution. Part III ends with a text that again refers to the broadly understood sphere of trade and business. It concerns selected problems of the American corporate governance system, and its critical analysis will certainly interest specialists in this field.

This book is not a standard monograph that deals exhaustively with a specific issue. However, this was not the research goal of the authors of the scholarly work that the reader holds in his hands. The intention of individual authors was to thoroughly discuss selected issues from the perspective of the extremely broad research field, which is American law and jurisprudence. For these reasons, the editors did not include joint conclusions at the end of the book. A summary of each of the issues raised can be found at the end of each chapter.

PART I

IDEAS AND INTERPRETATIONS

Chapter I

AMERICAN CONCEPTS OF LEGAL INTERPRETATION FROM THE PERSPECTIVE OF POLISH THEORY OF LAW

Mikołaj Hermann and Michał Krotoszyński

1. Introduction

Legal interpretation is undoubtedly one of the core issues discussed in legal science, particularly in regard to theory and philosophy of law. This should be no surprise as the rules of interpreting legal provisions adopted in a given legal culture co-determine the content of legal norms in force in particular countries, and thus co-establish their legal systems.[1] Therefore, the same legal text can be understood differently depending on the interpretative directives applied. For the same reason, any change in the accepted rules of interpretation—whether they be evolutionary or revolutionary—may cause a significant transformation in the law even without any formal modification of legal regulations.

The stability of interpretative directives, their precision and careful arrangement are what make it easier to preserve uniformity in applying even ambiguous legal provisions, and thereby support values such as legal security and equal treatment of subjects. On the other hand, any vagueness of such rules may result in arbitrary verdicts, and—in extreme situations—legal chaos. From a practical point of view, knowledge of interpretative directives coupled with the ability to apply them are basic prerequisites for any lawyers to perform their social role.

The objective of this study is to present general approaches to legal interpretation in American judicial practice and juridical doctrine. We analyze them using terms developed in Polish legal science, which in our opinion provide precise theoretical tools particularly suited for this purpose. We believe that, on the one hand, it will help us present the abundance and diversity of American concepts of legal interpretation. Their originality, which stems partly from the features of American legal system, is one of the reasons of growing interest of European scholars in these theories. On the other hand, we expect that this methodology

[1] Zygmunt Ziembiński, *Problemy podstawowe prawoznawstwa*, Warsaw, 1980, pp. 247-48, 269.

will enable us to present these concepts in a manner familiar to scholars from European legal culture (especially the continental one). This seems to be especially important, as many of basic terms related to legal interpretation are used in various ways by different American authors. Thus, we hope that this perspective will shed new light on these otherwise well-known concepts, making the text of interest to both European and American readers.

2. Criteria for Classifying American Concepts of Legal Interpretation

Polish legal theory includes many diverse concepts of interpretation, which for the most part follow an analytical approach.[2] The subject of their consideration is the relation between legal provisions and legal norms, the characteristics of legal texts, as well as the distinction of the various types of interpretative rules and the determination of their interrelations. A paradigmatic case for these concepts is an interpretation of legal provisions contained in typical normative acts such as statutes, ordinances or local regulations. However, this does not mean that certain peculiarities pertaining to interpreting the constitution are overlooked or left out of the analysis.[3]

Our study accepts the assumptions of the derivational concept of legal interpretation developed by Zygmunt Ziembiński and Maciej Zieliński,[4] which currently aspires to become the integrated approach to the interpretation of law in Poland.[5]

[2] Jerzy Wróblewski, *Zagadnienia teorii wykładni prawa ludowego*, Warsaw, 1959; Jan Woleński, *Logiczne problemy wykładni prawa*, Cracow, 1972; Maciej Zieliński, *Interpretacja jako proces dekodowania tekstu prawnego*, Poznan, 1972; Leszek Nowak, *Interpretacja prawnicza. Studium z metodologii prawoznawstwa*, Warsaw, 1973; Ryszard Sarkowicz, *Poziomowa interpretacja tekstu prawnego*, Cracow, 1995; Leszek Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Cracow, 2002; Zygmunt Tobor, *W poszukiwaniu intencji prawodawcy*, Warsaw, 2013. See also Krzysztof Płeszka, Tomasz Gizbert-Studnicki, "Dwa ujęcia wykładni. Próba konfrontacji," *Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z nauk politycznych* no. 20, Cracow, 1984, pp. 17-27.

[3] *Wykładnia konstytucji. Inspiracje, teorie, argumenty*, eds. Tomasz Stawecki, Jan Winczorek, Warsaw, 2014; Sławomira Wronkowska, "O niektórych osobliwościach konstytucji i jej wykładni," in *Wykładnia konstytucji. Aktualne problemy i tendencje*, ed. Marek Smolak, Warsaw, 2016, pp. 15-37; Sławomira Wronkowska, "Kilka uwag o językowym aspekcie wykładni konstytucji," in *Wykładnia prawa. Tradycja i perspektywy*, ed. Mikołaj Hermann, Sebastian Sykuna, Warsaw, 2016, pp. 73-87; Sławomira Wronkowska, "O swoistości wykładni konstytucji. Uwagi kolejne," *Przegląd Konstytucyjny* 2(1), 2018, pp. 12-25.

[4] Zygmunt Ziembiński, *Logiczne podstawy prawoznawstwa. Wybrane zagadnienia*, Warsaw, 1966, pp. 119-50, 208-26; Maciej Zieliński, *Interpretacja*; Maciej Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warsaw, 2012.

[5] Maciej Zieliński, "Derywacyjna koncepcja wykładni jako koncepcja zintegrowana," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 68(3), 2006, pp. 93-102; Maciej Zieliński, Olgierd Bogucki, Agnieszka Choduń, Stanisław Czepita, Beata Kanarek, Andrzej Municzewski, "Zintegrowanie polskich

This approach is based on the distinction between *a legal provision* and *a legal norm*.[6] The former constitutes a basic editorial unit of a normative act, covering a grammatical sentence,[7] while the latter is a norm of conduct—understood as an unambiguous utterance that either orders certain subjects to perform specific actions under given circumstances or prohibits them from performing such actions—which has been enacted or recognized by the state authority.[8] By issuing a legal provision, the lawmaker introduces changes to the legal system, which involve the addition of new norms or the elimination of existing ones. Unlike a provision itself, the changes in question are not directly articulated by the legislator but require recreation by legal interpretation. Thus, *legal interpretation* turns out to be a complex process aimed at recreating legal norms from legal provisions. During this process, three sets of interpretative rules must be applied:[9]

1) *linguistic rules*, which order to understand legal provisions in accordance with semantic and syntactical rules of a particular national language, unless a specific meaning is introduced by legal definitions (legal language) or determined by judicial practice and juridical doctrine (juristic language),[10]

2) *systemic rules*, aimed at preserving coherence of the legal system, which during an interpretation of an ambiguous legal provision prescribe an interpreter to reject a result that is incompatible either with norms of the same legal force that perform a function of legal principles (a horizontal aspect), or with norms of a higher legal force, especially with the constitution (a vertical aspect),

3) *functional rules*, which refer to the values or purposes attributed to the lawmaker; among those the purposive (teleological) rules must be distinguished, which take account of *ratio legis*, conceived of as the lawmaker's concrete values or purposes related to the establishment of a specific regulation;[11] the rules in

koncepcji wykładni prawa," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 71(4), 2009, pp. 23-39; Maciej Zieliński, Marek Zirk-Sadowski, "Klaryfikacyjność i derywacyjność w integrowaniu polskich teorii wykładni prawa," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 73(2), 2011, pp. 99-111.

[6] Zygmunt Ziembiński, "Przepis prawny a norma prawna," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 22(1), 1960, pp. 105-22. See also Mikołaj Hermann, "Norma prawna: wyrażenie czy wypowiedź?," *Przegląd Sejmowy* 115(2), 2013, pp. 67-85.

[7] Maciej Zieliński, in Sławomira Wronkowska, Maciej Zieliński, *Problemy i zasady redagowania tekstów prawnych*, Warsaw, 1993, p. 20.

[8] Zygmunt Ziembiński, *Problemy podstawowe*, pp. 119, 149.

[9] Maciej Zieliński, *Wykładnia prawa*, passim. It should be noted, however, that the separation of three distinct bodies of interpretative rules was made in Jerzy Wróblewski, *Zagadnienia teorii*, passim.

[10] For more on that distinction, see Bronisław Wróblewski, *Język prawny i prawniczy*, Cracow, 1948; Sławomira Wronkowska, *Analiza pojęcia prawa podmiotowego*, Poznan, 1973, p. 40; Zygmunt Ziembiński, "Le langage du droit et la langage juridique. Les criteres de leur discernement," *Archives de Philosophie du Droit*, vol. XIX, Paris, 1974, pp. 25-31.

[11] See also Mikołaj Hermann, *How Can Ratio Legis Help a Lawyer to Interpret a Legal Text? Employing the Purpose of a Regulation for Legal Interpretation*, in *Ratio Legis. Philosophical and Theoretical Perspectives*, ed. Maciej Dybowski, Verena Klappstein, Heidelberg, 2018, pp. 187-205.

question allow a lawyer to select one of the possible results obtained according to the linguistic rules, to confirm the result of a linguistic interpretation, or—exceptionally—to modify such a result.

In various concepts of legal interpretation, these rules are either recognized as equally significant or one of them is given priority over the others.

According to many scholars, legal interpretation should aim at recreating legislative intent.[12] However, the term "intent" should be clarified, for in this context it may have two different, though interlinked, meanings: communicative and instrumental.[13] In the communicative sense, the intent is related to the legislator's design regarding the content of legal norms that are to be reconstructed from legal provisions. To determine their content, one must employ all three types of interpretative directives distinguished above. On the other hand, in the instrumental sense, intent is related to the effects that the legislator means to achieve through a legal regulation. This factor is taken into account only if the teleological rules of interpretation are to be applied. Hereinafter, communicative intent will simply be referred to as "intent," while instrumental intent as "purpose."

Taking legislative intent into consideration, one can distinguish two types of concepts of legal interpretation: *subjective concepts*, according to which a legal text should be understood in line with the lawmaker's design, and *objective concepts*, according to which a legal text separates from the legislator and, thus, recourse to the lawmaker's design becomes at most an auxiliary argument in the interpretation process.[14] In fact, as we believe, in both cases the interpretation is aimed at recreating the legislative intent, yet the legislator is defined in two different ways. In the former situation, an actual lawmaker is meant, namely real persons involved in the legislative procedures (for instance: sponsors of bills, members of the Parliament, cooperating experts), while in the latter, there is a certain theoretical construct, called the rational lawmaker, which is assigned specific qualities such as: perfect command of a given language, an ordered system of values or complete knowledge of how to achieve expected effects.[15] Importantly, for neither of those two concepts of interpretation is intent understood psychologically. When establishing what the legislative intent was, in the subjective concepts lawyers refer to legislative history, namely materials generated in the course of creating law, such as motions, committee reports or analysis by leg-

[12] Zygmunt Tobor, *W poszukiwaniu*, passim.

[13] Cf. Tomasz Gizbert-Studnicki, "Wykładnia celowościowa z perspektywy normatywnej," in *Wykłady w Trybunale Konstytucyjnym z lat 2011-2012*, ed. Krzysztof Budziło, Warsaw, 2014, pp. 116-17.

[14] Eugeniusz Waśkowski, *Teoria wykładni prawa cywilnego*, Warsaw, 1936, pp. 13-17.

[15] For more on that distinction, see Sławomira Wronkowska, "The Rational Legislator as a Model for the Real Lawmaker," in *Polish Contributions to the Theory and Philosophy of Law*, ed. Zygmunt Ziembiński, Amsterdam, 1987, pp. 148-50. See also Leszek Nowak, "A Concept of Rational Legislator," in *Polish Contributions*, pp. 137-45.

islative experts,[16] whereas in the objective concepts they should conduct a complex analysis of a legal text based on the assumptions regarding the rational lawmaker. However, it should be emphasized that in both cases it is possible to apply all previously distinguished kinds of interpretative rules, i.e., linguistic, systemic and functional ones.

The last distinction of concepts of legal interpretation, introduced to Polish jurisprudence by Jerzy Wróblewski, is based on whether the interpretation of the same legal regulation may evolve over time.[17] The question in this case is whether a legal norm contained in a specific provision can change its content because of transformations taking place in social culture, including accepted values, or because of new scientific findings increasing knowledge about people, society and the world in general—so that the norm can still serve the purpose of its enactment to the highest degree. If a given concept of interpretation rejects the possibility of reinterpreting a legal provision, it is referred to as *static*, and if it allows the content of a legal norm to be adjusted to current conditions—as *dynamic*. Basically, in the dynamic concepts at least equal importance must be assigned to the functional rules of interpretation as to the linguistic ones. This is not necessary in the case of static concepts, where the linguistic rules can prevail.

These two divisions intersect. Thus, the concepts of legal interpretation can be classified as: subjective and static, subjective and dynamic, objective and static, or objective and dynamic. Traditionally, in Polish jurisprudence the first and last of these four approaches are considered to be the most typical. However, according to the contemporary paradigm, the objective and dynamic concept prevails in Poland.[18]

3. American Concepts of Legal Interpretation

In his famous Tanner Lecture, delivered in March 1995, judge Antonin Scalia complained about the neglected state of the art of statutory interpretation. Not only was there no generally accepted theory of such interpretation among the judiciary, but there was also a significant lack of interest in this topic when it came to legal education.[19] Whether he was right or wrong in his assessment, more than twenty years later things seem to be looking up, at least within academia. There

[16] On the legislative history, see Agnieszka Bielska-Brodziak, *Śladami prawodawcy faktycznego. Materiały legislacyjne jako narzędzie wykładni prawa*, Warsaw, 2017; Michał Krotoszyński, "Legislative History, Ratio Legis, and the Concept of the Rational Legislator," in *Ratio Legis*, pp. 57-73.

[17] Jerzy Wróblewski, *Zagadnienia teorii*, pp. 151-207. See also Maciej Zieliński, *Wykładnia prawa*, pp. 245-47.

[18] Maciej Zieliński, *Wykładnia prawa*, pp. 245-47.

[19] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton, 1997, pp. 3-48.

is a significant number of concepts of statutory and constitutional interpretation developed in the American jurisprudence, which also reflect different views on the role of the judiciary in a democratic system.[20]

According to *textualism*, a theory of interpretation that currently dominates in American courts,[21] "the objective indication of the words, rather than the intent of the legislature, is what constitutes the law."[22] Therefore textualism rejects "intent of the legislature as the proper criterion of the law"[23] and in general prohibits the use of legislative history as an interpretative material. Judge Scalia, who is known as a prominent advocate of this approach towards statutory and constitutional interpretation, summed it up in just five words: "The text is the law."[24] Yet, as each and every text, legal provisions need interpretation. According to textualism, they are to be construed according to their *plain meaning*, that is: the meaning that a reasonable person would gather from the text of the law. Such a reasonable reader does not look at words in isolation but draws their meaning from their context. This, according to Scalia, may even lead to the correction of an obvious legislative mistake[25]—although strong textualists, like John Manning, are even more cautious when it comes to such an alternation.[26] Seeing interpretation as a "holistic endeavor," Judge Scalia was even ready to resolve ambiguity by accepting the meaning which produces a substantive effect compatible with the rest of the law.[27] This is of course problematic, as it is difficult to imagine how one can decide whether such an effect is prescribed by the law without assessing its purpose or intent.

According to Polish terminology, textualism is an objective theory, in which linguistic rules clearly dominate the process of legal interpretation. Yet, if one attempts to assess a prescribed substantive effect, the use of some basic purposive

[20] For an overview of American concepts of legal interpretation in Polish see, e.g., Bogumił Brzeziński, "Współczesne amerykańskie teorie wykładni prawa," *Państwo i Prawo* 61(7), 2006, pp. 22-39.

[21] Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service Report, 2014 [online], https://fas.org/sgp/crs/misc/97-589.pdf [22.12.2018], p. 1.

[22] Antonin Scalia, "Common-Law Courts," p. 29.

[23] Ibid., p. 31.

[24] Ibid., p. 22.

[25] Ibid., pp. 20-21.

[26] According to Manning: "Properly understood, modern textualism provides a more contextual reference point—a «reasonable user of language» approach that eliminates many putative absurdities that would arise under a literal meaning framework. For those absurdities that remain, the Court should acknowledge that negating perceived absurdities that arise from clear statutory texts in fact entails the exercise of judicial authority to displace the outcomes of the legislative process. Under our system of government, the Court should permit such displacement only when the legislature's action violates the Constitution, rather than an ill-defined set of background social values identified on an ad hoc basis by the Court." John Manning, "The Absurdity Doctrine," *Harvard Law Review* 116(8), 2003, p. 2486.

[27] *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988).

rules seems necessary. Nevertheless, their use is restricted to the cases where there is doubt as to the ordinary meaning of a provision. Textualism usually involves a static approach,[28] although there are some authors that support exploring statute's *current plain meaning*, as opposed to the original one.[29]

According to *intentionalism*, the court should act as a faithful servant of legislature; therefore the discovery of a lawmaker's intent is the correct aim of statutory interpretation.[30] The "intent" can be understood in at least three ways.[31] One may try to learn the intent of the actual legislators or to establish the intent that can be conventionally attributed to the legislature through their acceptance of the bill. Finally, Judge Richard Posner argues for "imaginative reconstruction:" a judge "should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied."[32] Each of these approaches deals with some version of communicative intent. Therefore intentionalism seems to be a subjective theory of statutory interpretation. The proponents of this theory often underline that the intent of a current government—unless expressed by a subsequent amendment—cannot influence the meaning of a law introduced be a previous legislature.[33] Thus, most intentionalists tend to favor a static approach.[34]

According to the intentionalists, the intent of the legislature can be discovered using the legislative record. These materials can be consulted in at least five circumstances: (1) to avoid an absurd interpretative result; (2) to fix a legislative error; (3) to understand the meaning of a specialized term; (4) to find the purpose of a certain provision; (5) to choose between several possible in-

[28] Antonin Scalia, "Common-Law Courts," p. 38.

[29] John T. Hutchens, "A New New Textualism: Why Textualists Should Not Be Originalists," *Kansas Journal of Law & Public Policy* 108(16), 2006-2007, pp. 108-28.

[30] See, e.g., Richard A. Posner, "Statutory Interpretation—in the Classroom and in the Courtroom," *The University of Chicago Law Review* 50(2), 1983, pp. 800-822; Earl M. Maltz, "Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach," *Tulane Law Review* 63(1), 1988, pp. 1-28.

[31] William N. Eskridge Jr., Philip J. Frickey, "Statutory Interpretation as Practical Reasoning," *Stanford Law Review* 42(1), 1990, pp. 325-32.

[32] Richard A. Posner, "Statutory Interpretation," p. 817.

[33] Earl M. Maltz, "Statutory Interpretation," p. 12.

[34] Yet, Richard A. Posner acknowledges that "When a constitutional convention, a legislature, or a court promulgates a rule of law, it necessarily does so without the full knowledge of the circumstances in which the rule might be invoked in the future. When the unforeseen circumstance arises—it might be the advent of the motor vehicle or of electronic surveillance, or a change in attitudes towards religion, race, or sexual propriety—a court asked to apply the rule must decide, in light of information not available to the promulgators of the rule, what the rule should mean in the new setting. Realistically, it is being asked to make a new rule, in short to legislate. This entails a creative decision, involving discretion, the weighting of consequences, though, properly, a more circumscribed decision than one made by a real legislature." Richard A. Posner, *Overcoming Law*, Cambridge, Mass., 1995, p. 231.

terpretations of a statute.[35] Whether it is possible to resort to legislative history if a meaning of a statute is clear, remains an open question. For example, Earl Maltz argues that a plain meaning of a law should be accepted, at least in the absence of "absolutely clear contrary legislative history."[36] However, one should note that if there are situations where a plain meaning may yield precedence to the intent—including avoiding an absurd result or fixing a legislative error—then it is always necessary for the courts to resort to legislative history to assess whether they face such a situation in the case at bar. To use Polish terminology: apart from using linguistic interpretative rules, the court should always resort the functional rules as well, at least to confirm that the plain meaning of the text is in line with the intent which can be established with the use of legislative history.

Purposivism, the third of the grand theories, refuses to take legislative intent into consideration. Still, it is mindful of "the position of the legislature as the chief policy-determining agency of the society."[37] The task of the court, according to Henry Hart and Albert Sacks, is therefore to (1) "decide what purpose ought to be attributed to the statute and to any subordinate provision which may be involved;" and to then (2) "interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either: (a) a meaning they will not bear, or (b) a meaning which would violate any established policy of clear statement," such as a need to clearly mark an exception from a general rule. Thus, the words used in a statute, read in their context, should be used both as "guides in the attribution of general purpose" and "as factors limiting the particular meaning that can properly be attributed."[38] Each and every legal provision needs to be interpreted to be understood and dictionaries seem to be an especially reliable source in the attempt to attribute a meaning. The use of the context allows for a correction of obvious legislative mistakes. As for the purpose, the court should assume that a statute was enacted by "reasonable persons pursuing reasonable purposes reasonably."[39] Yet, unlike the Polish concept of the rational legislator, this presumption has to yield if it was proven otherwise. The purpose can be established: (1) by contrasting the new and the old legislation to find the mischief that called for the new legislation as its remedy; (2) by observing post-enactment judicial and administrative precedents and popular construction; (3) with the use of context, including general public knowledge

[35] Stephen Breyer, "On the Uses of Legislative History in Interpreting Statutes," *Southern California Law Review* 65(2), 1992, pp. 848-61.

[36] Earl M. Maltz, "Statutory Interpretation," p. 22.

[37] Henry M. Hart Jr., Albert M. Sacks, *Legal Process: Basic Problems in the Making and Application of Law*, Cambridge, Mass., 1958, p. 1410.

[38] Ibid., p. 1411.

[39] Ibid., p. 1415.

and, to a limited degree, legislative history[40] and (4) according to the presumptions drawn from the general legal policy.[41] The attribution of a purpose should take into account "how the particular statute is to be fitted into the legal system as a whole,"[42] whereas the adjudication of law should "strive to develop a coherent and reasoned pattern of applications intelligibly related to the general purpose."[43]

In purposive statutory construction, all three types of interpretative rules need to be applied. Even though systemic and purposive rules seem to dominate the process, the meaning thus established has to be in line with the result of linguistic interpretation—with an exception of a clear legislative mistake. Purposivism is rather an objective theory, although the use of legislative history is still possible to a limited extent. As purposivism takes into account post-enactment context of the law, including precedents and popular construction, a dynamic element is thereby introduced into this otherwise static approach.

The political aim of each of these three theories is to "reconcile statutory interpretation by unelected judges with the assumptions of majoritarian political theory."[44] Each of them therefore seeks to constrain judges, although by very different means. Nevertheless, all these concepts find common ground in general acceptance of a static approach. On the contrary, the concept of *dynamic statutory interpretation*, as developed by William Eskridge Jr., states that the statutes should be construed in light of their present societal, political, and legal context.[45] In this eclectic approach, three factors should be taken into account: the text, the legislative history and the subsequent evolution of social context and public values. If the statutory text is clear and relatively recent, the literal meaning should determine the outcome of interpretation, unless such a reading would pose constitutional problems or render absurd results unsupported by legislative history. To the contrary, if the text is ambiguous and old, the evolutive perspective is to be taken into account: the more fundamental the changes in public values, the more important such considerations. In such cases, the use of systemic and functional directives will determine the result of the interpretation that cannot be established using the linguistic ones. Yet, Eskridge is clear, in such circumstances, what judges do is no longer plain statute construction—but implicit law-making.[46]

[40] The legislative history can throw a light on (1) general purpose of the act and (2) cannot contradict a purpose otherwise indicated or lead to an interpretation disadvantageous to private people who had no access to the legislative history. Ibid., pp. 1415-16.

[41] Ibid., pp. 1413-17.

[42] Ibid., p. 1414.

[43] Ibid., p. 1417. This last idea can later be found in the works of Ronald Dworkin. See Vincent A. Wellman, "Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks," *Arizona Law Review* 29(3), 1987, pp. 413-74.

[44] William N. Eskridge Jr., Philip J. Frickey, "Statutory Interpretation," p. 325.

[45] William N. Eskridge Jr., "Dynamic Statutory Interpretation," *University of Pennsylvania Law Review* 135(6), 1987, p. 1479.

[46] Ibid., p. 1533ff.

Turning to constitutional interpretation, one can distinguish two main interpretative theories: originalism and the living Constitution. According to *originalism*, courts should interpret the Constitution in line with its original meaning, that is: the meaning at the time of its enactment. By definition, originalism involves a static approach. Yet, the term "original meaning" is severely ambiguous and may in fact involve deeply contrasting approaches. Each of the three grand theories previously described can be used as a base of such a theory. One may look for the original intent of the Framers (*intentionalist originalism*[47]), original plain meaning at the time of enactment (*textualist originalism*[48]) or original purpose of the Constitution (*purposivist originalism*).

On the other hand, *living constitutionalism* embraces the belief that the Constitution "evolves, changes over time, and adapts to new circumstances, without being formally amended."[49] According to David Strauss, the true Constitution is less a legal text and more principles and policies embodied in the judgements of the Supreme Court and "traditions and understandings that have developed outside the courts."[50] It is what one may call *Constitution in action*, not the one in books. This approach is of course inherently dynamic. Yet, it often falls outside of legal interpretation at all—and into the realm of common-law law-making.

Some contemporary theories of constitutional interpretation try to reconcile these two approaches. According to Jack M. Balkin, "we must be faithful to the original meaning in the sense of the original semantic and communicative content of the words. But it does not follow that we must apply the constitution's words in the same way that they would have been applied by the people who wrote them."[51] Thus, giving an example of the Equal Protection Clause, Balkin argues that today "we are bound only by the original meanings of the words—which in this case is the same as the contemporary meaning—and not the original expected application."[52]

In a somewhat similar vein Lawrence Solum's *semantic originalism*[53] states that the linguistic meaning of the Constitution—equal to its original public meaning—was fixed at the time of its enactment. Constitutional interpretation aims at discovering this original sense. This specific meaning makes a contribution to

[47] Raoul Berger, *Government by Judiciary: the Transformation of the Fourteenth Amendment*, Indianapolis, 1977.

[48] Antonin Scalia, *Common-Law Courts*, passim.

[49] David Strauss, *The Living Constitution*, The University of Chicago Law School, 27.09.2010 [online], https://www.law.uchicago.edu/news/living-constitution [22.12.2018].

[50] Ibid.

[51] Jack M. Balkin, "Constitutional Interpretation and Change in the United States: The Official and the Unofficial," *Jus Politicum* 14(9), 2015, p. 4. See also Jack M. Balkin, *Living Originalism*, Cambridge, Mass., 2011.

[52] Jack M. Balkin, "Constitutional Interpretation," p. 4.

[53] Lawrence B. Solum, "Semantic Originalism," *Illinois Public Law and Legal Theory Research Papers Series* no. 07-24 (Draft Paper, 22.11.2008) [online], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 [22.12.2018].

the American law system. The most probable version of this contribution is that such a semantic meaning constitutes at least a majority of constitutional law. Yet, there are situations where the Constitution's meaning is vague, ambiguous, or may contain gaps or contradictions. In such cases there is a need to construct the norms of constitutional law. Solum believes that this process—which can be pursued in multiple ways—falls outside the scope of constitutional interpretation covered by originalist theories. This can be a domain of doctrines of living constitutionalism.

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Summary. Legal interpretation is without doubt one of the central issues discussed in legal science, in particular in theory and philosophy of law. This should not come as a surprise since the rules of legal interpretation co-determine the content of legal norms in force and thus co-establish the legal system itself. The main aim of the article is to present general approaches to legal interpretation existing in the American judicial practice and juridical doctrine. Thus, the text describes the most prominent theories of both statutory construction (textualism, intentionalism and purposivism) and constitutional interpretation (originalism and living constitutionalism). We analyze those concepts using terms developed in Polish legal science as in our opinion they form particularly precise theoretical tools for this purpose. We hope that this perspective will shed a new light on these otherwise well-known concepts, making the text interesting for an American reader as well.

Keywords: legal interpretation, textualism, intentionalism, originalism, living constitutionalism

Chapter II

AMERICAN IDEA OF HUMAN DIGNITY IN THE CASE-LAW OF THE SUPREME COURT OF THE UNITED STATES: A EUROPEAN PERSPECTIVE*

Michał Urbańczyk

1. Introduction

Dignity of the human person is a fundamental element of the legal system in a liberal democracy. It is approached as an inherent and inalienable, equal and priceless value to which every individual is entitled purely by virtue of being human. When discussing its place and function within a democratic legal system, one should refer to three domains of law in which it plays a momentous normative role. The first of those the system of international law, as human dignity constitutes a value on which the post-war world order was established.[1] The second domain in which human dignity performs a crucial role is the system ensuring protection of human rights, where it is assumed to be an inviolable value that lies at its very foundations (e.g., in the EU Charter of Fundamental Rights[2] or the

* The English version of this chapter has been prepared by Szymon Nowak.

[1] The preamble of the Charter of the United Nations asserts the necessity to reaffirm faith in fundamental human rights, and in the dignity and worth of the human person. Charter of the United Nations [online], https://www.un.org/en/sections/un-charter/preamble/index.html [17.09.2020]. Much the same is expressed in the Universal Declaration of Human Rights, where human dignity is referred to as many as five times, including twice in the preamble (which states that freedom and dignity have been the object of human aspiration and struggle for centuries) and immediately in Article 1., which sets forth that "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights [online], https://www.un.org/en/universal-declaration-human-rights/ [17.09.2020].

[2] Article 1—Human Dignity: Human dignity is inviolable. It must be respected and protected. It needs to be stressed that the preamble of the Charter of Fundamental Rights alone states that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity. Furthermore, the subsequent Title 1 is entirely dedicated to dignity and, next to Article 1 cited above, it concerns the right to life (Article 2), the right to integrity of the person (Article 3), prohibition of torture and inhuman or degrading treatment or punishment (Article 4) prohibition of slavery and forced labour (Article 5). Charter of Fundamental Rights of the European Union [online], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN [17.09.2020].

Constitution of the Republic of Germany[3]). It is often cited as a direct source of human rights (for instance in Article 30, Constitution of the Republic of Poland[4]) or as a value inherent to each human being (Article 5, African Charter on Human and Peoples' Rights[5]).

Finally, human dignity is a vital component that shapes laws in particular areas of positive law in countries around the world. In the broadly understood criminal law, it has invariably had and continues to have a substantial influence on the catalogue of punishments and penal measures that a state can bring to bear with respect to criminals. Numerous countries and societies have rescinded death penalty precisely because it was contrary to human dignity. The manner in which one serves their prison sentence has also evolved (and still evolves) due to how human dignity is perceived. Administrative law—in the broad sense—also distinctly demonstrates the impact of human dignity. It may be encountered for instance in the regulations pertaining to social assistance or—in a wider perspective—the obligations of the state towards its citizens in the economic, social, and cultural spheres.

Thus, one can hardly dispute the claim that the post-war period is an era of dignity.[6] However, it must be noted at this point that the idea of human dignity does not appear in the earlier declarations of human rights of the eighteenth century. Neither the American Bill of Rights nor the French Declarations of the Rights of Man and Citizen happen to draw on the idea of dignity as a source of human rights. On the other hand, in the latter half of the twentieth century, the

[3] Article 1 of the Basic Law for the Federal Republic of Germany: "(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." Grundgesetz für die Bundesrepublik Deutschland [online], https://www.gesetze-im-internet.de/gg/BJNR000010949.html [17.09.2020].

[4] Article 30: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities." Constitution of the Republic of Poland [online], https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [17.09.2020].

[5] Article 5: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. African Charter on Human and Peoples' Rights [online], https://www.achpr.org/legalinstruments/detail?id=49 [17.09.2020].

[6] The phrase *high era of dignity* was employed by James Q. Whitman, "On Nazi Honor and New European Dignity," in *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*, ed. Christian Joerges, Navraj S. Ghaleigh, Oxford, 2003, p. 243. Still, one should underline that this author does not concur with Whitman's claim that the striving to respect dignity clearly distinguishes European law from American law. The findings of studies on the issue were published in the monograph entitled *Idea godności człowieka w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych Ameryki* (Poznan, 2019, pp. 398); a number of said findings are presented in this paper. It may be added for the benefit of the American reader that the monograph is available from the US Library of Congress: https://catalog.loc.gov/vwebv/search?searchCode=LCCN&searchArg=2019277046&searchType=1&permalink=y [1.09.2020].

idea of human dignity[7] was increasingly often quoted by philosophers, political scientists, social and political activists, such as judges, attorneys, or politicians. As regards the United States, one needs to mention such figures as Martin Luther King, Myres McDougal, Harold D. Lasswell, Ronald Dworkin, William Brennan, Alan Gewirth, Gregory Vlastos, James J. Paust, Michael Meyer, William A. Parent, Martha Nussbaum, Leon R. Kass, Michael Rosen, George Kateb, Francis Fukuyama, Michael Sandel and John McCain. Also, numerous experts on constitutional law and human rights undertook analyses and advanced descriptions of the role of human dignity. Lastly, one cannot fail to stress that in the latter half of the twentieth century, the idea of human dignity began to feature permanently in the case-law of the Supreme Court of the United States.

The general remarks above give rise to a number of more detailed questions, given the context of the American political and legal tradition. First, one should ask whether the presence of the idea of human dignity in twentieth century case-law of the Supreme Court owes solely to the emergence of an international system of human rights protection? If not, then what is the provenance of the concepts of human dignity in the Supreme Court's case-law; in particular, are they rooted in the American political and legal thought? If the roots are to be sought in early political-legal thought, then how did the notion of human dignity evolve in the

[7] Given the issue discussed here, the principal terminological problem which needs to be resolved concerns the considerable range of diverse terms and phrases used in the United States (in the past and at present) to refer to the idea of human dignity. Two aspects, evinced both in the case-law of the Supreme Court and in the literature of the subject (spanning eighteenth-century writings of the Founding Fathers and twenty-first-century constitutional analyses), should be deemed greatly characteristic of the American perception of the idea of dignity. Firstly, there is no terminological distinction between the idea of dignity and the idea of human dignity. Both terms are used in the context of equal, universal and priceless value inherent to each person. This is exemplified in the dissenting opinion of Justice Thomas in the landmark case *Obergefell v. Hodges*, 576 U.S. 644 (2015), who employs the term "dignity" in one sentence only to refer to the same value as "human dignity" in another. A similar approach is seen in American jurisprudence. For instance, in a 2011 paper, the same notion of human dignity is denoted by such diverse phrases as the "right to dignity," "dignity," and "human dignity," followed by "dignity rights" in the subsequent sentence; Rex D. Glensy, "The Right to Dignity," *Columbia Human Rights Law Review* 43(1), 2011–2012, pp. 65–142. Secondly, multiple terms are used interchangeably and treated as equivalent when conveying one single meaning of human dignity. Oscar Schachter's paper *Human Dignity as a Normative Concept* offers a splendid example, since the author employs as many as twelve various terms and expressions/phrases: dignity, human dignity, dignity of the human person, the dignity and worth of all persons, the dignity of the person, the dignity of the individual, inherent dignity, dignity and intrinsic worth, the inherent dignity of the human individual, essential being, the worth and dignity of individuals as well as human dignity and the intrinsic worth of every person; Oscar Schachter, "Human Dignity as a Normative Concept," *The American Journal of International Law* 77(4), 1983, pp. 848–54. In addition, neither the case-law of the Supreme Court nor American jurisprudence offer any clear-cut distinctions to set particular meanings of dignity apart. The division into dignity of the person (godność osobowa), dignity as moral excellence (godność osobowościowa) and personal dignity (godność osobista), understood as a personal right, protected in civil law, which has been adopted in Polish science, is thoroughly alien to American thought.

American political-legal tradition of the nineteenth and twentieth centuries? How could one define the American concept of the idea of human dignity? If dignity of the person represents such a vital idea and value, can one speak—based on the case-law of the U.S. Supreme Court—of an American doctrine of human dignity? Finally, what roles and functions does it play in the case-law of the Supreme Court?

As the author agrees with the assertion that "the soul of a government of laws is the judicial function,"[8] this paper is dedicated to the findings of his studies concerning the essence, the role, and the function of human dignity in the case-law of the Supreme Court of the United States. In his inquiry, the author has employed the methodological tools and instruments of European law and legal sciences which, among other things, yields a different analysis of the function of the idea of human dignity than in American jurisprudence whilst showing greater correspondence with the European notions of the value. Nonetheless, the author is convinced that the conclusions reached on the basis of American case-law may prove helpful in resolving classical problems that the European thought has to confront seeking to determine the place of the idea of dignity in the entire system of democratic law.

Research carried out by this author demonstrates that human dignity, construed as an inherent, inalienable, equal and priceless value to which each individual is entitled for the sole fact of being human, occupies a very prominent place in the case-law of the Supreme Court of the United States. Before the issue is discussed in detail, however, one has to address—evencursorily—the quandaries referred to above.

2. The Idea of Human Dignity in the American Political and Legal Tradition

Human dignity did not emerge in the case-law of the Supreme Court in the wake of its introduction in international law, since it may be found in judgements issued prior to the establishment of the international system of human rights protection. The first ruling in which human dignity is a principal element in the majority opinion was made in *McNabb v. United States* (1943). What is more, it is referred to in the judgement as a foundation of the "democratic society, in which respect for the dignity of all men is central," being thus affirmed two years before the signing of the Charter of the United Nations, and five years before the enactment of the Universal Declaration of Human Rights. Furthermore, it appears as an element of key significance—given the issue discussed here—in the rulings in *Skinner v. Okla-*

[8] "…the soul of a government of laws is the judicial function." The statement originates from the speech of Arthur E. Sutherland, delivered on 17 June 1964 in St. Paul (Minnesota), cited after: William J. Brennan, "Some Aspects of Federalism," *New York University Law Review* 39(6), 1964, p. 961.

homa[9] and *Glasser v. United States*[10] (where it is drawn upon only in the dissenting opinions, and therefore without a direct impact on how the cases were ultimately resolved). Finally, one cannot fail to mention the judgement in *Chisholm v. Georgia* (1793) with its reference to native dignity, while an overview of the writings of James Wilson suggests that the reference was random or intended a different meaning of human dignity than analyzed here.

Significantly enough, the very term of human dignity had been known to federal (*Zubrick v. Woodhead* [1937] and *Esquire v. Walker* [1945][11]) and state case-law (*Laage v. Laage* [1941][12]) already in the 1930s and 1940s.[13] Therefore, contrary to what is often claimed in American jurisprudence, the ruling in Yamashita of 1946 is not the first judgement to have invoked the idea of human dignity in the history of the American judiciary (though it may be considered the first adjudication of the Supreme Court in which "human dignity" is used in the context of human rights protection).[14] One should also dismiss the assertions that the very term was utterly unknown to the case-law of the American courts prior to World War II. The content of the judgements cited above offers a major argument against the claim that human dignity was an "alien" element in the American legal order,

[9] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). In the concurring opinion, Justice Jackson emphasized that there were limits to the extent to which the majority represented by the legislative may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority, even those who were guilty of what the majority defines as crimes.

[10] *Glasser v. United States*, 315 U.S. 60 (1942). In his dissenting opinion, Justice Frankfurter underlined that the laws contained in the Bill of Rights are not abstract. It depends on the specific circumstances whether the "safeguards of liberty and dignity" it sets forth were infringed.

[11] It needs to be noted that it was employed in that case with a different meaning, one which bears little relevance to the issue discussed here. The case concerned alleged obscenity of photographs published in the *Esquire* magazine. The phrase "human dignity" was employed in the context of distinction between decency and obscenity: "[the] criterion for decency is anything that is proper, in order, certainly not harmful to human dignity." Cf. *Esquire v. Walker*, 151 F.2d 49 (D.C. Cir. 1945).

[12] *Laage v. Laage*, 176 Misc. 190 (N.Y. Misc. 1941).

[13] A thorough research into judgements of the American courts yields several incidental instances of invoking human dignity in that period: the ruling of the Indiana Supreme Court in *Herman v. State*, 8 Ind. 545 (1855), where it was emphasized that should prohibition of alcohol consumption be upheld, "eulogies upon the dignity of human nature should cease; and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish;" *Brown v. Walker*, 161 U.S. 591 (1896), where it was observed that the protection ensured under the Fifth Amendment stems from the sense of personal self-respect, liberty, independence and dignity, which "which has inhabited the breasts of English-speaking peoples for centuries;" ruling of the Federal Court of Appeal in *Zurbrick v. Woodhead*, 90 F.2nd 991 (Conn. Cir. Ct 1937), which refers at one point to "human dignity;" the judgement of the New York State Court of 1941, where the phrase appears as well. Also, in *Laage v. Laage*, 176 Misc. 190 (N.Y. Misc. 1941), the Justice referred to the totalitarian Germany to observe that its systems caused human dignity to be humiliated and degraded in its very essence.

[14] Thus, e.g., Vicky C. Jackson, whose conclusions rely on a search in the Lexis and Westlaw databases—eadem, "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse," *Montana Law Review* 65(1), 2004, p. 17.

which was transplanted from international law or introduced only as an aftermath of the conclusion of World War II.

Additional arguments to support the notion of American provenance of the idea of human dignity in the case-law of the U.S. Supreme court may be found in the discussions and debates which ensued in the late 1940s in the legal milieu following the establishment of the Charter of the United Nations and the enactment of the Universal Declaration of Human Rights.[15] It follows from the legal articles, lectures, speeches and analyses of the post-war period that the American jurists shared the conviction of the idea of human dignity being firmly rooted in the political and legal heritage of the United States. The notion was expressed directly by the chairman of the American Bar Association (ABA), E. Smythe Gambrell, who stressed that "[f]or three hundred years our people have cherished the spiritual concept" according to which freedom-related rights of a person are theirs personally, as opposed to having been conferred by the state. According to Gambrell, that tenet had been included in the Declaration of Independence, while its reification in practice made it possible for the human dignity to be respected and allowed the affluence and wealth of the society as a whole to increase significantly. Gambrell further asserted in the following sentence that human dignity is indeed well rooted in the American tradition, stating that "[t]he great truths of humanity do not spring newborn to each new generation. They emerge from long experience."[16]

American statesman and lawyer Dean Acheson spoke in a similar vein when commenting on the emergence of the post-war international community, as he underlined that the cornerstone of the American society is in their perception of freedom, in which they recognize two aspects. The first is treating each citizen as a goal in itself, which gives rise to the fundamental principle of the Worth of Man. The second consists in conceiving the citizen as a member of the community, an individual whose actions contribute to the common good of the former, thus establishing the principle of the Unity of Society. Acheson stated quite emphatically that the idea of the worth of the human, grounded in the fact of all people being born equal, had been "hammered into our democratic tradition on the anvils of revolution and of civil war." For this reason, each American is strongly and rightfully aware of their individual dignity from which stems the right to one's own opinion, faith, and politics.[17]

The views expressed by other commentators and authors featured the foremost American legal periodicals were no different. An article published in 1952

[15] More broadly on that issue: Michał Urbańczyk, *Idea godności*, Chapter 4, Section 2, "Powojenna debata nad wpływem prawnomiędzynarodowej idei godności człowieka na amerykański system ochrony praw obywatelskich," pp. 279-84.

[16] E. Smythe Gambrell, "Challenge of a New Day," *Mercer Law Review* 7(2), 1955–1956, p. 243.

[17] Dean G. Acheson, "Development of the International Community," *Proceedings of the American Society of International Law* 46, 1952, p. 20.

in the prestigious *New York University Law Review* calls upon those who create and interpret law to take the traditional views concerning justice and the dignity of man into consideration. The ideals of American culture "are embodied in our law, but they also permeate the casual relationships of our daily lives as a people." One of those is the idea of the dignity of the individual, which in itself comprises a number of rules contained in the American legal system.[18] Other representatives of American jurisprudence and practitioners alike would also underscore that fact that the global community "has long been in search of the international principle and rule of law necessary for its cohesive strength." Worthy of great effort, these aspirations aim to accomplish one goal, namely to safeguard the basic dignity and worth of man,[19] which is recognized as a part of the "intellectual and spiritual inheritance" of America.[20]

Considering the above, it may be interesting to see how the conceptions of human dignity evolved in the American political and legal tradition. After all, before 1943 the understanding and the significance of human dignity—in various domains—did witness extensive transformation and evolution. Throughout that period, the dignity of the person was a philosophical idea which had its impact on the spheres of public life, for instance as part of debates concerning the war against Great Britain or the abolition of slavery. In addition, the idea had a political facet, being often invoked in political writings, and proved to have an effect on the views of politicians, judges, lawyers, as well as the opinions of the broad public. Clearly, the idea of dignity exerted an influence on the political and legal system in America. However, that influence was sporadic, manifesting itself only at certain moments in history rather than being continual.

In the period from 1776 (i.e. from the promulgation of independence) to 1943, the idea of dignity not so much evolved but displayed varying degrees of influence on systemic and judicial solutions. With respect to American thought on the eve of independent state, one should mention the writings of Thomas Paine[21] and James Wilson.[22] The works of Thomas Jefferson also offer certain indirect indications that their author to some extent acknowledged an inherent and inalienable worth that the person possessed.[23] The early decades of the American state had its crowning

[18] Earl J. McGrath, "Humanities and the Law," *New York University Law Review* 27(1), 1952, p. 59. It is worth noting that E.J. McGrath realized the discrepancy between the ideals to which he referred and which he believed to make up the American vision of human dignity, and the political and social realities in the United States. He therefore observed that the faith in the inherent worth of each person had long suffered numerous violations in everyday life, while many of his compatriots had demonstrated insolent disregard for the dignity of their fellow citizens. Ibid., p. 61.

[19] Luis Kutner, "World Habeas Corpus for International Man: A Credo for International Due Process of Law," *University of Detroit Law Journal* 36(3), 1959, p. 240.

[20] Nadine L. Gallagher, "Law Day–USA," *Women Lawyers Journal* 45(2), 1959, p. 3.

[21] Cf. Michał Urbańczyk, *Idea godności*, pp. 47-54.

[22] Ibid., pp. 67-73.

[23] Ibid., pp. 54-66.

moment in the judgment in *Chisholm v. Georgia*, in which human dignity (as an inherent quality of each person) is invoked as a value protected by the adopted systemic solutions. Subsequently, however, the significance of dignity decreased to the point where in the ruling in *Dredd v. Scott* the human is claimed to be the object not the subject of law (let alone a holder of equal and priceless value). The trend changes with Lincoln's proclamation which abolished slavery with a view to restoring an order of human values, but the document itself does not make any reference to the idea. Still, evidence of the influence of the dignity concept may be found in major political-legal works and other writings by such authors as Franz Lieber[24] or Frederick Douglass,[25] as well as in the texts and speeches by the American first-wave feminists, who fought for women's suffrage.[26]

In the Reconstruction era, the idea of dignity wanes yet again as the Black Codes are introduced. To counter the latter legislation the Fourteenth and Fifteenth Amendments are passed to ensure freedmen real freedom and equal rights, as well as protect former slaves from discrimination under state law. However, such legal solutions do not demonstrate any tangible influence of the idea of human dignity either. The latter half of the nineteenth century sees further regression, culminating in the judgment in *Plessy v. Ferguson*; with certain exceptions, such as the Lieber Code, the idea of dignity is on the defensive. Nineteenth-century America, with its slavery and Black Codes, as well as the racially segregated America of the first half of the twentieth century was not a place where the idea of dignity was pursued in practice.[27]

Thus, in the early twentieth century, the idea of dignity was construed in a rather traditional fashion in the domain of law. Its definitions in the highly regarded American legal dictionaries provide eloquent proof in that respect. In the second edition of *Black's Law Dictionary* from 1910, the entry for "dignity" states that it is "an honor; a title, station, or distinction of honor; dignities are a species or incorporeal hereditaments, in which a person may have a property or estate" (in which it actually drew on the eighteenth-century *Commentaries on the Laws of England* by William Blackstone). In the 1916. *Ballentine's Law Dictionary* dignity is defined as: "a title; one of the incorporeal hereditaments" or "titles of rank or office." In contrast, freedom, freedom of speech, and equal-

[24] Ibid., pp. 77-82.

[25] Ibid., pp. 82-85; Michał Urbańczyk, "Idea godności człowieka w amerykańskiej kulturze i doktrynie prawnej," *Miscellanea Historico-Iuridica* 15(2), 2016, pp. 196-99.

[26] Michał Urbańczyk, *Idea godności*, pp. 85-90; idem, "Idea godności człowieka w amerykańskiej," pp. 199-202.

[27] Much the same happened in Europe, which after the Congress of Vienna saw departure from the achievements of the revolution and lasting consolidation of the reactionary monarchist systems and colonial empires; the interwar period brought further attenuation of the concepts of democracy, freedom, and human rights. Even so, one cannot forget about Kant's philosophy for instance, one of whose mainstays was unshakeable faith in *Menschenwurde*, meaning none other than the dignity of man; cf. Michał Urbańczyk, "Wieloznaczność idei godności w filozofii Immanuela Kanta" (in print).

ity were provided with much more comprehensive entries which approached contemporary definitions.[28]

The judgment in *McNabb v. United States*[29] (1943) marks the beginning of a period in which the influence of the idea of human dignity becomes palpable in the case-law of the Supreme Court. In the judgment, the Supreme Court had to answer whether testimonies had been given in appropriate circumstances.[30]

The Supreme Court held that the incriminating evidence had been obtained in contravention of the Constitution and the applicable laws. The opinion to the judgment, delivered by Justice Frankfurter, includes a significant reference to the idea of human dignity. The Justice underlines that respect for the dignity of all men is a principal value of the democratic society, while protection against improper enforcement of law is a natural element of such a community. Frankfurter also addressed vital issues relating to the application of criminal law, noting that unrelenting prosecution of crimes does not guarantee soundness of the judgement, whereas impartiality of the law does not prevent much valued liberties from being disregarded. The Justice noted that past experience teaches one that adequate safeguards should be put in place to mitigate the dangers from the "overzealous, as well as despotic" enforcers of the law.[31] Moreover, it was stressed that the rules of criminal law, according to which the police must demonstrate legal grounds for detention with reasonable promptness, are a crucial component of the process, not only ensuring protection to the innocent but also leading to a conviction by means of measures that characterize a progressive and self-confident society.[32]

There are several noteworthy elements in the above ruling. First, the reference to human dignity appears in the majority opinion, as opposed to the dissenting opinion. In addition, the judgment repealed the previous conviction. Furthermore, the idea of human dignity was invoked as such—not as an adjunct—having been recognized as a core element of a democratic and progressive society. Also, it provided context for a deliberation on the criminal procedure, the rights of the

[28] *Black's & Ballentine's Law Dictionaries* [online], https://openjurist.org/law-dictionary/dignity [18.08.2018].

[29] *McNabb v. United States*, 318 U.S. 332 (1943).

[30] Prior to the first interrogation, the suspects had been detained for nearly 24 hours, after which they were being questioned for hours on end for over two days. The confessions, given in the absence of a counsel, provided grounds to institute a trial ending with a conviction for murder. It needs to be emphasized that all three members of the McNabb family lacked any extensive education (having only attended four grades of primary school) and, spending all their lives in the mountains, had never been farther from their abode than the town of Jaspers, 34 kilometres away. Contrary to the laws in force at the time, they were not brought before the judge for a preliminary hearing, commitment or to be granted bail.

[31] *McNabb v. United States,* 318 U.S. 332 (1943).

[32] Ibid.

defendants and the aims that criminal law is expected to serve. It may therefore be concluded that in that case, the reference to the idea of human dignity proved to have a significant bearing on the interpretation of how norms of criminal law should be applied.

3. Analysis of the Case Law of the U.S. Supreme Court after 1943

Analysis of the Supreme Court's judgments demonstrates that the idea of human dignity performs two essential functions, a corrective and a creative one. The former is evinced in the rulings pertaining to certain civil rights stipulated in the Bill of Rights. The creative function comes to the fore as new civil rights are formulated due to growing importance of the Fifteenth Amendment. Still, it may play a twofold role in either instance considering how momentous it is. Hence, its role may be crucial when human dignity constitutes a key element of the majority opinion, affecting the final ruling which becomes a landmark case, as may be seen with respect to the Fourth, Fifth, Sixth, and Eighth Amendments. Dignity of the person is present in a number of landmark cases which establish a new legal standard or rules of procedure which safeguard rights and liberties. By way of example, one should mention *Miranda v. Arizona*[33] and its significance for the Fifth Amendment; *Rochin v. California*[34] or *Schmerber v. California*[35] and their significance for the Fourth Amendment; *Trop v. Dulles*,[36] *Hope v. Pelzer*[37] and their significance for the Eighth Amendment in the context of cruel and unusual punishments; *Atkins v. Virginia,*[38] *Roper v. Simmons*[39] and *Kennedy v. Louisiana*[40] with respect to the Eighth Amendment in the context of limiting the use of death penalty; *McKaskle v. Wiggins*[41] with respect to the Sixth Amendment. Much the same applies to the abolishment of racial segregation (*Brown v. Board of Education of Topeka*[42] and *Heart of Atlanta Motel, Inc. v. United States*[43]), the right to death with dignity (*Cruzan by Cruzan v. Director, Missouri Department of Health,*[44] *Washington*

[33] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[34] *Rochin v. California*, 342 U.S. 165 (1952).
[35] *Schmerber v. California*, 384 U.S. 757 (1966).
[36] *Trop v. Dulles*, 356 U.S. 86 (1958).
[37] *Hope v. Pelzer*, 536 U.S. 730 (2002).
[38] *Atkins v. Virginia,* 536 U.S. 304 (2002).
[39] *Roper v. Simmons*, 543 U.S. 551 (2005).
[40] *Kennedy v. Louisiana*, 554 U.S. 407 (2008).
[41] *McKaskle v. Wiggins*, 465 U.S. 168 (1984).
[42] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[43] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).
[44] *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

v. Glucksberg[45]), the right to abortion (*Planned Parenthood v. Casey*[46] and *Gonzales v. Carhart*[47]), decriminalization of sexual relationships (*Lawrence v. Texas*[48]) and legalization of same-sex marriages (*Obergefell v. Hodges*[49]).

On the other hand, the reference to the idea of dignity may be marginal and incidental. In such a situation the idea of dignity appears as an ancillary argument in the majority opinion, it is invoked by a judge in the dissenting opinion, and does not provide a constantly present argument in the context of a given civil right (here, one should perhaps distinguish instances when the ruling itself is not a landmark case). This may be observed in the case-law relating to the First Amendment (*Cohen v. California*[50]), Second Amendment (*McDonald v. Chicago*[51]), social benefit rights (*Goldberg v. Kelly*[52]) or election laws (*Bush v. Gore*[53]).

3.1. Corrective Function with Respect to Civil Rights

Considering the issue under discussion, the most important judgement—relating to the Fifth Amendment—was made in *Miranda v. Arizona* (1966). In a 5 to 4 decision, the Supreme Court held that the testimony of the suspect, obtained by the police in the course of interrogation, must be preceded by the suspect's being advised of their due right to counsel and the right to remain silent.

In the rationale to the majority opinion, delivered by Justice Warren, the Court made a critical appraisal of the circumstances and conditions in which the suspect was subjected to interrogation. The Court found it obvious that such an environment of interrogation was created for the sole purpose of coercing the suspect into compliance with the will of the questioner, also noting that the atmosphere bore the hallmarks of intimidation. For this reason, the procedure was as "destructive of human dignity" as physical intimidation.[54] It was also held that the prohibition of self-incrimination, a crucial pillar of the adversarial system, relies on a certain set of values which imply one superior concept, namely that the constitutional fundament of that privilege is in the respect with which a state or federal government must approach the dignity and integrity of its citizens.[55] In the opinion, the Court cited Edgar Hoover, head of the FBI, according to whom the enforcement

[45] *Washington v. Glucksberg*, 521 U.S. 702 (1997).
[46] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).
[47] *Gonzales v. Carhart*, 550 U.S. 124 (2007).
[48] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[49] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[50] *Cohen v. California*, 403 U.S. 15 (1971).
[51] *McDonald v. Chicago*, 561 U.S. 742 (2010).
[52] *Goldberg v. Kelly*, 397 U.S. 254 (1970).
[53] *Bush v. Gore*, 531 U.S. 98 (2000).
[54] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[55] Ibid.

of law must simultaneously respect the inviolability of historic liberties of the individual, as "turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory."[56]

It is greatly interesting that references to dignity were also included in the dissenting opinion of Justice John Marshall Harlan,[57] who stated that the human dignity of the accused is not the only one involved, as the human personality of other members of the society should be treated with equal care and attention. The right to remain silent is not the only value that should be taken into account in this case. Social interest, manifesting in the requirement of public order and security, matters just as much.[58] Harlan observed that the most fundamental function of any government is to ensure security to the individual and their property. Such public goals are accomplished through application of criminal law, which largely aim to prevent crime. If such tasks are performed in an unreasonable and ineffective manner, it is futile to speak of human dignity and civilized values. Prompt and sure apprehension of those who demonstrate no respect for the personal security and dignity of their fellow citizens has an effect on others, resulting in general prevention.[59]

Justice Harlan also voiced his misgivings regarding negative outcomes of the majority opinion, stating that in certain cases law will make it possible for a killer, rapist or other criminal to walk free, enabling them to commit crime again. As a result, Harlan maintains, "there will not be a gain, but a loss, in human dignity." The concerns one is inclined to have do not stem from the consequences of a judgement for criminal law as an abstract framework, but from the possible outcomes for the potential future victims of the criminals who will be able to resume criminal activity due to the shortcomings of the procedure.[60]

As regards the Fourth Amendment, attention should be drawn to the 1952 *Rochin v. California* case,[61] in which the Supreme Court unanimously found that the measures used by the police to obtain evidence were unlawful and repealed the conviction. It was found that the conduct of the police officers, which had ultimately led to the conviction, had not merely been a breach of the general rules applicable in that respect or upset "fastidious squeamishness or private sentimentalism about combatting crime too energetically" but a "conduct that shocks

[56] John E. Hoover, "Civil Liberties and Law Enforcement: The Role of the FBI," *Iowa Law Review* 37(2), 1951–1952, pp. 175, 177–82.

[57] John Marshall Harlan (1899–1971), Supreme Court Justice in 1955–1971, was a grandson of John Marshall Harlan, who sat on the Supreme Court in 1877–1911; more broadly, see "John Marshall Harlan. United States Jurist 1899–1971" [online], in *Encyclopaedia Britannica*, https://www.britannica.com/biography/John-Marshall-Harlan-United-States-jurist-1899-1971 [27.07.2018].

[58] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[59] Ibid.

[60] Ibid.

[61] *Rochin v. California*, 342 U.S. 165 (1952).

the conscience."[62] Justice Frankfurter, who delivered the opinion on behalf of the majority, also stressed the necessity for the law enforcement authorities to carry out their duties in a way which respects the decencies of civilized conduct. In conclusion, Justice Frankfurter noted that the measures the officers had resorted to were "so brutal and so offensive to human dignity."[63]

To sum up, the discussed ruling unmistakably reflects the normative influence of human dignity. The idea was drawn upon in the majority opinion in a landmark case, setting forth a new constitutional standard with respect to the conduct of the police. Thus, the idea of human dignity caused a change of the previous judicial paradigm and corrected the understanding of the scope of a civil right.

Vital adjudication was also made in *Schmerber v. California*[64] (1966), another landmark case which yielded a more precise construction of the Fourth Amendment and protection against search without a warrant, as well as the safeguards against self-incrimination arising under the Fifth Amendment. The Court held that compulsory blood sampling does not constitute testimony under duress and therefore it does not violate the Fifth Amendment and the privilege against self-incrimination. It was also ruled that interventions into the human body generally require a warrant, but in this case the Court invoked the exigent circumstances exception.

Justice Brennan, who delivered the majority opinion, made several references to the idea of human dignity. First, with regard to alleged breach of the prohibition against self-incrimination, Brennan cited an excerpt from the holding in *Miranda v. Arizona*, in which it is stated that the constitutional underpinning of that privilege is the respect that must be accorded to the dignity and integrity of the citizens by state or federal government. Furthermore, it was underlined that the principal function of the Fourth Amendment is to protect personal privacy and dignity from unwarranted intervention of the state. The interests of human dignity and privacy, protected under the Fourth Amendment, prohibit any such intrusions solely on the grounds of anticipated possibility of obtaining desired evidence. When clear indication that such evidence will actually be found is lacking, those fundamental human interests require that law enforcement officers bear the risk that such evidence may disappear.[65]

Noting the import of that ruling, one should also stress that human dignity was recognized there as a constitutional value protected under the Fourth Amendment.

The idea of human dignity also demonstrates its corrective function in the judgment in *Goldberg v. Kelly* (1970), concerned with social rights and welfare

[62] Thus, in that landmark case, the Supreme Court established a new benchmark (shock-the-conscience test) for evaluating the conduct of police officers; the test consist in verifying in each instance whether given conduct is so inadmissible as to shock the conscience. Ibid.

[63] Ibid.

[64] *Schmerber v. California*, 384 U.S. 757 (1966).

[65] Ibid.

benefits. In the majority opinion, Justice Brennan drew on American history, writing that "[f]rom its founding, the Nation's basic commitment has been to foster the dignity and wellbeing of all persons within its borders." The key observation in the ruling was that social assistance is not merely charity, but a means which serves the ends stated in the very preamble to the Constitution, i.e. to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[66] A number of other aspects in the judgments attest to Justice Brennan's "dignity-oriented" approach to the right to social assistance. The role that the idea of dignity played here was a significant, but the ruling itself did not have a lasting impact on pertinent case-law.

Certain issues were similarly rendered in more specific and precise terms with respect to the right to abortion. In the American experience, the key judgement in that respect was made in *Roe v. Wade*,[67] though the idea of human dignity does not appear there directly. Still, explicit references to human dignity can be found in the subsequent watershed decisions of the Supreme Court concerning abortion.[68] In 1992, the Supreme Court issued judgment in *Planned Parenthood of Southeastern Pa. v. Casey,*[69] in which it examined the constitutionality of selected provisions in the 1988 and 1989 amendments to the Pennsylvania Abortion Control Act of 1982, which imposed certain obligations on the woman wishing to have abortion performed.

In a 5 to 4 decision, the Court upheld the constitutionality of the right to abortion, but at the same time found that the challenged regulations are constitutional, with the exception of the obligation to advise the husband. The opinion is highly exceptional, in that it was delivered by three judges (Justices O'Connor, Kennedy and Souter), while two others agreed only in part, submitting partly concurring and partly dissenting opinions (Justices Stevens and Blackmun). Justices Rehnquist and Scalia expressed dissenting opinions—rejecting the precedent of *Roe v. Wade*—in which they were joined by the remaining Justices, White and Thomas. It needs to be noted that the reference to the normative nature of human dignity played an exceedingly significant role in the majority opinion.

The Supreme Court held that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[70] In consequence, the Supreme Court linked the spheres of human

[66] Constitution of the United States [online], https://www.senate.gov/civics/constitution_item/constitution.htm [17.09.2020].

[67] *Roe v. Wade*, 410 U.S. 113 (1973).

[68] History of the dispute for the right to abortion is presented as a commentary to the most important events and legislation in Melody Rose, *Abortion: A Documentary and Reference Guide: A Documentary and Reference Guide*, Westport, 2008.

[69] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

[70] Ibid.

autonomy, privacy and dignity into a foundation of rights protected by the substantive aspect of the Due Process Clause. As the Justices emphasized, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[71]

References to dignity were made in the dissenting opinions as well. Justice Stevens underlined that the power to take such a traumatic yet admissible decision is an element of basic human dignity. For this reason, the decision must rest exclusively with the conscience of the woman concerned.[72] Stevens further asserted that constitutional freedom of choice also involves equal dignity to which each person is entitled. This equal dignity is due to the same degree to a woman who decided to terminate pregnancy as to a woman who decides to give birth to a child. If the latter is not subject to any limitation of her freedom of action, no such limitations should be imposed on the former.[73]

Dignity appears in conjunction with freedom in another abortion-related judgment in *Stenberg v. Carhart*[74] (2000). On that occasion, its normative impact was evinced only in the dissenting opinion of Justice Kennedy. Justice Kennedy drew attention to the exceptional brutality of the criminalized method of terminating pregnancy. He stressed that it is a medical procedure which many decent and civilized persons deem as abhorrent as the gravest crimes against human life.[75] As the D&X procedure is more akin to infanticide, the authorities of the state of Nebraska are entitled to conclude that the procedure constitutes greater risk of disrespect for life and, as a result, greater risk to the profession and society whose sustained functioning depends on mutual recognition of dignity and respect. Kennedy found that the Supreme Court is not entitled to criticize such conclusions, noting further that pronouncing state provisions unconstitutional means abrogation of a law which expressed the will of the people of the state of Nebraska, who found that medical procedures should be informed by moral principles rooted in the intrinsic value of human life, including the life of the unborn.

Nonetheless, Justice Kennedy's dissent was so significant that in the subsequent judgment pertaining to the right to abortion, it was he who delivered the majority opinion. Due to tremendous controversy surrounding that abortion method, the ruling of the Supreme Court sparked numerous protests across the United States. In response to the judgment in *Stenberg v. Carhart*, Congress passed the federal Partial-Birth Abortion Ban Act in 2003. Dr Carhart, along with other physi-

[71] ibid.
[72] Ibid.
[73] Ibid.
[74] *Stenberg v. Carhart*, 530 U.S. 914 (2000).
[75] Ibid.

cians who performed terminations using that method, challenged the act, contending its unconstitutionality. The Supreme Court decided the case *Gonzales v. Carhart*[76] in 2007, holding in a 5 to 4 decision that the act is not unconstitutional. The rationale asserted that prohibition of partial-birth abortion is neither unconstitutionally vague, nor does it represent a restriction of the right to abortion. The majority opinion was delivered by Justice Kennedy. It is worth stressing that he referred to human dignity at one point only, but that point was pivotal to the entire ruling.

Justice Kennedy drew on the rationale of the bill, presented in the course of the legislative process. It was stated at that stage that "[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." To Kennedy, the act expressed respect for the dignity of human life.[77]

On the other hand, in the single dissenting opinion Justice Ginsburg recalled that while reaffirming the landmark judgment in *Roe v. Wade*, the Supreme Court referred to the "the centrality of 'the decision whether to bear […] a child,' […] to a woman's 'dignity and autonomy,' her 'personhood' and 'destiny,' her 'conception of…her place in society.'" [78] in *Planned Parenthood of Southeastern Pa. v. Casey*.

3.2. Creative Function with Respect to Civil Rights

One of the foremost issues in which the idea of human dignity performed creative function was racial desegregation. The judgment in *Brown v. Board of Education of Topeka*[79] of 1954 is considered one of the most important rulings in the history of the United States. This landmark case initiated the process of racial desegregation, partly revoking the rule of "separate but equal," established in *Plessy v. Fergusson*. The Supreme Court unanimously held that segregation in public schools, based on racial premises, contravenes the constitutional principle of equal protection of rights under the Fourteenth Amendment. It is observed in the opinion that "in the field of public education, the doctrine of 'separate but equal' has no place," stressing further that "separate educational facilities are inherently unequal."[80]

It is a great paradox that the rationale does not refer to the idea of human dignity directly. However, it is universally acknowledged in the literature of the subject that the idea lies at the foundation of the judgment, the opinion is written using a dignitary language while the holding itself safeguards the so-called dig-

[76] *Gonzales v. Carhart*, 550 U.S. 124 (2007).
[77] Ibid.
[78] Ibid.
[79] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[80] Ibid.

nitarian interests. Maxime Goodman found that "[in] Brown, the Court preserved the dignity of black school children."[81] Justice Brennan concluded in a similar vein, writing about shared values that judges have to protect in order to foster social equality.[82] Concurring with Justice Brennan, Jordan J. Paust also expressed the view that the idea of dignity is at the heart of argumentation in the rationale underlying the judgment.[83] Christopher Bracey stressed that the ruling in question "placed the issue of dignity at the forefront of the movement for racial justice."[84] Also, Naomi Rao underlined the significance of the judgment in the context of human dignity. In the light of dignity construed as recognition, she noted that the Supreme Court highlighted the importance of racial equality in that very holding.[85]

The considerable role of the idea of human dignity in creating actual right to equal treatment (as opposed to merely formal guarantees which were not reflected in the social and political realities) regardless of skin color is also evident in the judgment in *Heart of Atlanta Motel, Inc. v. United States*[86] (1964), in which the appellant challenged the provisions of the Civil Rights Act of 1964.[87] The act prohibited discrimination due to race, colour, sex and ethnic origin in places of public accommodation. The Supreme Court had to answer the general question whether passing the bill the Congress infringed the rights of entrepreneurs and, in so doing, exceeded its powers arising under the Constitution's Commerce Clause.[88] The Court unanimously affirmed constitutionality of the provisions of the act and rejected the contentions of the appellants.

In their rationale, the Court drew on the opinion of the Senate Commerce Committee, according to which ensuring respect for personal dignity is the fundamental goal of the act. A violation of that dignity clearly accompanies refusal of equal access to public establishment, in this case hotel services. The Supreme

[81] Maxine Goodman, "Human Dignity in Supreme Court Constitutional Jurisprudence," *Nebraska Law Review* 84(3), 2003, p. 762.

[82] William Brennan, "Equality Principle in American Constitutional Jurisprudence," *Ohio State Law Journal* 48(4), 1987, p. 921, idem, "Color-Blind, Creed-Blind, Status-Blind, Sex-Blind," *Human Rights* 14(1), 1987, p. 31.

[83] Jordan J. Paust, "Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content," *Howard Law Journal* 27(1), 1984, p. 172.

[84] Christopher Bracey, "Dignity in Race Jurisprudence," *University of Pennsylvania Journal of Constitutional Law* 7(3), 2005, p. 696.

[85] Neomi Rao, "Three Concepts of Human Dignity in Constitutional Law," *Notre Dame Law Review* 86(1), 2011, p. 263.

[86] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[87] Civil Rights Act 1964 [online], http://library.clerk.house.gov/reference-files/PPL_CivilRightsAct_1964.pdf [17.09.2020].

[88] The American norms of commercial law have its constitutional sources, specifically in Article I, Section 8, Clause 3, known as the Commerce Clause. It grants Congress exclusive powers over interstate trade. The powers of Congress provide a foundation for the entire federal and state legislation in the domain of broadly understood commercial law; Roman Tokarczyk, *Prawo amerykańskie*, Cracow, 2003, p. 172.

Court underlined that individuals running such businesses do not have the right to choose persons they would serve.[89] The Court even referred to the 1963 appeal of President Kennedy who, justifying the need for a new civil rights act, stated that promoting the general welfare quoted in the preamble of the Constitution also means eliminating discrimination based on race, color, religion or ethnic origin.[90] The matter was approached in a similar manner by Justice Goldberg in his concurring opinion, where he underscored that the primary aim of the Civil Rights Act are not economic considerations but the vindication of human dignity.[91]

To recapitulate the above, one should draw attention to the following issues. The holding in *Brown v. Board of Education of Topeka* was a breakthrough. Even though it lacks direct references to the idea of human dignity, the language in which it was formulated clearly demonstrates that the protection of a fundamental value—equal, universal, and inestimable worth of each person—was at its root. After all, it called the very idea of dividing people because of their color into question. Then, in *Heart of Atlanta Motel, Inc. v. United States*, it was emphatically stated that both Congress and the Supreme Court deem human dignity to be a basic value which justifies the struggle against racial discrimination. In practice, protection of human dignity became more important than freedom and property. It outweighed freedom of the individual in the domain of commerce and services, and proved superior to the liberty of using one's own property and conducting business, as entrepreneurs were denied the "right" to choose their patrons at their own discretion, without any governmental regulation coming into play. Protection of human dignity, even pursued in an indirect fashion and without direct references to the idea, was elevated to the rank of a major task faced by the entire legal system. In both judgments, it was held to be a vital element from the standpoint of the entire society in such important spheres of life as education and business activity. In any case, the normative nature of dignity in terms of eliminating racial segregation and discrimination was most pointedly articulated in the political-legal doctrine of Martin Luther King, in which the idea of human dignity played a paramount role.[92]

The idea of human dignity also contributed greatly to the emergence of the right to death with dignity. In this respect, one of the crucial judgments was given in *Cruzan by Cruzan v. Director, Missouri Department of Health* in 1990. The judges had to answer the question whether the Due Process Clause contained in the Fourteenth Amendment entitled parents of Nancy Cruzan to consent effectively on her behalf to have life-sustaining treatment discontinued. In the majority opin-

[89] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[90] Ibid.

[91] Ibid.

[92] More broadly in Michał Urbańczyk, "Przeciw segregacji rasowej. Idea nonviolence i jej filozoficzne korzenie w myśli społecznej Martina Luthera Kinga," *Filo-Sofija* 15(29), 2015, pp. 177–91; idem, *Idea godności*, pp. 193–213.

ion delivered by Chief Justice Rehnquist, one can discern only indirect traces of influence of the idea of human dignity, as it speaks of preservation of human life irrespective of its quality, and cites excerpts from earlier judgments in that case (dissenting opinion of Justice Higgins). On the other hand, the concurring opinion by Justice O'Connor does include direct references when she states that the requirement for a patient capable of expressing their will to surrender to procedures which interfere with their bodily integrity against their will violates patient's liberty, dignity, and freedom to decide on the course of treatment on their own. Human dignity is drawn upon even more expressly in Justice Brennan's dissenting opinion. It was his viewpoint which became predominant later on. Brennan stresses that the right to refuse unwanted medical intrusion cannot be denied to those who have found it to be degrading and without human dignity. Brennan concluded that the state's duty to preserve life must involve recognizing the right of the individual to avoid circumstances in which the latter would feel that efforts to sustain their life demean or degrade their humanity.[93] Thus, he found that the procedural impediments imposed by the Supreme Court of Missouri were biased and improper, resulting in impermissible restriction of the right of Nancy Cruzan to die with dignity. Similarly, dissenting Justice Stevens observed that respecting the interests of Nancy Cruzan necessitates discontinuation of procedures which a court had long since pronounced offensive to human dignity due to invasion of bodily inviolability and integrity.[94]

In 1997, the Supreme Court heard two more cases which are important from the standpoint of this study, communicating judgments in both on the same day (26th June): *Washington v. Glucksberg*[95] and *Vacco v. Quill*.[96] In the first, the Supreme Court held that the right to assisted suicide is not protected under the Due Process Clause contained in the Fourteenth Amendment; this means that state authorities may criminalize actions of this kind. In the second case, the Supreme Court ruled that the right to die is not protected under Equal Protection Clause, thereby permitting state regulations in that respect. References to human dignity played a significant role in either judgment.

In *Washington v. Glucksberg*, the Supreme Court approached the right to suicide, committed with or without assistance, differently than the right to refuse treatment with which the decision in *Cruzan v. Missouri Department of Health* was concerned. Individuals have to right to accept natural death instead of prolonging their life artificially but they do not have the right to seek death actively. Refer-

[93] Here, Justice Brennan drew on the judgment in *Brophy v. New England Sinai Hospital, Inc.,* 398 Mass. 417, (1986).

[94] Here, Justice Stevens referred to the established adjudicative approach to violation of bodily integrity, cf. *Rochin v. California* discussed in Chapter II.3.

[95] *Washington v. Glucksberg*, 521 U.S. 702 (1997).

[96] *Vacco v. Quill*, 521 U.S. 793 (1997).

ences to the normative nature of human dignity were also made in the concurring opinions. For instance, Justice Stevens (who presented the same opinion in *Vacco v. Quill*) placed substantial emphasis on the importance and role of human dignity, not only in the entire legal system but also in the moral system which preceded it.

Justice Souter expressed a similar view with respect to independent decision to terminate one's life. In his opinion, the judgment did to mean that the contention of the appellants' claim to have the right to assisted suicide recognized are not ungrounded.[97] The matter concerned competent, adult and terminally ill patients who independently and in full awareness requested their physicians to prescribe drugs so that they could administer them on their own to hasten their death. The judge noted that the state authorities had not denied that the persons acted to protect their personal dignity while facing inevitable death and experiencing physical and mental suffering. Given such exceptional circumstances, Souter found it consistent with the standards of medical practice that they should be provided with prescriptions for drugs which, apart from alleviating pain, may hasten their death.

The normative nature of human dignity was also evinced in the last concurring opinion by Justice Breyer (who also attached the same opinion in *Vacco v. Quill*); Breyer concluded that in the case in question, one should debate on the entitlement which could be defined as the right to die with dignity.

An adequate assessment of the impact of the idea of human dignity on the recognition and more precise formulation of the right to die with dignity must not overlook the effect of those ruling on state legislation. By 2018, eight states introduced provisions[98] which distinguished between aid with suicide and medical assistance in dying, permitting the latter. In 1994, Oregon passed the Death with Dignity Act. In 2008, Washington adopted the Death with Dignity Act by popular vote. In 2009, in a 5 to 2 decision, the Supreme Court of Montana held that state law does not prohibit suicide when it is assisted by physicians, and introduced protection for those who prescribe their patients agents that cause death at their request. In 2013, the parliament of Vermont passed the Patient Choice and Control at End of Life Act. In 2015, the California End of Life Option Act was adopted in California, after four earlier attempts to pass such a law. In 2016, in a popular ballot, voters of Colorado supported the so-called Proposition 106, which legalized assisted death of the terminally ill. In the District of Columbia, the Death with Dignity Act came into effect in 2017, having been adopted in 2015. Enacted in 2018, laws allowing medical assistance in dying have been in force in Hawaii since January 1, 2019.

In a number of other states similar initiatives were advanced and examined, citing the necessity to respect human dignity in the final moments of their life.

[97] The judge admitted that at that point, state legislature is in his opinion more competent to resolve such cases. Ibid.

[98] Montana is an exception, where the question was resolved by the ruling of the Supreme Court.

For instance, a Death with Dignity bill was proceeded in Maryland in 2015, while Massachusetts Death with Dignity Initiative was rejected in 2012 in said state; in 2014 the bill of the Death with Dignity Act fell through in the Senate of New Jersey, while a draft bill of the Death with Dignity Act was submitted in 2015 in New York.[99]

Legalization of homosexual relationships has provoked and continues to provoke equally turbulent disputes in the United States. In this respect, the idea of human dignity also played a significant role in the case-law of the Supreme Court, affecting the shape of pertinent regulations.

One of the first judgments related to the issue was made in *Bowers v. Hardwick*[100] (1986).[101] Human dignity was invoked only in the dissenting opinion of Justice Stevens, who was joined by Justices Brennan and Marshall. Stevens underlined that the matters the Court had to resolve concerned the right of each individual to take extremely important decisions, whose consequence will affect the future of that individual or their entire family. The Court defined such decisions as fundamental and involving basic values. It was noted that the language used in such cases draws on the origins of the American heritage of freedom: "the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." Thus, the entire federal judiciary, informed by historical experience and the tradition of respect for the dignity of individual choice in the matters of conscience, acknowledges the existence of those rights and the associated duty of their protection in appropriate cases.

Several elements in this judgment require a more profound reflection, even though the idea of dignity was mentioned only in the dissent of one judge; in addition, this is not a reference to human dignity but the dignity of one's individual choices. Nonetheless, the assertions made by Justice Stevens are greatly important for several reasons. First, his viewpoint (shared by a minority in the mid-1980s) would prevail in the early twenty-first century and would be deemed as correct in the judgment in *Lawrence v. Texas*[102] of 2003. Second, as already observed, there are no precise terms in the American tradition to denote the idea of human dignity and very often several phrases are used when writing about one and the same idea, in fact. Third, the approach of Justice Stevens is very characteristic of the American political and legal tradition, in which human dignity is inseparably

[99] In 2017, the court of appeal rejected the claim to recognize the right to death with dignity as compliant with the constitution of the State of New York in *Myers v. Schneiderman*, 2017 NY Slip Op 06412, 2017 N.Y. Lexis 2557 (2017).

[100] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[101] Michael Hardwick was indicted with a punishable act according to the state laws of Georgia, namely the crime of sodomy: an oral or anal sexual intercourse (without distinction into homo- and heterosexual act). The intercourse had taken place with mutual consent at his home, which was entered by a police officer who had been observing Hardwick. By a 5 to 4 decision, the Court held that the contested provisions are constitutional.

[102] *Lawrence v. Texas*, 539 U.S. 558 (2003).

bound with individual liberty, while the freedom of choice is one of its chief manifestations. This freedom of making decisions is even more important and valuable when it applies to the private sphere, in which the individual resolves personal matters, in particular those concerning their intimate life and the person alone. That sphere is specially protected owing to the inestimable worth of each person, i.e. the dignity of the individual. In this case the conjunction of human freedom and dignity was described as the dignity of individual choice.[103]

The protection of intimate homosexual relationships returned to the Supreme Court in 2003 in the landmark ruling in *Lawrence v. Texas*. This time, the idea of human dignity was expressed in the judgment itself and in the majority opinion, thus having a direct influence on the final verdict of the Court. The Court had to resolve whether penalizing adults for consensual sexual intercourse in a private dwelling violates their vital interests and liberties protected by the Due Process Clause. The petitioners also argued that criminalization of specific homosexual conduct—for which heterosexual couples are not held liable—violates the Equal Protection Clause. By a majority of 6 to 3, the Supreme Court concurred with the contentions of the petitioners and overruled its judgment in *Bowers v. Hardwick*. The majority opinion was delivered by Justice Kennedy, in which the idea of human dignity and its role in the context of the Due Process Clause was one of the leading arguments.

According to Justice Kennedy, the contested regulations pertain to the most private human actions and sexual behaviors, in which one engages in the most private of places, i.e. one's home. Their purpose is to control personal relationships which remain within the scope of freedom of choice of every individual without fear of punishment. It does not matter whether a given interpersonal relationship can be legitimately recognized by law or not. The liberty protected by the Constitution enables homosexual persons to exercise their right to engage in relationships on the premises of their homes and in their private lives, whilst preserving their dignity as free persons.[104]

For several reasons, the case is momentously significant for the issue discussed here. First, it was yet another manifestation of the impact of the idea of human dignity on the understanding of the substantive aspect of the Due Process Clause. The judges again linked human dignity with the rights in question (interests of freedom) that an individual is entitled to exercise without the hindrance of state intrusion. Second, human dignity is involved as a value opposed to discrimination, just as in the struggle against racial segregation, but this time with respect to unequal treatment of homosexual persons. After all, it was explicitly stated that branding such conduct violates the dignity of individuals.

[103] *Bowers v. Hardwick*, 478 U.S. 186 (1986).
[104] Ibid.

The holding in *Obergefell v. Hodges*[105] (2015) is considered the watershed judgment in terms of rights of homosexual persons. Moreover, it is very much connected with the issue discussed here, as the ruling relies on human dignity to a considerable extent, employing it as a prime argument to interpret the Fourteenth Amendment, ultimately giving rise to a new fundamental right protected by the Constitution, i.e. the right to same-sex marriage. It is also the judgement in which human dignity was defined for the first time (the attempt was made by Justice Thomas in his dissenting opinion); moreover, its place in the American tradition, Constitution, and the entire system of American law was described in detail. Still, it needs to be noted that the term "dignity" was used in several different meanings.

To sum up, it should be observed that the idea of human dignity occupies a prominent place in the case-law of the Supreme Court and has a powerful influence on the interpretation and application of law as a foundation of the entire system, a mainstay of the system of civil rights, a foundation of particular civil rights and at the same time their basic interpretive criterion. Simultaneously—depending on the context—it may function as constitutional value, a constitutional principle, a subjective right (right to die with dignity or the right to same-sex marriage) or the related so-called dignitarian interests. In such contexts as personal liberty and autonomy in the private sphere, criminal law, discrimination based on race or sexual orientation, its influence is decisive with respect to the directions of development in case-law. On the other hand, in other spheres (e.g., social assistance) its impact is much weaker. It may also be noted that references to human dignity are very occasionally encountered in the context of other amendments and civil rights, including the Second and the Fifteenth Amendment, for instance.

However, this study demonstrates a certain problem, or more precisely a discrepancy between seeing human dignity as a source of laws and liberties and its uneven influence on those rights. Still, one must remember that the American Bill of Rights does not have the structure of the contemporary declarations of human rights (most frequently a separate chapter in the Constitution). Furthermore, rights and liberties are contained in other amendments (especially in the so-called Reconstruction Amendments: the Thirteenth, the Fourteenth, and the Fifteenth). The amendments themselves are variedly structured and pertain to distinct matters. Next to such fundamental individual rights as the freedom of speech, association, assembly and religious freedom covered in one amendment, the neighbouring Third Amendment concerns billeting soldiers in private dwellings. In contrast, the First Amendment remains fundamentally important today and provides a source for a range of separate rights and legal theories relating to the latter, whereas the present-day significance of the Third Amendment is negligible. Finally, it should be added that certain amendments are decidedly more often

[105] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

invoked as safeguards of rights and liberties than others (it suffices to compare the impact of the Fourteenth and the virtual "obscurity" of the Ninth Amendment). On the other hand, the appearance of reference to human dignity in the new contexts of time-honored and firmly established civil rights (e.g., the Second Amendment) demonstrates a direction of evolution in the case-law of the Supreme Court as it becomes a foundation that may ultimately span the entirety of civil rights.

4. Conclusions

There can be no doubt that Hugo A. Bedau was right claiming that human dignity is "the premier value underlying the last two centuries of moral and political thought in Western society."[106]

However, can one speak of the American doctrine of human dignity (as one may do without any doubt with respect to the American doctrine of freedom of speech) and how to define the American version of the idea of human dignity? If a doctrine is defined as a body of assertions or convictions in a certain field, an ordered set of views concerning a subject, or a viewpoint which, shaped over time, accounts for the origins, evolution, functioning and goals—of the idea of human dignity in this case—then the American doctrine of human dignity does exist. The idea is an inherent component of the American political and legal tradition, even though its influence and presence varied considerably in the course of over two centuries of U.S. history, while its interpretation in the case-law of the Supreme Court has undergone constant evolution. Over two centuries of tradition and experience make up the doctrine of human dignity, whose fullest expression may be found in the case-law of the Supreme Court.

Naturally, it should be remembered that the doctrine encompasses distinct approaches to certain issues, competing concepts, and clashing opinions, but a certain core of views is sufficiently precisely formulated. The latter spans the understanding of human dignity, its concomitant, complementary, or competing concepts, its roles and the functions it is designated, as well as the legal concepts on which it has the most significant impact.

It remains to attempt to define human dignity in its American variant. It is a priceless and inherent, equal and universal value due to every individual purely because they are human, which has its essential interpretive contexts in the freedom of choice and the sphere of personal autonomy; given respect for those values, it should remain unencumbered by any external intrusion, especially by the state. One of the basic aspects of the American concept of human dignity is rejection of

[106] Hugo A. Bedau, "The Eighth Amendment, Human Dignity, and the Death Penalty," in *The Constitution of Rights: Human Dignity and American Values*, ed. Michael J. Meyer, William A. Parent, Ithaca and London, 1992, p. 145.

state paternalism towards the citizens, even in extreme situations when it may result in harm to which an individual may be exposed.[107]

This approach entails two aspects of actions of the public authority in the context of respect for human dignity. First, a negative one, requires the state and its representatives to withhold an action in order to protect the dignity of a person. Here, examples may be found in the judgments of the Supreme Court in the domains of criminal procedural law and substantive law. Second, there is the positive aspect, when the dignity of the individual is protected by taking particular actions, as exemplified by activities aiming to eliminate discrimination based on race or sexual orientation.

It is an exceptional trait of the American concepts that human dignity is combined with the freedom of speech. The broadest possible freedom of speech is grounded in the need to respect human dignity, and that aspect outweighs potential damage to individual reputation.

Debatable and evolving issues include gradation of human dignity and the question whether death penalty conforms with it. In Europe, one of the essential characteristics of dignity is that it remains indelible as a human attribute, which is why capital punishment was recognized as wholly incompatible with human dignity, but the matter is not so self-evident in the United States. On the contrary, for many decades those who violated basic laws and social norms (by committing a crime) would simultaneously relinquish that value. The more serious the crime, the more violently and irretrievably was that priceless value lost.[108]

A detailed analysis of the case-law of the Supreme Court, supported by an overview of political and legal thought of the nascent American state as well as examination of the sources in American jurisprudence from the 1950s (i.e. at a time of great debate on the emerging system of human rights), has clearly demonstrated that the American concept of human dignity is an autonomous and original creation, firmly rooted in the political-legal tradition of the United States and an idea present from its inception. It is by no means a borrowing of international standards but an outcome of long years of evolution. However, two elements need to be remembered. First, it was only the 1940s case-law of the Supreme Court which brought about the revival of the idea and fostered growth of the American concepts of human dignity, which may jointly be approached as the doctrine of human dignity. Secondly, broadly understood political and legal tradition in the United States demonstrates that the evolution of the notions of human dignity there was not without its obstacles and difficulties. Slavery, racial segregation and discrimination hampered or even precluded the spread and recollection of

[107] Michał Urbańczyk, *Idea godności*, p. 353.

[108] William J. Brennan, "Guardians of Our Liberties—State Courts no Less than Federal," *The Justices' Journal* 15(4), 1976, p. 99.

the simple truth which lies at the foundation of the American political system, namely that all people are created equal in their priceless worth, to draw on the words of Thomas Jefferson.

The American experience shows what it is means to attach importance to freedom of the individual without the concern for human dignity. One of the examples is the period following the Civil War, when the emancipation of slaves was not accompanied by the concern for their dignity as humans. At the same time, here one may find proof of caring only for equality before the law, especially in its formal aspect, without ensuring respect for human dignity. This is well evinced in the judgment *Plessy v. Fergusson*, while the doctrine of "equal, but separate" is its most eloquent materialization. Formal equality under the law did not entail the concern for human dignity when law is applied. It was only in the ruling in *Brown v. Board of Education of Topeka* that racial segregation was found to be essentially unjust and inadmissible because it meant violation of human dignity.

Naturally, safeguarding human dignity cannot take place at the expense of freedom and equality. The tensions between these ideas, crucial to the case-law of the American Supreme Court but also to the United States and liberal democracy in general, are some of the foremost challenges of the twenty-first century.

The American concept of human dignity relies on a specific vision of relationships between state, society, and the individual. The vision is probably most comprehensively outlined in the concurring opinion of Justice Brandais in *Whitney v. California* of 1927, who observed that those who had achieved American independence believed that "the final end of the State was to make men free to develop their faculties," while "the deliberative forces should prevail over the arbitrary" in its government.[109] Self-realization is in fact a very potent component in the American concept of human dignity.

The American concepts of human dignity found in the case-law of the Supreme Court represent an original and unique contribution to the global history of personal dignity. The above analysis of the case-law and the resulting conclusions may prove useful in the experience of other states and communities, European ones included. Europe today faces one of the most serious post-war crises, which is rooted in the crisis of values. The American perception of human dignity differs in many respects from the European experience and, as such, it may help to mitigate the crisis by underscoring individual autonomy and linking human dignity with the natural right that everyone has to "be the master of their fate," simultaneously stressing their responsibility for their actions, which again is directly associated with the human being and their inestimable worth.[110]

[109] *Whitney v. California*, 274 U.S. 357 (1927).
[110] Michał Urbańczyk, *Idea godności*, p. 356.

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Summary. Human dignity is a basic element of the legal system in a liberal democracy. It is approached as an as an inherent and inalienable, equal and priceless value to which every individual is entitled purely by virtue of being human. Therefore, the text sets out to discuss the status of the human person in the case-law of the U.S. Supreme Court, the earliest liberal democracy of modern times.

In the conclusions, the author states that human dignity, understood as an inseparable and inalienable value of every person due to the sole fact that they are human is a crucial value protected in the case-law of the U.S. Supreme Court. It needs to be noted that human dignity is usually invoked in cases where judgments constitute precedents in their legal system, which means that they also establish new legal norms or sets of rules which safeguard rights and liberties.

An adequate definition of the American notion of human dignity must allow for the fact that it is perceived as a priceless and inalienable value, an equal and shared quality that each individual is possessed of only because they are human. The principal background of its interpretation is freedom of choice and the sphere of personal autonomy. In consequence, human dignity should be free from any external intrusion, especially from the state.

Key words: human dignity, case law, U.S. Supreme Court, abortion, euthanasia, criminal law, police brutality, death with dignity, same-sex marriage

Chapter III

THE DOCTRINE OF PIERCING THE CORPORATE VEIL: THE MEASURE TO FIGHT FRAUD OR INJUSTICE

Agnieszka Bartolik

1. Introduction

The conclusion set by Stephen M. Bainbridge in *Abolishing Veil Piercing* seems to leave no doubt as to the future of the doctrine of piercing the corporate veil. It is called "rare, unprincipled, and arbitrary" and the idea that it should be abandoned in favor of a different solution to achieve better, more predictable results is suggested.[1] As it will herein be presented, it is indeed difficult to prove that there is one strict test leading the process of piercing the corporate veil. However, the opposite finding results from the following article.

The history of creation of limited liability is presented first in order to set the historic frames of the doctrine which is called an exception of the limited liability rule or remedy for the abuse of concept of separate entity. It is followed by examples of creditors' protection and introduction to the concept of piercing the corporate veil. Three doctrines which set the rules for application of piercing of corporate veil are discussed afterwards. The article ends with introduction of the concept of horizontal and vertical piercing and comments on the voluntary and involuntary creditors.

2. Limited Liability Creation

As noted by Nicholas Murray Butler, "limited liability corporation is the greatest single discovery of modern times. […] Even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it."[2] Certainly the concept of limiting liability has

[1] Stephen M. Bainbridge, "Abolishing Veil Piercing," *Journal of Corporation Law* 26(3), 2001, pp. 479-536.

[2] Quoted in William M. Fletcher, *Cyclopedia of the law of private corporations,* Chicago, 1917.

significantly contributed to economic growth both in the United States of America and other countries across the globe. The formation of artificial entities took centuries and changed multiple times, placing emphasis from one purpose to another.

Prior to the seventeenth century, institutions such as universities and churches had the power to sue and be sued and to own property on their own behalf. Acting mostly in the character of non-profit entities, they were not focused on making profit, but rather on providing public services. Therefore the main concern at that time was to ensure succession in case of death or resignation of its founders.[3]

It was the colonial expansion which shifted the emphasis from guaranteeing continuity to providing that the enterprises are managed and organized in the most efficient way. When the massive import of spices began, merchants in England were granted monopoly rights by the government to sell products they acquired overseas. In order to manage that right, the need for entity which could bring together the traders arose. By the decision of Queen Elizabeth such entity was created in the form of the British East India Company. Made up of investors, who provided resources in return for shares, the first official joint-stock corporation had been accorded a privilege of limited liability. These shares could be traded between merchants and allowed the company to change the group of investors from one sail to another. Since the publication of the "Bubble Act" only joint-stock companies, which were granted charters by the Crown, could legally trade shares and possessed features which are nowadays attributed to companies—such as entity status.[4] At the same time it has to be emphasized that according to scholars, in the early nineteenth century, although recognized by law, limited liability was not one of "the essential attributes of the corporations."[5]

Since England had used joint-stock companies for establishment and administration of its colonies overseas, this form of conducting business became well known in United States. However, contrary to the approach applied in England, colonies' governors in the United States were less reluctant in granting corporate charters. While still being more expensive than operating as a partnership, managing business in the form of chartered joint-stock companies allowed for the creation of the aforementioned separate legal entity. The sole drawback being that shares could only be sold to other investors, without an option to "repurchase."

At the same time states were experimenting with doctrines of limited and unlimited liability, as the capital was streaming from the states offering the lat-

[3] Reuven S. Avi-Yonah, Dganit Sivan, "A Historical Perspective on Corporate Form and Real Entity: Implications for Corporate Social Responsibility," in *The firm as an entity: implications for economics, accounting and the law*, London, 2007, pp. 153-55.

[4] Ron Harris, "The Bubble Act: Its Passage and Its Effects on Business Organization," *The Journal of Economic History* 54(3), 1994, p. 614.

[5] Phillip I. Blumberg, "Limited Liability and Corporate Groups," *Journal of Corporation Law* 11(4), 1986, pp. 573, 579-80.

ter to those offering the former. Along with the formation of limited liability rule, various ways of protecting creditors were constructed in order to prevent abuse in the form of separate legal person.

3. Creditors' Protection and Understanding the Concept of Limited Liability

The most natural and intuitive protection had been designed to come into force at the time of company dissolution. When the situations in which company did not possess enough assets to fulfill all of its contractual obligations started to occur, creditors realized that they would need to face the risk of losing money owned by the corporation they were dealing with. What nowadays seems like the basic rule of fairness and justice, namely that alongside with the dissolution of separate legal entity its debt should be paid, was not a worldwide principle in nineteenth century. Case law in England provided that alongside dissolution of the corporation, all debts owed against it ceased to exist.[6] At that time the American approach was more favorable to the creditors, providing that shareholders would be responsible for debts in case of a lack of assets necessary to fulfill the company's obligations (either instantly at the date of dissolution or after specific period of time).[7]

The dispute over the character of shareholder liability occurred after the publishing of the New York Act of March 22, 1811, entitled "An Act Relative to Incorporations for Manufacturing Purposes." Scholars were confused about the phrase "individually responsible" used in section 7 of the act in relation to the responsibility of people composing the company.[8] The question was whether that meant the now commonly understood term limited liability or whether a so-called "double liability" arose. The latter would mean that shareholders were liable not only for the full payment of a subscription at par, but also for the excess of such sum in case of the company's insolvency.[9] In the case of *Slee v. Bloom* Chief Justice Spencer of the Court of Errors, basing its ruling on the provisions of the above mentioned act, concluded that "the only advantages of an incorporation under the statute over partnerships, and the only substantial difference between them,

[6] Frederick G. Kempin Jr., "Limited Liability in Historical Perspective," *American Business Law Association Bulletin* 4(1), 1960, p. 23.

[7] Ibid.

[8] According to section 7 of the act: "That the stock of such company shall be deemed personal estate, and be transferable in such manner as shall be prescribed by the laws of the company; and… for all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the said company, and no further…."

[9] Stanley E. Howard, "Stockholders' Liability Under the New York Act of March 22, 1811," *Journal of Political Economy* 46(4), 1938, pp. 499-514.

consists in […] an exoneration from any responsibility beyond the amount of the individual subscriptions." Whereas this statement seemed as a strong support of modern understanding of limited liability, his approach changed in 1824 while he acted as a judge in the case of *Penniman v. Briggs.*[10] This time, according to Chief Justice Spencer "the legislature [New York Act of March 22, 1811] did not mean to declare, that the stockholders should be liable as they were liable at common law. Something more was intended; … that the extent of the stock held by them should be the measure of their individual liability to creditors. The statute does not refer to them in their corporate capacity, but as individual stockholders …."[11] This position was affirmed by Judge Woodworth, who was the other member of the Court ruling in this case, by saying that "every stockholder, in a company of this description [indebted at the time of dissolution], incurs the risk of not only losing the amount of stock subscribed, but is also liable for an equal sum, provided the debts due and owing at the time of dissolution, are of such magnitude as to require it."[12] Thus it can be said that, in line with the courts' established case practice, New York Law of March 22, 1811, had provided the creditors with more advantageous protection in the form of shareholders' double liability.[13] However shortly after, the rule that "the individual members of a private corporate body are not liable for the debts, whether in their persons or in their property, beyond the amount of property which they have in the stock"[14] was affirmed by scholars.

When the law finally recognized the predominance of limited liability, as it is known nowadays, entrepreneurs were forced to work out ways to protect against the insolvency of their business partners. Modern measures applied in the law of contracts include obligations to keep company's liquidation, activity or finance leverage ratios on certain level in order to prevent jeopardizing of repayment caused by risky behavior of companies' authorities.[15] In practice, however, such provisions are usually part of loan or investment contracts, leaving a significant group of creditors not engaged in the banking or investing industry unprotected.

Legal system across the world adopted diversified laws aimed at reducing the exposure of entering into financial distress. Without going into the details and efficiency of these solutions, following should be pointed out as examples: mandatory disclosures of information regarding significant action of the company,

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] The most severe liability measures could be observed in relation to shareholders of banks until 1932, shortly after banking industry crisis occured in the early 1930s, they were a subject of application of double liability rule. According to William J. Carney, "Limited Liability," in *Encyclopedia of Law and Economics*, ed. Boudewijn Bouckaert and Gerrit De Geest, 2000.

[14] Frederick G. Kempin Jr., "Limited Liability," p. 18 quoting Angell and Ames, *The Law of Private Corporations Aggregate,* Boston, 1832, p. 349.

[15] William J. Carney, *Corporate Finance: Principles and Practice*, Saint Paul, Minn., 2014, pp. 55-62.

duty to publish annual reports, requirements of minimum capital, rules governing raising and maintenance of capital, limitations on the assets distribution to shareholders[16] or right to vote by the share pledgor.

4. Piercing the Corporate Veil as an Exception to Limited Liability

In the light of the above, it is clear that the limited liability rule was neither a simple consequence of the concept of distinct legal entity, nor was it absolute from the beginning of its formation. Nowadays however, it can be stated that the doctrine of corporate personhood provides separation of a company's assets from the assets of its founders, meaning that shareholders can decrease their economic risk to the amount invested in the corporation. Even though this business vehicle was designed to allow for such behavior, it should not be stated that by the sole concept of separate entity, this limitation is absolute. The concept of legal entity is simply nothing more than a legal fiction and should not be abused. It took time to gain the experience necessary to understand the goals and implications of the limited liability doctrine, as well as set a frame for creditors' protection and even then, it was impossible to entirely prevent fraud, bad business management or undercapitalization. Thus it should not be a surprise that the legislature constructed a measure to hold shareholders liable for the obligations of the corporation by constructing the doctrine of piercing the corporate veil.

This most litigated issue in American corporate law[17] allows creditors to gain access to shareholders assets by "piercing" the shield built by the corporate personhood. Since the doctrine has its basis in equity,[18] it is then in almost complete discretion of the judge[19] and requires that the plaintiff did not violate the clean hands principle. However, according to Philip Blumberg, there is some difficulty in the application of the above, since "This is a jurisprudence by metaphor or epithet. It does not contribute to legal understanding […] Courts state that the corporate entity is to be disregarded because the corporation is, for example, a mere "alter ego." But they do not inform us why this is so, except in very broad terms that provide little general guidance. … Few areas of the law have been so sharply criticized

[16] More about "German" legal solutions in Peter O. Mülbert, "A Synthetic View of Different Concepts of Creditor Protection—or a High-Level Framework for Corporate Creditor Protection," *ECGI - Law Working Paper* No. 60/2006, 2006, pp. 28-35.

[17] Robert B. Thompson, "Piercing the Corporate Veil: An Empirical Study," *Cornell Law Review* 76(5), 1991, p. 1036.

[18] Reasoning for classification of the veil piercing measure as an equitable remedy can be found in the case of *DeWitt Truck Brokers v. W. Ray Flemming Fruit Co.*, 540 F. 2d 681 (4th Cir.1976).

[19] Rolf Garcia-Gallont, Andrew J. Kilpinen**,** **"**If the veil doesn't fit… an empirical study of 30 years of piercing the corporate veil in the age of LLC," *Wake Forest Law Review* 50 (5), 2015, p. 1229.

by commentators."[20] In the view of thereof it is of great economic risk that it may result in arbitrary and inconsistent judgments,[21] especially in the light of empirical studies conducted at the end of twentieth century, which showed that piercing the corporate veil is a phenomenon occurring only in closely-held corporations towards active shareholders.[22] Thus it is extremely important from the perspective of smaller enterprises, which are not able to assign substantial funds for legal counsel, that the rules of corporate veil piercing should be clear and predictable.

The confusion around the rules of piercing the corporate veil arose because of general terms used by the court in order justify the imposition of liability on shareholders. Often the Court explained its decisions by stating that the corporation was simply a "shell," "sham," "instrumentality" or "alter ego" of the shareholder.[23] Therefore it is hard to find common factors used for the purpose of deciding whether or not the corporate veil should be pierce, even though the reasoning behind them is always the same, namely to do justice.[24]

5. Doctrines of Piercing the Corporate Veil

Scholars have distinguished three main doctrines applied by the courts: the "instrumentality" doctrine, the "alter ego" doctrine and the "identity" doctrine.[25] In the frequently cited case of *Lowendahl v. Baltimore & Ohio Railroad*,[26] the following factors had been pointed out as necessary under the instrumentality doctrine: (1) complete control, including policy, finances and business practices in the relation to transaction being subject of the claim, so that the company had no separate will, (2) such control has been used to commit fraud, violate other legal duties, or has been used to do an act tainted by dishonesty or unjust conduct violating the plaintiff's rights, and (3) such fraud or wrong results in unjust loss and injury to the plaintiff. In order for the claim to be successful the alter ego doctrine requires the evidence of (1) such unity of interest and ownership between stockholder and corporation that it can be said that the corporation no longer exist as a separate person, but it is merely the alter ego of controlling shareholder and (2) that refusal of piercing the corporate veil would encourage fraud or promote

[20] Phillip I. Blumberg, *The Law of Corporate Groups: Procedural Problems in the law of parent and subsidiary corporations*, New York, 1983, passim.

[21] Which was signalized by Stephen M. Bainbridge in "Abolishing LLC Veil Piercing," *University of Illinois Law Review* 2005(1), 2005, p. 77.

[22] According to Robert B. Thompson: "among the 1600 reported cases of piercing the veil, there was no case in which shareholder of a publicly held corporation were held liable" in "The Limits of Liability in the New Limited Liability Entities," *Wake Forest Law Review* 32(1), 1997, pp. 9-10.

[23] Franklin A. Gevurtz, *Corporation Law,* Saint Paul, Minn., 2000, pp. 70-71.

[24] *Pepper v. Litton*, 308 U.S. 295, 310, 1939.

[25] James D. Cox, Thomas Lee Hazen, *Corporation Law,* Toronto, 2012, pp. 86-94.

[26] *Lowendahl v. Baltimore Ohio R.R. Co.*, 247 App. Div. 144 (N.Y. App. Div. 1936).

injustice.[27] Finally, the identity doctrine, according to the reasoning of Connecticut Supreme Court in *Zaist. v. Olson* case, states that if because of the unity of interest and ownership there is no longer such thing as "independence of a corporation" it would be against justice and equity to allow such entity to avoid liability "conducted by one corporation for the benefit of the whole enterprise."[28]

After analyzing the above mentioned factors of each doctrine one may acknowledge that it is almost impossible to properly distinguish one from another, and according to scholars such a conclusion would be correct. Judicial approach seems to focus not so much on the applied test, as on the general rule flowing from the aforementioned.[29] Whereas the requirement of risk of fraud or injustice does not give rise to any difficulty, it is the control or unity of interest condition which creates some further questions. In reality simply the fact that one or more stockholders controls the corporation is usually not enough for the courts to rule in favor of the plaintiff. The case law distinguishes regular control from the "domination," in which as was previously pointed out, the company possesses no separate will.[30] As it was aptly put by Franklin A. Gevurtz, such a distinction is "silly" and incorrect, since the corporation's decisions are the decisions of its shareholders solely because, as an artificial person, a company is not capable of its own mind.[31] Thus courts started adding other factors in order to fulfill the test of domination or control, such as a lack of corporate formalities, commingling of funds or assets, severe undercapitalization or treating the company's assets as one's own. Without deeply analyzing the above, it may be stated that they provide more guidance in the application of piercing the corporate veil doctrine.

It was also repeatedly emphasized that piercing the corporate veil does not interfere in the sole existence of the company. Ruling in favor of the creditors does not necessarily mean that all of corporation's debts will be then paid by the shareholders or that all stockholder will be held personally liable for them.[32] Piercing is a measure to be used to impose such liability on one or all of them—the aforementioned fraud element points out to the court when is the time to pierce and assigning the control factor tells it against whom.[33] For that reason, this doctrine should not be treated as one interfering with separate entity of the company, but rather as a remedy for preventing abuse.

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[27] *Southern Cal. Fed. Sav. & Loan Assoc. v. United States*, 422 F.3d 1319, (Fed. Cir. 2005).

[28] *Zaist v. Olson*, 154 Conn. 563, Conn. 1967.

[29] Karen Vandekerckhove, *Piercing the Corporate Veil*, Alphen aan den Rijn, 2007, passim; James D. Cox, Thomas Lee Hazen, *Corporation Law,* p. 88; Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality,* New York, 1993, pp. 310-11.

[30] *Craig v. Lake Asbestos*, 843 F.2d 145 (3d Cir.1988).

[31] Franklin A. Gevurtz, *Corporation Law,* p. 77.

[32] Robert W. Hamilton, *Corporations including partnerships and limited liability companies*, Saint Paul, Minn., 2001, passim.

[33] Franklin A. Gevurtz, *Corporation Law,* p. 79.

The above mentioned study refers to "vertical" veil piercing, i.e. the situation allowing creditors to reach shareholder's assets. To further understand the relationship between limited liability and the agents standing behind the company this section will illustrate the concept of "horizontal" and "reverse" piercing.

6. Horizontal Piercing

When two companies are the subsidiaries of the same parent corporation, to hold one of them liable for the action of the other, the plaintiff must claim that the horizontal piercing should occur. Such possibility was recognized on the basis of South Carolina amalgamation theory[34] presented in the case of *Kincaid v. Landing Development Court*.[35] According to the court the subsidiaries should be treated as a one company in light of the law, when there exist "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." In deciding whether sister corporations act *de facto* as the single enterprise the case law pointed out factors such as common officers and shareholders, sharing an office and phone number or using the same model documents for conducting business. It was in the most recent case of *Pertuis v. Front Roe Restaurants* in July, 2018, when the South Carolina Supreme Court decided to establish the framework for the application of the above theory. In line with the principles and objectives represented in relation to vertical piercing, the court ruled that the above examples of union between corporations are no longer enough to justify piercing the corporate veil. There has to be an evidence of some "fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions."[36] Thereby, it was once again emphasized that there is nothing illegal or wrong in the mere creation of business structure with the aim of limiting one's liability. Only when a breach of law occurs, such a right will be denied.

7. Reverse Piercing

Finally, the last variation of piercing the corporate veil, i.e. reverse piercing, imposes the liability for an individual's debt on the corporation. It is definitely the most controversial of all presented remedies. In the article published by Nicholas Allen, two method of reverse piercing are presented, one relying upon the requirements set up for vertical piercing, the other o called the "equitable results"

[34] Also referred to as "single business enterprise" theory.

[35] *Kincaid v. Landing Development Corp.*, 289 S.C. 89 (S.C. Ct. App. 1986).

[36] *Pertuis v. Front Roe Restaurants, Inc.,* 423 S.C. 640, 817 S.E.2d 273 (2018)

approach.[37] The latter has been recognized by the Colorado Supreme Court as a form of protection for innocent third parties from the risk created as a result of "unartfully performed" reverse piercing.[38] To apply this approach, the court must ensure that there is no other, less invasive method of achieving justice. It seems especially important to prevent situations in which shareholders suffer harm because the judgment allows creditors to reach for the assets of a company in order to repay the debt caused by only one of them. Even though it may create an additional obstacle in proving the justification for piercing, it may be a more equitable remedy than denying reverse piercing on the ground that third party right may be violated. The main alternative to the doctrine of reverse piercing is the agency law, but it does not cover all the cases in which corporate form is used to "shelter personal assets."[39] As was rightly noted by Allen, denying the recognition of reverse piercing doctrine may cause some sort of guidance in escaping from liability by using the separate entity in order to hide one's assets.

8. Involuntary and Voluntary Creditors

In view of the above considerations, the problem of voluntary and involuntary creditors should be addressed before a final conclusion is given. Since contract creditors were previously in the position to negotiate binding agreements and include previously mentioned provision protecting them from the risk of company (or individual) insolvency, it seems like a rational statement that they should be given weaker protection than tort claimants. The freedom of contract was shaped to allow individuals to make business decision and to bear its consequences. What seems like a common sense suggestion was seriously undermined by the study conducted by Robert Thomson in 1991.[40] According to his survey, until 1985 the courts were more likely to pierce the veil in contract claims than in cases involving tort victims. This finding caused a lot of confusion among scholars and helped shape another argument in favor of the abolition (or criticism) of the piercing the corporate veil doctrine. However, in the latest study published by Peter B. Oh in 2010, this thesis has been completely reversed.[41] New data based on the cases in the period from 1658 to 2006 (including additional twenty-one years in comparison to Thompson survey) showed that the practice actually follows the theory. It can now be confirmed that piercing the corporate veil is far more significant in torts than contracts.

[37] Nicholas B. Allen, "Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice," *St. John's Law Review* 85(3), 2014, passim.

[38] Ibid.

[39] *Fischer Investment Capital Inc. v. Catawba Development Corp.,* 689 S.E. 2d 143 (N.C. App. 2009).

[40] Robert B. Thompson, "The Limits of Liability in the New Limited Liability Entities," *Wake Forest Law Review* 32(1), 1997, pp. 9-10

[41] Peter B. Oh, "Veil-Piercing," *Texas Law Review* 89(1), 2010, p. 81.

9. Conclusions

Although it is true that the concept of limited liability has been designed in order to separate individuals assets from the assets of company, it also has to be emphasized that history has shown that such a distinction was never absolute nor to be used in the aim of deceiving business partners. As long as such a decision is dictated by the sole intention of creating some sort of business structure in order to limit one's risk, it is recognized as lawful and just. It is when some sort or fraud or violation occurs, that there is a need for reflection on the nature and purpose of the corporation.

Among various form of creditors' protections against such wrongdoing, one is typical for the common law system—the doctrine of piercing the corporate veil. This often criticized equitable remedy, even though vague and imprecise always had one goal i.e. to prevent injustice. To achieve this purpose the courts have been applying three main doctrines which despite confusion have been commonly accepted. The evolution of the case law on this subject has introduced new measures in the form of reverse or horizontal piercing, once again aimed at preventing the abuse of separate entity of corporation. Its effectiveness in protecting the more vulnerable party has been verified by the most recent studies, which showed that tort claimants are protected more than contract creditors.

One may say that in contrast to what Stephen M. Bainbridge believes, the superiority of doctrine of the piercing the corporate veil over different solutions lays in its vagueness. It allows it to adapt to different situations, without hoping that the strict provision of law will be enough to prevent injustice in operating in the form of corporation. Measures such as requirements of minimal capitalization or strict provisions regarding the potential liability of shareholders in jurisdictions such as Polish have repeatedly failed in achieving true fairness in creditor—company relations. The concept of separate entity cannot be an obstacle from protecting the individuals, since it was the individuals who invented such legal fiction in order to achieve policy goals.

I believe that there is no defect in creating legal measures which promote judicial discretion, as long as the people composing the judiciary are able to achieve true justice in using the equitable remedies.

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Summary. The aim of the article is started by modern criticism reflection on the application of "piercing the corporate" veil doctrine in American law. Firstly, it will present the history of formation of limited liability concept and it will identify the exceptions from the absolute limitation of shareholders' liability as well as the attempts to prevent the abuse of the form of separate entity. Then, the doctrine of piercing the corporate veil will be discussed as one of the methods of counteraction the above mentioned wrongdoings and preventing frauds. The concepts of "horizontal" and "reverse" piercing along with citation of the studies on the applicability of the doctrine to involuntary and voluntary creditors will end the deliberations on application of piercing the corporate veil by judges. Presentation of advantages of current form of the concept of piercing the corporate veil in United States will precede the conclusion of the need of leaving the doctrine of piercing the corporate veil.

Key words: corporate veil piercing, limited liability, horizontal veil piercing, reverse veil piercing

Chapter IV

PRAGMATIC TRUTH IN RORTY'S CULTURAL POLITICS

Mehmet Sadik Bektas

1. Introduction

In order to understand the legal system of American constitution, law, justice, and social problems in both America and Europe, it is necessary to interpret the philosophy and the structure of thought it has produced. For example, if a system is to be established or a law is to be created, it is created on the basis of the concept of truth. However, while dealing with the concept of truth, we must follow a path by considering different versions of it. For instance, when the laws are drafted, should they be created from a universal understanding of truth, without regarding cultural characteristics? One could say that a European researcher, who is conducting his/her work in the field of jurisprudence or a philosopher, who is interested in what is the correct way of approaching social and political problems such as freedom of speech or religious involvement in politics, has always taken American-style philosophy and politics as the center of their analysis. Can, for instance, European laws and rules be produced based on American laws without knowing the tradition of American philosophy? The role of the state in the American political and legal system, the impact of pragmatic philosophy interpreting social and cultural characteristics such as what is the correct way of creating rules or what is the practical strategy to understand social events, the debate about freedom of speech, and the liberal idea of sovereignty, are all determined by the constitutional principles, which have a direct relationship with the American pragmatic philosophy. One of American neo-pragmatist thinker Richard Rorty, let it be an example, is known for his contribution to the philosophy of pragmatism as a new strategy for political events and defended liberalism as a new political ideology. Notably, the cultural politics that he interpreted through a liberal point of view includes clues on how western jurisprudence system should act, for example, in case of racism, toleration, and religious institutions. His one of main thesis on cultural politics, therefore, provides a foundation for both American politics and liberal societies.

Rorty argues that modern philosophy as a discipline sees itself as an attempt to underline or refute the claims of knowledge made by science, morality, art, religion and has not adequately interested in the role of pragmatism in the epistemology of truth and culture. Pragmatism, therefore, he believes, opens a road for more beneficial both in politics and in the theory of knowledge, which is simply "an abandonment of the very attempt to learn more about nature and adequacy conditions of inquiry."[1] With this in mind, his concentration on pragmatism and language eventually led him to criticize European founders of modern philosophy such as Descartes' dualism, Kant's transcendental idealism, and Locke's representative theory of perception. The fundamental philosophy of Rorty, then, is the practical philosophy and its combination with language, which sees the vocabularies and truth as tools. Rorty's both interpretation of truth and cultural politics is a strategy based on the western liberal idea. Although, for example, by emphasizing the importance of cultural politics as what words to use, he followed a righteous way, such a line remains mistrustful whether it guarantees that there will be no other problems at the end of the road. Therefore, the primary purpose of this article is to show that Rorty's interpretation of truth and his solution for toleration, which he names *cultural politics* is unfavourable and insufficient in case of non-western societies, while his utilitarian ethics involve one-sided western ethnocentric perspective.

2. Different Versions of Truth

The place for the notion of truth has been an essential topic within the history of philosophy. From German philosopher Immanuel Kant to the pragmatist philosophers such as Charles S. Pierce, William James, John Dewey, Richard Rorty, and to the classical American philosophers mainly, Bertrand Russell and Alfred Whitehead. Different theories, therefore, have been explained commonly. Correspondence, coherence, and practical methods (Pragmatism), for example, are among the most popular propositions.

2.1. The Correspondence Theory of Truth

The correspondence theory of truth is "a precise and innovative account of how the truth of a proposition depends upon that proposition's connection to a piece of reality."[2] Narrowly speaking, the trueness of knowledge, in correspondence hypothesis, insists the view that truth is correspondence to, or with, a fact. Corresponding theories emphasize that true beliefs and valid expressions correspond

[1] Bjørn T. Ramberg, "Richard Rorty," *The Stanford Encyclopedia of Philosophy* [online], https://plato.stanford.edu/entries/rorty/ [10.10.2020].

[2] Joshua Rasmussen, *Defending the Correspondence Theory of Truth*, Cambridge, 2014, passim.

to real situations. The interest of this theory emphasizes the relationship between ideas or phrases on the one hand and objects on the other. The theory maintains that a representative of truth or falsehood of knowledge is determined by how it relates to things or objects. The assumption that correspondence theory centers around is a matter of copying from what is known as objective reality and then representing it in thoughts, words, and other symbols.

The central concrete defense given by the sympathizer of this kind of truth theory is its obviousness. For instance, Descartes once said that "I have never had any doubts about truth because it seems a notion so transcendentally clear that nobody can be ignorant of it…the word 'truth', in the strict sense, denotes the conformity of thought with its object."[3] Kant, on the other hand, is another philosopher, whose views may lead to correspondence premise. "The nominal definition of truth" says Kant, "that it is the agreement of cognition with its object, is assumed as granted."[4] Kant, with this genre, maintains that the truth is taken for granted and is dogmatic, that is, many people accept it. James agrees with Kant and Descartes and emphasizes that "truth, as any dictionary will tell you, is a property of certain of our ideas. It means their 'agreement,' as falsity means their disagreement, with reality."[5] Russell followed the same pattern with Descartes, Kant, and James and embraced the notion of absolute knowledge by saying, "Dogmatism and scepticism are both, in a sense, absolute philosophies; one is confident of knowing, the other of not knowing. What philosophy should dissipate is a certainty, whether of knowledge of ignorance."[6] Russell, like most of his philosophical contemporaries, was a neo-Hegelian and Absolute Idealist. He commented on the concept of truth through a dualistic vision. For him, the notion of truth can only be known by its opposite; falsehood. Hence, Russell, in his novel, claims three points to observe in the attempt to discover the nature of the concept. In the first point, he indicates that a theory of truth must be based on its opposite, falsehood. Secondly, he believes that falsehood and truthiness exist together with the beliefs, and thirdly he argues that the truth or falsehood of a belief depends upon something which lies outside the knowledge itself. On this theory, the righteousness of a proposition is understood in terms of the way reality is described, a reality, which is mental.

2.2. The Coherence Theory of Truth

As a competitor of the correspondence hypothesis, the coherence theory of truth states that the "truth of any (true) proposition consists in its coherence with some

[3] Anthony Kenny, *The Philosophical Writings of Descartes*, Cambridge, 1991, p. 139.
[4] Predrag Cicovacki, *Anamorphosis: Kant on Knowledge and Ignorance*, Lanham, Md., 1997, p. 175.
[5] Barry Allen, *Truth in Philosophy*, Cambridge, Mass., 1993, p. 61.
[6] Bertrand Russell, *Philosophy for Laymen*, Crows Nest, 1951, passim.

specified set of propositions."[7] There are two essential respects, which differs from the former theory of truth from the latter. These theories that rival each other give contradictory explanations based on propositions and their real conditions. While for one, the relationship is consistency, for the another, it is correspondence. The two theories also provide contradictory statements of the conditions of truth. According to the theory of coherence, the actual conditions of propositions consist of other propositions. In contrast, the theory of correspondence states that the real conditions of propositions are not the propositions but the objective features of the world.[8]

Although coherence and correspondence theories are opposite or contradict each other, they offer an immense opportunity to understand the epistemology of knowledge. That is, unlike deflationary theories, both consistency and correspondence theories claim that truth is a feature of propositions that can be analyzed according to the kinds of real-state suggestions, and their relationship proposition depends on these conditions.[9]

The coherence theory was associated with the idealism of Spinoza, Kant, Fichte, and Hegel. The underlying reason for why these idealists were led to embrace the coherence theory of truth was the metaphysical position they took. For example, advocators of the correspondence theory ontologically take the idea of belief as accurate. However, Idealists such as Hegel did not believe the ontological distinction between faith and what makes these beliefs as real. From the idealists' perspective, the collection of views are the determinants factors what make a reality. In the philosophy of idealism, therefore, all ideas or beliefs are said to be compatible since the world is the mind itself or created by a rational agent.

The coherence theory of truth consequently can be examined according to three different philosophical works of literature: (A) in scientific theories, where a new observational fact is integrated and coherent with existing fact, (B) in analytic language philosophy, which indicates the trueness of sentences as depending its agreement with a set of propositions, and (C) in traditional epistemology where the coherence is internal with the personal set of beliefs.

Consequently, an opinion cannot be valid since it corresponds to something which is not a belief. Instead, the truth of a conclusion can only consist in its coherence with other ideas. In short, reality and truth cannot be independent of people's beliefs and thoughts. A theory is correct to the extent that it is compatible with other views.

Among these lines, another theory which deals with the concept of truth is the philosophy of Pragmatism which was introduced by Charles Sanders Peirce, Wil-

[7] James O. Young, "The Coherence Theory of Truth," *The Stanford Encyclopedia of Philosophy* [online], https://plato.stanford.edu/entries/truth-coherence/ [10.10.2020].

[8] Ibid.

[9] Ibid.

liam James, and John Dewey at the beginning of the twentieth century. Although there are different views among philosophers who defend the pragmatic philosophy, the stock point of all is to interpret the concept of truth according to the result of a vision or an action.

3. The Pragmatic Theory of Truth

Pragmatic theories of truth are usually associated either with Peirce or James' proposal, which claims that truth is defined in terms of utility. More broadly, pragmatic theories of truth focus on the connection between reality as a result of an inquiry and practice as a way of dealing with reality. Depending on the pragmatic approach, factual statements might be those that are useful to believe. Unlike correspondence theories, pragmatic theories of truth tend to view reality as a function of the practices people engage in, and the commitments they make when they solve problems, make assertions, or conduct scientific inquiry.

The pragmatic approach to the notion of truth, in a broader sense, focus on the link between truth and epistemic practices, in particular practices of inquiry and assertion. Pragmatic theory may be expressions that are useful for believing and are the result of an investigation, which is based on ongoing scrutiny or represent ambitious discourse norms. Like other truth theories, pragmatic understanding is often put forward as an alternative to the correspondence theories of reality. Unlike correspondence theories, which tend to see reality as a static relationship between a truth-bearer and a truth-maker, pragmatic truth theories tend to see the truth as a function of the practices and commitments people make. More generally, pragmatic approaches tend to emphasize the vital role of the concept of truth in a range of disciplines and discourses. It is based not only on discourse stating scientific truth but also on ethical, legal and political discourse.[10]

The American philosopher, Peirce is known for being the first pragmatist, who interpreted truth as a result of his pragmatic theory of meaning. In *How to Make Our Ideas Clear* an essay he wrote in 1878, he says "to pin down the meaning of a concept; we must consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object."[11] For Pierce, the meaning of truth is based on the result that it causes. In other words, to define a belief correctly, it is necessary first to examine the effect of that belief in practice. His pragmatism is evident in his knowledge of reality. Although, he claims that propositions cannot be considered right since people believe in them, the concept

[10] For a concurring article, see John Capps' article "The Pragmatic Theory of Truth" [online], https://plato.stanford.edu/entries/truth-pragmatic/ [1.09.2020].

[11] Charles S. Peirce, "How to Make Our Ideas Clear," *Popular Science Monthly* 12, 1878, pp. 286-302.

of truth cannot have an independent meaning outside of experience. Peirce does not see truth as an idea which is independent of human thought (that is, reality) or as a sign of the object. To him, truth stands for ontological dimension, which is explored in an experience. According to this, any idea or symbol, however, represents the action of the object. The audible effects of that proposition then determine the righteousness of a thesis in Peirce's thought. The ultimate test of what truth means is the behaviours that this truth makes or inspires.

Peirce's contemporary psychologist and friend James is another thinker who is known for his contribution. In several popular lectures and articles, James, like Peirce, presents the account of a fact-based on the functional role of the concept of reality. James emphasizes that truth represents satisfaction, and that true beliefs satisfy one's faith in a sense. In other words, James expresses that truth is a concept that fulfils the faith. However, unlike Peirce, James argues that true beliefs can be satisfactory and indispensable. In the lectures published as *Pragmatism: A New Name for Some Old Ways of Thinking*, James writes, "Ideas…become true just in so far as they help us get into satisfactory relation with other parts of our experience, to summarize them and get about among them by conceptual shortcuts instead of following the interminable succession of particular phenomena."[12] James believes that the truth ideas are like tools. They help us to do what is needed to make things more efficient. Therefore, for the philosopher, the notion of truth is the truth of an individual, which is acceptable as long as it functions. To provide the most detailed explanation of the notion, it is necessary to start the analysis of fact from the individual and the beliefs that operate according to this individual. Later, James developed his ideas and insisted that truth has a relativistic sense, that is to say, its existence depends and functions according to a particular community. Individuals collect their experiences through shared knowledge, research, and then the group gradually develops the belief structures that belong to the higher levels of truth. Community members perceive various experiences in this way and progressively determine their value. In this way, limited or partial truths and objective beliefs become acceptable as this process progresses.

As an analytic thinker, Rorty took the route of James and Pierce and argued that truth is nothing but a linguistic phenomenon, a claim which created a basis for his strategy; cultural politics. Different vocabularies give us beliefs that are more or less useful in coping with the environment in various aspects. In his novel, *Contingency, Irony, and Solidarity* Rorty addresses the notion of truth and language as following:

> We need to make a distinction between the claim that the world is out there and the claim that truth is out there. To say that the world is out there, that it is not our creation, is to

[12] William James, *Pragmatism. A New Name for Some Old Ways of Thinking* [online], http://www.gutenberg.org/files/5116/5116-h/5116-h.htm [10.10.2020].

> say, with common sense, that most things in space and time are the effects of causes which do not include human mental states. To say that truth is not out there is to say that where there are no sentences, there is no truth, that sentences are elements of human languages, and that human languages are human creations. Truth cannot be out there—cannot exist independently of the human mind—because sentences cannot so exist, or be out there. The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own—unaided by describing activities of human beings—cannot.[13]

According to Rorty's account, modern epistemology is not only an attempt to legitimize our claim to know the real thing, but also an attempt to legitimize philosophical thought in many accounts with the advent of science. As a result of Nietzsche, Husserl, and Heidegger influence on Rorty's philosophical thought, he kept many of his views in Anglo-American philosophy tradition. Therefore, it can be mentioned that Rorty's work has two aspects. One of them relates to the philosophy of the language. More precisely, the significant effect that vocabularies and meaning have in the scope of philosophy and culture. The other is American pragmatism, which Dewey and James defended.

Rorty has concluded that the claim that the mind reflects reality is not valid. Truth is not something created by the human mind independent of the subject, but an intersubjective linguistic consensus builds it. It is not possible to speak of the existence of truth, apart from the human mind. The world is outside the human mind, but the narratives about it are not. What we will talk about is the truth or falsity of the narratives about the world. We cannot speak of the righteousness or falsehood of a world that is not expressed linguistically. Here, the importance given by Rorty to the language is clearly seen. There is no world other than language because the world is something we create within our mind.

Philosophers like Rorty, do not address the concept of truth as a universal value. Whitehead mentions of existence of a half-truth and Rorty speaks of the life of vocabularies and language. Pragmatists, like Rorty, argue that there are no absolutes that can define reality. They believe that everything is relative to something else; therefore, the existence of absolute morality and truth is a utopia. The common point that most of American pragmatist philosopher share is that they interpret the concept of knowledge from a relativist and liberal perspective. To say that societies form concepts of reality according to their own culture and norms means to approve certain social events in a certain way. However, such a theory of truth damages social order and justice. If as post-modern relativists, who disagree with the idea of absolute truth, is right then even the ugliest practices, such as slavery, environmental destruction, and the physical abuse of women become to be seen understandable, if not acceptable, as long as they conform to the standards or norms of the society. (In this sentence, I emphasize the word 'understandable' rather than 'acceptable'

[13] Richard Rorty, *Contingency, Irony, and Solidarity*, Cambridge, 1989, pp. 4-5.

because a neo-pragmatist and relativist philosopher from particular cultural perspective might understand such behaviors even though he/she does not accept it). Not all truths are mind nor act depended. For example, the existence of tectonic plates, trees, and galaxies. The reality of such phenomena is not depended to any action nor language. They are out there to be discovered or seen. As Searle says,

> Along with realism, we generally assume that our thoughts, talk, and experiences relate directly to the real world. That is, we assume that when we look at objects such as trees and mountains, we typically perceive them; that when we talk, we typically use words that refer to objects in a world that exists independently of our language; and that when we think, we often think about real things. … The referential theory of thought and language typically find it embarrassing to have to concede external realism. Often they would rather not talk about it at all, or they have some more or less subtle reason for rejecting it. In fact, very few thinkers come right out and say that there is no such thing as a real-world existing absolutely, objectively, and totally independently of us. Some do. Some come right out and say that the so-called real world is a "social construct."[14]

As a conclusion, to ask whether the truth is universal or not is perhaps the beginning of the mistakes made by pragmatist philosopher and philosophy. If we categorize the fact only in general terms, we cannot get pragmatic results. Rorty's pragmatic understanding of truth not only carries a philosophical dimension, but he has also adapted it to culture, politics and sociology. For example, his influential work or strategy on cultural politics provides us with clues on the concept of pragmatic truth, both in politics and the concept of justice.

4. Cultural Politics as a Pragmatic Truth

In his book *Philosophy as Cultural Politics* (2007), the neo-pragmatist philosopher Rorty emphasizes the importance of cultural politics in which he replaces with the ontology, the study of what things exist. As stated by him, the term cultural politics encompasses discussions about what words to use. There, he draws attention to a new strategy by replacing words within the language. In his description, cultural politics is portrayed as such, "when we say that Frenchmen should stop referring to Germans as "Boches" or those white people should stop referring to black people as "niggers," we are practicing cultural politics."[15]

The particular idea of cultural politics, according to Rorty, is derived from the work of another American philosopher, Brandom, who divides culture into three spheres. In the first sphere, Brandom argues that "the individual's authority is supreme; in the second sphere, the non-human world—the scientific method—

[14] John Searle, *Mind, Language And Society: Philosophy In The Real World*, New York, 1999, p. 15.

[15] Richard Rorty, "Cultural Politics and the Question of the Existence of God," *Studia Universitatis Babes-Bolyai—Studia Europaea* 41(1), 2001, p. 37.

is supreme; in the third sphere, society does not delegate, but keeps the right to decide to itself."[16] As the third sphere is the arena of cultural politics, such politics are dedicated to the local people who want to make, for example, what authority should keep, what law to apply.

My first criticism of the cultural politics of Rorty comes from the notion of society and the idea of truth as two concepts that should be considered separately. While the definition of the "community" or "society" is understood and agreed by the vast majority of scholars, the description of the word "truth" can be differentiated, as already mentioned. In other words, it is useful to state what is the purpose of society and truth. Society as defined by Peter Berger and Thomas Luckmann is a "dialectic phenomenon, in that, it is a human product, and nothing but a human product, that yet continuously acts upon its producers. Society is a product of man. It has no other being except that which is bestowed upon it by human activity and consciousness."[17] People are conscious beings. The formation of society also means the formation of the order and its discipline.

In a natural state, there is no human community in a specific order, with certain laws accompanied. Such a system is created only by beings with intelligence and consciousness. Nevertheless, the concept of truth, on the other hand, is a different thing. As I have mentioned before, the concept of truth is not just a human concept. The existence of trees or tectonic plates is a human-independent phenomenon. Such truths do not require any consciousness or human society. For this reason, it is a meaningless and unnecessary hypothesis to claim that human societies create their truth; instead, it should be noted that truths create societies. To create a society, there must be built on truth, not create or built a truth. For example, there is a truth called 'tree' in nature, which helps us to produce papers or pencils or there are 'wars' in history, and this truth is enough to keep people together, or there is a truth called 'irregularity' and laws and rules are required to eliminate this truth or a society cannot be established where there are volcanic mountains, the reason is that it is the truth that those mountains are erupting. These examples reveal that truth constitutes societies and laws, not vice versa, as claimed by relativist thinkers.

In *Philosophy as Cultural Politics*, Rorty says,

> It is a feature of a democratic and pluralist society that our religion is our own business – something we need not even discuss with others, much less try to justify to them, unless we feel like doing so. Such a society tries to leave as much free space as possible for individuals to develop their sense of who they are and what their lives are for, asking only that they obey Mill's precept and extend to others the tolerance they enjoy."[18]

[16] Hendricus J. Prosman, *The Postmodern Condition and the Meaning of Secularity*, Utrecht, 2011, p. 95.

[17] Thomas Luckmann, Peter L. Berger, *The Social Construction of Reality*, London, 1966, p. 79.

[18] Richard Rorty, *Philosophy as Cultural Politics*, Cambridge, 2007, p. 25.

These sentences indicate that the writer adopts a secular and liberal world view and expresses the individualization of religion or seeing the latter as a private matter. The next focus of my criticism starts here with a question: is it possible to privatize religion? Before answering this question, we need to define the concept of religion, which is not subjected to a description in Rorty's cultural politics or perceived from a western Judeo-Christian perspective. In Durkheim definition, religion appears as "a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a church, all those who adhere to them."[19] In Durkheim philosophy, religion does not emerge as an individual feature. On the contrary, religion embodies pluralist rituals and implies a single morality for many people. As a psychologist and founding father of pragmatic philosophy, James, on the other hand, defines it broadly as the experiences of human individuals as they see themselves related to whatever they consider to be divine. From James' definition too, one might understand that religion does not only require or refer a faith in transcendent or monotheistic God. In this sense, religion attributes sacredness. Whether in James or Durkheim epistemology, one might then understand that religion has a fundamentally pluralist meaning. Based on these definitions, a conclusion can be obtained: pragmatic philosophy does not discuss whether the rationality or how much is the privatization of religion is possible, but they argue religious beliefs or faiths can be introduced or should be kept private into the political arena in a democratic society in general. It is also a public issue to discuss whether a particular belief is reasonable and whether it will play a role in public and social policy issues. This is an essential point that secularists often ignore. Secularists, like Rorty, think that if a religious person disagrees with a secular or modern norm, a secular opinion should be the putative view, which violates the basic principles of democracy since democracy is also the voice of minority especially in case of freedom and equality.

Another deficiency of Rorty is that he does not adequately stand on the concept of culture, which remains a mystery in his philosophy and—as I argued earlier—believes the existence of truth according to societies. Culture, as cultural anthropology Edward Tylor defines, "is a term which encompasses the social behavior and norms found in human societies, as well as the knowledge, beliefs, arts, laws, customs, capabilities, and habits of the individuals in these groups."[20] Culture, then, refers to the habits of the societies formed by individuals. These expressions or habits do not constitute a concept of truth. Because they are beyond right or wrong, these are structures accepted without question. More precisely, it is the

[19] Ann Taves, *Religious Experience Reconsidered: A Building-Block Approach to the Study of Religion and Other Special Things*, Princeton, 2009, p. 176.

[20] Essien Essien, *Handbook of Research on the Impact of Culture in Conflict Prevention and Peacebuilding*, Hershey, 2020, passim.

culture that needs a concept of universal truth not vice-versa, as Rorty or other pragmatists claim. For example, building a mosque or a church requires the same rules of physics. Alternatively, gravity rules work the same way in every culture. Therefore, the definition of society implies the meaning of culture, not truth.

Rorty's and Brandom's next controversial views are connected with their cultural relativism, the philosophical doctrine about the nature of morality.[21] The main feature of cultural relativism is to adopt the idea that there is not the ultimate right or wrong. A society that embraces it loses its ability to judging. How relativity, including cultural relativism, penetrates modern society has been shown in strange ways in which we try to deal with some contradictions. For example, the meaning of tolerance became unconditional support and agreement for all views or lifestyles. However, those who choose to be intolerant should not be supported or accepted. Tolerance, therefore, becomes a final good or right on its own, which contradicts the whole idea of relativity. In other words, tolerance means a fundamental feature of morality. Likewise, violent crimes such as rape, murder, and slavery require a moral judgment—but strict cultural relativists cannot always say that such things are always wrong. What traditional relativist missed was the distinction between cultural relativism and ethical relativism. While the former states that a person's behavior and acts should be treated and understood according to his/ her culture, the latter is seen as a philosophical doctrine, which insists that there are no absolute truths in ethics "and that what is morally right or wrong varies from person to person or from society to society."[22] The concept of truth, again, has an important place in this chapter. If the concept of a universal truth brings a pragmatic or useful result, then pragmatic relativists accept the existence of a universal understanding of truth, even if it is involuntary.

One of the other vital features of cultural politics is the function of language. To show this functionality, Rorty states that "instead of talking about different races, let us just talk about different genes."[23] Rorty's main aim is to believe that by changing the vocabulary or deconstructing a set of discriminatory words, he believes that some social issues will be overcome. For example, using genes as a new word instead of race may abolish the phrase 'racism' but it still does not guarantee whether if using this kind of language lead new problems such as 'genism.' Rorty may be right in that regard, but changing the language or removing some words in the language is not guaranteed to cause any further problems.

Rorty's point is not only the words in the language but also his interest in the concept of happiness. That is to say; he believes that concepts, such as religion and god, prevent happiness as following: "To say that talk about God should be

[21] John Cook, *Morality and Cultural Differences*, Oxford, 1999, passim.

[22] James Rachels, "Ethical relativism," *Encyclopedia Britannica* [online], https://www.britannica.com/topic/ethical-relativism [10.10.2020].

[23] Richard Rorty, *Philosophy*, p. 3.

dropped because it impedes the search for human happiness is to take a pragmatic attitude toward religion that many religious believers find offensive and that some theologians think besides the point."[24] In order to disagree with these sentences, we need to start with a question: does a concept of god and religion impede a search for human happiness? Neo-pragmatist Rorty' fault starts with his usage of the word happiness, religion, and god in contrast with each other. Therefore, in this part, I will take two steps to disagree with him. In the first step, religion will be interpreted whether it impedes happiness. In the second step, I will take a position who disagree with the modern understanding of secularism. There are many essential aspects of religion that can increase personal satisfaction. Some of them can be explained as following; a sense of community that has been established among those who have the same belief system. This community has a social connection that can provide help and support for those who need it in many ways. To make a more detailed explanation, we should discuss the goals of these two words. Rorty shows an understanding of religion as opposed to James', in whose description religion is not only connected with a supernatural being. Religion can have a social ritual, as in Durkheim, and these rituals occupy a vital place in the happiness of the individual. For example, sacred holidays are seen as religious rituals without involving of a God or Gods. However, these holidays might also be the sources of happiness of the individual. Another contribution to the positive relationship between religion and happiness comes from research conducted by Pew Research Center, where the link between the two is clear. For this reason, religion and God as an impediment in front of human happiness is a biased approach. My latter criticism is related to the modern idea of secularism which keeps religion free of state affairs as a strategy followed by modern liberal societies.

Extremists atheists like Rorty interpreted religion on Judeo-Christian tradition, and such interpretations eventually led to the idea that religion and state affairs should be separated. In fact, there is a point that must be defined, that is what we mean by politics. If one means by politics as a beneficial way of dealing with injustice, then monotheist religions such as Christianity and Islam emphasize the need to be treated fairly. Again, if one means by politics as the purification of public spaces from religious symbols, then why in many western countries religious holidays, such as Christmas recognized by the state while for instance Ramadan is ignored? Charity, for example, is one of the pillars of Islam and Christianity. These religious rituals are significantly helpful to reduce economic injustice. Or, why then permission for the religious background conservative parties are allowed to be voted? Such issues can be demonstrated that state affairs are very closely related to religion. As it turns out, according to George Holyoake, who put his statement of secularism into literature, the intention was the separation of government from

[24] Ibid., p. 4.

the church, not religion from the state. While religion and political parties have many standard features, they are complementary elements.

Another critical issue that Rorty touches in his cultural politics is his concern with ontology. He argues, "I want to argue that cultural politics should replace ontology, and also that whether it should or not is itself a matter of cultural politics."[25] The main mistake of the philosopher is that he ran out of the definition of the term when he proposes an allegation. So the necessary thing we have to do here is first to discuss what ontology means. In doing so, it is more convenient to take advantage of the book *An introduction to Ontology*, which has been written by Nikk Effingham, for whom ontology is the study of what things exist.[26] For Effingham ontology is not something that everybody does. Besides material objects, such as buildings, insects, antibodies, etc., ontology is interested in non-material objects. By non-material objects, he does not mean god, angel or devil since such phenomenon also is an exciting area of ontology, but numbers, properties, places, events, works, music, culture, language, democracy, freedom, etc. The definition of ontology, therefore, entails us to think that cultural phenomenon, words, politics, meanings, dates, places are the topic of the ontology. As for Rorty's claim, the displacement of cultural politics with ontology has no meaning since culture and politics are themselves ontological.

5. Utilitarianism as a Basis for a Pragmatic Theory of Truth

The strategy and goal that Rorty has followed throughout his career have been to interpret the philosophy of utilitarianism through a pragmatic perspective. To put it differently, his main aim was to create a room for both utilitarianism and pragmatism. By following such a strategy, Rorty went behind the philosophy of James, whose pragmatism represented utilitarian ethic. James agreed with the English philosopher and political scientist, Mill, who believed that the right thing to do, and a genuine belief to acquire, is the one, which causes most for human happiness. James, like Mill, often concluded that all questions, including questions about the existence of a supernatural being, boil down to questions about what will help create a better world. Rorty like James, does not deny his interest in the important and necessary of utilitarian ethics. In other respects, like James and Mill, Rorty believed that an action should be construed according to the level of happiness. Therefore, before going through the philosophy of Rorty, it is proper to concentrate on the philosophy of utilitarianism to show why applicability of happiness as pragmatic is misleading.

[25] Ibid., p. 5.

[26] Nikk Effingham, *An introduction to ontology*, Cambridge, 2013, passim.

The philosophy of utilitarianism, which has been invented by British philosophers, Jeremy Bentham, and Mill, focuses on the concepts of happiness, pain, and pleasure. In other words, utilitarianism claims that the moral righteousness of an action depends on its desire. The theory postulates that steps ought to support the happiness of society as a whole. It is also crucial to remember that utilitarianism brings a practical perspective to the right action and wrong behavior. It is interpreted according to the conclusion of whether an attitude is useful in terms of human happiness. In this respect, the understanding of utilitarianism paves the way to consequentialism, the view that the morality of any particular act properties depends solely on its consequences.

As reported by Mill, acts should be classified morally right or wrong if the consequences of action reach the highest number of people. Thus, a move that causes the greatest pleasure for the majority of people might be called the right one. To sum up, utilitarians consider society as rightly ordered and therefore just. From this point of view, its first goal is to maximize utility within the organization; secondly, it is a consequentialist theory, thirdly, it emphasizes equality, and fourthly, it rests upon rationality. The maximization of happiness composes an essential feature of rational thought, which famously is at the center of the philosophy of hedonism, the teaching which argued that the pursuit of pleasure and essential goods are the primary goals of human life. As in the philosophy of hedonism, Bentham and Mill unified happiness and satisfaction and considered that the actuality of such sensation existed. Bentham claimed that the interpretation of words such as "ought," "right," and "wrong" belongs to its usefulness. In other words, for him, the governance of human beings was led by two inherent values: pleasure and pain.

The consequentialist characteristics of the theory carve out a weakness in such a philosophy. The concept of happiness itself causes criticism of utilitarianism. While happiness is often imagined as an individual's response since ancient Greek, utilitarianism reinterprets it as a plural name. For instance, Aristoteles outlines happiness as dependent on the person him/herself. For him, the fundamental goal of one's life is one's quest for happiness. Similar clarification plays an essential role in Plato's philosophy. The Symposium and the Phaedrus are two dialogues that focus on the individual soul and pay little attention to communal life. Instead, they concentrate on self-preservation, self-improvement, and self-completion. Plato maintains a virtue-based eudemonistic conception of ethics. That is to say, "happiness or well-being (eudemonia) is the highest aim of moral thought and conduct, and the virtues (arête: 'excellence') are the requisite skills and dispositions needed to attain it."[27]

After all, as long as happiness is described as part of the individual's existence, the philosophy of utilitarianism stands opposed to the notion of happiness on

[27] Frede Dorothea indicates more about Plato's ethics in her essay, published in *Stanford Encyclopedia*.

the account that utilitarianism is based on the pleasure of society. However, this concept of happiness does not commonly bring comfort or acceptability since the cultural and moral values of society prevent certain behaviors, although such actions may provide a high sense of satisfaction. Since the most influential cultural phenomenon in the, for example, the Islamic community is its religion, and this involves and incorporates fundamental ethical and moral obligations different from that of the society, the functionality of a utilitarian view in such a nation cannot be reconciled with an individual's beliefs, which may be different from what is most useful to society. Therefore, religious ethics, utilitarianism, and the concept of truth are essential factors that interfere with each other. The reason for such an argument lies behind the deontological ethics that corporates with religion. In contrast to consequentialist theories, deontological theories judge the morality of choices by criteria different from the states of affairs those choices have. They emphasize the morality of an action, which depends on its rightness or wrongness under some social and cultural constructs, rather than based on the consequences of the work.

Rorty's efforts to combine romantic utilitarianism, pragmatism, and polytheism with democracy leads two critical mistakes. In his claim, "Romantic utilitarianism, pragmatism, and polytheism are compatible with both wholehearted enthusiasm and wholehearted contempt for democracy,"[28] Rorty ignores the differences rather than similarities between utilitarianism and democracy. The former is an ethical theory, while the latter is a political idea. The second point focuses on characteristics that make up these theories: for utilitarianism happiness is an equal feeling for each human being while for democracy, the vote is equal value for each being. However, different factual assumptions and utilitarian arguments can lead to different results. For example, any person can argue based on utilitarian arguments that a strong government is essentially required to control people's selfish interests and that any change may threaten the stability of the political order, which eventually lead the government to take an autocratic and conservative position.

On the other hand, William Godwin, an English philosopher of the early nineteenth century, assumed "the basic goodness of human nature and argued that the greatest happiness would follow from a radical alteration of society in the direction of anarchism."[29] Although utilitarian ethics is considered as a valuable structure in Rorty's liberal democracy, its characteristics are only accepted in secular societies. From this point of view, Rorty's understanding of liberal democracy, built on utilitarian ethics, embraces a structure that underestimates the power of religion as a cultural phenomenon.

[28] Richard Rorty, *Philosophy*, p. 39.

[29] Henry R. West, "Effects Of Utilitarianism In Other Fields," *Encyclopedia Britannica* [online], https://www.britannica.com/topic/utilitarianism-philosophy/Effects-of-utilitarianism-in-other-fields#ref68614 [10.10.2020].

To sum up, in this short article, it is clear that the pragmatic philosophy, which has a profound influence on American society, law, politics, and thought structure, is a western-based liberal project. The concept of truth, in such a philosophy, is evaluated through utilitarian ethics. Although truth has cultural value for pragmatists, rejecting the universality of knowledge leads justice to be understood as a cultural phenomenon. Therefore, the ideas carried by the American philosophical tradition do not imply a universal interpretation of issues such as justice, politics, and culture. Pragmatic thought structure is, consequently, inversely proportional to any country's legal system.

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Summary. Although the idea of absolute truth brings solutions to some problems, its universal adaptability is questionable. That is to say, making legal decisions based on a universal understanding of truth may also raise problems. We must shape our justice system, keeping in mind its different versions at the same time. Neither sociological nor legal rules should be formed under the influence of single political ideology. Although essential works have been produced in both law and philosophy literature, the understanding of justice, for instance, has been a matter of discussion, as is the understanding of morality. For example, the philosophical tradition of America, pragmatism, has given a great deal of work on this subject. Although this form of thinking emphasized the importance of language, the understanding of truth interpreted by neo-pragmatists—like Rorty—has not achieved enough success in solving the problems in the long term. Thus, although the central theme of this article is to emphasize the importance of the ideas of a neo-pragmatist philosophers like Rorty, it is also to question the applicability of his philosophical thinking.

Key Words: truth, pragmatism, cultural politics, utilitarianism

PART II

INSTITUTIONS AND PROCEDURES

Chapter V

THE RIGHT TO A JURY TRIAL IN LIGHT OF THE AMERICAN CRIMINAL JUSTICE SYSTEM: A EUROPEAN PERSPECTIVE

Łukasz D. Bartosik

1. Introduction

The American jury trials, besides some notable exceptions, have not received much attention from Polish legal scholars or political scientists.[1] It is not particularly surprising why.

Jury trials were introduced to the legal system of a new sovereign Polish state during the interwar period by several legal documents—the March Constitution of Poland from 1921 (Konstytucja marcowa 1921),[2] the Polish Code of Criminal Procedure (Kodeks postępowania karnego) from 1928,[3] and the Law on the Organization of Common Courts (Prawo o ustroju sądów powszechnych) from the same year—but their practical implementation was not fully successful and their institutional lifespan was relatively short.[4] Due to the outbreak of the Second

[1] See, for example, Paweł Laidler, "Amerykańska ława przysięgłych jako instytucja polityczna," in *Idee, instytucje i praktyka ustrojowa Stanów Zjednoczonych Ameryki*, ed. Paweł Laidler, Jarosław Szymanek, Cracow, 2014, pp. 125-44; Idem, "Problem reprezentacji społecznej w kanadyjskiej ławie przysięgłych do spraw karnych," in *Pani Anna w Kanadzie. Księga pamiątkowa dedykowana Pani Profesor Annie Reczyńskiej*, ed. Marcin Gabryś, Magdalena Paluszkiewicz-Misiaczek, Cracow, 2016, pp. 213-34; Mieszko Tałasiewicz, "O autorytecie epistemicznym ławy przysięgłych i twierdzeniu Condorceta," *Decyzje* 27, 2017, pp. 111-18.

[2] See Act of 17 March 1921—Constitution of the Republic of Poland (Dz.U. z 1921 r. Nr 44, poz. 267), Article 83.

[3] See Executive Order of the President of the Republic of Poland of 19 March 1928 Code of Criminal Procedure (Dz.U. z 1928 r. Nr 33, poz. 313).

[4] The Polish procedure of selection of jurors in the Second Polish Republic vastly differed from the highly rotational American model, where summons are traditionally issued on an ad hoc basis, and where almost everyone is eligible to serve on a jury. The jurors under the Polish Law on the Organization of Common Courts from 1928, on the other hand, were to be elected by special committees formed at the District Courts, hold their duties in one-year terms, and preference was to be given to those who elicit the highest degree of education and extraordinary aptitude to perform as a juror due to their high character and life experience. See Rozporządzenie Prezydenta Rzeczypospolitej z dnia 6 lutego 1928 r. Prawo o ustroju sądów powszechnych, Dz.U. z 1928 r. Nr 12, poz. 93, art. 214-230.

World War, the free and independent Polish state had collapsed. After the War came to an end, jury trials, however, were not reclaimed.

The law of the Polish People's Republic (Polska Rzeczpospolita Ludowa), under the new regime of the Soviet Union, adopted a somewhat parallel institution of lay judges,[5] which then has been maintained in the Third Polish Republic (III Rzeczpospolita) after the democratic transition of 1989-1991. In practice, nonetheless, the role of lay judges remains marginal. It does not bear such social or political consequences that may be attributed to the operation of juries. In other words, juries simply never had a chance to become an anchor of freedom of the Third Polish Republic. Furthermore, it seems that over the last seventy years their very idea has been either forgotten or treated as a historical curiosity. It is thus the task of the new generation of Polish jurists to start a thorough discussion on the restoration of juries and their reintroduction to the Polish justice system—preferably modeled on the American experiences.

In this article, I will present the main benefits of jury trials and argue that the implementation of the American model of the right to a jury trial would positively affect not only the Polish judicial system but also the Polish democratic society in general. The argument will be centered predominantly around the advantages of jury trials in (serious) criminal cases—as guaranteed by Article III and the Sixth Amendment to the United States Constitution—but its argumentative core, through careful analogy, could be also extended to civil matters. At this point, it needs to be stressed that the article considers the benefits of juries at the trial-stage. Presentment and indictment by a grand jury (guaranteed by the Fifth Amendment to the U.S. Constitution), that is the elements of the pre-trial stage of criminal proceedings, are beyond the article's main concern.

Because the article is to contribute to a wider discussion on the introduction of full-fledged, American-style right to a jury trial to the Polish criminal justice system, I will also present the most important challenges associated with the functioning of jury trials (which might simultaneously appear as the most decisive counterarguments against my thesis), and indicate why they do not necessarily constitute an obstacle to the proposed solution, regardless of social or cultural differences between Poland and the United States.

The remarks made in the article are of particular importance now, in the times of radical changes made in the Polish judicial system and the so-called democratic crisis (as referred to by various commentators), beginnings of which—as I contend—could be sought not in 2015, that is the coming to power by the Law and

Also see Jakob Maziarz, *Sądy przysięgłych w II Rzeczypospolitej w praktyce Sądu Okręgowego w Krakowie*, Warsaw, 2017.

[5] *Cf.*, for example, Andrzej Pasek, "Zasada udziału czynnika społecznego w procesie karnym w początkach Polski Ludowej," in *Zasady prawne w dziejach praw publicznego i prywatnego*, ed. Marek Podkowski, Wroclaw, 2015, pp. 183-97.

Justice (Prawo i Sprawiedliwość) party, but rather in the flawed construction of the Polish justice system which does not take into account the strength of the real social factor in the adjudicating processes by deprecating the power of the juries. Fortunately, according to the ruling of the Polish Constitutional Tribunal (Trybunał Konstytucyjny) from 2011, the current Constitution of the Republic of Poland, due to its open-ended article 182, allows for the introduction of juries into the organization of common courts, without the necessity of altering the basic law.[6]

2. The Constitutional Foundations of the Right to a Jury Trial in the American Criminal Justice System

The trial by jury is a hallmark of the American criminal justice system.[7] It is rooted in the centuries-old British tradition (predating even the Norman conquest of Britain in 1066)[8] which was brought from the Old Continent to the American colonies in the beginning of the seventeenth century, and later adopted in the foundational documents of the new American republic. And even though the British imperial government tried to restrict the right to a jury trial in the times preceding and during the American Revolution, the Supreme Court of the United States often underlined the British heritage of the right. For instance, in *Thompson v. Utah*, the Court noted that "the word 'jury' and the words 'trial by jury' were placed in the [C]onstitution [...] with reference to the meaning affixed to them in the law as it was in this country [the United States] and in England at the time of the adoption of that instrument."[9]

The Founding Fathers, men who laid the foundations for an independent American state and created the United States Constitution of 1787 and the Bill of Rights of 1789, considered the right to trial by jury as one of the fundamental rights of the free people. In the eyes of the Framers, the utmost importance of juries could be collated with such underpinnings of the American body politic as the rights to life and property, personal liberty, the rule of law, and equality of all men. Even despite the heated debates and vast differences between the Federalists

[6] Postanowienie Trybunału Konstytucyjnego z 30.06.2011 r., Ts 180/10 (OTK B 2011.369). Article 182 of the Polish Constitution broadly states that „A statute shall specify the scope of participation by the citizenry in the administration of justice." See Konstytucja Rzeczpospolitej Polskiej z dnia 2 kwietnia 1997 roku, Dz.U. z 1997 r. Nr 78, poz. 483, art. 182.

[7] Trials by jury are not only a prominent feature of the American legal system but also a significant element of the American popular culture, especially cinematography. Countless movie-makers centered the screenplays of their productions around juries and jury trials. Just to name a few, jury trials are present in such movie classics as the *Twelve Angry Men* (1957), *To Kill a Mockingbird* (1962), *My Cousin Vinny* (1992) or *Runaway Jury* (2003), and many other cinematic productions.

[8] Susan N. Herman, *The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution*, Westport, 2006, pp. 6-8. The British tradition of jury trials, in turn, has a Germanic heritage.

[9] *Thompson v. Utah*, 170 U.S. 343, 350 (1898).

and Antifederalists during the ratification period, the salience of juries was not questioned by either of the political groupings. This contention is best illustrated by Alexander Hamilton who, in *Federalist* no. 83, wrote that:

> The friends and adversaries of the plan of the [Constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.[10]

Almost half a century later, Alexis de Tocqueville—perhaps one of the most acute observers of the American democracy—in a similar vein remarked that what separated the United States from the continental Europe as well as Great Britain were laws guaranteeing "the participation of the people in public affairs, the free voting of taxes, the responsibility of government officials, individual freedom, and", indeed, "trial by jury."[11] And even though Tocqueville himself conceded that all of "[t]hese pregnant principles were there [in the United States] applied and developed in a way that no European nation has yet dared to attempt,"[12] most of those principles (especially the rule of law) were in fact sooner or later advanced as political rudiments of liberal democracies in the twentieth-century Europe, including post-communist Poland. We shall now dare to attempt to implement the institution that was overtly left out by the Polish lawmakers—the right to a jury trial.

Before we proceed to the main arguments in favor of the (re)introduction of jury trials to the Polish judicial system, we shall introduce the American constitutional provisions which expressly guarantee the civil right to a jury trial, and simultaneously remain the cornerstones of the American constitutional jurisprudence. Although, as stated before, the Polish open-ended article 182 of the Polish Constitution allows for the introduction of American-style jury trials to the Polish justice system without altering the basic law, the following provision of the U.S. Constitution can be, at least in some way, a paragon for the implementation of similar solutions to the current Constitution of the Republic of Poland.

Article III, Section 2 (3) of the U.S. Constitution stipulates as follows:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.[13]

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[10] Alexander Hamilton, "Federalist no. 83," p. 460, in Alexander Hamilton, James Madison, John Jay, *The Federalist*, New York, 2006.

[11] Alexis de Tocqueville, *Democracy in America*, New York, 1966, pp. 36-37.

[12] Ibid., p. 37.

[13] U.S. Const. Art. III, Sec. 2 (3). The provision is thus also safeguard against the practice common during the times of the British dominion, when prisoners were often tried in places very distant from

This provision is then elaborated and further clarified in the Bill of Rights, barring the federal government from imposing any laws or committing any actions which would hinder the effect of the right to a jury trial.[14] The Sixth Amendment to the U.S. Constitution expressly states that the right to a jury trial is one of the most critical individual rights of the accused in the criminal proceedings, and a precondition for securing other basic procedural rights:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[15]

Importantly, neither the Constitution nor the Bill of Rights explicitly define the institution of a jury. We shall thus turn to the Black's Law Dictionary, the American common law tradition, and statutory law to see what the term *jury* actually denotes.

In contraposition to the *grand jury* from the Fifth Amendment (which, as mentioned in the introduction, decides whether the indictment will be granted on the pre-trial stage of the proceedings), the *petit jury* of the trial stage of a criminal case mentioned in the Sixth Amendment is usually comprehended as:

> Twelve competent men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled and sworn to render a true verdict according to the law and the evidence.[16]

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where the crime was committed. In Sue Davis, Jack W. Peltason, *Corwin and Peltason's Understanding the Constitution*, Belmont, 2004, p. 202.

[14] It warrants mention that the broad procedural protections of the Sixth Amendment (assistance of counsel, the right against self-incrimination of state defendants, speedy and public trial, confrontation of opposing witnesses, and compulsory process for obtaining favorable witnesses, or notice of the accusation) were applied to the relations between individuals and the state governments only in the Supreme Court's decisions of the 1960s. The right to a trial by jury was incorporated to the Due Process Clause of the Fourteenth Amendment and therefore made applicable to the states in the Supreme Court's decision in *Duncan v. Louisiana* from 1968. Since Poland is a unitary state, these problems are irrelevant to the main thesis of the paper. Benjamin Ginsberg, Erin Ackerman, *A Guide to the United States Constitution*, New York and London, 2007, p. 38; *Duncan v. Louisiana*, 391 U.S. 145 (1968).

[15] U.S. Const. amend. VI. The final version of the Sixth Amendment does not differ considerably from the James Madison's first proposal offered in Congress on June 8, 1789 which stated as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." James Madison, "Amendments Offered in Congress on June 8, 1789," in Carol Berkin, *The Bill of Rights: The Fight to Secure America's Liberties*, New York, 2015, p. 151.

[16] Henry Campbell Black, *Black's Law Dictionary, Revised Fourth Edition*, St. Paul, Minn., 1968, p. 993.

Put simply, a jury is a group of twelve ordinary citizens who are obligated to render a judgment in a case, or, more precisely, to ascertain the guilt of the defendant or lack thereof on the bases of arguments and evidence presented orally in court.[17] Jurors, in other words, are judges of facts, not law.

Speaking in statutory terms, enrollment of jurors in the United States federal courts is based on the Jury Selection and Service Act of 1968, which, too, could be model for more specific legal solutions in the event of implementation of a jury system to the Polish judiciary.

According to the Act, every American citizen may receive a jury summons, unless he or she is exempted on one of the following grounds (exclusions apply in U.S. federal courts):

1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
3) is unable to speak the English language;
4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.[18]

To ensure fairness of the proceedings, the Act prohibits excluding citizens from juries on the basis of race, color, religion, sex, national origin, or economic status.[19]

It is evident in the light of the federal provisions that almost everyone may be complied to become a juror so long as he fulfills certain basic criteria and none of the exemptions apply. Importantly, as we are to observe in the succeeding sections of this article, both the salient benefits of jury trials as well as the most significant challenges associated with their operation stem from the very fact that the duty to serve on a jury is one of the most universal civic responsibilities.

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[17] As a historical note, it is worth mentioning that until the fifteenth and sixteenth century, British juries, composed of "twelve men of the neighborhood," were obligated to express their opinions as to the criminal or otherwise wrongful conduct of the defendant "on the basis of their own knowledge" rather than facts presented by the opposing parties in an adversarial fashion, through a judicial duel. William Seagle, *The Quest for Law*, New York, 1941, p. 174.

[18] Jury Selection and Service Act of 1968 (28 U.S. Code § 1865). Apart from some basic, common-sense exceptions, several states adopted broader qualifications for jurors such as "ordinary intelligence" (e.g., California) or "good character and standing in the community" (e.g., Louisiana). It is beyond the purpose of this article to try to explain what these terms denote in the context of jury trials, but they nevertheless pose a value in reminding us that the jury duty requires a great amount of civil virtue and judiciousness on the part of the jurors.

[19] Jury Selection and Service Act (28 U.S.C.S § 1862). A similar rule applies to grand jurors from the Fifth Amendment.

We shall now proceed to the examination of the main benefits and potential challenges which a criminal justice system resting on jury trials faces, drawing from the American example. The subsequent remarks might be then comparatively applied to the Polish legal system in which the right to a jury trial, as argued in the beginning of this article, shall be reintroduced.

3. Salient Benefits of the Right to a Jury Trial

Jury trials are not only the most extensive realization of the principle that a democratic body politic should assure the presence of the social factor during the legal adjudicating proceedings but also a paramount safeguard of both the substantive and procedural rights of the accused. Because the Sixth Amendment to the U.S. Constitution—as clarified by the Supreme Court—secures the right to a jury trial when a defendant faces more than six months in custody, jurors take part in ascertaining the guilt of the defendant only in serious, high-stake criminal cases, and not merely misdemeanors.[20] Hence, juries manifest the general expectations of the society as to the rudiments of the functioning and—to some extent—axiology of the entire criminal justice system, as well as protect the rights of minorities against the overreach of the democratic majority. Moreover, due to the large number of jurors (twelve in federal cases and at least six in noncapital felony cases under state law, as stipulated by the Supreme Court), juries pose a substantial barrier before corruption, and therefore contribute to the impartiality of the criminal justice system. Lastly, thanks to the ability to strike down immoral or unjust (state or federal) laws—a process known as *jury nullification*—juries pose a political role, constituting a bulwark against a tyrannical government. Even though the fear of tyranny is by some deemed an echo of the past, it is nonetheless unquestionable that the operation of the juries buttresses the democratic notion of checks and balances, imposing a direct check on the judiciary, and an indirect check on the legislature.[21]

3.1. Better Manifestation of the Public Opinion and Protection of the Minorities

I contend that the strength of the social factor during adjudicating processes lies in the fact that juries simultaneously better represent the expectations of the community and restrain the will of the majority (expressed through legislative and executive acts) from infringing upon the rights of the minorities.

[20] Ervin Chemerinsky, Laurie L. Levenson, *Criminal Procedure: Investigation*, New York, 2013, p. 10.

[21] Grand juries from the Fifth Amendment to the U.S. Constitution also pose a check on the broadly understood executive, verifying the conduct of the police.

The capability of juries to democratically manifest the public opinion as to the scope of criminality of certain actions affects both sides of the criminal proceedings—the defense and the prosecution alike. Because jurors are called to the jury duty on an ad hoc basis, they can consider the circumstances of a particular case in a more individualized way than a professional judge, even despite the fact that they are bound by law and jury instructions. The role of the professional judge might be oftentimes confined to merely applying the law (statutory or judge-made), regardless of the deeper social and political expectations of the society as to how the criminal law ought to operate, how severe should the punishments be, and also which acts to penalize or not.

So how is it possible that twelve ordinary citizens might be often more capable of delivering a reasonable judgment of fact than a professional judge with numerous years of courtroom experience? The answer, as a matter of fact, lies in the factor mentioned in the latter part of the question: long, professional experience of judges and their vast education. The routine of professional judges might make them so certain of their legal knowledge and the unescapable adherence to its precepts that they might lose the substance (the moral core) of the case, setting the deeper societal expectations as to how the law ought to operate aside. As Norman J. Finkel simply put it, "'law on the books' may be at odds with commonsense justice" expressed by the jurors.[22]

A professional judge might center his comprehension of the case around positivistic, fossilized thought patterns and interpretations of legal concepts which are not present in the minds of jurors who rely mostly on common-sense, grounding their convictions in the evidence introduced during trial and every-day life experience.[23] In result, a jury may favor a defendant who would be otherwise convicted according to the strict reading of the law, and deem him or her not guilty. Similarly, although this is a rarer instance, a jury might favor the case of the prosecution, and find a defendant guilty even though the prosecution did not meet the instructed standard of proof beyond reasonable doubt.

Judges are indeed masters at focusing on the letter of the law (be it based on statutes or previous case-law, under the rule of *stare decisis*). But that renders them susceptible to grounding their judgments in reasoning morally contrary to public opinion during a given time. Twelve ordinary citizens drawn from various backgrounds—especially when we are to cumulate all the cases decided by the juries in the scale of the entire nation—might considerably better manifest democratic society's wants and needs addressed towards the criminal justice system than a relatively small quarter of judges. Juries, in other words, constitute

[22] Norman J. Finkel, *Commonsense Justice: Jurors' Notions of the Law*, Harvard, Cambridge and London, 1995, pp. 1-2.

[23] Ibid., p. 50.

the "conscience of the community."[24] In this vein, they are a working of democracy on a day-to-day basis—and not merely a working once in two, four, or five years, when the elections come.

Paradoxically, because juries supervise the operation of the courts in interpreting the legislative acts and executive measures on a day-to-day basis, and, as writes William Seagle, in result oftentimes make their "own" laws through a continuous sequence of analogous decisions in similar matters, they further the principles of liberty and "the rule of law, not men."[25] James Madison, one of the Constitutional Convention's greatest proponents of including the provision guaranteeing the right to a jury trial into the Bill of Rights, averred that the public opinion is the highest manifestation of reason and common sense of the American people. In expression of his views, stressing the pinnacle of the Enlightenment political thought, Madison famously said that "the prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power"—the people itself.[26] The Bill of Rights, with its provisions safeguarding the right to a jury trial, was the "means to control the majority from those acts to which they might be otherwise inclined."[27] So contrary to popular intuition, pronouncing the democratic element within the judiciary furthers the notion of protecting minorities from the overwhelming majority rule expressed by the common legislatures, and simultaneously prevents a positivistic, majoritarian reading of the law.[28]

Not without reason, the right to a jury trial is protected by as much as three provisions of the Bill of Rights: the Fifth (criminal grand juries), Sixth (criminal trial juries), and Seventh Amendment (civil juries).[29] One of the greatest advocates of the right to a jury trial, Supreme Court's Justice Hugo Black, named them "a great engine of democratic self-government, in which ordinary citizens in the lower house of the judiciary might help counterbalance a more elitist and not always trustworthy upper house of permanent judges."[30]

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[24] Ibid., p. 4.

[25] William Seagle, *The Quest*, p. 221.

[26] *Annals of the Congress of the United States: First Congress*, volume I, Washington, 1834, p. 437.

[27] Ibid.

[28] In Ronald Dworkin's terms from his *Law's Empire*, juries thus contribute to justice, whereas legislatures contribute to fairness understood as the majoritarian will.

[29] As notes Akhil Reed Amar, several other provision of the Bill of Rights offer indirect protection to the juries: "The First Amendment rule against prior restraints was largely designed to privilege juries against judges, as was the Fourth Amendment's regime limiting warrants; and the Eight Amendment imposed special restrictions on setting bail and sentencing criminals in part because in these contexts, judges would typically act on their own, unchecked by juries." Akhil R. Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic*, New York, 2015, p. 47.

[30] Ibid.

3.2. Juries as a Guarantor of Impartiality of the Criminal Justice System

Juries not only put a bar on a narrow, positivistic reading of the law, thereby providing for a better representation of the citizens' beliefs, but also remain a guarantor of impartiality, integrity, and objectivity of the entire judiciary.[31] This effect of the operation of juries stems mainly from two factors: (1) a large number of jurors constituting a jury in every case (twelve in cases argued in the U.S. federal courts) and (2) a high rotation of jurors which ensures that each case is argued before a new, random composition of citizens representing a cross-section of society.

I do not argue that the introduction of trials by jury into the Polish judicial system is the only solution capable of combating corruption and putting an end to nepotism or political appointments of judges. There are other potential measures contributing to the integrity of the judiciary, such as buttressing the independence of judges, improving judges' working conditions, raising judicial accountability, ensuring fairness and independence during appointment processes, and others.[32] But it is much more difficult to bribe, harass, blackmail or otherwise detract twelve citizens from making an honest and righteous judgment in a criminal case than it is to bribe, harass or blackmail a single judge (or a panel of three, or—in some cases—even five judges). Given the rule that jurors are selected from an abundant pool of citizens and randomly assigned to cases on an ad hoc basis, the details of their personal and family life remain largely unknown to the judge, the audience, as well as both sides of the proceedings. A jury composed of a fairly large representation of the community embodied in twelve persons is thus more immune to potential detractions from their independent reasoning by third parties wanting to affect the verdict in a particular case.[33]

In principle, all professional judges occupy an independent government position and should be free from outside pressures. In reality, however, all judges are placed within a fairly rigid hierarchy of the court system, and—depending on the scope of influence of other state authorities on the judiciary—that alone might affect their judgments. If they decide a case clearly against the already established judicature or statute, or even the political agenda of a party currently in power, their decision might be overruled at a higher instance at best, or they might lose their position at worst (the Polish post-2015 judicial realm might here serve as

[31] A similar view is expressed by the majority of Brits in regards to their common law system which over the last decades limited the availability of jury trials. Stan Hok-Wui Wong, "Juries, Judges, and Corruption: A Cross-National Analysis," *Public Integrity* 9(2), 2007, pp. 133-53.

[32] *Combating Corruption in Judicial Systems: Advocacy Toolkit, Transparency International: The Global Coalition Against Corrupion* [online], http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Judiciary_Advocacy_ToolKit.pdf, pp. 23-30. [02.03.2019].

[33] Jurors suspected of partiality may be struck out by attorneys through challenges for cause. See Adam Smith, *Lectures on Jurisprudence*, Indianapolis, 2010, pp. 425-26.

a good example). Jurors, on the other hand, do not face any direct pressure as to their final decision over the guilt of the defendant. Moreover, they do not hold any legal responsibility for their decision.[34] In an overwhelming majority of cases, once the jurors leave the jury room and their spokesperson delivers the "guilty" or "not guilty" verdict, they can banish most thoughts about potential repercussions which they might have had when entering the court. Their decisions are virtually risk-free: both their reputations (especially in the contemporary, urbanized United States) and finances are left intact. We may only add that judges, on the contrary, often work in the same court for years and tend to be well-known figures among the legal and political community. Hence, they might face more pressure from all kinds of external sources, such as lobbyists, political parties, or corrupt local authorities.

3.3. The Ability to Subvert Unjust Laws as a Bulwark Against Tyranny

The ability to progressively subvert unjust or obsolete laws might be, in a way, similar to the argument that juries better represent the public opinion while simultaneously curbing the will of the majority. But whereas that previous argument focused on how juries affect the society politically by expressing the prevalent social desires, the role of the juries also has a broad-based moral effect, tempering the public government. The American Founding Fathers—and especially James Madison, the author of the constitutional provisions guaranteeing a right to a jury trial—considered this bottom-up moral impact of the juries on the government a bulwark against tyranny and radical violations of the rights of the accused. Hence, we shall examine this point separately.

Juries have the capacity to strike down immoral laws and creating their "own" laws. By distinguishing between right and wrong, they put a check on an overarching, morally reprehensible government. By immoral, we understand laws that are intuitively, or *prima facie*, unjust and contrary to the foundational principles of the American body politic—individual rights and liberties, equality of all men, and the

[34] One can raise an argument that this is a negative state of affairs, reinforced by the fact that jury duty is not a particularly well-paid task and detracts people from their every-day life. A long trial might become especially burdensome for the jurors who have an active life and a demanding career. Conceivably, they might become uninterested in the case and not pay attention to important facts or evidence presented in the courtroom. In the worst scenario, when a succeeding contention in the jury room arises, such an indifferent juror might concede to the "guilty" vote for the sake of finally going home. There is no need to underline that such an attitude might result in years in prison (or death penalty) for an innocent person which would potentially otherwise walk free. Empirical data, however, indicates that jurors have a deeply moral and emotional attachment to their role trying to deliver the most just verdict possible. See Julia Davis, *The moral and emotional landscape of jury duty*, News from the University of South Australia [online], http://w3.unisa.edu.au/unisanews/2015/June/story7.asp [5.03.2019].

rule of law—which now pervade all liberal democracies of the West, including the post-communist Poland. The process during which a jury annuls an unjust law is traditionally referred to as *jury nullification*.

> [It] occurs when a jury acquits a defendant who is otherwise guilty based on the facts of the case because jurors' collective conscience leads them to decide either that the underlying law is substantively unjust or that the application of the law to the particular facts before them would result in a miscarriage of justice. Thus, jury nullification involves the jury in a process of judging the law and not just establishing the facts of a case and mechanically applying the law as instructed by a judge.[35]

Jury nullification is best explained on the example of the so-called *victimless crimes*. Whenever the government imposes a law that penalizes the people for exercising their traditional constitutional liberty without infringing upon anyone else's rights, such as the laws criminalizing the citizens' possession or consumption of certain substances (like alcohol or marijuana), the juries can put an end to them through nullification. Continuous voting "not guilty" in favor of certain classes of defendants abrogates the morally reprehensible law which tyrannizes the people (at least in their opinion). Juries' activity may also nullify laws providing for disproportionate penalties for conduct which should be penalized but in a given legal system is penalized too harshly.

It is true that the process of jury nullification demands a substantial number of trials, might be lengthy, and often requires favorable circumstances (such as a challenge of an unjust law on the grounds of the federal or state constitution). In other words, jury nullification requires more than a single jury deprecating a particular law. It is nevertheless feasible and has happened multiple times in the American legal history that the courts overturned immoral laws due to the operation of juries composed of the free citizenry. To present a few examples:

> [J]uries nullified England's eighteenth and nineteenth century "Bloody Code," which allowed commoners to be put to death for stealing bread; America's Fugitive Slave Laws of 1850, under which abolitionists were convicted for aiding slaves to escape; and the prohibition laws of the 1920s.[36]

Both the prosecutors and judges—who are, by law, independent—are part of the state justice system and remain ingrained in its hierarchy. Because they

[35] Elizabeth Bussiere, "Trial by Jury as "Mockery of Justice": Party Contention, Courtroom Corruption, and the Ironic Judicial Legacy of Antimasonry," *Law and History Review* 34(1), 2016, pp. 155-98 (note 16).

[36] "Bloody Codes" were harsh eighteenth and nineteenth century British laws, which, during their peak, imposed death penalty for over two hundred crimes, including minor offenses against property rights. See Valerie P. Hans, Neil Vidmar, *Judging the Jury*, New York, 1986, p. 149. Citing from John P. Ryan, *The American Trial Jury: Current Issues and Controversies* [online], http://www.socialstudies.org/sites/default/files/publications/se/6307/630711.html [02.03.2019].

represent the state itself, it is highly unlikely they will turn against its edicts. History of virtually every country knows instances of judges or prosecutors using the power to advance their interim political goals, with reckless disregard to basic individual rights. The oppressive nature of actions of the British state officials during the colonial period were in this regard an overt inspiration for the Founding Fathers. Justice White well-summarized these contentions in *Duncan v. Louisiana*:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority [...]. Providing an accused with the right [...] gave him an inestimable safeguard against the corrupt and overzealous prosecutor and against the compliant, biased, or eccentric judge.[37]

It is worth noting that juries are capable of not only striking down laws that are immoral but also of eradicating useless and obsolete ones. This is particularly important in the common law systems, such as that of the United States, in which old, eighteenth century case-law which does not comply with the expectations of the twenty first century might still exist and formally remain in force. Old case-law might be removed from the system either by another court or the legislature but the body which wants to get rid of a law has to be higher in hierarchy. This may sometimes generate contentions as to the division of competencies and the position of a particular state authority within the legal hierarchy. A large body of decisions reached by juries over a considerable amount of time might pose an additional impulse for the lawmakers and courts to change the law.

4. Potential Challenges Facing the Implementation of the Jury System in Poland

Admittedly, there are some concerns which the Polish lawmakers should take into account before implementing the right to jury trial into the Polish criminal justice system. The arguments most frequently raised against the introduction of common-law-style jury trials which pertain also to Poland are based on two main assumptions, namely that (1) jurors do not have sufficient knowledge of the law as well as expertise in other, often specialized fields which might be necessary to understand the intricate details of the case; and that (2) jurors base their judgments mostly on common-sense and evidence presented in the courtroom by skilled trial

[37] *Duncan v. Louisiana*, 391 U.S. 145, 155-156 (1968).

attorneys, which renders them prone to unjustified sympathies, social biases and prejudices as well as external psychological influences which impair their ability to deliver a reasonable verdict.[38] We shall address these challenges below.

4.1. Lack of Necessary Expertise

What was described in the preceding sections of this article as the salient benefit of jury trials—jurors' common sense—in the eyes of a layman might as well turn into their biggest drawback, depending on a given standpoint. It would be a truism to say that ordinary people randomly selected from a pool of citizens of a certain jurisdiction do not possess specialized knowledge from a multitude of scientific fields (medicine, physics, architecture, forensic science, etc.) which might be necessary to entirely understand all of the factual complexities of a particular case.[39] This argument is sometimes buttressed by the fact that a prevalent majority of jurors do not have any significant knowledge of the law, and especially of its highly specialized fields and subfields (such as the law of securities, mergers and acquisitions, or intellectual property).[40]

The lack of expertise on the part of jurors may be considered a major challenge especially now, in the twenty first century, when the technology and science evolve so rapidly that almost no one—unless he or she is a professional trained in that narrow field—can remain up-to-date following changes occurring on an almost day-to-day basis. The process of implementing the system of jury trials to the Polish criminal law cannot omit these aspects. Both the scholars and the lawmakers have to effectively address these concerns.

[38] These two arguments obviously do not exhaust the list of other potential drawbacks of juries, such as, for example, corrupting, delaying or aborting trials. Some of these problems became apparent due to the massive use of social media in the burgeoning Digital Age. Research shows that jurors "CONDUCT polls of their Facebook friends as to whether a defendant is guilty. MAKE comments about court staff through social media, such as "f**k the judge." RESEARCH the case they are hearing through Google. [Exchange] Facebook messages with the accused person" [capitalization original]. Another potential drawback of the juries is their proclivity to award unreasonably high damages for litigants in civil cases. Since this last argument is irrelevant in criminal trials, it will not be elaborated upon. Sean Fewster, *Courts face massive problems as jurors corrupt trials by turning to social media for help* [online], https://www.news.com.au/technology/courts-face-massive-problems-as-jurors-corrupt-trials-by-turning-to-social-media-for-help/news-story/110428bf7acc98bce499cfdad8790be4 [03.02.2019].

[39] See, for example, Jonathan J. Koehler, Nicholas J. Schweitzer, Michael J. Saks, Dawn E. McQuiston, "Science, Technology, or the Expert Witness: What Influences Jurors' Judgments About Forensic Science Testimony?," *Psychology, Public Policy, and Law* 22(4), 2016, pp. 401-13.

[40] The lack of knowledge of the law does not constitute a drawback since jurors are finders of facts, not law, so their role is mainly to determine the guilt of the defendant in a criminal case. As long as they are properly instructed by a professional judge who supervises the case they are in a position to deliver a sound verdict.

In the criminal law, juror's lack of specialized knowledge transpires in regards to an array of issues related to the advanced usage of telephones (new forms of wiretapping), Internet (digital profiling, localization services), and many other, newer, and more complicated inventions. Jurors' unfamiliarity with all the nuances of technology and science might give lawyers advantage when trying to convince the jury in favor of their client, based on juries' scientific knowledge shortcomings. The role of a judge who instructs the jury is also limited, insofar as he has the obligation not to spoil the case and remain neutral throughout the proceedings confining his function to safeguarding the order of the trial and exercising his evidence gatekeeping function.

These arguments, however, could be refuted on three grounds.

First, in the adversarial proceeding, it is in the interest of the opposing parties' attorneys to present evidence in way that is easily understandable to an ordinary person. It often involves calling an expert witness who describes the scientific complexities behind the trial's decisive issues (who could be then questioned by the opposing counsel).[41] So it is not the responsibility of the jurors to be trained in a specialized field, but an imperative for the prosecutor to elucidate the facts of the case in a way that would indicate defendant's guilt beyond reasonable doubt through questioning witnesses and expert witnesses during examination and cross-examination.[42]

Second, criminal matters—such as theft, arson, rape, murder, etc.—are naturally more palpable to the jurors than complex civil litigations. Criminal matters largely deal with conduct of individuals and thus with questions to which an ordinary juror can relate to, without requiring abstract scientific or mathematical understanding.

Third, professional judges are experts in law and, and usually do not possess specialized knowledge of science or technology. Put simply, they are not necessarily in an advantageous position in comparison to the jury. A jury composed of twelve deliberating citizens, on the other hand, might unfold the nuances which a solitary man would otherwise omit.[43] Since a mistake of one man is more probable than a mistake of twelve men (on the federal grounds), the fear of vesting the decision of defendant's guilt in the hands of the judge is not justified even by the assumption that he might have a broader scope of expertise.[44]

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[41] See *What Factors Influence Jurors when Evaluating the Testimony of Expert Witnesses* [online], https://www.hgexperts.com/expert-witness-articles/what-factors-influence-jurors-when-evaluating-the-testimony-of-expert-witnesses-44848 [5.03.2019].

[42] See Sonia Chopra, "The Psychology of Jurors' Decision Making," *Plaintiff* [online], https://www.plaintiffmagazine.com/item/the-psychology-of-jurors-decision-making [4.03.2019].

[43] It is beyond the scope of this paper to touch upon the problem of the so-called *expert juror*—*a* juror who possesses specialized knowledge and might unduly dominate the deliberations in the jury room.

[44] Paul Mendelle, "Why juries work best," *The Guardian* [online], https://www.theguardian.com/commentisfree/2010/feb/21/juries-work-best-research [5.03.2019].

4.2. Social Biases and the Vulnerability to Psychological Influence

Countless studies have been conducted on the psychology of juries. Only recently, along with the development of forensic psychology as well as behavioral and cognitive sciences, scholars started to comprehend the multi-faceted aspects of the reasoning processes that take place in the minds of jurors. Psychological studies suggest that all humans tend to hold biases on various grounds, sometimes even subconsciously.[45] There are procedural safeguards, preventing jurors from outside parties influencing the outcome of a case. Jurors are strictly prohibited from researching the case on their own and consulting its merits with any third person or even other jurors during the ongoing trial. They are obliged to ground their verdict only on the evidence presented in the courtroom, and their own life experience and knowledge. Because of these restrictions and constant exposure to opposing arguments jurors, according to some commentators, might be prone to internal social biases and intentional psychological influences.

Jurors might be lured by lawyers who use influencing tactics and psychological tricks to induce certain reactions of those sitting in the jury box.[46] It is conceivable that trial lawyers with years of courtroom experience might have an easier task appealing to a juries than to professional judges who are said to be more resilient to psychological influences. Convincing the jury usually focuses on employing jurors' emotions, implicitly held opinions, and preconceived notions. In this vein, the operation of juries—however unpredictable—provides more chance of winning a case to a party with a less convincing set of starting evidence so long as that party has a practiced trial attorney. Needless to say, this might lead to higher numbers of criminals avoiding prosecution. Nonetheless, there are no ultimately convincing empirical studies proving that jurors are swayed by trial lawyers' manipulations more easily than by available evidence.[47] Research to the

[45] Some biases may be merely transient. Imagine, for instance, a man who was cheated on by his wife—he might temporarily hold a bias against women for a certain period of time after the adultery, and, similarly, against blonde women if his wife was blonde. The most prevalent biases indicated by decision scientists are, among others, confirmation bias and pre-decisional distortion. Lee J. Curley, "How jurors bias can be tackled to ensure fairer trials," *The Conversation* [online], http://theconversation.com/how-juror-bias-can-be-tackled-to-ensure-fairer-trials-100476 [4.03.2019]. Also see Margaret B. Kovera, *The Psychology of Juries*, American Psychological Association, Washington, 2017; Reid Hastie, *Inside the Juror: The Psychology of Juror Decision Making*, Cambridge, Mass., 1993.

[46] Indeed, people can be influenced by a skillful trial lawyer, but almost everyone who enters the courtroom as a juror expects that both sides—the defense and the prosecution alike—will try to present their case as persuasively as possible. The sheer consciousness that it is the responsibility of a juror to determine defendant's guilt in conformity with the truth contributes to the maintenance of the public spirit, insofar as it reminds the people that living in a republic entails not only rights but also (social and legal) obligations.

[47] See Patterson Dubois, "Some Observations on the Psychology of Jurors and Juries," *Proceedings of the American Philosophical Society* 53(215), 1914, pp. 307-22.

contrary is also available. As Brian Bornstein and Eddie Green point out drawing from previous studies:

> [T]here is plenty of evidence that jurors also use careful, systematic processing strategies. Despite critics' contentions that jurors lack the ability to comprehend complex scientific and technical evidence, posttrial interviews show that jurors tend to analyze expert evidence in a fairly rational and methodical way. They strive to evaluate the quality of experts' arguments and spend considerable deliberation time discussing the nature of the experts' testimony, which is clearly suggestive of systematic processing …. Jurors also perceive themselves to be careful evaluators of the evidence; a strong majority of jurors interviewed after deliberating said that they thoroughly reviewed the evidence and jury instructions in the process of reaching their verdict ….[48]

But even if jurors are capable of making rational decisions, what about deeply rooted biases? All men, including the so-called ordinary citizens, more often than not hold certain biases, which, if not suppressed, may potentially induce rendering a discriminatory verdict on the basis of sex, race, ethnicity, accent, social or economic status, or numerous other factors. Although a biased jury might occur everywhere, this problem is most readily visible in areas with a long history of discrimination (such as the American South) and becomes especially overbearing when the person facing criminal charges is a member of a minority.[49] Judges are taught not to be affected by biases and take oath that they will render their verdicts based on law, the principles of logic, and experience, rather than prejudice

[48] Brian H. Bornstein, Edie Greene, "Jury Decision Making: Implications For and From Psychology," *Current Directions in Psychological Science* 20(1), 2011, p. 65.

[49] Akhil Reed Amar emphasizes the socio-historical context of the operation of juries during particular times. Their perception was quite different during the revolutionary era in the second half of the eighteenth century and after the Civil War when juries helped to maintain racial discrimination. "The Revolutionary Founders loved juries: in 1760, colonists did not get to vote for Parliament (and they certainly did not have any say in who was to be kind), so one of the few place where they could actually make their voices heard was a local jury room. In most colonies, imperial officials appointed colonial judges, so judges were not always heroes to the colonists. The colonial jury thus naturally evolved into a political institution—one of the most truly representative institution in the colonies—so it is unsurprising that the jury emerged as the main bulwark of the original Bill of Rights. The Civil War experience, however, tempered the American enthusiasm for juries. A new model of dissent emerged, involving a commitment to protect not only those who opposed government policy (although that continued to be very important), but also those who challenged the majority viewpoint. Of course, the paramount virtue of the jury to the Framers was its fundamentally populist makeup, but a majoritarian jury provides a less than complete safeguard for this new kind of dissent." Akhil R. Amar, *The Law*, p. 133. Also see Marvin D. Free, *Racial Issues in Criminal Justice: The Case of African Americans*, Westport, 2003; Adam Liptak, "Exclusion of Blacks From Juries Raises Renewed Scrutiny," *New York Times* [online], https://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html [5.03.2019]; Janell Ross, "How big of a difference does an all-white jury make? A leading expert explains," *The Washington Post* [online], https://www.washingtonpost.com/news/the-fix/wp/2016/05/30/how-big-a-difference-does-an-all-white-jury-make-a-leading-expert-explains/?utm_term=.ae4c6d070d6b [8.03.2019].

or short-lived impulses. But, as history had proven many times, it would be naive to think that professional judges do not hold such biases. Including the justices of the Supreme Court, they, too, contributed to the maintenance of racial segregation in the post-Civil War United States through decisions at both the state and federal levels.[50] Importantly, due to the large ethnic and religious homogeneity of the Polish society, the problem of racial discrimination does not pose an immediate danger.

5. Conclusions

Men who laid the legal and political foundations of the independent American state—the Founding Fathers—underlined the importance of juries, embedding provisions assuring the right to a jury trial in both the original United States Constitution and the Bill of Rights. They held suspicions that a free government might some day erode and turn into a political tyranny likened to the dominance of the British Crown over the thirteen American colonies. In the presence of the British officials within the colonial authorities, juries composed of local citizenry often allowed the colonists to pass verdicts opposing the policies of the faraway government in London and the decrees of its henchman in the Northern American continent. Not without reason, the institution of a jury trial occupies a special place in the American history.

While the fear of tyranny is nowhere near as overarching today as it was over two hundred thirty years ago, during the times of the American founding, juries still remain a critical social, non-political, and non-partisan factor in the American judicial system. As Alexis de Tocqueville has acutely observed, keeping the people active within their communities—be it through the participation in civil associations, engagement in local politics, or sitting in the jury box—has been the key to the preservation of law and order of the American republic since its very conception. When the people lose the ability to participate within those areas, so their government gets further and further from them and ultimately ceases to be "their government." These remarks are universal and bear a long-lasting value regardless of geographical boundaries.

Admittedly, the obligation to serve on a jury is one of the most burdensome and responsible duties of a citizen. It allows, and simultaneously forces, the people to exert measurable influence on the criminal justice system, and thereby induces an array of potential drawbacks (which, in turn, should be addressed by the legislatures). Once the substantial social factor in the justice system is abandoned—so is the example of post-War Poland—it is a demanding task to change course and

[50] See, for example, the landmark Supreme Court case in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

implement a reform. An effective criminal justice system resting upon the institution of the jury would have to be strictly adversarial and assure that trials are public and speedy—not exceeding a few weeks. In order to be viable in Poland, such a transition would require the taking of many substantive measures and extensive planning and preparation as well as a radical transfiguration of the way the role of the court system is perceived. But, as we have demonstrated, in a true democracy people should retain the ability to strike down immoral laws and put a check on governmental actions, and the freedom to have their views represented both in courts and outside of the courtroom. And this applies universally to American as well as Polish citizens.

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Summary. The paper discusses the institution of a jury trial in light of the American criminal justice system. First, it provides fundamental historical and legal context of the functioning of criminal trial juries in the U.S. system of federal law. Second, it proceeds with the most important arguments in favor of and against the implementation of juries at the trial stage of legal proceedings within the legal systems of states which have not adopted that institution in its fullest extent. In conclusion, an argument is made that the benefits of jury trials often benefit the society at large. Hence, the Polish lawmakers should deliberate over expanding the scope of the social factor—juries—in the judicial proceedings (especially within the criminal justice system).

Key words: jury, american law, jury trial, criminal justice system, Sixth Amendment, Seventh Amendment

Chapter VI

JUDICIAL SELECTION SYSTEM AND ITS IMPACT ON JUDICIAL INDEPENDENCE

Paulina Obara and Michał Passon

1. Introduction

Judicial independence is considered to be one of the most important features when it comes to creating a judiciary the "third power" in the checks and balances system. In a wider perspective, it is a characteristic recognised by the international law as a vital one; every human rights treaty or declaration refers to a right to a fair trial before an independent court.

Nevertheless, the assurance of the mechanisms, which truly guarantee a judicial independence, is highly difficult to create. Especially when considering a choice or formation of the judicial selection system, it is important to deliberate over its influence on judicial independence and possible implementation of additional security features.

In the United States, where exist multiple judicial selection methods, the discussion is still topical. In addition, most of these systems involve some kind of a popular election in the process, as a sign of a democratic value, which is not a common solution around the world. While democratic accountability of the judges might be seen as a more transparent way then a judicial selection excluding public election, it raises certain threats to preserving judicial independence. On the other hand, the U.S. method of selection to the federal courts, which exclude popular vote, highly depends on politics and a current ruling party. Therefore, the certain endangerments to the judicial independence can be observed in both: federal and state courts.

2. Judicial Independence

The idea of judicial independence has been known in American law and politics at least since 1780 when John Adams drafted the Declaration of Rights in the Massachusetts Constitution. The Constitution of United States was yet to come when an

aforementioned law stated: "It is the right of every citizen to be tried by judges as free, impartial and independent."[1] Because of that nowadays, as well as in the past, judicial independence shall be treated not only as a privilege for judges but also as a guarantee for individual's rights. In order to enforce recognition and respect for those rights it is mandatory that the third branch will be independent.[2] The Constitution of the United States[3] ensures that there will be trinity of branches and all of them will be independent from each other. Cole states that: "independent judiciary serves as a check … assuring that one branch does not exercise the power of the other."[4] Thus the idea of checks and balances associated with Charles de Montesquieu was provided.[5]

The third article of Constitution of the United States does not legally define the term "judicial independence" and focuses mostly on how to achieve it rather than what it actually is. Therefore it is necessary to determine what it means. Independence shall be understood as a "freedom from being governed or ruled by another…"—therefore, judicial independence determine that judges cannot be ruled by any other branch[6] (Legislative or Executive powers). For this reason, whenever Congress or President takes an action which usurps power assigned to the judiciary, it should be considered as a violation of separation of powers.[7] Likewise judges cannot be intimidated, under someone's influence, so they may resolve disputes fairly. Individuals have to be assured that they are impartial and that the neutral, unbiased person will arbitrate properly.

Nonetheless it does not indicate that judicial power is unlimited; for instance, since *Marbury v. Madison* ruling[8] in 1803 it is indisputable whether Supreme Court is capable of declaring void acts of Senate unconstitutional but even the Supreme Court (and inferior courts) is bound by the rule law, facts and arguments of the parties.

As a result, the Constitution of the United States grants measures which will preserve judicial independence. It states that judges shall be able to keep their of-

[1] Declaration of Rights In Massachussets Constitution (1780) [online], https://malegislature.gov/Laws/Constitution [1.09.2020].

[2] Judicial Independence Committee of the American Board of Trial Advocates, *Preserving a Fair, Impartial and Independent Judiciary* [online], http://www.judges.org/wp-content/uploads/ABOTA-JudicialWhitePaper-final.pdf [1.09.2020].

[3] Constitution of the United States [online], https://www.senate.gov/civics/constitution_item/constitution.htm [17.09.2020].

[4] Charles D. Cole, "Judicial Independence in the United States Federal Courts," *The Journal of the Legal Profession* 13, 1988-1989, p. 184.

[5] Scott D. Gerber, *A Distinct Judicial Power*, *The Origins of an Independent Judiciary, 1606-1787*, Oxford, 2011, pp. 21-23.

[6] Definition of indepence is available online at: https://dictionary.cambridge.org/dictionary/english/independence.

[7] See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

[8] *Marbury v. Madison*, 5 U.S. 137 (1803).

fices as long as they behave in a good way. It allows them to adjudicate peacefully by not being worried about their offices. Also, as stated earlier, this encourages them to resolve the disputes as their conscience dictates. Likewise, lifetime tenure is the instrument which allows them to adjudicate a case fairly although sometimes judicial discretion may lead to an outcome which might be unpredictable or unpopular among society and even their sentence can be sometimes against their own moral codes. Their opinions may differ from what the law orders but ultimately a court is constrained by law and there are no exceptions from this rule. For instance, when it comes to a death penalty, judges have to adjudicate according to the law even when they do not accept a this type of punishment.[9] This privilege grants possibility to resolve the dispute (at least theoretically) not based on political matters but on the judge's conscience which is undoubtedly limited by the Constitution and other acts.

The Constitution also states that judges should receive compensation and it cannot be diminished during their service. The financial aspect of their independence is as much important as the political one. Judge should be able to evaluate the case without worrying about his family's economical matter. The amount of his compensation cannot be limited so the legislative or executive branches cannot threaten the judges by reducing their salaries. This regulation also makes the judges less liable to a corruption, which would be clearly against the law and morality. By providing stable and adequate compensation the certain standard of life is established for their families and for them. The Supreme Court states that the Compensation should be looked upon as a measure which benefits the public interest in competent and independent judiciary. That pledge of the founding father grounded in the American Constitution is as much important to judges as for all individuals and future of fairness of all future court cases.[10]

Aforementioned measures allow to maintain judicial independence and provide that the judges will not anticipate negative consequences because of their sentences. As long as judicial independence is respected it would lead to an implementation regardless of who is currently ruling.[11] Those instruments are mandatory to guard the judicial power grounded by the Constitution of the United States.[12] Additionally, they provide limits for other individuals or branches and guarantee recognition and respect for the rights and freedoms in the United States of America.

[9] Like Joyce H. Green admits—she is against the death penalty; when she knew that it was eligible she evaluated the case thoroughly and after all it turned out that the death penalty was not the only possible verdict. From William Domnarski, *Federal Judges Revealed,* Oxford*,* 2000, p. 152.

[10] See *United States v. Will,* 449 U.S. 200, 202 (1980).

[11] Bernd Hayo, Stefan Voigt, "Explaining de facto Judicial Independence," *International Review of Law and Economics, Forthcoming* [online], https://www.uni-marburg.de/fb02/makro/forschung/gelbereihe/artikel/2005-07-hayo.pdf [1.09.2020].

[12] Alexander Hamilton, *Federalist No. 78* [online], http://www.constitution.org/fed/federa78.htm#2 [1.09.2020].

3. Judicial Selection

Judicial system in the U.S. is dualistic. According to the Constitution,[13] the federal court system consist of 2 levels: Supreme Court and other "inferior courts," established by Congress. At the same time, Constitution[14] entitles each state to implement its own judicial system, limited in its jurisdiction only to a certain territory. Considering the significant differences between federal and state regulations concerning judicial selection and a variety of solutions proposed by the states themselves, it is vital to present the federal and state systems separately.

3.1. Historical Background

When looking back at the origins of judicial selection systems, there are usually distinguished 3 periods:

1) original lifetime appointment, which started with the Declaration of Independence (1776),

2) Jacksonian democracy, which lasted approx. from 1828 to 1848,

3) progressive period, dated from the early twentieth century.[15]

During these periods, there were mostly discussed 4 different judicial selection methods, which are: 1) lifetime appointment, 2) partisan election, 3) nonpartisan election, 4) merit selection and retention.

The first movement was a result of a freshly gained independence from England's ruling. Therefore it rejected almost every English solution, substituting it with the very opposite one. When in England it was a king to elect judges for a tenure, in U.S. most states included in their constitutions provisions stating that judges should be appointed for a lifetime tenure by a collective authority. Having thought this was the most suitable way of ensuring judicial independence, Constitutional Convention adopted this solution in the Constitution ("shall hold their Offices during good behaviour"),[16] however the participants had to compromise on which authority should elect federal judges. The final solution was to grant this power to the President with a requirement of a Senate's approval.[17]

After some time, states' authorities revised their beliefs. It became popular to think that states' judges, as they are closely with the citizens, should be elected in a popular vote. The other argument for this solution that was given is judicial independence, which could be only genuine while judges would not have to depend

[13] Article III section 1 of U.S. Constitution.

[14] Article IV section 1 of U.S. Constitution.

[15] Lee Epstein, Jack Knight, Olga Shvetsova, *Selecting Selection System* [online], http://epstein.wustl.edu/research/conferencepapers.2000MPSA.pdf [10.10.2020], p. 4 et seq.

[16] Article III section 1 of U.S. Constitution.

[17] Article II section 2 clause 2 of U.S. Constitution.

on the ruling party to be elected. As a result, during Jacksonian democracy over 20 states decided to amend their constitutions by implementing nonpartisan or partisan election of judges. The difference between them is that by partisan election the candidates for judges disclose their support for a certain political party and usually after a tenure they can be reelected or given under a retention vote[18] (retention vote was a kind of referendum in which the citizens decided whether the judge should be retained in his office or not).[19] Consequently, while running in nonpartisan elections, candidates are not identified with a certain political party.[20] When at the beginning of this period partisan election was a more common solution, it changed in a late phase to nonpartisan election. It was believed it provides higher level of independence for judges[21] (while running for office with an identification of a supporting party, the elections did not diverge from typically political elections).

All of the above resulted in beginning the progressive period, which focused on a merit election method. It assumed that while electing/appointing a judge, what should really be taken into consideration are his qualifications, training and integrity.[22] The basic structure of this method combined the election/appointment and also a retention election or reelection. Although this method seems to reconcile both of the previous propositions, it was not widely spread in the U.S. (contrary to popular vote). In literature authors indicate arguments to explain this fact such as: general resistance to changes, as the method was not successful (elsewhere), decline of public confidence.[23]

3.2. Federal Courts

Constitution of the United States of America shapes the Federal Courts system which consists of the Supreme Court and inferior courts. While the one Supreme Court has already been established by the Founding Father, Article no. 3 in its first section declares that the Congress is capable of establishing those inferior courts. Consequently the Congress drafted the Judiciary Act and thus established the first federal courts. Additionally, it states in section no. 1 that the Supreme Court of the United States will consist of jointly six professional judges (chief justice and five

[18] Challenges to the Independence of the Judiciary: A Case Study of the Removal of Three Judges in Iowa [online], https://www.ibanet.org/Document/Default.aspx?DocumentUid=208A8368-CF66-47E7-A9B2-E0D17B8E5545 [10.10.2020], p. 13 in fine.

[19] Mary A. Celeste, "The Debate over the Selection and Retention of Judges," *Court Review* 46(3), 2009-2010, p. 84.

[20] Ibid., p. 14.

[21] Ibid., p. 84.

[22] Compare Principle 10 of Basic Principles on the Independence of the Judiciary by U.N. (1985).

[23] Mary A. Celeste, "The Debate," p. 85.

associates)[24] but because of the changes to Judiciary Act the number of justices has been changed throughout the time and it is set to nine at the moment.

American Constitution in Article no. 2, section 2 states that the President of the United States of America is authorized to nominate Supreme Court's justices. There are no rules which determine who can be nominated for a judge (justice). Furthermore, there are no clear rules of promotion,[25] so the judge who decides in the lower court might never be promoted, but can be nominated regardless.

President of the United States also has the capacity to nominate judges of the inferior courts, which were established by the aforementioned Judiciary Act. Inferior courts consists of: District Courts, Courts of Appeals, Specialized Courts and U.S. Court of Appeal for Federal District.[26] Likewise, President nominates judges and they are required to be confirmed by the Senate of the United States.; both the justices of the U.S. Supreme Court and judges serve life-tenure as mentioned earlier.

Because the Constitution of the United States requires "advice and consent" from the Senate,[27] the candidates have to take part in the hearings of Senate's Committee on the Judiciary. During the hearing they are being interviewed by the senators to find out whether they will be proper candidates for judge (justice) office. They are being asked about the rule of law, judicial office and their independence. In addition, they are asked about their beliefs (sometimes on political or life matters), their ruling and opinions on the law. This process determines how the future judge (justice) will adjudicate and how he/she will resolve the disputes between the parties. Consequently, the candidate is being verified whether he has a good character and work ethic, proper qualifications and required knowledge about the law and its system. Because there is no promotion or clear rules about who should be nominated for a judge or justice[28] and it is up to the President, it is necessary to verify and make sure that proposed candidates will preserve their judicial independence by being impartial in court cases in the future and if they are willing to interpret the law according to American values granted and stated in U.S. Constitution.

This way of selecting the judges (justices) implements the idea of John Adams who recommended that the judges shall be "nominated and appointed by the governor, with the advice and consent of council."[29] This type of an appointment

[24] Judiciary Act of 1789.

[25] Obviously traditional promotions exist in some circuits but it is neither the feature declared by the Constitution nor by the Judicial Act.

[26] *The Federal Court System in the United States. An introduction for Judges and Judicial Administrators in Other Countries* [online], http://www.uscourts.gov/sites/default/files/federalcourtssystemintheus.pdf [1.09.2020].

[27] Article II section 2 of U.S. Constitution.

[28] Anna M. Ludwikowska, Rett R. Ludwikowski, *Sądy w Stanach Zjednoczonych. Struktura i jurysdykcja*, Toruń, 2008, pp. 31-35.

[29] Scott D. Gerber, *A Distinct Judicial Power,* pp. 21-23.

constitutes the checks and balance mechanism because the Executive Power nominates judges but they are required to receive a confirmation from the Legislative Branch. Despite those actions of other branches, Founding Fathers provided aforementioned measures to ensure the individuals that the judicial independence will be preserved. Therefore, the judiciary branch shall be able to affect other branches by enforcing them to obey the law and verifying if the enacted acts or bills are constitutional[30] (and thus they act like a check in so-called "check and balance" system). The biggest role in "judicial review"[31] belongs to the Supreme Court of the United States, which is able to issue the writ of certiorari.

3.3. State Courts

As it was mentioned before, a structure of the state court system is not uniform. Each state is entitled to implement its own judicial system on the basis of the Constitution.[32] Therefore it is not possible within this study to present all of the solutions introduced in each state so I will demonstrate the system only in outline. On the whole it is possible to claim that there are usually 2 instances (trial/district court and then appellate court) and on the top of it a supreme court, which is entitled to interpret the state's law.[33]

When it comes to judicial selection, nowadays states usually adopt one of the following methods: 1) popular vote (either in partisan or nonpartisan version), 2) merit selection, 3) legislative appointment, 4) executive appointment. The most popular solutions are the first two, as according to a research[34] there are 16 states that chose nonpartisan election, 5) adopted partisan version and 14 implemented merit selection. This division may not be entirely adequate, as some of the systems are hybrid, which means they combine more than one method, e.g., 1) in Alabama partly merit selection is conducted only in the certain counties in case of a preterm vacancy, while regularly the state applies partisan elections;[35] 2) Arizona mostly uses merit selection (while choosing Supreme Court and Appellate Court' judges) but judges of a Superior Court are primary elected in a popular vote.[36]

The first two methods include citizens' participation in the selection, therefore I would like to take a closer look at them.

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[30] Anna M. Ludwikowska, Rett R. Ludwikowski, *Sądy,* p. 33.

[31] See *Marbury v. Madison*, 5 U.S. 137 (1803).

[32] Article IV section 1 of U.S. Constitution.

[33] Anna M. Ludwikowska, Rett R. Ludwikowski, *Sądy,* pp. 90-98.

[34] Alicia Bannon, *Rethinking Judicial Selection in State Courts*, New York, 2016, p. 4.

[35] *Judicial Selection in the States: Alabama* [online], http://www.judicialselection.us/judicial_selection/index.cfm?state=AL [1.09.2020].

[36] See http://www.judicialselection.com/judicial_selection/methods/selection_of_judges.cfm?state= [1.09.2020].

Partisan elections can be defined as regular elections (similar to the politician election), during which the candidates are assigned on a ballot to a party they support.[37] The electors choose a particular amount of judges, depending on how many vacancies there are to assume. The judges are elected for a specific tenure after which they can be reelected or (rarely) subjected to the retention elections. The length of the term of course vary depending on the state but it can also be different for trial, appellate and supreme courts (approx. form 30 days to 15 years).[38]

Nonpartisan elections are distinct from partisan version in the way they do not require (or perhaps it better to say: do not allow) from the candidates a disclosure of a supported political party. Beside this fact, the election are constructed mostly in the same way as the ones described before. Whether and how disclosing political views influences judicial independence will be a subject of consideration in the following part of the study.

The idea of merit selection is to choose for judges the most qualified from the applicants. It constitutes two stages: the first is an appointment of the candidate by a governor or nominating commission.[39] Than the judges are in some ways put to the "trial" (second stage), as after a certain amount of time they are submitted to the retention election, when electors decide whether a particular judge should remain in the office (a judge does not face any challenger at this point).

Nominating commissions exist in 34 states but they have various shapes and different roles.[40] In some states there is just one commission which evaluates the applicants for all of the state's courts (e.g., New Hampshire), while other states appoint different commissions for assessing the chief justiceship, for each district of the supreme court, court of appeals, district court and for the courts of limited jurisdiction (e.g., Nebraska, where the total number of commissions is 33). The term of service usually lasts from 2 to 6 years, excluding the cases in which the term is not limited or it depends on a governor's discretion (e.g., Massachusetts). In most cases a commission consist of representants of lawyers, non-lawyers and (in some cases, e.g. Idaho, Missouri) judges (usually it is Chief Justice, who serves *ex officio*).

The members (lawyers and non-lawyers) can be appointed by a state bar association or by a governor, more rarely by a legislature, speaker of the house or

[37] Challenges to the Independence of the Judiciary: A Case Study of the Removal of Three Judges in Iowa [online], https://www.ibanet.org/Document/Default.aspx?DocumentUid=208A8368-CF66-47E7-A9B2-E0D17B8E5545 [10.10.2020], p. 13 in fine.

[38] Ibid., see Table 1. and Table 2., pp. 16-17; also: National Center for States Courts, *Methods of Judicial Selection* [online], http://www.judicialselection.com/judicial_selection/methods/selection_of_judges.cfm?state= [1.09.2020].

[39] Challenges to the Independence of the Judiciary: A Case Study of the Removal of Three Judges in Iowa [online], https://www.ibanet.org/Document/Default.aspx?DocumentUid=208A8368-CF66-47E7-A9B2-E0D17B8E5545, p. 14 [10.10.2020].

[40] American Judicature Society, *Judicial Merit Selection: Current Status* [online], http://www.judicialselection.com/uploads/Documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf, pp. 8-12, [1.09.2020].

senate president. When it comes to judge-members of the commissions (if they exist), they mostly serve ex officio (chief judge or justice) or they are elected by a chief justice, a judicial conference or in one case—by a governor (Minnesota).

The chair is most commonly appointed by a governor, in some cases by commission members (e.g., Oklahoma, Tennessee) or there is someone serving this function *ex officio*. This last category is present in Wyoming, where it is Chief Justice to be a chair but there is one very interesting case in New Mexico, where this function belongs to the Dean of the University of New Mexico School of Law.

Another interesting subject is what requirements must the candidates meet to be taken into consideration by a nominating commission. The states usually establish from 1 to 7 conditions for the applicants. These are: a license to practise law [in general] for a certain amount of time (mostly 5-13 years) or in the state; active law practise for 5-8 years, sometimes it must be continuous law practice in state (e.g., Kansas); being a member of a state bar; being U.S. citizen/qualified elector in state/resident of a state; minimum age vary from 18 to 35 of age; maximum age or mandatory retirement age is 70-75; candidate should be moral and of good character.

In some states the requirements do no vary depending on the court (candidates must have the same qualification for a trial and supreme court, e.g., California, Connecticut) or they almost do not have any conditions at all, e.g., "learned in the law" in Maine or mandatory retirement at the age of 70 in New Hampshire.[41]

4. The Impact of Selection Methods on Judicial Independence

As it was presented in the third part of this study, U.S. have tried to find a perfect method to select/elect judges. By "perfect" should be understood: ensuring judicial independence, properly involving regular citizens but also fairly assuring judge's qualifications. As a result, there is still no unanimous agreement on the most suitable method of appointment; each of them has its pros and cons. Nevertheless, it is researching the impact of those selection methods on judicial independence the proper part of this study. Therefore, according to the previous division conducted in the third part, there is going to be presented the influence on judicial independence separately for the federal and state courts.

4.1. Federal Courts

From time to time a dilemma arises when a new justice has to be chosen for the Supreme Court of United States of America. Recently a death of the Justice Antonin

[41] All of the data available at National Center for State Courts site: http://www.judicialselection.com/judicial_selection/methods/selection_of_judges.cfm?state= [1.09.2020].

Scalia brought a battle over the emptied office.[42] Ability of the U.S. Supreme Court to control and restrict other branches makes it very tempting for the President and the ruling party to have a friendly "ally" in the judicial branch. Liberals and Conservatives whenever it is possible try to "take over" the Supreme Court by appointing (nominating and confirming) proper candidates. It would allow the other branches to change the law effortless and the Congress to function more freely, which may lead to drastic changes which American society often demands. This should be considered as a threat to the judicial independence. Judge shall be nominated for his knowledge and for the common good, not because of his beliefs or just for political interests. American Board of Trial Advocates points out: "in recent years, politicians and special interests have repeatedly attempted to erode judicial independence, evidencing a lack of respect for the vital roles of separation of powers and checks and balances within American constitutional governance."[43] Actions like that undermine the meaning of this office and the whole judicial branch.

In addition, this type of selection makes it possible for people to claim that judges might be used as tools for political affairs and for political gains rather than their accomplishments, knowledge and great work ethic. Being appointed by the President of the United States and with the blessing of the U.S. Senate may not earn the necessary respect for justices or judges, those who might be seen as political—as Kurland states—might "lose the general respect of the public, …, weaken the entire structure of the judiciary, and consequently damage an important factor contributing to social stability and peace."[44] Sometimes someone's appointment might be a political affair rather than an accurate and precise evaluation of candidate's qualifications. This might be an issue considering that in order to be a judge there is no such thing as a legal training. As stated before, there is no rules for promoting the judges and because of that every judge might be nominated by the President no matter in which office they were ruling previously. In the future, this lack of regulation may lead to nominating not qualified judges because of a political interest. Thus it will promote the obedience toward the other branches in order to be appointed for instance as a justice in U.S. Supreme Court. This will endanger the judicial independence and social trust towards the judiciary. Lack

[42] See Daniel Fisher, "Antonin Scalia Dies, And Obama Could Transform The Supreme Court," *Forbes* [online], https://www.forbes.com/sites/danielfisher/2016/02/13/antonin-scalia-dies-and-obama-can-transform-the-supreme-court/?sh=60a67c91e097 [10.10.2020], also see Stephen Collinson, "Justice Antonin Scalia's death quickly sparks political battle," CNN Politics [online], https://edition.cnn.com/2016/02/13/politics/antonin-scalia-supreme-court-replacement/index.html [1.09.2020].

[43] Judicial Independence Committee of the American Board of Trial Advocates, *Preserving a Fair, Impartial and Independent Judiciary,* pp. 8-9 [online], http://www.judges.org/wp-content/uploads/ABOTA-JudicialWhitePaper-final.pdf [1.09.2020].

[44] Philip B. Kurland, "The Appointment and Disappointment of Supreme Court Justices (1972)," *Law and the Social Order* 1972(2), 1972, p. 235.

of trust for judges and questionable legitimacy and independence may result in a lack of respect, especially for unpopular rulings, hate speech against the judges or even opposition against the Constitution.

The political aspect of Senate's Confirmation also interferes with judicial independence. Hearings organised by Senate Judiciary Committee are very detailed—senators interview the nominee by asking them about their legal career, rulings, opinions and beliefs. They try to predict how the future judge will adjudicate. Surely the candidate prepares a lot for those hearings so he would gain a trust of the Committee and the society, which would result in being confirmed and appointed. By reviewing the candidates and their judgements Committee is assured that the confirmed candidate will be a proper choice but also not much of a concern in the future. For instance, the candidate may be viewed by the members of Senate's Committee as an inappropriate person to become a justice because of his/her political views, which may lead to constitutional extremism.[45] Public perception of the U.S. Supreme Court as an argument was also brought frequently—few senators hesitated whether William Rehnquist will worsen public perception of this institution or not. What is more, they were bothered by the amount of sole dissents from him[46]—it sounds really worrying because the right to dissent is somehow connected with judicial independence. Because of that they might try to accept the candidate who will be adjudicating in the way that suits the Senate and will be accepted by the American society. Deciding who will rule in the future based on mentioned earlier matters might be considered a very opportunistic way of appointing the nominees. Also, it might be dangerous for individual's right when such a person will be deciding whether a death penalty is eligible or not. This may lead a judge to decide the case against his conscience but in accordance with someone else's expectations in hope of the promotion or nomination. It violates judicial independence and fairness of ruled sentences and should be considered a threat for checks and balance system.

Furthermore, we cannot deny that a judge (justice) shall be impartial, however in some states it is necessary for them to gain support from local authorities or local community. Clearly they cannot belong to the political parties but the former member of it can become a judge in the future. In order to become a federal judge it might be necessary to gain the needed support[47] thus judges "might be tendered by lobbyist in terms of the best-access offer to the justice system."[48] This

[45] See William H. Rehnquist's hearing before the Committee on the Judiciary, 1986 Serial No. J-99-118, pp. 17-27, 36 [online], https://www.loc.gov/law/find/nominations/rehnquist-aj/hearing.pdf [1.09.2020].

[46] Ibid.

[47] Anna M. Ludwikowska, Rett R. Ludwikowski, *Sądy,* p. 35.

[48] Fabian Zhilla, T*he Dark Sides of the US Model of Judicial Selection* [online], http://effectius.com/yahoo_site_admin/assets/docs/ThedarksideoftheUSmodelofjudicialselection_EFFECTIUS_newsletter16.346105314.pdf [1.09.2020].

means it might be easier to become a judge by using the support from the former party or friendly authorities. Consequently, less known candidates might not be able to become judges, but on the other hand—they have never been members of any party so theoretically speaking they might be more suitable for the office because of their impartiality. Because of it judges may resign from their personal beliefs and do whatever it takes to achieve their goal. As Fabian Zhilla states: "It discharges judges from their professional and ethical components"[49] and they will not be nominated based on their expertise. It can become even a greater threat to judicial independence, fair appointment and selection in the future.

Life tenure is also a dilemma which is often criticized by some people. They point out that this type of selection which constitutes a life-time service as a justice shall be revoked and they considered it not only as a weakness of their legal system but also as a threat to judicial independence—"Lifetime appointments have failed their intended purpose of ensuring judicial independence."[50] It guarantees that appointed judges will rule a long time after they were nominated and as good as it looks this regulation from the Constitution has its flaws. For instance judge (justice) may be obliged to show gratitude by ruling in a certain way and when he is not willing to, he might be pushed towards doing it against his will. The impeachment, although restrained by the Constitution to be used only in certain situations, may be used against the Founding Father's will in order to sabotage or corrupt the judges. The other branch because of this possibility might be able to undermine judicial independence and subordination of judiciary power.

Apart from that, the Constitution of the United States of America declares few measures (mentioned earlier) which are to make it more difficult for the other branches to influence the judiciary in an unacceptable manner. The threats which were mentioned are crucial because they can affect judicial independence, their impartiality and thus endanger the Constitution. *De lege ferenda* the future judges shall be granted more judicial independence, e.g., by limiting the possibility of impeachment—the threat of using it surely influences judicial impartiality and the right to the fair trial. In addition, the process of selecting the candidates for federal courts depends greatly on politics thus it is worth suggesting that the judges shall be nominated by some kind of a judiciary body and later confirmed by the Senate. This option will grant more judiciary independence in the future and will provide qualified and well-prepared judges (justices) to be appointed. Changes to the U.S. Constitution will be required but every individual in the U.S. might benefit from it.

[49] Ibid.

[50] Jason C. Gay, "End Lifetime Judicial Appointments," *The Federalis*t [online], https://thefederalist.com/2015/03/13/end-lifetime-judicial-appointments/ [1.09.2020].

4.2. State Courts

As it was presented in the third part of the study, there are multiple methods of selection judges in the states, however only 3 solutions are widely used: partisan election, nonpartisan election and merit selection followed by retention election. Therefore, while explaining different aspects of the possible influence of a method of selection on judicial independence, I will only focus on those mentioned above.

As it was introduced before, judicial independence should be understood as the capacity of individual judges to decide cases without threats or intimidation that could interfere with their ability of adjudication. When thinking of partisan election, the first argument that comes to mind is: how disclosing politician views is not a threat for an independence. For some it is sort of a guarantee as it is true that judges have their own political opinions, which somehow could influence their adjudication. The judges are being seen as normal people and regular officials, so they should be elected in a "normal" way.[51] Nevertheless, it is difficult to agree with such an opinion when looking at the campaigns during those elections—it started to remind the legislative elections. There is no merits-related discussion; the candidates, as they are assessed by common (not-educated in law) people, know they must somehow convince them to vote for them. The most popular way to do so is by addressing difficult and loud topics like abortion, death penalty or homosexual marriages. In other words: the election became populistic.

Nonpartisan elections seem to be less influencing judicial features as they assume judges should not be identified with a certain political party; even though they have their opinions, while adjudicating, they should follow the law, not the private political views.

Reality presents itself otherwise. Although candidates should not disclose their opinions on political-related topics, the campaign is equally unpleasant as the one conducted during partisan election. In both cases the advertisements are becoming more and more negative (against other contestants). Applicants tend to make promises on the way they would rule while elected. How a judge remains independent while deciding on a case he/she made a promise before? There is always a risk of not being reelected or retained if ruled against previous promise. This is certainly a situation, which influences the "capacity of deciding the case without interfering." It is even more problematic when it comes to funding contributions. According to the research[52] it is visible that nonpartisan election cost less than partisan election but still these are enormous amounts of money

[51] Charles G. Geyh, "The Endless Judicial Selection Debate and Why It Matters for Judicial Independence," *Articles by Maurer Faculty.* Paper 55, 2008, p. 1270.

[52] Chris W. Bonneau, "The Dynamics of Campaign Spending in State Supreme Court Elections, 1990–2004 (2007)," in *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections*, ed. Matthew J. Streb, New York, 2007, pp. 59-72.

spent on campaigns (in 1999-2004 the average sum for partisan election was $885,177 while for nonpartisan $549,160[53]). Many states do not have the limit on those external contributions, therefore big companies are willing to support financially particular candidates. Would the chosen judge be able to rule against his previous fundor while deciding his case? It seems to be too much of a threat to rely on judge's integrity.

Merit selection was created to preserve judicial independence by minimizing political influence and ensuring judicial quality of adjudication through a qualifications screening by an independent body. Also, as during the retention election the judge does not face any contestant, there is no need for negative advertisements, populistic discussion or spending a significant amount of money on a campaign. Taking those facts into consideration results in a belief that merit system truly secure judicial independence. However, it does not exclude a possible political influence on the decisions of governor or nominating commission, especially the legal one like lobbying.

Despite all the threats presented above (concerning popular vote), one cannot deny existing certain judges who would stay independent regardless. However, those ones would have to confront the fact they are most likely to be removed from the office as neither of the presented methods ensure a lifetime tenure for the judges. This is exactly what happened to the 3 judges from Iowa, who unanimously decided to uphold homosexual marriage in 2010. The case was unprecedented as electorate vote against retention of three Iowa's Supreme Court judges.[54] Iowa's selection system is a merit one; firstly, nominating commission chooses the candidates, they are appointed by a governor and they face retain election after one year in office, and then at regular intervals.[55] It implies that even a merit system, which was supposed to protect judicial features, including independence, by focusing on judge's qualifications and assessing them by an independent body, is not sufficient in comparison with popular election of any kind (even when it is "just" judicial accountability to the electorate).

There suggest itself a big question: do we wish for the judicial accountability to "the people," who can easily remove a judge from the office for an unpopular ruling? Is there a place for judicial independence?

For the aforementioned reasons, retain election, or more precisely judicial accountability, and a lack of lifetime tenure appear to be the most threatening factors for judicial independence. Even a creation of a system like a merit selection method will not guarantee an independence when judge has to acknowledge the fact of a removal from the office, not on a basis of immoral or illegal behavior but

[53] Ibid., p. 8.

[54] See Alicia Bannon, *Rethinking*, p. 22f.

[55] *Judicial Selection in the States: Iowa* [online], http://www.judicialselection.us/judicial_selection/index.cfm?state=IA [1.09.2020].

on a ground of unpopular decision, assessed by the electorate, who is not trained in law and cannot estimate the reasoning in a legal light. It is a laudable idea to engage citizens in a process of judicial selection in a democratic system but the people do not pay attention to this power unless there is a loud and controversial case. *De lege ferenda* it is worth suggesting removing the power of electorate to recall a judge from the office or narrowing it down to the particularly indicated situations, which would not endanger judicial independence. From the wider perspective the most suitable solution could be establishing a lifetime tenure for the judges. Of course it has it flaws (presented in 4.1) but up today there was not found a more appropriate method. Thus any attempt of a political influence would not (or should not) affect the judge, who would not be afraid of losing his office if his ruling is unpopular among politicians/governor/members of nominating commission/financial supporters or electorate.

5. Conclusions

Judicial independence is one of the most if not the most important rule which constitutes properly functioning legal system. It is meant to provide the possibility for judges to rule and interpret the law while not being concerned about political influence or their income. Founding Father of the U.S. wanted to create a strong judiciary power which would be a part of check and balance legal system and although the certain degree of judicial independence is provided by aforementioned instruments/measures, this system has its flaws. Enacted methods of judicial selection affect the judicial independence and thus its deficiency pose a threat for individual rights such as a right to a fair trial.

Weaknesses which exist at the level of State Courts consist of lobbying, no life tenure, fund-raising or campaigns which are so similar with elective campaigns. They make the judges vulnerable to the public opinion—often they have to express their views on controversial subject in order to be elected or hold the office (retention). Additionally, they have to take part in negative (almost political) campaigns and gain the support from local authorities or other important groups. Enacting life tenure and promoting merit elections instead of partisan ones might be an option which would guard the judges from those harmful influences.

Selection to the U.S. Federal Courts also reduce judicial independence. The candidates are being nominated and confirmed by the politics. Every President wants to appoint the judge in the U.S. Supreme Court who will rule in a suitable (for him) manner. Judges might be tempted to achieve wanted office by resigning from their impartiality. Political views and personal beliefs are being evaluated by the Senators who do not have to be a qualified lawyers, also they can question impartiality of the judge and the way in which he applicates the law. This type of

selection undermines judicial independence and promotes obedient judges rather than well-qualified ones. A judiciary body who has an authority to choose the best judges (instead of U.S.) might be an answer to the presented problem.

The aforementioned threats to judicial independence which derive from the specific types of selection cannot be disregarded as they pose the threat to the checks and balance system declared by the U.S. Constitution. For this reason, they shall be a subject of deliberation between three branches, experts (academics) and society. Presented deficiencies weaken judiciary power and by decreasing its degree of independence, the individuals rights are endangered (e.g., right to a fair trial) which may further question legitimacy of all three branches. Therefore solution to the issues discussed before must be immediately but carefully provided. U.S. Constitution exists for over the 200 years but maybe it is a time to reevaluate it and adjusts it to the challenges of the twenty-first century.

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Summary. This paper aims to present how the type of selection of the judges in the United States of America might affect the judicial independence granted by the U.S. Constitution as it is one of the most important guarantees to the check and balance system in the United States. The authors explain what is the judicial independence and how it is preserved. The authors indicate the problem of various, different ways of judge's selection in Federal Courts and in the State Courts declared by U.S. Constitution and enacted acts; thus the system of a American Judiciary is very complicated. The authors believe that certain rules and manners which constitute the aforementioned process affects the judicial independence. Consequently they pose threats to a judicial independence which shall be taken into consideration in order to maintain rule of law in United States.

Keywords: judicial independence, selection of judges, constitution, federal courts, state courts

Chapter VII

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPP) IN THE AMERICAN LEGAL THOUGHT*

Artur Pietruszka

1. Introduction

In 2005, *TrumpNation: The Art of Being the Donald* by The New York Times journalist Timothy L. O'Brien was published in the United States.[1] In one of the chapters the author, quoting three anonymous sources from the "closest circle" of the current President of the United States, stated that Donald Trump "was not remotely close to being a billionaire," while his net worth was between $150 million and $250 million. In response, Donald Trump filed a suit against the journalist and the publisher, seeking a total of $5 billion in damages [*sic!*], alleging that the journalist's assertions are untrue, while the claims he thus propagated slandered Trump's good name and damaged his business. The lawsuit concluded only in 2011, when the court of appeal in New Jersey finally held that the lawsuit was thoroughly unfounded.[2] Donald Trump spent $1 million in fees for the lawyers who represented him in the case.[3] However, in a press interview following the conclusion of the case he admitted that victory had not been his chief goal, saying: "I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make his life miserable."[4]

Several years ago, the construction of a commercial and service complex began in the centre of a Polish city. According to the designs, the building would be erected in very close proximity to the neighboring tenements, which sparked the protests of residents. The latter turned to competent public administration bodies, drawing attention to the fact that the investor is in breach of the law, while the issued

* The English version of this article has been prepared by Szymon Nowak.

[1] Timothy L. O'Brien, *TrumpNation: The Art of Being The Donald*, New York, 2005.

[2] See *Trump v. O'Brien*, 29 A.3d 1090, (N.J. Super. Ct. App. Div. 2011).

[3] Aaron Smith, "SLAPP Fight," *Alabama Law Review* 68 (1), 2016, p. 308.

[4] Paul Farhi, "What Really Gets Under Trump's Skin. A Reporter Questioning His Net Worth," *The Washington Post*, March 8th, 2016 [online], https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3e-e4c2-11e5-b0fd-073d5930a7b7_story.html?utm_term=.ceb20be8de46 [25.11.2018].

planning permission does not meet pertinent requirements. The matter was still in progress when the most active of the opponents found statements of claim from the property development company in their postboxes. It was alleged that the activities of the residents, especially their having suggested that the investor had violated the law, were damaging to the good name of the company, and thus adversely affected its reputation on the market. The company demanded that each of the defendants pay thousands in compensation which would go towards social ends. The lawsuit lasted for over a year and involved considerable stress for the residents and expenses they incurred to defend the action of the company. Ultimately, the court ruled in favor of the residents and dismissed the plaint. Nonetheless, the investor accomplished its goal: the complex was built because the neighbors did not have the time and will to continue their efforts to have the planning permission revoked.

Even though the two above cases took place at a different time, in different countries and distinct legal system, they share one thing in common, namely either can be classified as a SLAPP (Strategic Lawsuit Against Public Participation). Without going into too much detail, it should be noted at this point that cases of this kind (proceedings before a court) are instituted to discourage one from speaking out on issues which constitute an object of public interest as well as curb protests and stifle political activity.[5]

The American legal thought owes the term Strategic Lawsuits Against Public Participation to two professors from the University of Denver: sociologist Penelope Canan and lawyer, George W. Pring. Also, the abbreviation "SLAPP" is not altogether meaningless, bringing the action of slapping to mind. Such a designation of the legal "phenomenon" discussed in this paper is not just coincidental, as will be demonstrated further.

Canan and Pring encountered SLAPP independently as part of their professional activities. They met in 1983 and embarked on studies concerned with SLAPP, focusing on the legal aspects as well as on the psychological, social, economic, and political aftermath of the phenomenon.[6] The latter term appears justified in this case precisely due to the interdisciplinary nature of SLAPP, which goes beyond the "classical" perspective of jurisprudence. In the first stage, Canan's and Pring's research involved statistical analysis of 100 selected cases under way in American courts. Subsequently, they interviewed the parties to the proceedings in order to determine the motivation of the plaintiffs, and the impact of participation in the suit on the later political and social activities of the defendants.[7]

[5] Byron Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression*, Waterloo, 2014, p. 1.

[6] George W. Pring, Penelope Canan, *SLAPPs. Getting Sued For Speaking Out*, Philadelphia, 1996, pp. X–XI.

[7] On the methodology of research see esp. Penelope Canan, George W. Pring, "Studying Strategic Lawsuits against Public Participation: Mixing Quantitative and Qualitative Approaches," *Law & Society Review* 22(2), 1988, pp. 385-95 and George W. Pring, Penelope Canan, *SLAPPs. Getting Sued*,

Papers published by Canan and Pring were received with considerable interest among the representatives of the American doctrine, legal practitioners, and finally the legislative branch.[8]

The aim of this paper its to attempt a reconstruction of the notion of SLAPP based on the achievement of the American legal thought. It may therefore be said that this study constitutes a dogmatic analysis of SLAPP and the legal institutions relating to the phenomenon. Although it is concerned solely with American law and does not aspire to be a comparative work, given the Polish example above it may provide inspiration for lawyers with a background in the continental system to engage in further inquiry.

2. Constitutional Background

Before I move on to discuss detailed issues associated with the phenomenon of SLAPP, it is necessary to outline the constitutional background, in particular with respect to the right to petition under the U.S. Constitution.

According to the First Amendment to the Constitution, Congress shall pass no laws which would make any religion a state one, prohibit observing any religion, restrict freedom of speech and press, or circumscribe the right to peaceful assembly, or the right to petition the government to prevent or eliminate the causes of distress or grievances of the citizens.[9]

Thus, the First Amendment to the United States Constitution provides for numerous fundamental rights and liberties. At times, it is even considered the source of other rights and freedoms set forth in the Bill of Rights.[10] However, the right to petition the government has never been the object of so many judgments of American courts and studies in the doctrine as the remaining rights and freedoms stipulated in the First Amendment.[11]

The right to petition is deeply rooted in the American legal culture, dating back to a period before the Declaration of Independence. It is noted that at the time petitioning was a form by means of which citizens demanded a law to be enacted or their grievances to be redressed.[12] Petitions of this kind were initially

pp. 209-22. The methodology is critically assessed by Joseph Beatty, "The Legal Literature of SLAPPS: A Look behind the Smoke Nine Years after Pring and Canan First Yelled „Fire!"," *University of Florida Journal of Law and Public Policy* 9(1), 1997, pp. 85-110.

[8] See, instead of many Byron Sheldrick, *Blocking Public Participation* with extensively cited literature and case-law (esp. pp. 152-63).

[9] Polish translation after: Paweł Laidler, *Konstytucja Stanów Zjednoczonych Ameryki. Przewodnik*, Cracow, 2007, pp. 109-10. The remaining translations by this author.

[10] Ibid.

[11] See Gregory A. Mark, "The Vestigal Constitution: The History and Significance of the Right to Petition," *Fordham Law Review* 66(6), 1998, p. 2155 ff.

[12] Ewa Wójcicka, *Prawo petycji w Rzeczypospolitej Polskiej,* Warsaw, 2015, LEX/el.

submitted to the (British) king, and then to state parliaments.[13] In the 1830s, the institution of petition became an extra-parliamentary instrument of protest that citizens took advantage of to demand protection of their liberties and rights and to criticize public authority.[14] This involved numerous petitions to abolish slavery which resulted in the introduction of limitations on debate and the obligation to respond to petitions (the so called gag-rule).[15]

Today, the importance of the right to petition has radically changed since its function has been taken over by other liberties and rights—also provided for in the First Amendment—the freedom of speech and press in particular.[16] At the same time, one cannot fail to observe that the function of the right to petition is to some degree distinct from the aforementioned constitutional liberties. In the first place, filing petitions is a particular type of speech aiming to "alter government practices and policies;" also it may be addressed to a public officer responsible for that practice or policy.[17] Furthermore, it is presumed in the United States that the scope of the right to petition encompasses the right to access to the government, which is understood as the right to communicate the views of the citizens to the authorities (the legislative, the executive, and the judicial branch), as well as to advise those authorities of specific matters.[18] This is because among other things, the purpose of the right to petition is to enable such bodies to make decisions based on exhaustive knowledge.[19] For this reason, the First Amendment prohibits limiting the right to petition. In yet another approach, the right to petition is mutually beneficial: the citizens can communicate their views and observations to bodies of authority, while the latter take advantage of the same "early warning system" of social uno.est.[20]

It should be emphatically underlined, that as the institution of the right to petition evolved, the scope of its application has been considerably extended. Hence, this is not only the literally understood circulating or signing of petitions which is subject to protection, but also any action which expresses approval or disapproval of the government policies, such as bringing complaints, reporting violations of law, lobbying, federal campaigns, boycotts, picketing, and demonstrations.[21] One

[13] Anna Śledzińska-Simon, "Prawo petycji w Stanach Zjednoczonych," in *Teoretyczne i praktyczne aspekty realizacji prawa petycji*, eds. Ryszard Balicki, Mariusz Jabłoński, Wroclaw, 2015, p. 93.

[14] Ibid., p. 94.

[15] More broadly, see, e.g., Stephen A. Higginson, "A Short History of the Right to Petition Government for the Redress of Grievances," *Yale Law Journal* 96(1), 1986, pp. 158-65.

[16] Gregory A. Mark, *The Vestigal Constitution*, p. 2155.

[17] Ronald Krotoszynski, *Reclaiming the Petition Clause: Seditious Libel, Offensive Protest, and the Right to Petition the Government for a Redress of Grievances*, New Haven, 2012, p. 164; after: Anna Śledzińska-Simon, *Prawo petycji*, p. 95.

[18] Carol R. Andrews, "A Right of Access to Court under the Petition Clause of the First Amendment: Defining the Right," *Ohio State Law Journal* 60(2), 1999, p. 624 and case-law cited there.

[19] Ibid.

[20] George W. Pring, Penelope Canan, *SLAPPs. Getting Sued*, p. 17.

[21] Ibid., p. 16 and case-law cited there.

can hardly fail to notice that each of such actions is under protection which has its source in the freedom of speech, press, and assemblies asserted in the First Amendment.

It is particularly relevant for this study that the right to petition under the United States Constitution also entails the right of access to court, and therefore to file suits.[22] This notion derives, among other things, from the case-law of the U.S. Supreme Court.[23]

3. The Right to Petition and the Right of Access to Court

Questions arise, however, whether each suit is protected on the grounds of the right to petition? How should a court proceed in a situation in which the right of access to court (to file a suit) conflicts with other entitlements arising under the First Amendment?

As these questions relate quite significantly to the matters discussed here, one should consider how the U.S. Supreme Court attempted to answer them. In the following cases brought before the Supreme Court, one of the major issues was whether they should in fact be examined or whether they should be dismissed[24] at a pretrial stage, and if so, in which situations.

The first important judicial statement in that respect was the holding in *Bill Johnson's Restaurants, Inc. v. NLRB*.[25] The lawsuit was brought by a restaurant owner who dismissed a waitress after she had attempted to organize a union. Shortly after her contract had been terminated, the former employee filed a complaint with the National Labor Relations Board (NLRB). NLRB found the complaint legitimate and motioned for appropriate sanctions to be instituted against the employer. The owner responded with a lawsuit against his former employee, alleging for instance that the above conduct damaged his good name and, consequently, demanded $500,000 in punitive damages.

The Supreme Court observed that the suit had been filed with the aim of retaliating against the former employee for actions (e.g., filing charges with the NLRB) which are protected under the First Amendment. In the light of the criteria listed below, there can be no doubt that this was a SLAPP case. It was emphasized in the opinion to the judgment that a lawsuit may be a "powerful instrument of coercion or retaliation," while regardless of the end result, the defendant will incur substantial expenses having to retain a counsel, which might lead to a "chilling

[22] Carol R. Andrews, *A Right to Access to Court*, pp. 559-60; Julie M. Spanbauer, "The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth," *Hastings Constitutional Law Quarterly* 21(1), 1994, p. 43 ff.

[23] *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

[24] See *Black's Law Dictionary. 8th Edition,* St. Paul, Minn., 2004, p. 524.

[25] *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983).

effect."[26] Importantly, the Supreme Court underlined that "suits based on insubstantial claims—suits that lack a reasonable basis" are not subject to protection under the First Amendment.

However apt that observation may have been, practical application of the recommendation made in the aforementioned judgment proved problematic at the very least. In the subsequent holdings, the Supreme Court elaborated on the concept, acknowledging that "in order to be protected under the right to petition, the petitioner must not act with actual malice," whereby the latter was construed as "knowledge of falsity or reckless disregard of the truth."[27] Thus, the Supreme Court approached the standard of protection just as with respect to the freedom of press.[28]

In other words, a suit may be dismissed only when it has been demonstrated to have been filed with actual malice. Although it may be easy to allege, proving it is exceedingly complex,[29] which requires the case to be examined at length whilst relying on substance and facts.[30]

The standpoint of the Supreme Court changed in 1991 with the Omni case,[31] a dispute between two large-format advertising companies. Omni made an attempt to enter the market in Columbia, South Carolina, which at the time was largely controlled by Columbia Outdoor Advertising (COA). The latter was based in Columbia, while its owners remained in close relations with the local authorities. With a competitor in sight, COA began to lobby for the enactment of restrictive ordinances applicable to billboard construction. The existing (whose majority belonged to COA) would remain where they were, thus hampering the expansion of Omni on the local market. In response, Omni sued the city of Columbia and COA, alleging that the activities of the latter were dictated solely by economic considerations; in short, it was a sham.

In the opinion to the judgment of the Supreme Court, the right to petition protects "concerted effort to influence public officials regardless of intent or purpose."[32] Exclusion from that protection may—in the light of the doctrine outlined in the Omni case—apply only when an entity exploits the governmental process itself as a means to a different end (e.g., expose other entity to costs, delays), without genuinely intending to "procure favorable government action at all."

The above was contrasted with exercising the right to petition (i.e., entitlements it gives rise to) in order to achieve an outcome such as a change of policy or practice of an authority, or a change of law.

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[26] Ibid.

[27] *McDonald v. Smith*, 472 U.S. 479 (1985).

[28] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[29] George W. Pring, Penelope Canan, *SLAPPs, Getting Sued*, p. 23 and cited literature concerning the judgment in *New York Times v. Sullivan.*

[30] Ibid.

[31] *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991).

[32] Ibid.

In the light of the Omni doctrine, it is only in the first case that protection arising under the First Amendment may not apply, which in practice means inadmissibility of dismissal against an entity which abuses the right to petition and the necessity to examine the case substantively. At the same time, it needs to be noted that the Omni was concerned with antitrust law, therefore application of the presented guidelines in other branches of law may be disputable.[33]

4. The Notion of SLAPP

In the early studies into SLAPP conducted by Canan and Pring, the researchers determined one basic and three auxiliary criteria according to which a case could be classified as a SLAPP lawsuit. First, the case had to be concerned with speech (in the broad sense) aiming to influence public authorities (at federal, state, and local government level) so that they undertake factual or normative action.[34] It is in connection with that speech that there may ensue a claim or counterclaim in a civil suit filed against a non-governmental individual or non-governmental organization, concerning an actual, substantive issue in the public interest or otherwise socially important matter.[35]

The authors made it clear that the above criteria do not constitute an exhaustive definition of assertions, but merely provide a methodological framework for the research. This means in particular that that criminal cases are excluded from the scope of the term, though they still may lead to the same outcome as SLAPP does. Furthermore, there are other legal measure one can use to restrict social criticism; the rights of employers with respect to their employees—disciplinary dismissal for instance—play a significant role in the process. As already observed, the notion of *SLAPP* is limited to the subjective aspect, but it does not mean that persons who occupy administrative positions are not entitled to constitutional protection associated with the right to petition.[36]

At this point one should cite the results of the aforementioned qualitative research concerning SLAPP, carried out by Canan and Pring.

The major reason behind a SLAPP action was public (political) activity consisting in:

1) participation at a public hearing or debate—47% of studied cases;

2) filing public interest litigation[37]—30% of studied cases;

[33] George W. Pring, Penelope Canan, *SLAPPs. Getting Sued*, p. 28 with literature cited there.

[34] Ibid., pp. 8-9.

[35] Ibid.

[36] Cf. Julie M. Spanbauer, *The First Amendment Right*, pp. 48-49.

[37] On public interest litigation see, e.g., Zdzisław Kędzia, "Dochodzenie PGSiK—gwarancje instytucjonalne i proceduralne," in *Międzynarodowy Pakt Praw Gospodarczych, Socjalnych i Kulturalnych. Komentarz*, ed. Zdzisław Kędzia, Anna Hernandez-Połczyńska, Warsaw, 2018; cf. Robert Kulski, *Oby-*

3) reporting violations of law to competent bodies—18% of studied cases;

4) lodging formal government protest-appeals—8% of studied cases.[38]

Interestingly, exercising the right to petition in its narrowest sense, i.e. circulating or signing petitions relating to a particular issue accounted for only 3% of the studied SLAPP cases. The same percentage was observed as a result participation in peaceful demonstrations or boycotts.[39]

Canan noted that the risk of a SLAPP suit applies chiefly to parties speaking out on the following subjects:

1) urban development and spatial planning—38% of studied cases;

2) actions and policies of the local authorities and officials (including police officers, teachers, municipal councillors—30% of studied cases;

3) protection of the rights of consumers and tenants—20% of studied cases;

4) environmental protection (e.g., preservation of natural areas, conservation of endangered species, protection of animal rights)—16% of studied cases;

5) protection of human rights—13% of studied cases.[40]

It is evident that some of the cases were concerned with more than one of the above. The average amount of damages or compensation claimed by the plaintiff was $9 million. The defendants won the majority of cases (67%), whereby the likelihood of successful defence against a suit increased to 82% when the right to petition and the First Amendment were invoked.[41]

As noted previously, Canan and Pring conducted interviews with persons who had filed SLAPP lawsuits.[42] The typical motives behind the action included:

1) retaliation for successful opposition in a matter of public interest;

2) preventing expected future and competent opposition in such an issue;

3) intimidating and sending a message that opposition against a given entity (its action) will involve adverse consequences;

4) taking advantage of litigation (the court system) as an instrument in a political or economic contention.[43]

The most frequent allegations made in the studied *SLAPP* suit is defamation—53% of cases; business torts—32% of cases; violations of public order and nuisance—32% of cases.

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watelskie skargi sądowe (civil suits), in idem, *Ochrona zbiorowych interesów w postępowaniu cywilnym,* Warsaw, 2017. In international literature see, e.g., John Griffith, "Public Interest Litigation," *Judicial Review* 2(4), 1997, pp. 195-203.

[38] George W. Pring, Penelope Canan, *SLAPPs. Getting Sued*, p. 213.

[39] Ibid.

[40] Penelope Canan, "The SLAPP from a Sociological Perspective," *Pace Environmental Law Review* 7(1), 1989, p. 25; George W. Pring, Penelope Canan, *SLAPPs. Getting Sued*, pp. 213-14.

[41] Ibid.

[42] Pring and Canan consistently use the terms "filer" and "target" instead of the notions adopted in the American legal terminology, namely "plaintiff" and "defendant."

[43] Penelope Canan, *The SLAPP from a Sociological*, p. 30.

In the subsequent publication concerned with the discussed phenomenon the catalogue of features based on which a case may be qualified as a SLAPP suit was extended and formulated in greater detail. It was observed that SLAPP suits are characterized by an ulterior political or economic motive on the part of the plaintiff.[44] As pointed out in the American doctrine, the criterion makes it possible to distinguish between the pursuit of actual claims to which an entity is entitled and bringing a lawsuit to suppress social criticism (which is legitimate, i.e. does not transgress the limits of freedom of speech). The difference thus consists in the motivation of the litigating part and the merit of the suit assessed ex ante.[45] However, authors of the concept admit that despite applying a five-element test a lawsuit cannot be always conclusively defined as a SLAPP, because prima facie they are typical suits when a party seeks redress for defamation or violation of the rules of competition.[46]

The discussed criterion was critiqued as "unnecessary and pregnant with complications." Approaching the case from that standpoint—the ulterior motive behind the suit—one sees that it would increase the burden on the defendant, who would thus be obligated to demonstrate plaintiff's bad faith. Simultaneously, it does not yield a clear distinction between legitimate lawsuits and the SLAPP.[47] Consequently, it was suggested that greater emphasis be put on the outcome of the litigation. In other words, when trying to determine whether a case may be classified as a SLAPP suit, one should consider whether bringing it is likely to have an adverse effect on public debate involving the defendant or third persons. Should the conclusion be in the affirmative, the case needs to be approached as SLAPP suit.[48]

The above attempts at defining SLAPP were criticized by Thomas A. Waldman for being too broad.[49] Instead of a four- or five-element definition of SLAPP, Waldman advanced the following: a SLAPP lawsuit is associated with exercising rights deriving from the right to petition, while said exercise of rights is protected by statute or custom. Furthermore, the suit must be unlikely to succeed on the merits. Waldman noted that according to the definition by Canan and Pring, cases against persons who abuse the right to petition for sham purposes are also

[44] Dwight H. Merriam, Jeffey A. Benson, "Identifying and Beating a Strategic Lawsuit Against Public Participation," *Duke Environmental Law & Policy Forum* 3, 1993, p. 18.

[45] Ibid.; cf. also Darrel F. Cook, Dwight H. Merriam, "Recognizing a SLAPP Suit and Understanding Its Consequences," *Carolina Planning* 21 (2), 1996, p. 8.

[46] Darrel F. Cook, Dwight H. Merriam, *Recognizing a SLAPP*, p. 9.

[47] Jerome I. Braun, "Increasing SLAPP Protection: Unburdening the Right of Petition in California," *University of California, Davis Law Review* 32(4), 1999, p. 969 (see note 9 ibid.).

[48] Report drafted on request from the Attorney General of Ontario: *Anti-Slapp Advisory Panel Report To The Attorney General* [online], https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html [25.11.2018].

[49] Thomas A. Waldman, "Slapp Suits: Weaknesses in First Amendment Law and in the Courts' Response to Frivolous Litigation," *UCLA Law Review* 39(4), 1992, p. 1044 ff.

recognized as SLAPP suits.[50] At the same time, the author admits that arriving at a precise definition of SLAPP is exceedingly difficult, while qualification of a given case depends largely on the factual circumstances.[51] In his conclusions, the author observes that public activity of the citizens is in the interest of the state, which should be reflected in ensuring it substantial protection. According to Waldman, such an activity represents greater value for the state then protection of parties which may be affected in the course of exercising rights arising under the right to petition.[52] Such a premise should be thus taken into account when assessing and potentially classifying a case as a SLAPP suit.

Summing up the above, it may be concluded that despite discrepancies in terms of detail the SLAPP phenomenon consists in general in filing lawsuits which do not have meritable grounds against persons who exercise the rights deriving from the right to petition. Such an action is most often motivated by an attempt to prevent those persons from speaking out on particular issues or to retaliate for the criticism already expressed.

5. The Fallout of the SLAPP Phenomenon and the Mitigating Measures

One should consider the consequences—not only legal ones—of cases which meet the criteria outlined above. As already noted, in most SLAPP suits the courts hold in favour of the defendants. If so, what are the reasons to distinguish this group of lawsuits and investigate the measures to contain the SLAPP phenomenon?

In a frequently quoted holding of the Supreme Court of the State of New York, Justice Colabella stated quite graphically that "[s]hort of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."[53]

The key notion for the understanding of the SLAPP phenomenon is its "chilling effect." In the most widespread sense, it denotes "being discouraged or refraining from using measures available as part of natural or positive law in view of the threat of legal consequences."[54] The term has been employed by the U.S. Supreme Court since the 1950, primarily in cases relating to the First Amendment.[55]

The chilling effect may stem from legal uncertainty, meaning equivocal law or its flawed application. Consequently, an individual may be afraid of liability

[50] Ibid., note 296 on p. 1044.

[51] Ibid., p. 1045.

[52] Ibid., p. 1047.

[53] *Gordon v. Marrone*, 155 Misc. 2d 726 (N.Y. Misc. 1992).

[54] *Webster's New World Law Dictionary*, New Jersey, 2010, after: http://www.yourdictionary.com/chilling-effect#law [26.11.2018].

[55] See "The Chilling Effect in Constitutional Law," *Columbia Law Review* 69(5), 1969, p. 808.

for speech which should be protected.[56] However, the chilling effect may be also a result of the behaviour of entity other than the lawmaker. In particular, one can refrain from speaking out due to fear of wrongful conviction in a criminal case, wrongful liability for damages, the necessity to bear the costs of legal advice prior to speaking as well as subsequent litigation costs or loss of personal reputation.[57]

The above risks are particularly high with the SLAPP phenomenon.[58] Although it does not mean that all defendants or threatened persons respond in the same manner, i.e. decide not to speak, but it does not change the fact that SLAPP does exert that chilling effect.[59] Also, it needs to be noted that SLAPP affects not only defendants but also third persons. The latter situation is difficult to analyze, as it would have to be verified whether fear of lawsuit is an actual factor which determines the behavior of individuals, such as engaging in social activity or speaking out on a specific issue. Research of the kind was attempted by Pring and Canan[60] as well as—independently—by Waldman.[61] Both studies were conducted on a small group of respondents, whereby Pring and Canan compared the responses of persons who experienced the SLAPP phenomenon first-hand and those who were not exposed to such an experience. Waldman's investigation focused only on the latter group.

Although the findings of those studies should be approached with some caution, they suggest that a fear of litigation may be a factor which hampers social activity. Specifically, such an attitude is engendered by the fear of having to meet high costs of the action and unavailability of legal assistance.[62] What is more, persons who have experienced the SLAPP phenomenon tend to dissuade other persons from undertaking public activity.[63] This reason why the abbreviation SLAPP is so suggestive, as the phenomenon is indeed a "slap in the face of social activists," effectively reducing their participation in public life.

It needs to be emphasized once again that SLAPPs are targeted at speech concerning issues of public interest which is protected under the right to petition. Consequently, the chilling effect which discourages social activity of citizen in that respect constitutes a particular threat to democracy since it contradicts freedom of speech: the systemic and axiological foundation of the United States.[64]

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[56] Leslie Kendrick, "Speech, Intent and the Chilling Effect," *William & Mary Law Review* 54(5), 2013, p. 1652.

[57] Ibid., p. 1654.

[58] Thomas A. Waldman, *SLAPP Suits*, p. 990.

[59] Ibid, p. 991.

[60] Penelope Canan, George W. Pring, *SLAPPs. Getting Sued*, p. 219.

[61] Thomas A. Waldman, *SLAPP Suits*, p. 992.

[62] Ibid.

[63] Penelope Canan, George W. Pring, *SLAPPs. Getting Sued*, p. 219.

[64] See, e.g., Robert Abrams, "Strategic Lawsuits Against Public Participation (SLAPP)," *Pace Environmental Law Review* 7(1), 1989, p. 33.

Therefore, the necessity for actions aiming to confine the SLAPP phenomenon can hardly be disputed.[65] A discussion of measures which have been and continue to be adopted by state and federal authorities is beyond the scope of this study, but the most important initiatives deserve to be mentioned nevertheless.

As already observed, certain standards of protecting those who exercise the right to petition have been formulated in the case-law of the U.S. Supreme Court, for instance in the Omni case. However, the doctrine which culminated in that very judgment was developed on the basis of antitrust law and the so-called Sherman Act.[66] Hence its applicability in other cases has given rise to considerable doubt.[67]

Regardless of the above, Canan's and Pring's first publications on SLAPP immediately prompted a lively debate in the American doctrine concerning the necessity of introducing legislative solutions to counter the phenomenon, i.e. anti-SLAPP statutes, in which practitioners such as Attorney General of New York, Robert Abrams also contributed.[68]

Since the early 1990s, individual states began to counteract *SLAPP* precisely by means of statutory solutions. The enactments adopted in such states differ in terms of the model of protection and the catalogue of cases to which it applies. Due to the extent and nature of this text, more detailed outlines of those measures cannot be provided.

One of the first states to undertake such a legislative initiative was California, whose example was subsequently followed by a number of other states.[69] By 2016, 28 states had passed anti-SLAPP statues,[70] while in two a similar degree of protection is ensured by case-law.[71]

Today, there can be no doubt that solutions directed against the SLAPP phenomenon are needed. The debate is concerned solely with the appropriate model, i.e. one capable of providing highest possible (most effective) degree of protection of those who exercise the liberties stipulated in the First Amendment. Furthermore, it is also argued by some that anti-SLAPP protection should be regulated in federal legislation,[72] but thus far no measures have been adopted at this level.

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[65] In recent literature see, e.g., Aaron Smith, *SLAPP Fight*, p. 335. Still, cf. Joseph Beatty, *The Legal Literature*, pp. 109-10, who argues to reject the notion of SLAPP, even though—as it would seem—he does not question the need for protection against the chilling effect of meritless lawsuits.

[66] The Sherman Antitrust Act of 1890 (26 Stat. 209, 15 U.S.C. §§ 1–7).

[67] See footnote 33 and Joseph Beatty, *The Legal Literature*, p. 101, who observes that there are hardly any grounds to apply the doctrine of competition law in other cases.

[68] Robert Abrams, *Strategic Lawsuits,* p. 42.

[69] See more broadly in Jerome I. Braun, *Increasing SLAPP Protection*, pp. 1001-12.

[70] Aaron Smith, *SLAPP Fight*, p. 335.

[71] The states in question are Colorado and West Virginia. After: *State Anti-Slapp Laws* [online], https://anti-slapp.org/your-states-free-speech-protection/ [27.11.2018].

[72] See, e.g., Carson H. Barylak, "Reducing Uncertainty in Anti-SLAPP Protection," *Ohio State Law Journal* 71(4), 2010, p. 849; Stephen D. Zansberg, "Support Anti-SLAPP Legislation," *Communications Lawyer* 29(3), 2013, p. 3; Aaron Smith, *SLAPP Fight*, p. 335 and the sources cited there.

6. Conclusions

The right to petition, along with other rights deriving from the First Amendment, is a foundation of American democracy. Although the right has not been devoted as much attention as the other liberties set out in the same provision of the U.S. Constitution, it grants the individual certain highly significant entitlements in their relations with the government (or, more broadly, with a public authority).

At the same time, the right to petition and social activity of the citizens can be effectively hindered by filing groundless lawsuits against those who decide to speak out on issues of public interest. The "chilling effect" of such lawsuits is a real threat to citizen participation in the governance process.

The publications by Canan and Pring drew attention of both representatives of the doctrine, practitioners—judges and professional attorneys—and ultimately the legislative branch. To date, they resulted in changes in the law of 28 states and thus contributed to increasing the protection of persons exercising their First Amendment rights. Even so, SLAPP remains a problem for various social activists and non-governmental organizations, not only in the United States.[73]

The chief intention of this paper was to present the general background of the SLAPP phenomenon and discuss its characteristics. However, the case referred to in the introduction, which happened to have taken place several years ago in Poznań,[74] provided the direct incentive. The example—not an isolated one, it seems—demonstrates that the risk of a "chilling effect" produced by the fear of "court retaliation" does exist in Poland as well.

Allowing for all the differences between the American and Polish legal systems, constitutional traditions and social framework, it appears that the American experience in diagnosing and combating the SLAPP phenomenon may also prove useful in Polish circumstances.

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[73] See, e.g., John Council, "40 Media Groups Push For Texas Anti-SLAPP Law to Apply in Federal Litigation," *Texas Lawyer* [online], https://www.law.com/texaslawyer/2018/11/29/40-media-groups-push-for-texas-anti-slapp-law-to-apply-in-federal-litigation/ [30.11.2018].

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Summary. This paper covers the Strategic Lawsuits Against Public Participation (SLAPPs) phenomenon in the views of American legal doctrine. Its main purpose is to reconstruct the concept of SLAPP and to define the term itself. An observation that social activity can be stifled with the use of meritless, yet long and expensive court trials serves as the starting point for further investigation. The United States Constitution provides every citizen with freedom of speech and the right to petition the government to redress grievances. Such trials—baseless and motivated solely by the will to limit political activity—are a major threat to constitutional rights and liberties.

In Part I the author focuses on constitutional frameworks, specifically on the First Amendment to the United States Constitution and the right to petition. Part II presents the outcome of research conducted by P. Canan and G. W Pring who jointly coined the term SLAPP. Furthermore, the reception of cited authors' works is described. The author then intents to establish a definition of SLAPP. Part III concentrates on the adverse results of the SLAPP phenomenon, particularly the "chilling effect" as well as sheds a light on measures taken by the legislative in the United States to combat said repercussions. Concluding, the author states that despite these actions, SLAPP remains a serious threat to social and political activism.

Keywords: SLAPP, right to petition, First Amendment, chilling effect

Chapter VIII

AN INTRODUCTORY RE-EXAMINATION OF THE ELECTORAL COLLEGE AS A (RE-)DISTRIBUTIVE MECHANISM IN AMERICAN FEDERALISM

J. Patrick Higgins

1. Introduction

Had a Martian spaceship passed through the atmosphere above the United States on the night of November 8, 2016 and tuned into virtually any form of media, even without any prior knowledge of human nature—let alone politics—its inhabitants would immediately realize they were witnessing a consequential event of American social history. The histrionics of that evening, as well as the continuous, contested constitutional wrangling since, has contributed to a bipartisan cynicism so transformative that gazing back upon any era before the Presidency of Donald Trump is as if seeing through a glass darkly. Norms, conventions, social facts, public decorum, and institutions have been questioned or eroded wherever imaginable.

The Electoral College (EC) is an institution as decried as it is ancient, having existed since the ratification of the Constitution through a long, dubious history of attempted reforms and transformations. Seemingly once every generation there is a serious attempt to remove it altogether,[1] the College commonly evidenced as a vestigial remainder of the Founding Father's counter-majoritarian impulses, giving disproportionate weight to smaller states to complicate broad national political coalitions. Ironically, this counter-majoritarianism of the institutions appears

[1] For an attempt in the 1960s and 1970s, see Justin Fox, "The Electoral College May Not Actually Help Smaller States," *Bloomberg* [online], https://www.bloomberg.com/opinion/articles/2019-06-12/electoral-college-may-not-give-advantage-to-smaller-states [12.06.2019]. Another movement began in the mid-2000s as a consequence of George W. Bush winning the EC but losing the popular vote, in 2000 just as Trump did in 2016. See Dom Giordano, "Electoral College is a valuable part of our republic, and shouldn't be abolished," *The Philadelphia Inquirer* [online], https://www.inquirer.com/opinion/electoral-college-donald-trump-hillary-clinton-2016-election-dom-giordano-20190613.html [10.10.2020].

to be the only part of it consistently bipartisanly agreed upon.[2] The United States is currently gripped in one such movement now, with many hopeful Democratic candidates expressly campaigning to abolish or reform it.[3] Another movement seeks to build a coalition among the states to change the EC, though this proves to be a difficult task, constitutionally speaking.[4]

It seems this opposition to the college is gaining steam. A reexamination of the EC, its history and its nature, is thus timely, with the final aim to evaluate if it is acting as intended, weighing arguments for and against it. The key is that, as the EC is so intimately connected to population growth, concentration, and movement among and between the states, it represents the American federal system more generally, if imperfectly. This connection between the electoral college and federalism proves to be definitive.[5]

The paper finds that traditional defenders of it in the guise of advocates of fiscal federalism, is inadequately narrow, but so too are the political, often egalitarian critiques of it. What is needed, and what the paper tries to generally reconstruct, is a more nuanced, complex model that encompasses a variety of political, economic, social, and other factors such as climate and geography. Finally, the paper is intended to be introductory, theoretical, and explorative, rather than definitive, empirical, and precise. As such, the paper meets the requirements for comparative legal studies as outlined by editors, but it will ultimate agnostic as to any normative claims of whether the electoral college is something that the Europeans should or should not adopt. The electoral college is an adaptation of the American system, from its own history and context; it is a reflection of the American federal system, and, in an objective sense, it simply is. However, there is never a perfect system to distribute rights or political participation, both universally or even within a specific country, as democracy and liberalism are inher-

[2] Jon Gabriel defends this counter majoritarianism, in "The Electoral College is undemocratic? Of course. That's why it works" [online], https://eu.azcentral.com/story/opinion/op-ed/2019/03/31/electoral-college-undemocratic-course-thats-why-works/3286908002/ [14.06.2019]; Jamelle Bouie attacks it in "The Electoral College is the Greatest Threat to Our Democracy," *The New York Times*, 28.02.2019; For a middle ground, see Miles Parks, "Abolishing the Electoral College Would be More Complicated Than It May Seem" [online], https://www.npr.org/2019/03/22/705627996/abolishing-the-electoral-college-would-be-more-complicated-than-it-may-seem?t=1604912206708 [22.03.2019].

[3] Miles Parks, "Abolishing the Electoral College;" Jon Gabriel, "The Electoral College is undemocratic?".

[4] Shaun Boyd, "'Make Every Vote Count Equally': Lawmakers Push To Get Rid of the Electoral College" [online], https://denver.cbslocal.com/2019/02/12/vote-count-equally-electoral-college-bill/ [10.10.2020]; Daniel Uria, "Coalition to change Electoral College votes grow closer to 270-vote mark" [online], https://www.upi.com/Top_News/US/2019/06/13/Coalition-to-change-Electoral-College-votes-grows-closer-to-270-vote-mark/6361560294210/ [13.06.2019].

[5] For a concurring opinion, see Lorenzo Arca, "The Federalism Importance of the Electoral College" [online], https://law.fiu.edu/2017/02/21/federalism-importance-electoral-college/ [10.20.2020].

ently dynamic processes. What is useful for Europeans, in a practical sense, is to think of differences between the American political and constitutional system and the European one, especially with tensions on the ongoing project that is the EU, which seems to periodically wobble between federation and confederation. It also may be relevant for reflection on the national level. For example, in Poland many critics on the left have argued that the electoral college system is archaic for allowing the election of President Donald Trump, yet were similarly upset in that during the last presidential election, Rafał Trzaskowski lost the popular vote but won 10 out of Poland's 16 provinces. Ironically, if Poland had the American Electoral college system, it is almost certain that Trzaskowski would have won the election, despite losing the popular vote by a razor thin margin.

2. Time out of Joint? The Nature of the EC

The EC is a peculiar institution unique to the United States and unique among all other democratic systems. The early United States had a deep constitutional problem: how to avoid a tyrannical central government like those that existed in Europe and that they had experience with Great Britain, but also how that the Confederation of the original colonies was politically and economically too weak and unstable. The solution was a kind of compromise: a government with three equal branches that checked each other, a bicameral legislature with one house based on population (the House of Representatives) and the other where all states, regardless of size have equal votes (the Senate),[6] and a federal system where the levels of national, state, and local (sub-state) governments have their own rights, responsibilities, and semi-autonomous spheres of influence. There was both a written Constitution that had general principles of government, as well as a Bill of Rights that specifically enumerated the rights of individuals. Out of this same spirit of democracy with strong counter-majoritarian principles, the EC was born where the President of the United States is not elected directly, but that each state has an affixed number of representatives, or electors, based on population, who elect the President according to the popular will of the state. Though in theory these electors could become *faithless* and go against the wishes of the state, this is quite rare.

Every ten years the United States conducts a census to account the number of people per state and territory, which continuously reshuffles the distribution of votes in the House and hence the EC, with the number of representatives and votes in the EC fixed by constitutional amendment, so that some states are always

[6] Jeff Greenfield, "Why Liberals Should Stop Whining About the Senate," *Politico Magazine* [online], https://www.politico.com/magazine/story/2018/07/24/democrats-senate-constitution-219033 [10.10.2020].

either losing or gaining votes every ten years. The EC is generally a "winner-take all system," where the first person to secure the majority of votes in a state receives all of those votes. Thus, if the first-place candidate only receives 48% of the popular vote, they still receive 100% of the electors. On the other hand, there is no difference between winning by 80% and winning by 50.01%. This can lead to distortions where the popular vote of the country can diverge with the electoral vote, as happened in the 2000 and 2016 elections. The US President is thus not elected by pure popular vote, but rather *by winning the majority of the popular vote in the majority of the states*.[7]

The main lines of attacks on the EC are that it is outdated and that the countermajoritarian concerns of the Founding Fathers were the products of their time when the theory and practice of democracy were unknown. Given this, it should be completely abolished on the egalitarian principle of "one person, one vote," where the "worth" of a vote in Wyoming should be the same as one in California.[8] Another argument is that there has been a qualitative change in society since the Founders' time: now more Americans live in urban areas than rural ones, which the EC does not reflect. As the United States was arguably the first fully functioning democratic system in 2000 years, the idea that they may have been overly cautious is worth considering. Further, there is also some merit to critiques on the basis of geographical distribution, as the Founding Father's could certainly not have predicted that the 31 biggest cities would all be more populous than the least populous state.[9] But it also misses one of the major *moral* arguments made for the EC given by Alexander Hamilton in *Federalist* no. 68:

> Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue.[10]

Hamilton's argument is that an electoral system is *morally desirable*, in that it creates a kind of natural competition between candidates that allows the best candidates to rise and become elected. Demagogues may be successful in convincing the electorate in a few, perhaps even several, states, but it would be increasingly unlikely that they would capture the electorate of the whole country. As Hamilton

[7] For more a detailed explanation about the EC, see The National Archives and Record Administration, United States Government, *What is the Electoral College?* [online], https://www.archives.gov/electoral-college/about [10.10.2020].

[8] Supra, note 2.

[9] *Population and Housing Unit Estimates, 2018* [United States Census Bureau, 2018].

[10] Alexander Hamilton, "Federalist no. 68," in *The Federalist Papers,* New York, 1788.

was one of the preeminent members of the Federalist party as well as one of the main advocates of the Constitution, it seems reasonable to use his views as a proxy for the intention of the EC. *Thus, the EC is a method of geographic distribution of political power via the electors as representatives of the states in order to create an ethically desirable government.* Now that there is a theoretical claim, how to operationalize it? Opponents argue that the EC is no longer necessary, but how does it measure up to this expectation of it? One of the most sophisticated attempts to explore this connection between federalism and good governance is the fiscal federalism literature.

3. There and Back Again: Tiebout, Buchanan, Tullock, and Montesquieu

The fiscal federalism literature was born from Charles Tiebout's seminal 1956 paper.[11] Tiebout was concerned with how governments could prove for their citizens, but noted that politics was not the ideal method to transfer from private wants to public goods.[12] Instead, "consumer-voters" would move "to that community whose local government best satisfied his set of preferences."[13] His argument was simple: consumer-voters would move to locations where the government would best provide their needs. If there was enough consumer-voter mobility and options to choose from, the local government could provide public services just as efficiently as a perfect market.[14]

This perspective was revolutionary because it equivalated the movement of residences between local governments to a marketplace: if someone did not like their local government, they simply moved; indeed, the choice to move or not was equivalent to the choice to buy or not on a regular market.[15] This incentivized local communities to compete with each other just for residents, just as companies compete for customers. Nobel-prize winning economist James Buchanan and his lifelong friend and co-author Gordon Tullock and their students systematized this "Tiebout competition" into fiscal federalism and fiscal constitutionalism, which is still debated in the literature today.[16] Building on Tiebout, the potential for per-

[11] Charles M. Tiebout, "A Pure Theory of Local Government Expenditures," *Journal of Political Economy* 64(5), 1956, pp. 416-429.

[12] Ibid., p. 417.

[13] Ibid., p. 418.

[14] Ibid., p. 424.

[15] Ibid., p. 420.

[16] James M. Buchanan, "Federalism and Fiscal Equity," *American Economic Review* 40(4), 1950; James M. Buchanan and Geoffrey Brennan, *The Collected Works of James M. Buchanan,* Volume 9: "The Power to Tax," Indianapolis, 1980, [online], https://oll.libertyfund.org/titles/buchanan-the-collected-works-of-james-m-buchanan-vol-9-the-power-to-tax [10.10.2020]; James M. Buchanan

sons to move between different political locations has an effect on the tax base of those local units. This challenged the standard conception of federalism in America: rather than assuming that the federal, state, and local governments all acted on different levels, the levels interacted with each other. Assuming that the goal of a federal system is to prevent conflict between its subunits, competition among those subunits not only constrains those individual units and improves them via competition, but also this also constrains and improves the higher levels as well. Thus, competition among fiscal jurisdictions serves as a check against Hobbesian fears of Leviathan,[17] and Buchanan concludes that "Federalism serves the dual purposes of allowing the range or scope for central government activity to be curtailed and, at the same time, limiting the potential for citizen exploitation by state-provincial units."[18]

This "political competition" is directly connected with the EC system: as the states are continuously gaining or losing population, which translates to not only tax revenue but political representation in the House of Representatives and Presidential elections, there is great incentive for the states to create good fiscal, social, and political conditions. This has created an enormous body of research on tax policy and fiscal health, social factors, and other "non-economic" factors on determining inter-state migration. Unsurprisingly, economists have tended to emphasis fiscal factors, but Tiebout noted the importance of "non-economic factors,"[19] and Buchanan and Brennan note the importance of "psychological costs."[20] Critics of free market federal tax and fiscal policy emphasize social costs or non-economic factors such as weather, social environment, or family, whilst advocates of fiscal federalism follow Tiebout, Buchanan, and Tullock in emphasizing the economic, though they are beginning to acknowledge the importance of non-economic factors.[21] Some of the most complex and rigorous attempts to combine fiscal federalism literature with non-economic federalism in order to determine interstate

and Charles J. Goetz, "Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model," *The Journal of Public Economics* 1(1), 1972, pp. 25-43; Richard J. Cebula, "Migration and the Tiebout-Tullock Hypothesis Revisited," *The American Journal of Economics and Sociology* 68(2), 2009, pp. 541-52.

[17] James M. Buchanan and Geoffrey Brennan, "The Power to Tax," p. 166.

[18] James M. Buchanan, "Federalism and Individual Sovereignty," *The Cato Journal* 15(2/3), 1995, p. 261.

[19] Charles M. Tiebout, *A Pure Theory,* p. 418.

[20] James M. Buchanan and Geoffrey Brennan, "The Domain of Politics," in *The Collected Works of James M. Buchanan*, Volume 9, Indianapolis, 2000, pp. 181-96.

[21] For an involved debate between two experts, see Michal Mazerov, "State Taxes Have a Negligible Impact on Americans' Interstate Moves" [online], https://www.cbpp.org/sites/default/files/atoms/files/5-8-14sfp.pdf. [10.10.2020]; idem, *State 'Income Migration' Claims are Deeply Flawed* [Center on Budget and Policy Priorities, 20.10.2014]; Lyman Stone, *The Facts on Interstate Migration: Part Three* [online], https://taxfoundation.org/facts-interstate-migration-part-three [10.10.2020]; idem, *The Facts on Interstate Migration: Part Four* [online], https://taxfoundation.org/facts-interstate-migration-part-four [10.10.2020].

migration has been done by Richard Cebula, who has particularly noted the importance of weather, with the average temperature of January being particularly significant for inter-state migration.[22] However, such attempts at synthesizing are often empirically driven, rather than theoretically based, though such an extensive body of literature has in fact been developed in classical political theory in the work of Montesquieu. Thus, while some of the most ardent defenders of (fiscal) federalism have been American economists, a more effective defense requires returning back to one of the thinkers who inspired the American federalists in the first place.

The interest that Montesquieu had for the role of climate and geography on the historical development of civilization is well-known,[23] but it is part of a greater theory of how the "spirit" that governs a society is connected to culture, geography, law, politics, history, and other elements. Successful inclusion of these elements into the political, legal, and social structure, thus allows man, though inevitably shaped by nature, to ultimately overcome it in freedom. The ultimate result is a contextualist theory of history and law, where a perfect, timeless, universal government is impossible.[24] The idea of a counter-majoritarian, federal system with an EC is within this Montesquieuean spirit where political institutions are forced to be responsive to both economic and non-economic conditions. Though not the only factor, migration of people is perhaps one of the easiest, empirical data that we have as rough approximation if this universally understood, multivariate-responsive federal system is functioning as intended. It is now possible to test it.

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[22] Richard J. Cebula, "Migration and the Tiebout-Tullock Hypothesis Revisited," *The American Journal of Economics and Sociology* 68(2), 2009, p. 546; Richard J. Cebula and Gigi M. Alexander, "Determinants of Net Interstate Migration, 2000-2004," *Journal of Regional Analysis and Policy* 27(2), 2006, pp. 118, 122; Richard J. Cebula, "Internal Migration Determinants: Recent Evidence," *International Advances in Economic Research* 11(1), 2005, p. 271; Lowell E. Gallaway and Richard J. Cebula, "Differentials and indeterminacy in wage rate analysis: An empirical note," *Industrial and Labor Relations Review* 26(2), 1973, p. 993.

[23] Thomas A. Downing, "Negotiating Taste in Montesquieu," *Eighteenth-Century Studies* 39(1), 2005, pp. 71-90; David Young, "Montesquieu's Methodology: Holism, Individualism, and Morality," *The Historian* 44(1), 1981, pp. 36-50; Ramesh Dutta Dikshit, *The Political Geography of Federalism: An Inquiry into Origins and Stability,* Canberra, 1971; Robert Shackleton, "Montesquieu and Machiavelli: a Reappraisal," *Comparative Literature Studies* 1(1), 1964, pp. 1-13; Erwin H. Price, "Montesquieu's 'Spirit of the Law'," *The Mississippi Quarterly* 7(1), 1953, pp. 50-61.

[24] Isaiah Berlin, "Montesquieu," in *Against the Current: Essays in the History of Ideas*, ed. Henry Hardy, Princeton, 2013, pp. 164-203; Duncan Kelly, *The Property of Liberty; Persons, Passions, and Judgment in Modern Political Thought,* Princeton, 2011, pp. 60, 69, 94-95, 113; David L. Williams, "Political Ontology and Institutional Design in Montesquieu and Rousseau," *American Journal of Political Science* 54(2), 2010, pp. 525, 527, 530-32; Stanley Rosen, *The Elusiveness of the Ordinary: Studies in the Possibility of Philosophy*, Yale, 2002, pp. 29-30, 53; Melvin Richter, "An Introduction to Montesquieu's 'An Essay on the Causes that May Affect Men's Minds and Characters," *Political Theory* 4(2), 1976, pp. 132-33.

6. Is the Electoral College Still Working? 6 Empirical Tests

It is now possible to build a rough model, synthesizing from fiscal federalism and Montesquieu. Seven broad hypotheses are formulated.

1. That overall fiscal health of the state will be positively correlated with migration.
2. That average temperature in January will be positively correlated with migration.[25]
3. That people will be sensitive to political-cultural factors.
4. That net federal spending will be positively correlated with migration.
5. That people will be sensitive to their relative electoral power and that it will be positively correlated with migration.
6. That age of the state factors into its population. The original states, by prime mover advantage, would be able to direct flow of financial resources away from newer states, which would remain smaller in terms of political power, population, and, *ceteris paribus,* wealth.
7. That the natural resources of a state factors into population. States with higher natural resources would have a competitive advantage in terms of fiscal federalism, as they could offset their taxes with natural resources and other forms of wealth, which allows them to draw resources away from other states in a cycle similar to #6.

These last two hypotheses will be examined first, because they can be answered most purely from historical anecdotes. The original thirteen colonies of the United States were on the Eastern Coast. If hypotheses #6 holds, then the majority of the most populous states would still be from the original colonies. However, this is clearly not the case, as California, Texas, and Florida—the three most populous states—joined the union nearly 50 years since the Constitution was written. In fact, of the 15 most populous states, only about half of them are from the original thirteen colonies. If the 15 most populous cities are considered, the original 13 states become even *rarer*, with only two of the top 15 most populous cities—New York City and Philadelphia—located in one of the original 13 states. Again, California, Texas, and Florida dominate, with California having 4 of the most populous cities, and Texas having 5. These numbers are provided in Tables 1 and 2 on next page.

While this provides anecdotal evidence against hypothesis #6, it may support hypothesis #7, as Texas has been known for its abundance of oil for decades, whereas California was settled as part of the Gold Rush and possesses natural harbors for trade across the Pacific. It may also be possible that that these states have influences that are too specific to measure accurately, for example, New York and

[25] This follows the work of Cebula, that is widely accepted and replicated. Supra 22.

Table 1[26]

Rank	State	Population
1	California***	39,557,945
2	Texas***	28,701,845
3	Florida***	21,299,325
4	New York*	19,542,209
5	Pennsylvania*	12,807,060
6	Illinois**	12,741,080
7	Ohio**	11,689,442
8	Georgia***	10,519,475
9	North Carolina***	10,383,620
10	Michigan*	9,995,915
11	New Jersey***	8,908,520
12	Virginia***	8,517,685
13	Washington	7,535,591
14	Arizona	7,171,646
15	Massachusetts***	6,902,149

Table 2[27]

Rank	City	State	Population
1	New York	New York*	8,398,748
2	Los Angeles	California***	3,990,456
3	Chicago	Illinois**	2,705,994
4	Houston	Texas***	2,325,502
5	Phoenix	Arizona	1,660,272
6	Philadelphia	Pennsylvania*	1,584,138
7	San Antonio	Texas***	1,532,233
8	San Diego	California***	1,425,976
9	Dallas	Texas***	1,345,047
10	San Jose	California***	1,030,119
11	Austin	Texas***	964,254
12	Jacksonville	Florida***	903,889
13	Fort Worth	Texas***	895,008
14	Columbus	Ohio**	892,533
15	San Francisco	California***	883,305

[26] Data from: United States Census Bureau**,** *State Population Totals and Components of Change: 2010-2018.*

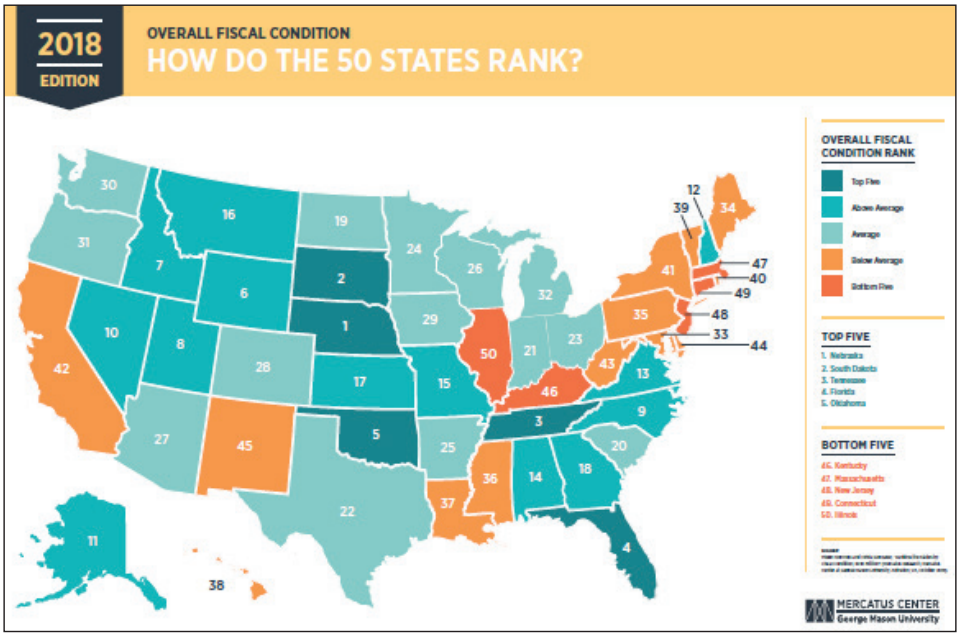
[27] * Original state ** Statehood between 1789 and 1812 ***Statehood between 1812 and 1861

Philadelphia were important centers of American finance since the colonial time period: how would one measure their impact on norms, practices, even banking laws since the time of the Founding? How would one measure the impact of New York City on American culture? Should one look through meeting minutes of Congress over the centuries and weigh the influence of states on national policy over the years? These hypotheses are too subtle to address so briefly here, but suffice it to say that the evidence for hypothesis #6 is weak and for #7 it is indirect.

Hypotheses #1-#5 were compared in a simple, multivariate ANOVA regression, using data presented in the Appendix 1 compiled from various US government sites as well as third party analyses based on US government data.

The full cross table is presented on next page.

From the data presented above, it is clear that only the average temperature in January, the average fiscal health of the state, and the self-identification of the voters as liberal that has any statistical significance on net migration. Thus Hypothesis #1 is supported: as the relationship is positive individuals, *ceteris paribus*, prefer warmer climates. Interestingly, Hypothesis #2 is supported, but what is interesting is that the coefficient is negative, meaning that individuals seem to prefer economically *worse* states. This is supported by recent findings of the State Fiscal Rankings by the Mercatus Center at George Mason University, presented below in Map1:



Map 1

Source: Eileen Norcross and Olivia Gonzalez, *State Fiscal Rankings* [online], Mercatus Center at George Mason University, https://www.mercatus.org/publications/urban-economics/state-fiscal-rankings, [10.10.2019].

Table 3

SUMMARY OUTPUT								
Regression Statistics								
Multiple R	0.6933919137							
R Square	0.4807923459							
Adjusted R Square	0.3942577369							
Standard Error	41023.68297							
Observations	50							
ANOVA								
	df	*SS*	*MS*	*F*	*Significance F*			
Regression	*7*	*65453826956*	*9350546708*	5.55607001	0.000141627699			
Residual	42	70683587689	1682942564					
Total	49	136137414645						
	Coefficients	*Standard Error*	*t Stat*	*P-value*	*Lower 95%*	*Upper 95%*	*Lower 95%*	*Upper 95%*
Intercept	*-517701.4603*	*313889.6606*	*-1.649310332*	*0.106544856*	*-1151156.434*	*115753.513*	-1151156.434	115753.513
Average Temperature January (2010-2015)	3684.136812	957.4767888	3.847755742	0.0003991884635	1751.870447	5616.403178	1751.870447	5616.403178
Average Fiscal Health Ranking (2010-2015)	-1993.463466	527.0585933	-3.782242603	0.0004859186534	-3057.110757	-929.8161751	-3057.110757	-929.8161751
% of Self-Identified "Liberal Voters" Per Stat	8102.878358	3293.061848	2.460591004	0.0180652194	1457.210575	14748.54614	1457.210575	14748.54614
% of "Self-Identified "Conservative" Voters	4803.341068	3420.409322	1.404317617	0.1675765039	-2099.324318	11706.00645	-2099.324318	11706.00645
% of Self-Identified "Moderate" Voters	5290.942892	3777.375336	1.400692921	0.1686511253	-2332.109069	12913.99485	-2332.109069	12913.99485
Net Federal Dollars Received (Millions)	0.1021592279	0.3655188356	0.2794910083	0.7812398463	-0.6354876375	0.8398060934	-0.6354876375	0.8398060934
Weight of Electoral Vote per Person	0.1189528656	0.06316204078	1.883296741	0.06659719915	-0.00851329174	0.2464190229	-0.00851329174	0.2464190229

Source: Author

With the exception of Texas and Florida, most of the states with the largest cities are also toward the bottom of the fiscal rankings. Further, of the most populous states, only Virginia, Florida, North Carolina, and George are within the higher tiers of fiscal health. This may suggest that individuals are drawn to states with combinations of high levels of social spending and large cities, rather than fiscally responsible ones. This needs be explored in greater depth, but it would suggest a dubious trend, as it would be the exact opposite of what fiscal federalism predicts individuals' self-interest may and poor financial incentives may hurt fiscal competition, rather than help it. Hypothesis #3 is partially confirmed. It is unsurprising that potential movers are not impacted by the weight of their electoral vote, as the EC itself is a somewhat obscure and arcane part of American politics to begin with. Similarly, it is not that surprising that individuals are not seriously impacted by net federal dollars that states receive, as this rarely goes to individuals directly, nor are most individuals likely even aware of their respective states' balance of payments ratio. What is *most* interesting is that it is that only voters who identify as liberal have their political views partially motiving their interstate migration. If true, this could suggest that the criticism of liberals and their supposed underrepresentation via the electoral college may be partially driven by their own self-selection into narrower political communities.

7. Conclusions: the EC and Political (Re-)distribution

Hamilton's defense of the electoral college is that incentivizing Presidential candidates to travel around the country produced, generally, a better form of government through a mechanism that was essentially a distribution of political power. Twentieth century fiscal federal theorists argued that economic competition among the states not only improves the governance of the states, but also improves and redistricts the federal government. In this way, fiscal competition among the states effects migration, which in turn effects the American federal and electoral system. Astute observes and critics have pointed out that economic and fiscal defenses of the federal system are too shallow, which the fiscal federal theorists themselves acknowledge. However, digging deeper into the political theory of federalism a more effective defense and understanding of the system is found in Montesquieu, where many economic and non-economic elements work together in a federal system to ultimately promote individual freedom and improve society. In a series of tests, it was found that migration is indeed sensitive to political culture, environment, as well as financial environment.

Contemporary critics of the American federal system are overly narrow in that they interpret it through egalitarian political terms and ignore these broader factors, all of which are put forward as part of the moral defense of the American

electoral system. Ironically, the data showed that those most sensitive to interstate migration are actually those more inclined to be liberal: thus not only is the small state bias largely illusory, but liberals themselves may contribute to it. The American electoral college, as it is sensitive to changes in population, effectively serves as a political redistributive mechanism: states receive funding not because of political bias, but because they are poor, and poorer regions with naturally lower populations are compensated with disproportionate voting power, because if they did not have it, there would be no way for them to compete in the competition that is at the heart of the electoral system. Thus, those who advocate abolishing the electoral college on politically economic grounds are actually doing the opposite by destroying a politically redistributive system.

To oppose the EC and request reforms to it is a fine thing, for it is an old and flawed institution that could certainly be improved. Yet, to abolish it without engaging the diverse, moral arguments for its existence in the first place is no solution, and would not resolve the constitutional dilemma of balancing the states and the central government that has existed since before America became a nation. Paraphrasing Churchill:

> Many forms of [American] Government have been tried, and will be tried in this world of sin and woe. No one pretends that the [electoral college] is perfect or all-wise. Indeed, it has been said that it is the worst form of [electing a President] except for all those other forms that have been tried from time to time.[28]

[28] Richard M. Langworth, *Democracy is the Worst Form of Government* [online], https://richard-langworth.com/worst-form-of-government [10.10.2020].

Appendix 1

	Average Net Migration (2010-2015)[a]	Average Temperature January (C) (2010-2015)[b]	Average Fiscal Health Ranking (2010-2015)[c]	% Self-Identified "Liberal" Residents[d] (2014)	%Self-Identified "Conservative" Residents (2014)	% Self-Identified "Moderate" Residents (2014)	Net Federal Dollars Received[e] (Millions $ 2017-2018)	"Weigh" of Electoral Vote Per Person[f] (2010-)
1	2	3	4	5	6	7	8	9
Alabama	4385.8	6.5	14	12	50	29	32,630	405,253
Alaska	**–3182.4**	**–14.9**	4	23	34	37	5,214	174,284
Arizona	55791.6	6.2	29	23	39	31	31,085	433,000
Arkansas	2018.2	3.9	30	14	42	38	15,263	367,407
California	70076	7.9	43	29	31	34	455	508,344
Colorado	52486.6	**–3.2**	21	28	33	34	**–533**	422,621
Connecticut	**–8164**	**–3.2**	46	25	33	36	**–14,353**	393,869
Delaware	5996	1	41	25	26	40	2,782	230,723
Florida	263917	14.1	7	24	37	39	45,886	510,318
Georgia	44373.4	7.3	22	20	42	32	23,501	449,756
Hawaii	2601	30	46	21	30	42	7,524	264,121
Idaho	9117.4	**–3.4**	16	21	42	32	5,885	284,628
Illinois	–62625.4	**–3.8**	50	27	32	35	**–4,654**	485,073
Indiana	896	**–3.4**	13	20	41	31	15,727	443,228
Iowa	3746.2	**–7.3**	20	23	41	31	3,476	386,394
Kansas	–6419	**–0.7**	22	27	39	31	5,776	354,363
Kentucky	2392.4	0.2	46	23	42	29	40,733	414,500
Louisiana	1430.2	9.2	29	14	50	30	17,730	426,920

1	2	3	4	5	6	7	8	9
Maine	1492.8	**–8.9**	37	30	34	33	7,443	263,457
Maryland	8922.2	0.2	32	29	28	36	36,524	442,059
Massachusetts	24457.8	**–3.8**	47	36	23	35	**–16,075**	466,246
Michigan	**–9525.2**	**–7.1**	35	24	35	33	24,648	471,223
Minnesota	6773.2	**–12.3**	32	27	35	32	5,350	401,986
Mississippi	**–6157**	6.8	29	19	45	30	20,531	368,624
Missouri	**–526.2**	**–1.2**	16	21	39	32	24,144	456,349
Montana	5788.4	**–5.2**	11	21	44	31	4,001	255,284
Nebraska	2316.8	6.8	29	19	45	30	–314	368,624
Nevada	29641.4	**–1.2**	16	21	39	32	3,419	456,349
New Hampshire	2107.2	**–7.4**	10	21	44	31	**–314**	255,284
New Jersey	**–8826.8**	**–0.9**	47	21	41	29	**–21,327**	273,424
New Mexico	**–8444.2**	1.7	41	24	33	37	18,149	339,257
New York	**–34332.6**	**–6.3**	42	28	34	34	**–35,562**	257,309
North Carolina	61984.4	4.1	23	28	29	37	34,495	480,477
North Dakota	9565.8	**–11.1**	8	23	34	38	–**544**	308,101
Ohio	**–8896.6**	**–3.4**	21	31	29	34	32,062	519,075
Oklahoma	12887.6	3.2	4	23	40	32	15,668	483,590
Oregon	32857	1.7	32	22	45	30	10,263	174,240
Pennsylvania	**–2438.6**	**–3.9**	33	21	40	32	29,435	489,209
Rhode Island	**–186.6**	**–2.1**	41	19	38	37	2,361	403,098
South Carolina	43587.2	6.6	28	30	30	34	25,162	423,517
South Dakota	**3330**	**–7.3**	3	23	36	34	1,226	495,511

1	2	3	4	5	6	7	8	9
Tennessee	32696.4	2.2	7	30	26	35	24,115	207,153
Texas	228974.8	7.8	17	15	43	35	8,594	393,877
Utah	11991.8	**–2.4**	9	15	47	32	917	203,794
Vermont	**–848.8**	**–8.3**	37	19	46	27	2,333	440,919
Virginia	20938.6	1.2	14	21	39	32	87,253	481,046
Washington	56479	0.5	28	20	45	31	**–1,366**	315,476
West Virginia	**–2738.4**	**–1.5**	39	35	30	32	13,225	165,503
Wisconsin	**–3399.6**	**–9.8**	31	19	39	37	3,104	472,873
Wyoming	541.6	**–5.2**	8	30	30	33	388	428,599

[a] Net Governing, *S*tate Migration Rate*s, Net Totals: 2011-2016* [December 2016].

[b] National Centers for Environmental Information, National Oceanic and Atmospheric Administration, *Climate at a Glance, Statewide Time Series*.

[c] The number represents an index, and was only aggregated across years for simplicity, hence why some states may have the same number. It is only intended as a "ballpark" estimate. See: Mercatus Center at George Mason University, *State Fiscal Rankings*.

[d] Pew Research Center, *Political Ideology by State* [online], https://www.pewforum.org/religious-landscape-study/compare/political-ideology/by/state/ [10.10.2020].

[e] Laura Schultz and Michelle Cummings, *Giving or Getting? New York's Balance of Payments with the Federal Government 2019 Report*, Rockefeller Institute of Government [online], https://rockinst.org/wp-content/uploads/2019/01/1-7-19b-Balance-of-Payments.pdf?fbclid=IwAR28H_bODapQKRqZ-BkvR6EHCMEoDQ7f7YkVH3G_RYMw98frtIO_t3ArVDrA [10.10.2020].

[f] Chris Clark, "How Powerful is Your Vote When it comes to voting, not all states are created equal," *Slate* [online], http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/11/presidential_election_a_map_showing_the_vote_power_of_all_50_states.html?via=gdpr-consent [10.10.2020].

Appendix 2: State Poverty vs Net Federal Dollars Received

	% of State Living Below the Poverty Level	Net Federal Dollars Received (Millions $ 2017-2018)
Alabama	15	32,630
Alaska	8	5,214
Arizona	12	31,085
Arkansas	14	15,263
California	10	455
Colorado	8	**–533**
Connecticut	8	**–14,353**
Delaware	11	2,782
Florida	11	45,886
Georgia	13	23,501
Hawaii	9	7,524
Idaho	11	5,885
Illinois	11	**–4,654**
Indiana	11	15,727
Iowa	8	3,476
Kansas	10	5,776
Kentucky	15	40,733
Louisiana	17	17,730
Maine	9	7,443
Maryland	7	36,524
Massachusetts	8	**–16,075**
Michigan	12	24,648
Minnesota	8	5,350
Mississippi	17	20,531
Missouri	11	24,144
Montana	10	4,001
Nebraska	9	–314
Nevada	10	3,419
New Hampshire	5	**–314**
New Jersey	8	**–21,327**
New Mexico	17	18,149
New York	12	**–35,562**
North Carolina	12	34,495

	% of State Living Below the Poverty Level	Net Federal Dollars Received (Millions $ 2017-2018)
North Dakota	8	–**544**
Ohio	11	32,062
Oklahoma	13	15,668
Oregon	10	10,263
Pennsylvania	10	29,435
Rhode Island	10	2,361
South Carolina	13	25,162
South Dakota	10	1,226
Tennessee	13	24,115
Texas	13	8,594
Utah	8	917
Vermont	9	2,333
Virginia	9	87,253
Washington	8	–**1,366**
West Virginia	17	13,225
Wisconsin	9	3,104
Wyoming	10	388

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Summary. The Electoral College is a unique artifact of American democracy. Born out of a counter-majoritarian spirit and a difficult compromise between a centralized political power and the rights of states, its critics view it as a vestigial institution no longer necessary for twenty first century democracy. On the other hand, its defenders, largely echoing Hamilton's original defense of it, claim that it protects individual freedom, restrains the government, and improves the electoral process of the President of the United States. Currently the United States is engaged in a contested debate about the nature of the Electoral College, whose opponents want to abolish it on egalitarian political grounds of "one person, one vote." This narrow, political critique is weighed against broader defenses that are moral, economic (through fiscal federalism), or historical and sociological, as in Montesquieu. Ultimately, it is found that the College still "works" as a distributive mechanism of political power, as it was intended.

Key words: Electoral College, fiscal federalism, Hamilton, Montesquieu, Buchanan

PART III

CHALLENGES AND DEBATES

Chapter IX

FROM LYNDON B. JOHNSON TO BARACK OBAMA: ANTI-POVERTY POLICY IN THE UNITED STATES

Jakub Serafin

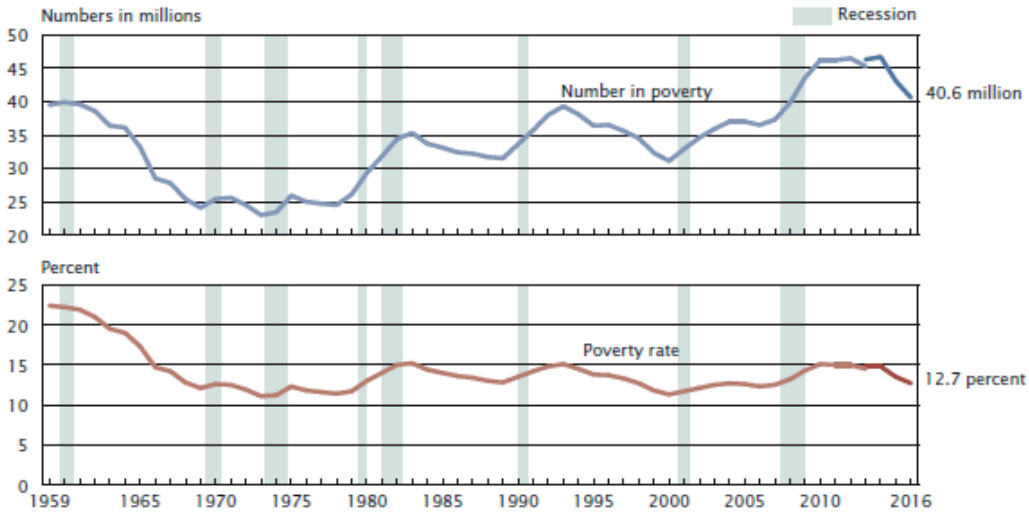
1. Introduction

Many people around the world have an assumption that the United States of America is a powerful and wealthy country where citizens have their own house, cars, decent jobs and money. This vision of America is very often popularized by very popular movies and TV shows. In the late 1940's and 1950's people from devastated by war Europe were amazed by the prosperity of American people. Nowadays we can observe similar trends for the people from the so-called Third World—especially If they have relatives or friends in the U.S. (in the both mentioned cases). In fact the situation in the USA was, and what is most important, still is completely different. In the same period of time when people from Europe were amazed by American wealth, this is 1950's, many American researchers have discussed the problem of increasing numbers of people living in poor economic conditions. In the first official data, developed by the U.S. Census Bureau in 1959, the poverty rate in the USA was 21,5% (which means that almost forty millions of Americans were living in poverty—Figure 1).[1]

Situation of many of these Americans were similar to people from times of Great Depression from 1929-1933, when millions had lost their jobs and had difficulties with the economic situation of their own households. Currently we have a very similar situation—when many people from around the world are dreaming about a good job and own home in the U.S.—the United States are still trying to reduce poverty, particularly after devastating results of the Great Recession (2008–2009). During the largest downturn since the Great Depression many people lost their jobs, savings and houses and the government undertook huge effort

[1] Jessica L. Semega, *Current Population Reports, P60-259, Income and Poverty in the United States: 2016*, Washington, D.C., 2017, p. 12.

Number in Poverty and Poverty Rate: 1959 to 2016



Note: The data for 2013 and beyond reflect the implementation of the redesigned income questions. The data points are placed at the midpoints of the respective years. For information on recessions, see Appendix A. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see <www2.census.gov/programs-surveys/cps/techdocs/cpsmar17.pdf>.

Source: U.S. Census Bureau, Current Population Survey, 1960 to 2017 Annual Social and Economic Supplements.

to overcome the results of the latest crisis.[2] The issue of social welfare is especially interesting when we try to compare it to European assumptions on this topic. Especially in the present times when it is really hard to imagine the problem with access to public health care and public housing or even public higher education. Therefore, it is important for the European readers to understand the foundation of the American social welfare, and how it was changed during Barack Obama's presidency and adopted for present times. For better understanding of the mentioned topic, the author relies on Institutional and functional methods as well as the comparative method. Thanks for used methods it was possible to present the most important factors of creating and implementing social welfare policies in the United States of America. Particularly when it is necessary to compare policies of more than one of the U.S. Presidents.

2. Importance of the *War on Poverty*

The issue of fighting poverty became the subject of a serious public debate during the presidency of John F. Kennedy, who during his first election campaign emphasized that he wanted to end the problem of poverty in the U.S. The vision of a program to curb poverty in the country was called *New Frontier*. A special im-

[2] John D. Graham, *Obama on the Home Front*, Bloomington, 2016, pp. 67-69.

pression on the thirty-fifth President of the U.S. was made by Michael Harrington's *The Other America* from 1962, which exposed the problem of poverty in American society. The second work on a similar topic that also influenced Kennedy was *Our Invisible Poor* by leftist writer and thinker Dwight MacDonald from 1963.[3] The activists and lobbyists of African-American organizations such as the National Association for Advancement of Colored People and National Urban League also prompted the presidential administration to take action. Before his tragic death, he managed to make several decisions including social policy, including: in 1962 he introduced a pilot program of food vouchers,[4] and also increased funds for the Social Security program.[5]

However, after the tragic death of J. F. Kennedy his successor Lyndon B. Johnson began a great social welfare legislation called *War on Poverty*. We can only wonder what the consequences would this program achieve if at the same time large amounts from the budget were not spent on long-lasting conflict in Vietnam. This program was presented by President Johnson during the State of the Union on January 8, 1964.[6] Its implementation was made of four laws passed in less than a year from August 1964 to July 1965. Regarding the scale of the *War on Poverty* legislation, it is actually deserved this name because it concerned, among others:

– Economic Opportunity Act of 1964, on the basis of this Act a network of government agencies (Community Action Agencies) was created. CAA were responsible for the implementation and coordination of many government programs to combat poverty;[7]

– Reforms of the Social Security Act of 1965 through the introduction of federal medical care for people over 65 (Medicare) and for the people with limited income and resources (Medicaid). The introduction of these two programs was a supplement to the social security program introduced in the original version of the Social Security Act of 1935 that is from the times of the New Deal policy of President Franklin D. Roosevelt;[8]

[3] Dylan Matthews, "Everything you need to know about the war on poverty," *The Washington Post* [online], https://www.washingtonpost.com/news/wonk/wp/2014/01/08/everything-you-need-to-know-about-the-war-on-poverty/ [18.08.2018].

[4] James N. Giglio, Stephen G. Rabe, *Debating the Kennedy Presidency*, Lanham, 2003, p. 110.

[5] Peter Ferrara, *A New Deal for Social Security*, Washington, D.C., 1998, p. 213.

[6] Krzysztof Michałek, *Mocarstwo: Historia Stanów Zjednoczonych Ameryki 1945-1992*, Warsaw, 1995, p. 213.

[7] Annelise Orleck, *The War on Poverty: A New Grassroots History, 1964-1980,* Athens, 2011, p. 3.

[8] Richard Cooper, *Poverty and Myths of Helthcare Reform*, Baltimore, 2016, pp. 215-18.

– Introduction of the Food Stamp Act of 1964, which in addition to providing nutritious food for the poorest families was to support the domestic agricultural industry;[9]

– Improving the level of education in primary and secondary schools. These changes were to give equal opportunities for a better start in adult life, better work and even higher education for millions of young Americans. These results were to be achieved thanks to the Elementary and Secondary Education Act of 1965.[10]

The purpose of introducing these legal acts was not only to guarantee ad hoc assistance for the poorest (food vouchers, housing allowances, Medicare and Medicaid insurance programs), as well as work at the foundation, e.g., in the form of vocational courses, adult education, cooperation of public and private welfare organizations.

Starting from the very beginning of *War on Poverty*, its reception by a large part of society was negative (especially by the Democratic Party's electoral base, mainly residents of the Southern States). It was realized that social assistance was not earmarked for the hard-working, rural and white part of society as it was during the Great Depression, but mainly to a large number of the African-American citizens. The moment when this program came into force coincided with the worst period for the African-American community in the U.S.—a lot of riots, the beginnings of problems with drug addiction and common crime. African-Americans using government assistance were also associated with the infamous ghettos in the inner cities.[11] Such a receipt of spending public money was not conducive to increasing the budget for *War on Poverty* in the next few years.[12] The atmosphere around social welfare funds was worsened by a report prepared by Daniel P. Moynihan: *The Negro Family: The Case for National Action*, the then adviser to President Johnson. What is worse, the unfinished report, without final conclusions and proposed solutions, leaked to the press. In this way, Americans could learn that the cause of poverty among African Americans is high unemployment among black men, and that many families are maintained by single mothers. Moynihan also described the phenomenon of *tangle of pathology*, which has a negative impact on all African-American families. This *tangle* included matriarchy, bad youth upbringing, high levels of offenses and crimes, a large number of armed people, alienation.[13] The conclusions that were not included in the report that leaked to the press, and which had importance to his author were mainly about creating more

[9] *Legacies of the War on Poverty*, ed. Martha J. Bailey and Sheldon Danziger, New York, 2013, pp. 155-56.

[10] Ibid., p. 66.

[11] Dorothy E. Roberts, "Welfare and the Problem of Black Citizenship," *Yale Law Journal* 105(4), 1996, p. 1570.

[12] Maurice Isserman, Michael Kazin, *America Divided*, New York, 2015, p. 199.

[13] Daniel P. Moynihan, *The Negro Family: The Case for National Action*, United States Department of Labor, March 1965, pp. 29-46.

good and solid jobs for black men. On the other hand, *War on Poverty* had a great impact for the process of desegregation and building equal society despite race differences. In case of most federal programs from discussed legislation funding on the state level was subject on assurance equal access to each of the programs for people and also in many cases providing employment for e.g., African-American teachers, doctors or nurses.[14] This aspect of *War on Poverty* was indirectly accomplishment of wider vision of American society (*Great Society*) introduced by President Johnson in 1964.[15] According to historian Michael Katz, the *War on Poverty* programs that could realistically contribute (including the Office for Economic Opportunities) to its eradication were never treated with due attention and professional staff were lacking. In addition, at the very beginning of their functioning, they were met by budget cuts.[16]

The *War on Poverty* was most complex antipoverty legislation in the history of the United States. It goal was directly turned to reducing issue of poverty and improving situation of poor people. Previous social welfare programs, like an important and well know *New Deal* from times of Franklin D. Roosevelt presidency or even from the *Progressive Era* (1890-1920)[17] were direct to improve economic and social situation in the country and only indirectly to fight with poverty. Other important and interesting fact about previous legislation is that even used terms are not directly about poverty—there are definitely more terms about economic and fiscal condition of country and Americans. Issue of legal acts language is often secondary matter, but in this case it has tremendous meaning because it is clear message for all people that main goal of legislation from 1964-65 is fighting with poverty and providing help for poor citizens. Also following programs were only more or less important reforms of the programs introduced in *War on Poverty*—such a retrenching of social welfare spending during President Ronald Reagan[18] presidency or welfare reform introduce by President Bill Clinton from 1996.[19]

These activities show in a short manner how great a venture in 1964 was taken by President Johnson. The fight against poverty undertaken by the thirty-sixth President of the United States shows clearly how important is a citizen in a democratic society, regardless of ethnicity, level of education and profession. The *War*

[14] *Legacies of the War on Poverty*, ed. Martha J. Bailey and Sheldon Danziger, New York, 2013, pp. 68, 269.

[15] President Johnson's speech at Ohio University, May 7, 1964. From: The American Presidency Project [online], http://www.presidency.ucsb.edu/ws/index.php?pid=26225&st=&st1 [19.08.2018].

[16] David Hilfiker, *Urban Injustice: How Ghettos Happen*, New York, 2011, p. 15.

[17] Joseph B. Chepaitis, "Federal Social Welfare Progressivism in the 1920s," *Social Service Review* 46(2), 1972, pp. 213-15.

[18] Congressional Quarterly Inc., *Budgeting for America*, Washington, D.C., 1982, p. 99.

[19] Vann R. Newkirk, "The Real Lessons From Bill Clinton's Welfare Reform," *The Atlantic* [online], https://www.theatlantic.com/politics/archive/2018/02/welfare-reform-tanf-medicaid-food-stamps/552299/ [19.08.2018].

on Poverty legislation is also proof that under unfavorable circumstances a certain group of citizens left to themselves may fall into serious economic problems, thus losing chances of achieving a similar standard of living and satisfaction as the rest of citizens. In such situations, the role of the state apparatus, which has appropriate mechanisms and possibilities to prevent permanent and harmful to the whole democratic society of social divisions, is extremely important.

The analysis of Lyndon B. Johnson's policy on poverty can also bring wider conclusions about the position of man in a democratic political system, whose fundamental assumptions provide, on the one hand, to provide citizens with an adequate standard of living (welfare), and on the other, guarantee equal treatment regardless of diversifying factors (equal protection of law), which is undoubtedly the material status. Knowledge about this legislation is also important for analyzing the activity of other American Presidents in the field of social welfare.

3. General Information about Current Poverty Rate in United States of America

The latest data from the U.S. Census Bureau reports that 12.7% (that is 40.6 million) of American citizens are currently live in poverty.[20] Of course, the concept of poverty is relative and needs to be updated for the needs of subsequent censuses. In statistical terms, the fact that a given person or the whole family is in poverty determines if income of this person or family for a given year is less than the poverty threshold. These values are updated each year. According to recent studies, the financial situation and social security of Americans is improving every year—both the declines of people living in poverty and those who do not have health insurance as well as increasing families incomes are noticeable. However, we must remember that as a result of the recent financial crisis of 2008, a drastic deterioration in the economic situation of many millions of Americans has occurred. At the climax of 2011, the poverty level was 15.9%.

However, when we are looking at these data, not only dry facts and numbers should be taken into account, but many serious issues resulting from poverty should be noted. Such problems are certainly caused by the disruption of the traditional family structure and the increase in the number of single parents, this issue is related to the high percentage of children living in poverty, which often has an overwhelming influence on their upbringing and decisions (mainly problems with education and crime activity of juveniles). There are also very clear differences regarding the number of people from a given racial group are living in poverty—if Americans of Asian descent are a phenomenon and role model (both

[20] Jessica L. Semega, *Current Population,* p. 12.

in terms of average income per family and percentage of poor people), there are African-Americans who are the poorest ethnic group.

The financial situation of women who are still earning annually (on average) 80% of the amount of American men—that is 41 thousand USD and 51 thousand USD—is also problematic.[21] These amounts are important when we look at the number of households run by single mothers. In the case mentioned above, as many as 7.6 million children raised by single mothers are living in poverty (in 2016 in total, 13.3 million children lived in poverty).[22] Of course, statistics on poverty are much more complex and on many other aspects—place of residence, education, age, etc. However, statistics on the topic of poverty in the U.S. are the most problematic and in opinion of many experts should be solved in the first.

4. Barack Obama: Views and Actions on Poverty Issue

However it is very important to analyze impact on the U.S. social welfare system during presidency of Barack Obama. That was one of the most crucial spheres of activity for the previous U.S. President and his administration. Obama had his own, unique ideas of how to achieve equal, just and wealth society. That vision became one of the most important determinants of his election results in 2008. Obama's policy assumed that poverty and social inequality were the most significant issues in the twenty–first-century U.S., therefore the main aim of his presidency became the legal and political initiatives which were meant to overcome poverty and its outcomes.[23] Obama's concept of American society have been challenged not only by political opponents but also by economic situation. President Obama begun his first term when the U.S. and its citizens had struggled with the most serious contemporary economic crisis. On that account Obama's campaign was focused not only on the issues of economic situation, but more importantly on the possible negative effects of the crisis for the lives of American people.[24] That is why I decided to analyze social, political, and legal aspects of these policies, as well as their actual and overall approach, with a special focus on the reasons of Obama's failure in that perspective.

In my opinion it is important to analyze at least three main initiatives promoted by the President during his two tenures in the White House. In the beginning of his first tenure, Obama initiated works on the complex legal act, which purpose

[21] Ibid., p. 7.

[22] Ibid., p. 14.

[23] Barack Obama*, Speech on American Dream*, Bettendorf, Iowa, November 7, 2007 [online], http://edition.cnn.com/2007/POLITICS/12/21/obama.trans.americandream/ [19.08.2018].

[24] Richard C. Fording and Joseph L. Smith, "Barack Obama's "Fight" to End Poverty: Rhetoric and Reality," *Special Issue: Social, Economic, and Political Transition in America: Retrospective on the "Era of Obama"* 93(5), 2012, pp. 1161-84.

was to prevent negative outcomes of the recession. The result of Obama's activities, which were undertaken with a close cooperation with the U.S. Congress and experts in many fields, was *American Recovery and Reinvestment Act (ARRA).*[25] The Act assumed not only direct support for the financial sector, but also activities that would counteract the further deterioration of the material situation of millions of Americans. As a matter of fact this legal act was above all to overcome effects of Great Recession, but it is important to analyze its purposes with general assumptions and wider perspective of Obama's social welfare policy. Another initiative of Obama's administration were so-called Promise Zones, which connected federal agencies with local leaders in decreasing poverty and providing support for the most needing citizens. The final result of that action were thirteen areas in which many governmental agencies and nongovernmental organizations are working together against social exclusion and problems resulting from poverty.[26] It is important to acknowledge that during the same tenure Obama's main social welfare program—Obamacare—was implemented, when Congress adopted *The Patient Protection and Affordable Care Act.*[27] The reform of the healthcare system proved not only important in political and legal aspects, but became the crucial element of President's social policy heritage, supported by the Democrats and highly criticized by the Republican Party.[28]

The analysis of the three main social policy initiatives undertaken by the Obama administration may bring a light to the research of the reasons of success/failure of his presidency, but the final result of that research would be limited if the analysis did not refer to a broader perspective of the U.S. social welfare programs. Therefore, my research also refers to the comparative analysis of the social assistance programs of other American President whose policies focused on the issues of poverty, and unemployment. It will be particularly important to compare Obama's views and policies in that respect with the achievements of other Democratic Presidents, which are Franklin Delano Roosevelt and Lyndon B. Johnson. Such an analysis is necessary due to the fact that Obama's actions did not replace any of the core social welfare programs of the *New Deal* and *War on Poverty* era policies (such as *Social Security*),[29] reforming them instead. In that context, it should be noted how closely did Barack Obama follow the policies of his great predecessors and to what extent these activities were using the ideas from the already existing programs, or were the effect of Obama's own initiatives inspired by previous

[25] *American Recovery And Reinvestment Act of 2009*: Law, Explanation and Analysis : P.L. 111-5, as Signed by the President on February 17, 2009.

[26] Robert E. England*, Managing Urban America (Eighth Edition),* Washington, D.C., 2015, p. 52; Corianne Payton Scally and David Lipsetz, in *Cityscape, Double Issue: Home Equity Conversion Mortgages: Transforming Communities* 19(1), 2017.

[27] *Patient Protection and Affordable Care Act*, 42 U.S.C. § 18001 et seq. 2010.

[28] James S. House, *Beyond Obamacare: Life, Death, and Social Policy*, New York, 2015, p. 234.

[29] The Social Security Act of 1935 Pub. L. 74–271, 49 Stat. 620; 42 U.S.C. ch. 7, 1935.

social policies of Democratic presidents. It is necessary to analyze approach and methods used by this Presidents. Firstly, because of exigent times in which they begun presidencies, these are times of *Great Depression* of 1929 and *Great Recession* of 2008.[30] Both Roosevelt and Obama had to take actions to recovery American economy and then to reduce consequences of economic crises. On the other hand, all three mentioned Presidents wanted achieved long term effects in social policy, especially for the purpose of secure life of American citizens. Historical and comparative analysis is also necessary due to the fact, that the issue of poverty had been a great challenge for several American leaders throughout many decades.[31]

In order to assess the effectiveness of President Obama's actions, the analysis of all available scientific sources concerning his most important social and political projects is not enough. Additionally, I intend to examine how the actions to overcome the economic crisis and improve the US economy influenced the situation of the poorest Americans. There is no doubt that the analysis of the change in their social status may bring a lot of crucial information on the effectiveness of presidential initiatives. I would also like to assess demographic change among poor Americans which could closer explain the social trends being the result of concrete governmental social policies. It is important to research whether Obama's policies brought significant improvement to the status of all social groups or were there any diversities depending on racial/ethnicity factors. Barack Obama had won his both campaigns not only be referring to the poor, but also by uniting racial and ethnic minorities who overwhelmingly supported his campaigns in 2008 and 2012.[32] In that respect, it shall be necessary to analyze the problem of contemporary poverty in terms of race and ethnicity, but also the place of residence, education, age and other important social data. I would especially like to analyze the status of contemporary American middle class, which has been clearly affected by the recession and which representatives had lost the sense of financial security and stability. It is also possible that, despite the change in figures,[33] the poverty structure still looks today the same as in 2008 when Obama won first elections. That is why I am going to estimate whether the President managed to meet the expectations of his constituents who suffered the most due to the economic crisis.

All the above mentioned issues cannot be analyzed with the reference to political aspects of Barack Obama's presidency. The political climate, the specific conduct of 2008 and 2012 election campaigns, the changing political leadership

[30] Terms *Great Depression* and *Great Recession* is widely use and acknowledge by economist and historians.

[31] Howard Zinn, *A People History of the United States: 1492- Present*, Edinburgh, 2003, pp. 460-61.

[32] Sam Roberts, "2008 Surge in Black Voters Nearly Erased Racial Gap," *The New York Times* [online], https://www.nytimes.com/2009/07/21/us/politics/21vote.html [13.05.2018].

[33] Jessica L. Semega*, Current Population,* p. 12.

in Congress, the checks-and-balances system leading to the necessity of the cooperation between the White House and the Capitol Hill, the role of the U.S. Supreme Court in determining the constitutionality of presidential legislative actions, as well as the political and ideological conflict between the Democrats and Republicans must be taken into consideration.[34] Despite the fact that my analysis does not focus on institutional matters, it is impossible to research governmental programs and their outcomes without defining concrete political circumstances in which Barack Obama had to conduct his presidency.

After eight years of Obama's presidency, the statistical poverty rate returned to its pre-recession level, however, more than 40 million Americans are still living in poverty.[35] Millions of Americans are living in uncertainty about their future and financial security. In the end, my research is supposed to answer whether Barack Obama's social policy and his approach could have long-term effects, thanks to which American people will be able to regain their sense of security and financial stability, or maybe the Democratic president will be remembered as an ineffective politician who was not able, due to institutional, political and maybe social reasons, to fulfill all of his campaign promises. In a broader sense, the result of the research may bring crucial answers to questions concerning future social welfare programs and policies implemented by the next generations of American politicians.

5. Most Significant Data About Social Welfare Programs and Its Participants (2009-2012)

When it comes to concrete data about social welfare, it is worth citing data from 2009-2012 published by the U.S. Census Bureau in 2015 on who participates in social welfare programs.[36] This report includes data on the following programs:

- Medicaid: Health insurance for poor people whose income is below a certain income level;
- Supplemental Nutrition Assistance Program (SNAP—formerly known as The Food Stamp Program): coupons for the purchase of food products;
- Housing Assistance: several programs supporting public housing or cheap rental of apartments
- Supplemental Security Income (SSI): type of pension for people over 65 and blind or with other disabilities, maintained by the Social Security Program Office;

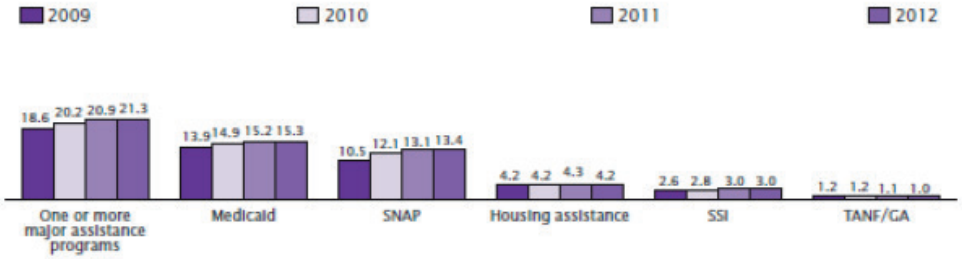
[34] Charles Barrilleaux and Carlisle Rainey, "The Politics of Need: Examining Governors' Decisions to Oppose the "Obamacare" Medicaid Expansion," *State Politics & Policy Quarterly* 14(4), 2014, pp. 437-60.

[35] Jessica L. Semega, *Current Population,* p. 12.

[36] Shelley K. Irving, Tracy A. Loveless, *Dynamics of Economic Well-Being: Participation in Government Programs, 2009–2012: Who Gets Assistance?,* Washington, D.C., 2015, passim.

- Temporary Assistance for Needy Families (TANF): financial help for poor families with children;
- General Assistance (GA): financial assistance for poor childless people or families.

Average Monthly Participation Rates for Major Means-Tested Programs: 2009–2012
(Percentage of noninstitutionalized civilian population)



Note: Data are not available for calendar year 2008 because data from the 2008 SIPP Panel are not available for the entire period. For concept definitions, see text box "Description of Concepts."
Source: U.S. Census Bureau, Survey of Income and Program Participation (SIPP), 2008 Panel, Waves 2–14.

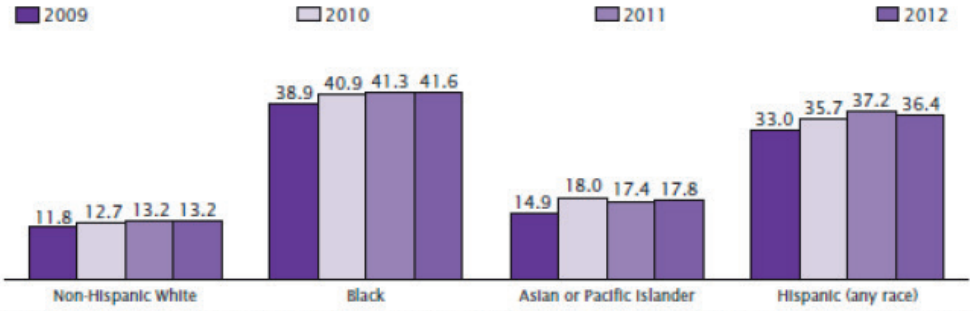
In 2012, 52.2 million people, which accounts for 21.3% of the total population, received federal-based financial support from at least one of the above programs. Between January 1999 and December 2012, the cost of this monthly state aid was 404 USD per person on average, and the race criterion was $ 446 per person black, compared to $ 377 per white person.[37] In the 2012, within at least one month, most people used Medicaid (15.3%), secondly it was a food cards program (13.4%), while the smallest number of people used TANF and GA (1% each). Detailed data for the period 2009-2012 is shown in the following diagrams (Figure 2).[38]

According to data, about 75% of people living in poverty used one of these programs for a period of from 37 to 48 months. In the years 2009-2012, the group that benefited most from social assistance were children and young people (people under 18). In 2009, they constituted 34.6% of beneficiaries, and in 2012—39.2%. Which is quite a worrying indicator because it is the children who suffer the most from poverty in the family. Additionally, worrying is the fact that in the period that was given to the analyzes, the number of people was systematically growing—in 2009 it was 18.6% of all citizens, and in 2012 the mentioned 21.3%. Analyzing the trends in the time of received social assistance, it is possible to distinguish the two largest groups of the first group of people who receive help for 1—12 months is 31%, and the second group are people using this assistance over 3 years is as much as 43%.

[37] Ibid., p. 13.
[38] Ibid., p. 4.

Regarding data about the ethnicity and race of participants of mentioned welfare programs, they are presented as follows. In 2012, of all persons who had been beneficiaries of one of the assistance programs for at least one month, as many as 41% were black people (Figure 3).[39]

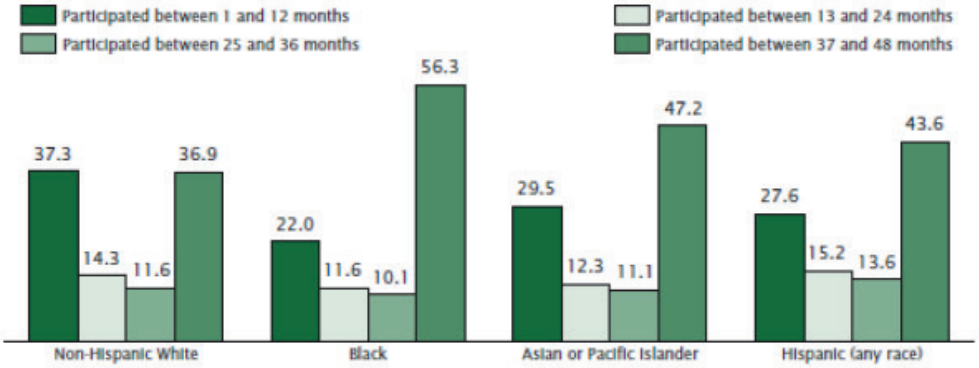
Average Monthly Participation Rates for Major Means-Tested Programs by Race and Hispanic Origin: 2009–2012
(Percentage of noninstitutionalized civilian population)



Note: Data are not available for calendar year 2008 because data from the 2008 SIPP Panel are not available for the entire period. For concept definitions, see text box "Description of Concepts."
Source: U.S. Census Bureau, Survey of Income and Program Participation (SIPP), 2008 Panel, Waves 2–14.

An even higher percentage of black people are in the case of persons receiving social assistance for 37-48 months (in the period January 2009-2012) and it amounted to 56%. In the case of people using short-term assistance, African-Americans constituted the smallest group, which constituted 22% of the total (Figure 4).[40]

Accumulated Months of Participation in Major Means-Tested Programs by Race and Hispanic Origin: January 2009–December 2012
(Percentage of noninstitutionalized civilian population participating in one or more major means-tested programs for 1 or more months)



Note: Data are not available for calendar year 2008 because data from the 2008 SIPP Panel are not available for the entire period. For concept definitions, see text box "Description of Concepts."
Source: U.S. Census Bureau, Survey of Income and Program Participation (SIPP), 2008 Panel, Waves 2–14.

[39] Ibid., p. 8.
[40] Ibid., p. 8.

Important information in the context of American families is the data on the extent to which a given type of family participates in social assistance for more than one month. In 2012, families with children and both parents used welfare assistance the least frequently (19.9%), while families which are run by single mothers as much as 58%. The latter type of family was the largest group in terms of duration of assistance (from 37-48 months), the percentage was 58.5%.[41]

As for the participation of African Americans in each of the six welfare programs, in 2012 these were the following numbers: for Medicaid, it was 29.3%; for SNAP 30.1%; for Housing Assistance 14.5%; for SSI 7.0%; for TANF together with GA 2.5%. These data show that, compared to other races, African Americans were the most numerous group in each social program. On the other hand, when comparing data from 2012 with those from 2009, it can be seen that the percentage of blacks receiving state aid remained at a similar level (the highest increase occurred in the SNAP program in 2009, the percentage of blacks was 26.0%, and in 2012 already 30.1%). The report also includes a comparison of the average amount that one black person received monthly in 2009-2012: for TANF and GA it was $ 316; for SSI 688 dollars; for SNAP 316 dollars (Chart 1).[42]

Median Monthly Benefit Amount for People Receiving Means-Tested Program Benefits by Selected Characteristics: 2009–2012

(In dollars)

Characteristic	Median monthly benefit amount[1]							
	All programs	Margin of error (±)	TANF/ GA	Margin of error (±)	SSI	Margin of error (±)	SNAP	Margin of error (±)
Race and Hispanic Origin[3]								
White	386	9	330	32	698	14	294	13
Non-Hispanic	377	15	301	30	693	18	267	18
Black	446	25	316	25	688	18	316	22
Asian or Pacific Islander	561	162	329	357	838	89	238	23
Hispanic	410	23	343	50	711	29	336	18
Non-Hispanic	401	14	313	19	694	13	287	14
65 years and over	303	39	277	185	633	61	138	9

[1] The dollar amounts are inflation-adjusted to 2012 dollars.
[2] Family income-to-poverty threshold ratio reflects the monthly poverty status. A ratio under 1.00 indicates that a person is in poverty, whereas a ratio of higher than or equal to 1.00 indicates that a person is not in poverty.
[3] Hispanics may be any race.
[4] Full-time and part-time employment reflect the monthly employment status.
Source: U.S. Census Bureau, Survey of Income and Program Participation (SIPP), 2008 Panel, Waves 2–14.

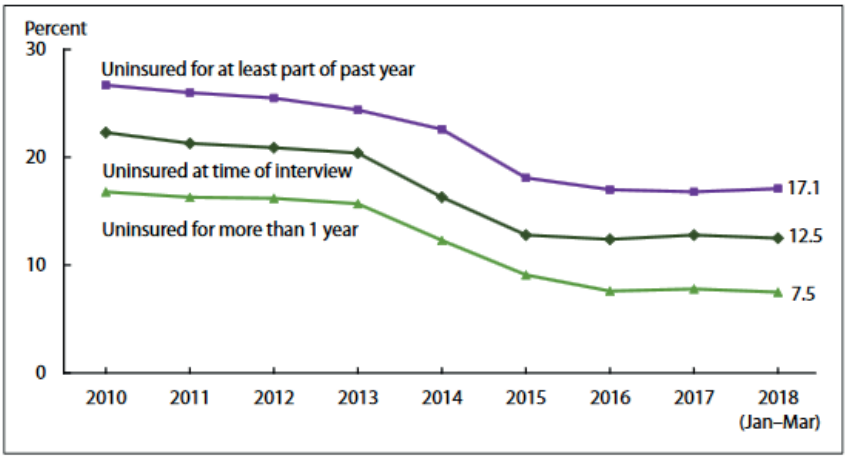
Data presented from the official governmental institution, based on numerous analyzes of non-governmental institutions, clearly indicate the still high level of poverty and particularly high dependence of African Americans on social assistance. Moreover, if you look at these data from a historical perspective, this problem becomes even more evident. According to many experts, the main drawback of most

[41] Ibid., p. 9.
[42] Ibid., p. 28.

social programs is that they rely instead on specific activities such as professional activation, training and others. Economist at the University of George Mason Walter E. Williams said: "The welfare state has done nothing, what Jim Crow could not do, what the harshest racism could not do. And that is to destroy the black family."[43]

Even taking into account the significant decrease in the poverty level of black people, which has been reduced by over 15% for half a year (the largest drop among all racial groups), the current 24.1% result still has to be considered unsatisfactory.

Percentage of adults aged 18–64 without health insurance, by three measures of uninsurance: United States, 2010–March 2018



NOTES: Beginning in 2016, answer categories for those who were currently uninsured concerning the length of noncoverage were modified. Therefore, starting in 2016, estimates of "uninsured for at least part of past year" and "uninsured for more than 1 year" may not be completely comparable with previous years. For more information on this change, see Technical Notes in the report. Data are based on household interviews of a sample of the civilian noninstitutionalized population.
SOURCE: NCHS, National Health Interview Survey, 2010–2018, Family Core component.

It is also worth looking at the data regarding health insurance. In the last 6 years there has been a significant fall in Americans who do not have any form of health insurance. This was mainly due to the introduction of a flagship social program by the administration of President Barack Obama. In 2010, at the time of adoption of the Patient Protection and Affordable Care Act,[44] 22.3% of Americans did not have any form of health insurance. At the beginning of 2018, only 12.5% of the uninsured Americans were recorded (Figure 5).[45] However, the fate of the so-called Obamacare are very uncertain under the new president and Congress with the Republican majority.

[43] Jason L. Riley, "The State Against Blacks" [online], https://www.wsj.com/articles/SB10001424052748704881304576094221050061598 [20.08.2018].

[44] The Patient Protection and Affordable Care Act, Pub. L.111–148 124 Stat. 119.

[45] Michael E. Martinez, Emily P. Zammitti, Robin A. Cohen, *Health Insurance Coverage: Early Release of Estimates From the National Health Interview Survey, January–March 2018*, Washington, D.C., 2018, p. 4.

6. Conclusions

Despite great financial effort and spending for social welfare of the United States of America is still trying to figure the most effective welfare programs, which could reduce poverty level. It is worth to mentioned that poverty rate in the U.S., after early success of *War on Poverty* legislation when it was reduce by 10%, is hold on similar level which is about 12,5%. occasionally U.S. Government need to take extraordinary action to reduce and prevent possibly higher poverty rate during economic recession. Barack Obama presidency occur during difficult economic circumstances and President Obama had to take additional action to resume poverty rate from the times before of Great Recession. On the other hand President Obama took initiative to introduce own ideas to fight with poverty. The most important achievement of President Obama is off course *The Patient Protection and Affordable Care Act*, but also important is his action to provide more effective and better coordinate assistance in the most needy region of the country, especially in the cities (creation of *Promise Neighborhoods* and *Promise Zones*).[46] Barack Obama in the second case used own experience from the volunteer social work in the Chicago inner city ghettos. Disquieting fact about poverty in the USA is that it is connected with racial issue—poverty rate is still much higher for the African-Americans—which lead to other social problems. That is why antipoverty policies need more actual, more activating and bipartisan initiative.

Consider early stages of my research for my planned dissertation I could conclude that reducing poverty level in United States of America to lower rate will be extremely severely for several reason:

– American social welfare is still leaning on distribution of financial sources among poor people, instead provide better chance to get decent job, which often regards higher education; Higher education and college degree is still unobtainable for the poor families and their children;

– There are great differences about ideas and goals of social welfare in the U.S. between members of Democratic and Republican Parties: often politicians from executive branch and legislative branch cannot work together to find better solutions for Americans, especially when they are members of two different Parties;

– Despite political views on role of State in finical crisis and preventing social inconvenience like poverty, even politicians from Democratic Party are depend on private financial sector (President Obama was very active in the beginning of his presidency to provide help for banks, insurance companies and car production industry).[47]

[46] Elizabeth Kneebone, Alan Berube, *Confronting suburban poverty in America*, Washington, D.C., 2013, p. 85.

[47] *Obama at the Crossroads*, ed. Lawrence R. Jacobs and Desmond King, New York, 2012, pp. 143-44.

Acts of law and regulations

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Summary. Article is dedicated to the analyze of approach and effects of president Obama social welfare policy. Author want to research purposes of most important legal acts and actions of president Obama to reduce poverty and it other negative effects. The research hypothesis is the phenomenon of poverty, which is the result of the complex social, political, economic, and legal factors is a still serious problem for the American establishment and society. Despite great funding for federal initiatives for fighting with issue of poverty there are not so many positives and long-term and permanent effects in reducing poverty. It is important to define the causes of this situation that according to the author, they have more legal to political than cultural to social relevance. Important part of the article is concentrate on most complex social welfare legislation introduced in 1964 by President Lyndon B. Johnson and called *War on Poverty.* Those legal acts are crucial in term of next U.S. Presidents including Barack Obama.

Key words: social welfare, poverty, War on Poverty, Barack Obama, Lyndon B. Johnson.

Chapter X

ABORTION IN JUDGMENTS OF THE SUPREME COURT OF THE UNITED STATES

Maciej Aureliusz Nycz

1. Introduction

Abortion and pregnancy are notions which are mutually intertwined. Pregnancy is a state when a woman carries an embryo or a fetus whereas an abortion is pregnancy termination process which allows a woman to quit the pregnancy by embryo or fetus removal.[1] Pregnancy is the fundamental way of procreation and, therefore, it leads to the creation of the world and state population. It means that abortion is also an important issue for it ceases the pregnancy and is directed against potentiality of lives. Therefore, it is not a surprise that the abortion regulations and abortion in general are subject to various ethical, religious and legal disputes.

In this study I would like to briefly review the history of abortion in rulings of the Supreme Court of the United States. The method I made use of in my research is strictly continental—the analysis of the evolution of abortion case law. However, that continental point of view must consider the fact that the development of case law bears strong resemblance to both law review as done by the constitutional tribunals and law-making process as done by the continental parliaments. Therefore, the methods we use in examining law review and law-making process in Poland may be utilized in American case law analysis. The selection of cases is based on the selection of rulings done by the Court in its judgments and on statements of legal scholars. What made me choose the rulings of the Supreme Court of the United States was that the Supreme Court was one of the first constitutional courts to decide on the constitutionality of abortion; it did it in 1976 in *Roe v. Wade*.[2] This case would be, therefore, discussed in a separate paragraph. What is also peculiar is that it was not a federal or a state statute that allowed

[1] Agnieszka Barczak-Oplustil, "Przerwanie ciąży," in *System Prawa Medycznego. Tom II. Szczególne świadczenia medyczne*, ed. Leszek Bosek, Warsaw, 2018, pp. 296–97.

[2] Eleonora Zielińska, *Przerywanie ciąży. Warunki legalności w Polsce i na świecie*, Warsaw, 1990, p. 95; *Roe et al. vs. Wade*, 410 U.S. 113 (1973), called hereinafter "*Roe v. Wade.*"

pregnancy termination but the ruling of the constitutional court of the United States invalidating provisions of a statute of one state. That step was done in 1973 when vast majority of states (50 states) barred on-demand abortions and only 42 of them allowed for abortion in case of threat of mother's life or health.[3] This must have been a dramatic change for the society and the states that the day after in all states of the United States on-demand abortions became legal. Furthermore, all major developments of abortion law in the United States will also be discussed because *Roe v. Wade* was not the last constitutional abortion case in the United States. These developments would not have taken place if citizens had not been challenging the controversial laws. Due to the fact that also Polish statute was and still is subject to various law review or amendments processes it may be salutary for the process' agents to also include American experience. Polish public awareness usually does refer only to *Roe v. Wade*[4] judgment and does not include any further developments[5] which is obviously ignoring the understanding of what the right to abortion and of privacy genuinely are. Consequently, this work might be of use in comparative approach to abortion law.

2. Before *Roe v. Wade*

Laws regarding abortion are not an ancient invention, because they have been introduced in most states of the United States since the latter half of the nineteenth Century.[6] Until then, performing or having abortion was not deemed as offence if it happened before mother feels her fetus moving ("quickening").[7] There were disputes whether abortion of a child after "quickening" was a crime or felony so it may be said that there was no firm common-law offence of abortion.[8] Even if we state that it may have been a crime, it certainly was not considered a murder but rather a manslaughter.[9] In the first part of the nineteenth century the distinction between the child before and after "quickening" was kept but the states began introducing statutes providing for a punishment in case of an abortion on a fetus which has not yet moved.[10] In the late nineteenth century the states began forbid-

[3] Jon O. Shimabukuro, *Abortion Law Development: A Brief Overview,* Washington, D.C., 2009, p. 1.

[4] *Roe v. Wade*.

[5] Jeremi Zaborowski, "99 lat więzienia za aborcję. Od kiedy bije serce, życie jest chronione" [online], https://tygodnik.tvp.pl/42758813/99-lat-wiezienia-za-aborcje-od-kiedy-bije-serce-zycie-jest-chronione [1. 09.2020]; TVN24 bis, "Większość Amerykanów za legalnością aborcji, ale nie po 20. tygodniu" [online] https://tvn24.pl/swiat/wiekszosc-amerykanow-za-legalnoscia-aborcji-ale-nie-po-20-tygodniu-ra342652-3438416 [1.09.2020].

[6] *Roe v. Wade*.

[7] Ibid., p. 133.

[8] Ibid., pp. 135–36.

[9] Idem.

[10] Ibid., pp. 138–40.

ding abortions in general and in 50s of the twentieth century majority of states had statutes barring abortions.[11]

The right to abortion is inherently comprised by the right to privacy.[12] Therefore, the history of this right which is of twentieth century origin must be briefly presented. The right to privacy as a constitutional right was established by the Supreme Court in 1891.[13] It is suggested that the right to privacy as a liberty from the state's intrusion was recognized by the Court just in 1923 in case related to the bar on German language lessons.[14] 1942 was a crucial year as far as reproductive rights are concerned. The Supreme Court issued a ruling in *Skinner v. Oklahoma* recognizing procreation rights as fundamental and, therefore, declaring Oklahoma statutes providing for obligatory sterilization in case of illicit sexual life void.[15] A woman must possess a right to decide on childbirth and this right might not be given to the state.[16] The next notable reproductive rights case was *Griswold v. Connecticut* which was decided in 1965 by the Supreme Court.[17] There was a law which proscribed using contraceptive means and giving assistance to people by providing them with these means.[18] This law was invalidated by the Court because it prohibited use of contraceptive means and providing them for non-medical purposes whereas simultaneously it allowed for the use and assistance in case of medical purposes.[19] The law was considered an unnecessary intrusion into the right to decide whether to bear children which was comprised by the right to privacy.[20] The reproductive right to decide on childbirth became a recognized fundamental right.

The next fundamental family right related at least indirectly to the abortion was the right to choose a spouse. In 1967 in the case *Loving v. Virginia* the Supreme Court asserted that the Virginia statute forbidding mixed-race marriages was invalid because the right to choose the spouse was fundamental and comprised by the notion of privacy.[21] A similar judgment to *Griswold v. Connecticut* was released in 1972 in the case *Eisenstadt v. Baird* in which the Massachusetts statute making contraceptive means for married couples inaccessible was declared void for it allowed the state to decide in so private issue as the decision on childbirth.[22] Finally, there arises the first constitutional abortion case. In 1971 the Supreme

[11] Idem.

[12] *Roe v. Wade*, 410 U.S. 113 (1973), pp. 152, 155; Eleonora Zielińska, *Przerywanie*, p. 95.

[13] *Union Pacific R. Co. v. Botsford*, 141 U.S. 250 (1891), p. 251; *Roe v. Wade*, p. 152.

[14] Laurence H. Tribe, *Aborcja. Konfrontacja Postaw*, Poznan, 1994, p. 117; *Roe v. Wade*, ibid.; the case was *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[15] Laurence H. Tribe, ibid., p. 118; *Skinner v. Oklahoma*, 316 U.S. 535 (1942), pp. 541-42.

[16] Idem.

[17] *Griswold et al. v. Connecticut*, 381 U.S. 479 (1965); Laurence H. Tribe, ibid., pp. 118–19.

[18] *Griswold et al. v. Connecticut*, p. 480; Laurence H. Tribe, idem.

[19] *Griswold et al. v. Connecticut*, pp. 498–99; Laurence H. Tribe, ibid., p. 119.

[20] Ibid.

[21] Laurence H. Tribe, ibid., p. 118; the case was *Loving v. Virginia*, 388 U.S. 1 (1967).

[22] Laurence H. Tribe, ibid., p. 119; *Eisenstadt v. Baird*, 405 U.S. 438 (1972), p. 453.

Court decided on whether Washington, D.C. abortion statute's provisions where unconstitutionally vague.[23] The Court uttered an opinion that abortion was to be derived from right to privacy and was, as such, a fundamental right which obliges the states to refrain from some of their legislative activity.[24] This judgment laid grounds for 1968–1973 mass questioning of the state laws regarding abortion and finally led up to *Roe v. Wade*.[25] The latter case and judgment must be explained and discussed thoroughly due to its historic significance.

3. *Roe v. Wade*—the Greatest Abortion Landmark Case

Decision in *Roe v. Wade* was one of the most important judicial decisions of the Supreme Court of the United States concerning abortion.[26] It was produced in 1973.[27] Besides the judgment being a landmark case, it contains also a brief history of abortion law.[28] It is one of the first rulings concerning the abortion in the view of constitutional law in the world.[29] The case was instituted by Jane Roe, John Doe and Mary Doe in 1970; their names were pseudonyms coined to protect the identity of the plaintiffs.[30] Wade (in fact Henry Wade) was a district attorney of Dallas County which was a place Jane Roe resided in.[31] Texas was a country having a statute of 1854 criminalizing abortion and one exception to this ban—if the life of the mother was under threat, one might perform an abortion.[32] Jane Roe had wanted to have an abortion performed by a licensed phycisian under safe clinical conditions.[33] Unfortunately, she did not fit into the exception and she could not afford having an abortion outside Texas so she asked James Hubert Hallford, who was a licensed phycisian, to perform an abortion.[34] He agreed and performed an abortion and, consequently, was prosecuted for breaching Texas criminal statute.[35] John and Mary Does also in-

[23] Jon O. Shimabukuro, *Abortion Law Development: A Brief Overview,* Washington, D.C., 2009, p. 2; *United States v. Vuitch*, 402 U.S. 62 (1971), pp. 63–64.

[24] *United States v. Vuitch*, pp. 78–80.

[25] Laurence H. Tribe, ibid., p. 3.

[26] Constitution Laws, *Major Decisions-Roe v. Wade* [online], https://constitution.laws.com/supreme-court-decisions/major-decisions-roe-v-wade [29.10.2018]; Jon O. Shimabukuro, *Abortion: Judicial History and Legislative Response*, Washington, D.C., 2018, p. 1.

[27] *Roe v. Wade*, p. 115.

[28] Ibid., pp. 130–142.

[29] Eleonora Zielińska, *Przerywanie*, p. 95.

[30] Ibid., pp. 122–23; *Encyclopaedia Britannica*, *Roe v. Wade* [online], https://www.britannica.com/event/Roe-v-Wade [29.10.2018].

[31] *Encyclopaedia Britannica*, ibid.

[32] *Roe v. Wade*, p. 120.

[33] Ibid., p. 122.

[34] Ibid., pp. 122–23.

[35] Ibid., pp. 122–23; the two cases were *The State of Texas vs. James H. Hallford*, No. C-69-5307-IH and *The State of Texas vs. James H. Hallford*, No. C-69-2524-H.

stituted a similar action. Mary Doe had a neural-chemical disorder and was advised not to be pregnant.[36] However, pregnancy would not impose serious risk on health or life of Mary Doe.[37] John and Mary Does wanted to fight for the rights of the similarly situated people.[38] Cases of Does and Roe were consolidated and heard together.[39]

Jane Roe, Mary Doe and John Doe claimed that the wide ban on abortion is unconstitutional for it breached First (Freedom of Religion, Press, Expression), Fourth (Search and Seizure), Fifth (Trial and Punishment, Compensation for Takings), Ninth (Construction of Constitution), and Fourteenth (Citizenship Rights) Amendments. James Hubert Hallford, the phycisian, was granted a leave to intervene in Roe's action.[40] He raised the same constitutional arguments and stated that the wording of the statute was vague and he did not know which cases would fit into the exception.[41]

There were three main arguments raised by the plaintiffs and the intervenor. All plaintiffs agreed that there was a personal right of a woman to end her pregnancy by abortion.[42] However, they raised three different justifications. First, the alleged right is part of a personal liberty embodied in the Fourteenth Amendment's Due Process Clause.[43] Second, the alleged right is derived from the right to privacy embodied in the Bill of Rights.[44] Third, the alleged right is derived from the rights reserved to the people by the Ninth Amendment.[45]

The justice explained the underlying reasons for enacting antiabortion statutes. These involved: discouragement of illicit sexual conduct, higher risk of death or health problems in case of abortion, legitimate interest of a state to protect embryos and fetus.[46] The legitimacy of the first reason was rejected while the Texas law had not been based on the discouragement of that behavior.[47] The second reason was also rejected for the abortion procedures became relatively safe; safer than the birth of a child.[48] The third reason may be legitimate but only when it is not absolute—in several circumstances women should have the right to terminate pregnancy by themselves.[49]

The court found out that the previous decisions of the Supreme Court concerning the Ninth and the Fourteenth Amendment had focused on the notion of

[36] Ibid., p. 123.
[37] Idem.
[38] Idem.
[39] Ibid., p. 122.
[40] Ibid., p. 123.
[41] Idem.
[42] Ibid., p. 131.
[43] Idem.
[44] Idem.
[45] Idem.
[46] Ibid., pp. 148–51.
[47] Ibid., p. 148.
[48] Ibid., pp. 148–49.
[49] Ibid., p. 150.

privacy, especially in the area of reproductive and marriage rights.[50] Majority of previous decisions made it clear that the abortion is comprised by the notion of privacy which is a fundamental right.[51] The court, however, stated that the right to privacy is not absolute and that women may not terminate pregnancy in every case and always.[52] The states may invade into the area of fundamental rights only if there is a legitimate state interest which means that the boundaries of a restriction must be as narrow as possible.[53]

Texas argued that every embryo and fetus is a person from the constitutional point of view and, therefore, it has a compelling right to invade women's privacy.[54] According to the court, a fetus is certainly not a person from the constitutional point of view because the word "person" is used only in postnatal contexts.[55] Therefore, there is no constitutional protection of an "unborn" child as such and there is no legitimate interest of a state in protecting embryos and fetus from the moment of conception on. Nonetheless, there is a legitimate state interest in protecting the potentiality of a human life which must be confronted with the privacy of a woman who carries an embryo or a fetus.[56] According to the court, the moment after which the access to abortion may be regulated by the state is the moment when mortality rate in abortion becomes higher than in childbirth.[57] This is also the moment when the fetus could live outside the woman (viability).[58] According to the Court, it was the end of the first trimester.[59] Any licensed phycisian may terminate pregnancy without judgment or decision before that moment.[60] A woman always possesses a right to terminate pregnancy if her life or health is at stake.[61] Finally, the court decided that the provision of Texas penal code did go far beyond that standard and declared all Texas antiabortion penal statutes void.[62] It must be said that all justifications raised by the apellants were accepted by the court and employed in the process of assessment of the Texas penal statute and the right to abortion. The right to terminate pregnancy is a fundamental right which is comprised by the right to privacy and that fundamental right must be protected by implementation of some procedures to make exercise of this right genuinely possible.

[50] Ibid., pp. 152–53.
[51] Ibid., pp. 152, 155; Eleonora Zielińska, *Przerywanie*, p. 95.
[52] Ibid., pp. 153–54; Eleonora Zielińska, *Przerywanie,* p. 94.
[53] Idem.
[54] Ibid., p. 159.
[55] Ibid., pp. 156–57.
[56] Ibid., p. 162.
[57] Ibid., p. 163.
[58] Ibid., pp. 160, 164–65.
[59] Idem.
[60] Ibid.; Eleonora Zielińska, *Przerywanie,* pp. 95–96.
[61] Ibid., p. 164.
[62] Idem.

4. Later Developments

The *Roe v. Wade* trimester rule was reaffirmed and reinforced in *Doe v. Bolton* in 1973.[63] Doe was a young woman and wanted to have an abortion in Georgia but her request was denied by the hospital in 1970.[64] Therefore, she sought a declaratory judgment declaring the Georgia statutes void because they had forced her to have too many children or to terminate her pregnancy contrary to the Georgia statute.[65] The latter imposed several restrictions on women who wanted to terminate their pregnancy which meant that women had to obtain a beforehand consent of two licensed physicians in licensed hospitals.[66] The court decided to rule the case on behalf of Mrs. Doe and to declare the statutes in question void.[67] According to the court, the states may not forbid pregnancy termination and they may not introduce procedures which hamper access to safe abortion in the first trimester.[68] Nevertheless, the court reassured that denominational hospitals are exempted from this rule which meant that they would not have to provide access to abortion.[69] If *Roe v. Wade* provided a straightforward rule which is clear (the first trimester rule) and granted an access to legal pregnancy termination in the United States, *Doe v. Bolton* safeguarded the procedural issues and discouraged the states from introducing hampering statutes.

Second issue, which arose shortly after *Roe v. Wade* and *Doe v. Bolton*, was issue of abortion funding. In 1977 there were three cases (so-called "The 1977 Trilogy") related to the nontherapeutic and elective abortions.[70] Each case was judged in the same manner—there has been no obligation of the states to fund nontherapeutic and elective abortions.[71] The states may regulate the issue as they want and, for example, may favour childbirths over abortions. As the public funding of therapeutic and nonelective (medically necessary) abortions is concerned, the essence of the rulings was the same as in cases above—there has been no legal obligation of the states to participate in federal abortion-funding program.[72] This was reinforced in *Rust v. Sullivan* in 1991, when the Supreme Court underlined that the federal family-planning funds do not have to cover abortion counselling and the regulations do not compel the states to fund free abortion counselling

[63] *Doe v. Bolton*, 410 U.S. 179 (1973); called "*Doe v. Bolton*" hereinafter.

[64] *Doe v. Bolton*, p. 185.

[65] Ibid., pp. 184–85.

[66] Ibid., pp. 185–86, 196–99; Jon O. Shimabukuro, *Abortion: Judicial History and Legislative Response*, Washington, D.C., 2018, p. 2.

[67] *Doe v. Bolton*, pp. 196–99.

[68] Ibid.; Jon O. Shimabukuro, ibid.

[69] *Doe v. Bolton*, pp. 196–97; Jon O. Shimabukuro, ibid.

[70] Jon O. Shimabukuro, *Abortion: Judicial,* p. 10; these cases were: *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); and *Poelker v. Doe*, 432 U.S. 519 (1977).

[71] Idem.

[72] Ibid.; *Williams v. Zbaraz*; *Miller v. Zbaraz*; *U.S. v. Zbaraz*, 448 U.S. 358 (1980).

procedures in area of family-planning procedures.[73] Therefore, abortions in the United States may not be free, it all depends on the state legislature. Currently, free pregnancy termination in all cases is available in 17 states whereas free pregnancy termination in case of rape or medical necessity is available in 32 states and the District of Columbia.[74] The availability of free pregnancy termination programs is relatively high.

Later on, there were several judgments concerning abortion which shaped the right to abortion as it is possessed by women in the United States today. First, the Supreme Court accepted the requirement of informed consent of a husband but only if it does not overrule the significance of maternal health.[75] There was also a case related to the prerequisite of obtaining an informed consent from the parent if there was an abortion to be performed on an unemancipated minor.[76] The City of Akron law preventing a minor from having an abortion without the consent of a parent was declared void because it imposed undue burden on the one possessing right to abortion.[77] The Kansas state law also required an informed consent of the parent but also provided for an alternative—the ruling of the court on motion of the minor might entitle the minor to perform abortion without parent's consent.[78] Therefore, the Kansas law was upheld by the Supreme Court.[79] A milder requirement is the requirement of a beforehand notification of parents. It was accepted by the Supreme Court in several cases and there are laws requiring minors or teenagers to notify their parents of abortion or the doctor to notify the parents.[80]

There arises a question—are abortions to be performed by a physician or any person? This issue was solved by the *Supreme Court in Connecticut v. Menillo* in 1981.[81] According to the court, the right to privacy and the state's legitimate interest supports the assertion that the abortions performed by nonphysicians do not fall within the right to abortion.[82] Therefore, if a woman wants to terminate her pregnancy in the United States, it must be done by a physician.

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[73] *Rust v. Sullivan*, 500 U.S. 173 (1991); Jon O. Shimabukuro, *Abortion: Judicial,* ibid., p. 3.

[74] Guttmacher Institute, *An Overview of Abortion Laws* [online], https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [29.10.2018].

[75] Jon O. Shimabukuro, *Abortion Law Development*: *A Brief Overview, Congressional Research Service*, Washington, D.C., 2009, pp. 5–6; case was *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); Laurence H. Tribe, ibid., p. 247.

[76] Jon O. Shimabukuro, *Abortion Law,* ibid., p. 7; the case was *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); Laurence H. Tribe, ibid., p. 250.

[77] Ibid.

[78] *Planned Parenthood Association of Kansas City, Missouri Inc. v. Ashcrof,* 462 U.S. 476 (1983); Jon O. Shimabukuro, ibid.

[79] Ibid.

[80] Jon O. Shimabukuro, *Abortion Law,* pp. 7–8. It contains a long list of cases related to the topic.

[81] *Connecticut v. Menillo*, 423 U.S. 9 (1975); called hereinafter "*Connecticut v. Menillo.*"

[82] Ibid., pp. 9–11.

5. Recent Rulings

Nevertheless, some time after *Roe v. Wade* there came judicial attitudes to narrow down the *Roe v. Wade* rule. The first judgment which was not fully consistent with that ruling was ruling in *Webster v. Reproductive Health Services* from 1989.[83] The Supreme Court had to assess the constitutionality of the 1986 Missouri statutes which limited freedom of public employees and hospitals to perform abortions.[84] The statutes were upheld by the court which meant that the constitutional freedom of women became narrower—the state became able to ban performing abortions by state employees.[85] Furthermore, the Supreme Court asserted that the states may have a legitimate interest throughout the whole period of pregnancy.[86] A real shift happened in 1992—then the *Planned Parenthood of Southeastern Pennsylvania v. Casey* ruling was issued.[87] Pennsylvania passed an abortion control statute in 1982 which provided for some restrictions on access to pregnancy termination such as: requirement of an informed consent of a parent, notification of a husband, duty to inform.[88] The provisions of Pennsylvanian statutes were not declared void by the Supreme Court.[89] The Supreme Court departed from Roe's trimester framework and replaced the requirement of the state's legitimate interest in protection of potentiality of human life with the undue burden test.[90] In other words, the states may regulate the pregnancy termination but only to a certain degree beyond which the burden imposed on women would be undue. Nevertheless, the court reaffirmed that the right to abortion was a constitutional one and it was a fundamental right.[91] On the other hand, the Supreme Court allowed the state to lay down new restrictions—the only requirement is that the burden may not be undue.[92] The states may regulate all aspects of pregnancy, even those related to the first trimester. Unsurprisingly, the states made use of that ruling and passed some new laws which somehow restrained women in their right to abortion.[93]

In 2000 the Supreme Court released a judgment in which declared Nebraska statutes proscribing so called partial-birth abortions[94] invalid because they were vague and did not safeguard women' health which meant that they do not have

[83] *Webster v. Reproductive Health Services*, 492 U.S. 49 (1989).
[84] Jon O. Shimabukuro, *Abortion: Judicial History and Legislative Response*, p. 3.
[85] Idem.
[86] Jon O. Shimabukuro, *Abortion Law Development,* ibid., p. 12.
[87] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[88] Ibid., p. 844.
[89] Ibid., pp. 880, 898, 899, 901; Jon O. Shimabukuro, ibid., p. 13.
[90] Ibid., pp. 878–79; Jon O. Shimabukuro, ibid.
[91] Jon O. Shimabukuro, *Abortion: Judicial History and Legislative Response*, ibid., p. 4.
[92] Ibid; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, p. 878.
[93] Jon O. Shimabukuro, ibid.
[94] Partial-birth abortions are abortions performed by induced dilatation of the cervix which causes the fetus to move outside; when the head of the fetus appears, it is crushed by the physician

mother health exception and they placed undue burden on women by barring not only the partial-birth abortions.[95] Subsequently, in 2003 a new federal law proscribing partial-birth abortions was passed and it was blocked by some state courts.[96] It was not in effect between 2003 and 2007 when the Supreme Court adjudged the issue in case *Gonzales v. Carhart*.[97] The federal bill was declared constitutional for, according to the Court, this statute did not place undue burden on women by thoroughly carving boundaries of the prohibition to the extent of partial-birth abortions.[98] From then on, partial-birth abortions have been banned in the United States which means that the earlier an abortion is performed the higher the probability of its lawfulness.

The most recent case is *Whole Woman's Health v. Hellerstedt* which was judged in 2016 by the Supreme Court.[99] It invalidated some Texas statutes provisions which prescribed that the physician, who may perform an abortion, had to conclude an agreement on transfer of a woman in case of abortion complications with the hospital which is located maximally 30 miles from the physician's venue.[100] Moreover, the place where abortion was to be performed had to be equipped like an ambulatory service center.[101] The Supreme Court found that these requirements placed undue burden on women for they increased the price of an abortion and lowered the number of physicians being able to terminate pregnancy; on the other hand, the quality of service and level of safety were considerably higher.[102] The Court assessed the burdens of the law on one hand and the benefits of it on the other[103] which means that undue burden is when there is a restraint without a benefit for the citizen. It was realized that in vast majority of abortion complications the women do not have to be transported to hospital so there was no state interest in binding the physicians with the hospitals.[104] The equipment standard requirement was also considered an undue burden by the Court whilst it did not improve the woman's position.[105] Conversely, the statute worsened her position because narrowing the number of clinics where abortion may be per-

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and the remnants of the fetus are removed through the cervix. Jon O. Shimabukuro, *Abortion Law Development: A Brief Overview*, ibid., p. 14.

[95] *Stenberg v. Carhart*, 530 U.S. 914 (2000); Jon O. Shimabukuro, *Abortion: Judicial,* ibid., p. 5; Jon O. Shimabukuro, *Abortion Law,* ibid., p. 16.

[96] Jon O. Shimabukuro, *Abortion: Judicial,* ibid., pp. 5–6.

[97] *Gonzales v. Carhart*, 550 U.S. 124 (2007); ibid.

[98] Ibid.; Jon O. Shimabukuro, *Abortion Law,* ibid., p. 17.

[99] *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016).

[100] Ibid., p. 2296; Jon O. Shimabukuro, *Abortion: Judicial History and Legislative Response*, ibid., p. 8.

[101] Idem.

[102] Idem.

[103] *Whole Woman's Health v. Hellerstedt*, pp. 2309–10; Jon O. Shimabukuro, ibid., p. 9.

[104] *Whole Woman's Health v. Hellerstedt*, p. 2311; Jon O. Shimabukuro, idem.

[105] *Whole Woman's Health v. Hellerstedt*, pp. 2315, 2318; Jon O. Shimabukuro, idem.

formed to few could raise the waiting time and make queues longer.[106] These restraints were not balanced with benefits so the Texas statutes placed undue burden and, therefore, were an unjustifiable intrusion into the fundamental right of a woman to terminate her pregnancy. The *Whole Woman's Health v. Hellerstedt* was a significant ruling for it employed the *Planned Parenthood of Southeastern Pennsylvania v. Casey* framework and developed it. The Supreme Court expounded the undue burden rule by setting forth a requirement that every restraint must be balanced with a benefit.

6. Conclusions

The shape of the abortion law was changing throughout the time. The classic continental point of view essence of which is following the development of case law with a historical approach revealed the genuine gist and boundaries of the right to abortion. At first, abortions were considered not so serious offences and it is argued that the law allowed a woman to terminate her pregnancy before "quickening" of the fetus. In the nineteenth century there were passed laws which restricted right to abortion which was not a fundamental right then. In the beginning of the twentyth century the right to privacy was established by the Supreme Court (*Meyer v. Nebraska*). In the following decisions of the Supreme Court expounded that right so that it began to also include reproductive rights. The right to abortion was recognized a fundamental right and a part of the right to privacy in 1973 in the well-known case *Roe v. Wade* which made it clear that a woman possesses a right to terminate her pregnancy until the end of the first trimester. All restraints were lifted and women started to enjoy the widest scope of freedom of decision on abortion in history. This kind of freedom was enjoyed by the women only until 1989 when the *Planned Parenthood of Southeastern Pennsylvania v. Casey* case was decided by the Court. The Court decided to depart from the Roe v. Wade framework and to allow the states to pass new restrictions whilst simultaneously it decided that freedom of the states was limited by the undue burden of the restraints notion. It also departed from the trimester rule—the state might regulate pregnancy termination even if the burden would be related to the first trimester. Up to today, there have been no cases which would overrule that decision of the Supreme Court. It interpreted the undue burden notion in *Whole Woman's Health v. Hellerstedt* case, decided in 2016, by stating that the burden is undue if the burden is not balanced with a benefit.

Notwithstanding the fact that the essence of the right to abortion is decisive in evaluation whether a woman possesses that right and to what extent, the minor

[106] Idem.

issues are also important. In the United States abortion procedures are funded by vast majority of states and in many of them abortions are free even if there is no threat on woman's life or health. However, participation in the abortion funding programs is not obligatory which means that it is up to the state legislature whether to participate. The Supreme Court recognized that some restraints may be laid down by the states, for example, waiting periods, obligatory consent, obligatory notification of parents or husband. Partial-birth abortions were recognized to be prohibited. On the other hand, the Supreme Court emphasized that the state may not make abortions impossible to perform by setting forth requirements which are too burdensome. Therefore, the Supreme Court did interpret right to abortion many times and it was one of the first to find constitutional roots of that right. It may be said that without the Court the right to abortion would not be so widely accepted by the states as a method of family planning. American women do owe much to the Supreme Court but they cannot forget that it is up to the Supreme Court to overrule *Roe v. Wade* and other rulings. The latter refers to Poland where the abortion statute has come under strict scrutiny of the Constitutional Tribunal in order to narrow down the already narrowed-down right to abortion. It might be helpful for it to consider the American case law development as well as for the public awareness. One ought not to fear the understanding the essence of the right to abortion; especially if it is regarded (as it should be) as part of the right to privacy.

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Summary. This article aims to present the history of the right to abortion from the jurisprudence of the Supreme Court point of view. The article begins with a brief description of the essence of abortion and then it describes the first regulations of the right to abortion when it was unsure whether women possessed the right to abortion. Nevertheless, abortion was not treated equally as murder. The ninetheenth century brought considerable changes to the right to abortion by eliminating it and it was just in the twentieth century when the right to abortion on demand of a woman was recognized (*Roe v. Wade*). It was permissible to perform abortion until the end of the first trimester of pregnancy. The article analyzes the aforementioned ruling and its consequences. Then some other aspects of the right to abortion are discussed, for example public funding of abortion. The article briefly describes the development of the Supreme Court's jurisprudence, taking into account the most recent rulings which narrowed the area in which women remained free to decide on abortion.

Keywords: right to abortion, *Roe v. Wade*, right to privacy, the Supreme Court

Chapter XI

POPULARIZATION OF TOTALITARIAN SYSTEMS AND HOLOCAUST'S NEGATION IN EUROPEAN AND AMERICAN LEGAL TRADITION

Michał Szymański

1. Introduction

II World War has changed the world dramatically. The war, started by Nazi Germany, costed lives of several millions of people. NSDAP, Hitler's party, was condemned as a criminal organization by the Nuremberg tribunal, as well as SS, the party's armed forces. Until the Second World War, political parties were, in the light of law, treated as mere associations. Despite attempts to stop extremism (e.g., in the Weimar Republic), totalitarian groups operated legally. Attempts to stop extremists, usually, were ineffective. After the war, new legal solutions appeared in many European constitutions. II World War was also a time of Holocaust. In many European legal systems negation of this crime is a felony.

This article aims to show the differences in American and European constitutionalism regarding the freedom of action of political parties as well as criminal norms in the promotion of totalitarianism and the denial of the Holocaust.

2. Definition of Totalitarianism and Holocaust Denial

The phenomenon of totalitarianism was born in the interwar period. This concept appeared in inter-war Italy. It was used by the thinker of Italian fascism, Giovanni Gentile and also by Benito Mussolini.[1] There is no doubt that the two most classic examples of totalitarianism are German Nazism and Soviet Communism. Among the many definitions of totalitarianism, the definition of Carl Joachim Friedrich and Zbigniew Brzeziński is the most classic. These two eminent political scientists in their work *Totalitarian Dictatorship and Autocracy* created a definition that best reflects the meaning of totalitarian ideas and regimes.[2]

[1] Stanley Payne, *Fascism: Comparison and Definition*, Madison, 1980, p. 73.

[2] Zbigniew K. Brzeziński, *Totalitarian Dictatorship and Autocracy*, Cambridge, Mass., 1956.

According to this definition, in a totalitarian state, there is one ideology that represents the ideal vision of the world that everyone must believe in. This is a significant difference in relation to authoritarian states. Authoritarian dictatorships are in conflict with full political freedom, however, they do not require any fanatical faith in their ideology.

Totalitarianism is the rule of the monoparties (NSDAP, Communist Party of Soviet Union, Communist Party of China, etc.). Of course, it is possible (e.g., currently in North Korea) to have one or two "satellite" parties, which pretend to create political pluralism. In essence, totalitarianism is the "takeover" of the state by a monoparty, which is to serve the implementation of the party's policy. Party functions and institutions are more important than state ones. Such a state is also characterized by a huge bureaucracy. The party is of mass character, often millions of citizens belong to it (usually forcibly—for example, in the Third Reich every child was required to belong to Hitler's Youth, a juvenile organization of the NSDAP), however, a narrow group of people exercises power in it. A perfect example is the "democratic centralism" invented by Lenin—power in the Communist Party, in fact, is exercised by a narrow group of leaders. Power in the state belongs to the leader of a political party—examples are the Nazi "Führerprinzip" or the Stalinist cult of the individual.

In every totalitarian state, there is a political police—examples are Hitler's Gestapo, Bolshevik Cheka, Soviet NKVD, Securitate in communist Romania, AVH in communist Hungary or the Ministry of Public Security in Poland during the Stalinist era. They are responsible for political repression as well as the politics of genocide. Examples of such political terror can be the Great Purge in Soviet Union, the Holodomor in Ukraine, "Polish Operation" of the NKVD, the Holocaust or the functioning of concentration camp systems (for example, the GULag system).

The totalitarian state controls every element of the citizens' life—in particular, having a monopoly on mass-media (they are used to indoctrinate citizens), weapons and characterized by a statist, centralized economy (War Communism, five-year plans, "aryzation" of economy in Nazi Germany).

The Holocaust denial (negationism) is an act of negation of the crime of Jews' genocide committed by Nazi Germany during World War II. It involves not only negating the existence of genocide *sensu stricto*, but also a significant understatement of the number of its victims. A popular view of the deniers is the lack of gas chambers during World War II and the fact that death in concentration camps was the result of a typhoid epidemic.[3]

[3] Andrew E. Mathis, "Holocaust Denial: A Definition" [online], https://www.academia.edu/14854907/Holocaust_Denial_A_Defintion [19.12.2018].

3. Europe

Concept of "battlesome democracy" (*"streitbare Demokratie"*) was created by the German-Jewish constitutionalist Karl Loewenstein (in opposition to the views of Hans Kelsen, who believed that democracy should ensure freedom of speech to everyone, even its contestants), assuming the need for defending democracy against the expansion of Fascism.[4] This theory assumes that the democratic state has the right to "defend" against actions (e.g., political activities) seeking to abolish the democratic system. The Basic Law of the Federal Republic of Germany implements this doctrine in the German system, which provides that political parties can be dissolved by the Federal Constitutional Court if they are dangerous to constitutional order. Article 21 says: "Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds. Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality."[5]

German Constitutional Court applied this clause twice—for the dissolution of post-hitlerite Socialist Party of Reich[6] and of Germany Communist Party.[7] The Socialist Party of the Reich was banned in 1952 because it denounced the Holocaust, propagated the imperial vision of Germany and had a structure modeled on NSDAP. The group consisted of the "main" core of the party, youth group, women's section and militia squad—same as NSDAP, Hitler Youth, National Socialist Women's League and SA/SS. In 1956, the Communist Party of Germany was outlawed for its aggressive policy aimed at overthrowing the capitalist system in Germany through a revolution. A lot of controversy is aroused by the activities of the National Democratic Party of Germany (NPD), but the Federal Constitutional Court had twice refused to ban the party. In particular, the first verdict is interesting, it says that there are so many agents of special services in the party that it is not known whether the activity of nationalists is a deliberate provocation of intelligence.[8]

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[4] Maciej Pach, "Niemiecka koncepcja demokracji zdolnej do obrony (zarys problematyki)," *Przegląd Konstytucyjny* 2, 2017, pp. 55-86.

[5] *The Basic Law of the Federal Republic of Germany.*

[6] BVerfGE 2, 1.

[7] BVerfGE 5, 85.

[8] Michał Szymański, "Program i doktryna Narodowodemokratycznej Partii Niemiec a swoboda działalności partii politycznych w demokratycznym państwie prawa," *Zeszyty Naukowe Towarzystwa Doktorantów Uniwersytetu Jagiellońskiego. Nauki Społeczne* 20(1), 2018, pp. 99-120.

In Italy the constitution forbids the existence of Italian Fascist Party, but activity of communist parties or associations is legal.[9] However, neofascist associations can, to some point, act legally. One of the last Italian Supreme Court's judgements allowed the usage of Roman salute.[10] In Italy, there are also numerous nationalist groups that often refer to the tradition of Benito Mussolini. Among them, one can point such groups as Forza Nuova, CasaPound Italia or (in a less radical formula) Liga (former Northern League).

Overwhelming majority of European legal systems are very strict in fighting totalitarian ideologies. For example, in 2016 Neo-Nazi movement National Action was banned last year by UK home secretary Amber Rudd.[11] Finland has banned the Nordic Resistance Movement.[12] In May 2017, the General Prosecutors Office of the Slovak Republic made a submission to the Supreme Court, requesting a dissolution of the Kotleba's—People's Party Our Slovakia. The General Prosecutors Office reasoned this step by alleged pro-fascist tendencies of the party, violation of the constitution of the Slovak Republic and violation of Slovak and international laws.[13] In Poland, a huge amount of controversy arose around radical movements after "Hitler's birthday" organized, allegedly, by a group called "Pride and Modernity."[14] Liberal and leftist circles demanded tightening criminal laws, which penalize the propagation of fascism in Poland. Liberal and leftist circles demanded tightening criminal laws penalizing the propagation of fascism in Poland. A special team was created in the Ministry of the Interior Affairs and Administration to analyze potential legal changes.[15] In the right-wing circles, however, the theory appeared that the entire event was a journalist provocation.[16] Another popular view in Po-

[9] Constitution of the Italian Republic.

[10] Eleanor Hartland, "Supreme Court rules 'Fascist salute not a crime'," *The Italian Insider* [online], http://www.italianinsider.it/?q=node/6415 [19.12.2018].

[11] Lee Harpin, "Amber Rudd bans 'terrorist' antisemitic hate group National Action" [online], https://www.thejc.com/british-neo-nazi-group-national-action-to-be-classed-as-terrorist-organisation-1.429174 [21.12.2018].

[12] Nick Robins-Early, "Finland Bans Neo-Nazi Nordic Resistance Movement" [online], https://www.huffingtonpost.com/entry/finland-bans-neo-nazi-group_us_5a202d7ae4b037b8ea206cf7?guccounter=1 [21.12.2018].

[13] "Slovak Prosecutor-General files motion to dissolve Kotleba's party" [online], http://www.romea.cz/en/news/world/slovak-prosecutor-general-files-motion-to-dissolve-kotleba-s-party [19.12.2018].

[14] "Za Hitlera i naszą ojczyznę, ukochaną Polskę." Reporterzy przeniknęli do środowiska neonazistów" [online], https://www.tvn24.pl/superwizjer-w-tvn24,149,m/superwizjer-tvn-z-kamera-w-srodowisku-polskich-neonazistow,807953.html [19.12.2018].

[15] "MSWiA chce skuteczniej walczyć z faszyzmem. Jest wniosek o powołanie specjalnego zespołu" [online], https://dorzeczy.pl/kraj/56363/MSWiA-chce-skuteczniej-walczyc-z-faszyzmem-Jest-wniosek-o-powolanie-specjalnego-zespolu.html [19.12.2018].

[16] Wojciech Biedroń, "TYLKO U NAS. Znamy kulisy śledztwa w sprawie „urodzin Hitlera." W tle tajemniczy zleceniodawcy, duże pieniądze i dziennikarka TVN" [online], https://wpolityce.pl/media/420145-tylko-u-nasurodziny-hitlera-byly-maskarada-znamy-kulisy [19.12.2018].

land regarding political radicalisms is the postulate of the National Radical Camp delegalization.[17]

Incidentally, it is also worth mentioning the law limiting the cult of Francisco Franco's rule in Spain. For a long time, there has been a political and legal dispute over the possibility of removing the remains of the dictator from the Valley of the Fallen, a monumental mausoleum commemorating the victims of the civil war.[18]

European countries in which denying the Holocaust is penalized are: Austria, Belgium, Bosnia and Hercegovina, Czech Republic, France, Germany, Greece, Hungary, Italy, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Russia, Slovakia, Spain and Switzerland. Attemps to ban Holocaust denial on the basis of the European Union have been blocked by the Nordic countries and the United Kingdom.[19] The most restrictive law applies in Austria. The Austrian National Socialism Probilition Law provides that:

> §3g. He who operates in a manner characterized other than that in § § 3a – 3f will be punished (revitalizing of the NSDAP or identification with), with imprisonment from one to up to ten years, and in cases of particularly dangerous suspects or activity, be punished with up to twenty years imprisonment.
> §3h. As an amendment to § 3 g., whoever denies, grossly plays down, approves or tries to excuse the National Socialist genocide or other National Socialist crimes against humanity in a print publication, in broadcast or other media.[20]

Lawsuits affecting Holocaust denial often create an atmosphere of scandal. The most famous of these is the case of David Irving, an eminent British historian and author of many books devoted to World War II, who began to profess and publicly proclaim the negationist theories, for which he was sentenced to prison by an Austrian court.[21] Another famous figure condemned for negationism was the former leader of the French National Front Jean Marie Le-Pen. The reason was the words: "corresponded to my thought that the gas chambers were a detail of the history of war."[22]

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[17] Szymon Grela, "Czy da się zdelegalizować ONR. OKO.press sprawdza możliwości władz i obywateli" [online], https://oko.press/da-sie-zdelegalizowac-onr-oko-press-sprawdza-mozliwosci-wladz-obywateli/ [19.12.2018].

[18] Michał Szymański, "Ley de Memoria Histórica de España (2007) oraz spory o Valle de los Caídos—hiszpańska próba usunięcia pamięci o frankizmie z przestrzeni publicznej," *Przegląd Europejskiej Kultury Prawnej*, 7, 2018, pp. 77-88.

[19] "EU Diplomats: Ban on Holocaust Denial Won't Curb Civil Liberties" [online], https://webcache.googleusercontent.com/search?q=cache:F41JZy3B8PQJ:https://www.haaretz.com/1.4816347+&cd=1&hl=pl&ct=clnk&gl=pl&client=opera [19.12.2018].

[20] Jacqueline Lechtholz-Zey, "The Laws Banning Holocaust Denial - Revised From GPN Issue 3" [online], http://www.ihgjlm.com/wp-content/uploads/2016/01/Laws-Banning-Holocaust_Denial.pdf [19.12.2018].

[21] "David Irving jailed for Holocaust denial" [online], https://www.theguardian.com/world/2006/feb/20/austria.thefarright [19.12.2018].

[22] "France: Le Len fined over Holocaust remarks" [online], https://www.bbc.com/news/world-europe-35979522 [19.12.2018].

In Poland, the case of the historian Dariusz Ratajczak, an employee of the University of Opole, was loud. In the book "Dangerous topics" he described the views of the negationists. He was attacked for this by liberal media and criminal proceedings were instituted against him, however they were later discontinued. Subjected to social ostracism, and according to right-wing circles (e.g., the national-Catholic *Nasz Dziennik*) wrongly accused (Ratajczak was not supposed to identify with negationism, but only to describe this phenomenon in his book) and hounded by the left, he lost his job at the university and died from alcohol intoxication in the car in which he live.[23]

4. United States

In the United States, freedom of speech is strongly protected from government restrictions by the First Amendment to the U.S. Constitution, states' constitutions, state and federal law. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This also applies to neo-Nazis and Holocaust deniers. A breakthrough lawsuit for the neo-Nazis was the *National Socialist Party of America v. Village of Skokie* in which the US Supreme Court ruled that presenting swastika in public space is not a physical attack on the victims of Nazism so it can be legally presented.[24]

The result is a multitude of neo-Nazi groups functioning legally in the United States. Among the former and currently openly functioning neo-Nazi groups, which operate in the US, one should mention the American Nazi Party (formerly functioning as the World Union of Free Enterprise National Socialists, National Socialist White People Party or New Order)[25] and the National Socialist Movement.[26] The circles that do not have an openly Neo-Nazi character, but refer to the racist vision of nationalism and which sometimes occupy neo-fascist inclinations is the Patriot movement[27] and the Alternative Right. Alt-Right focuses on libertarians, the so-called neo-Confederates, nationalists from e.g., Traditionalist

[23] Marek Zygmunt, "Samobójstwo ofiary nagonki *Gazety Wyborczej*" [online], http://stary.naszdziennik.pl/index.php?dat=20100618&typ=po&id=po42.txt [19.12.2018].

[24] *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

[25] American Nazi Party [online], http://www.americannaziparty.com [19.12.2018].

[26] National Socialist Movement [online], http://www.nsm88.org [19.12.2018].

[27] Lane Crothers, *Rage on the Right. The American Militia Movement from Ruby Ridge to Homeland Security*, Lanham, 2003; David A. Neiwert, *In God's Country. The Patriot Movement and the Pacific Northwest*, Washington, D.C., 1999; Stuart A. Wright, *Patriots, Politics and the Oklahoma City bombing*, Cambridge, 2007.

Worker Party or National Policy Institute but also neo-Nazi clusters around the blog "The Daily Stormer."[28]

This does not mean, however, that there has been any attempt to restrict freedom of expression in the United States. However, in Europe, this applies above all to Nazi groups (sometimes, as in the case of the Polish Constitution or the jurisprudence of the German Constitutional Tribunal, also the communist movements) in the case of U.S. this applies mainly to the extreme left.

During the First Red Scare many laws against communist propaganda were introduced. In as many as 24 states have been introduced laws prohibiting the public use of a red or black flag. In some states it was also extended to other symbols propagating the ideas of the extreme left. Ideologies which, according to state legislators, were dangerous to American security and the system, were among others Bolshevism, anarchism, "radical socialism" and "social or industrial revolution."[29]

These restrictions were the basis for the judgment of *Stromberg v. California*. In 1931, the Supreme Court stated that the California law of 1919 prohibiting the use of the red flag is contradictory to the First and Fourteenth Amendments to the US Constitution. In the opinion of the Supreme Court the law should not prohibit the presentation of any content unless it calls for violence and crime. California's law is out of focus and may limit peaceful left-wing demonstrations.[30]

Another attempt to limit the freedom of expressing communist ideas was the Communist Control Act of 1954. Dating from the Second Red Scare, the act prohibited the activities of the Communist Party of the United States and all its successors, and foresaw the criminalization of the membership of this party and other forms of communist activity. According to this legal act, the Communist Party was only supposed to pretend to be a political party and, in fact, was a subversive organization seeking to overthrow the government in America. Interestingly, the authors used the arguments very similar to Loewenstein refusing freedom of expression and political activity of the Nazis, but he appealed not only to the need to defend the democratic system, but also the state, which was close to the views of, for example, Carl Schmitt. The document stated that:

> It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the

[28] Michał Szymański, "Alternatywna prawica - prawo do hejtowania?" in Michał Urbańczyk, Łukasz Bartosik, Marcin Tomczak, *Amerykańska myśl polityczna, ekonomiczna i prawna - zagadnienia wybrane (tom I)*, Poznan and Lodz, 2018, pp. 207-228.

[29] F. G. Flanklin, "Anti-Syndicalist Legislation," *The American Political Science Review* 14(2), 1920, p. 292.

[30] *Stromberg v. California*, 283 U.S. 359 (1931).

> policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. (…) The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States.[31]

The Supreme Court has not ruled on the act's constitutionality but it was not enforced in practice by the American administration.

There are a number of communist organizations in contemporary United States. Among them there are parties like The Communist Party USA (the most important movement),[32] American Party of Labor (Marxist-Leninist and Hoxhaist party),[33] Revolutionary Communist Party, USA[34] and Socialist Action (Trotskyist party).[35]

5. Recapitulation

There is no doubt that the differences in the European and American legal systems approaching the freedom of speech are significant. The right to promote extremist ideas in the US is much wider than in Europe. Perhaps many of America's liberty traditions regarding freedom of expression are hard to apply in European soil. So we have here an interesting question—is the freedom to proclaim the radical views that once existed in Europe, and of which the United States are still a bastion, should not return to the Old Continent?

This question is not detached from reality. In Europe, we can observe an increase in the popularity of nationalist movements. In many countries power is taken over by parties known as "populist," and some governments are accused of authoritarian tendencies. In practice, it is often difficult to say unequivocally whether, on the basis of applicable laws, the law is infringed by radical activists or not. For example, Polish law speaks of the punishability of "propagating fascist or other totalitarian regimes." Do proponents of Polish national democratic or national-radical ideas, often cut off from Nazism, break the law? The concept of "another totalitarian system" is so vague that it leaves the possibility of various interpretations, which strikes political freedoms. This may lead to a situation in which we unjustly limit the freedom of expression of supporters of other views.

[31] Communist Control Act of 1954, U.S. Statutes at Large, Public Law 637, Chp. 886, pp. 775-80.
[32] The Communist Party USA [online], http://www.cpusa.org [19.12.2018].
[33] American Party of Labor [online], http://americanpartyoflabor.org [19.12.2018].
[34] Revolutionary Communist Party, USA [online], https://revcom.us [19.12.2018].
[35] Socialist Action [online], https://socialistaction.org [19.12.2018].

Regulations are often either imprecise (Germany) or they presuppose an arbitrary enumeration of banned views. Is it not a paradox that the ideology of Mussolini, who is responsible for the political execution of a dozen or so people, is forbidden in Poland, and the glorification of non-totalitarian regimes or movements (for example Anarchism) which are responsible for a larger number of political victims is admissible?

A similar problem is related to negationism. There is no doubt that in Poland these provisions serve to protect the victims' memory as well as (in connection with numerous amendments to the Act on the Institute of National Remembrance) to the good name of the Polish Nation. The Polish law also prohibits the denial of, for example, communist crimes committed in Poland. However, the questions arise again. Why is the Holocaust denial punishable in Europe, and negation of other mass crimes (such as the slaughter of Armenians or Holodomor) is legal? If the official, undeniable number of victims is 6 million, what would happen if the number of victims turns out to be no less, but more? For example, recent studies indicate that the number of Sobibor's victims was 100 000 more than expected. What if the research showed the opposite result? It is difficult to answer the question whether the American solution is better than the European one. Perhaps the golden mean is the provision, which was provided by the Act on the Institute of National Remembrance, which penalized attribution of the Nazi crimes to the Polish Nation, however it also provided the exclusion of freedom of historic research.

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Summary. II World War has changed the world dramatically. The war, started by nazi Germany, costed lives of several millions of peoples. NSDAP, the Hitler party, was condemned as a criminal organization by the Nuremberg tribunal. The Constitution of GFR stipulates so-called «fighting democracy» doctrine, which provides that political parties can be dissolved by the Constitutional Court if they are dangerous for constitutional order. German Constitutional Court applied this clause twice—for the dissolution of the post-hitlerite Socialist Party of Reich and of Germany Communist Party.

In Italy constitution forbids the existence of Italian Fascist Party, but activity of communist parties or associations is legal. However, neofascist associations can be, to some point, active legally. One of the last Italian Supreme Court's judgements allowed the usage of Roman salute. Overwhelming majority of European legal systems is very strict in fight with totalitarian ideologies. For example, in last month British National Action and Scandinavian Nordic Resistance Movement were delegalized.

II World War was also a time of Holocaust. In many European legal systems negation of this crime is a felony. The most known victim of that law was David Irving, a controversial British historian, who is considered as an expert of III Reich's history, but he also denies the official version of Holocaust's history.

The United States of America are known for their very liberal law in matters of freedom of speech. In that country there are active publicly Neo-Nazi (National Socialist Movement, American Nazi Party) or, at least, quite fascist organizations. The negations of Holocaust is also legal. Before the II World War many states forbade the usage of red flag (which was later stated as unconstitutional in judgement *Stromberg v. California*) and during the Second Red Panic the Communist Control Act was passed in 1954 by Congress. It forbade the existence of the United States Communist Party and criminalized it's membership.

Key words: free speech, free press, First Amendment, neonacism, Holocaust Denial

Chapter XII

THE INFLUENCE OF FREEDOM OF SPEECH ON THE FAIR USE AND ITS FURTHER DEVELOPMENT

Julia Pietrasiewicz

1. Introduction

Freedom of speech is considered to be an important element of modern democracy. One of the most well known advocates of the relationship between freedom of speech and democracy is Alexander Meiklejohn. He claims that the concept of democracy is the concept of the self-government of the people. For such a system to work, an informed electorate is necessary. To have the right knowledge, there must be no restrictions on the free flow of information and ideas. According to Meiklejohn, democracy will not be faithful to its fundamental ideal if those in power are able to manipulate the electorate by holding back information and suppressing criticism.[1] It also may be one of the most popular arguments we make when we have a disagreement or a quarrel. But what is actually free speech and why do we consider it as one of the most important values in our life? It is a most basic principle that supports the freedom of an individual or a community to articulate their opinions and ideas without fear of retaliation, censorship, or legal sanction. It is thought that the ancient Athenian democratic principle of free speech may have emerged in the late sixth or early fifth century BC.[2] It occurs in virtually every contemporary society and arouses unusual emotions among people despite the fact that it is protected and defined in hundreds of legal acts. One of the most important acts is the Universal Declaration of Human Rights, where article 19 states that „everyone shall have the right to hold opinions without interference" and „everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through

[1] Randal Marlin, *Propaganda and the Ethics of Persuasion*, Peterborough, 2002, pp. 226–27.

[2] Kurt Raaflaub, Josiah Ober, Robert Wallace, *Origins of democracy in ancient Greece*, Berkeley, 2007, p. 65.

any other media of his choice."[3] It is a base for a protection in every contracting country. At the same time people tend to forget one important thing. No law can be used for breaking another one, so there have to be some limitations to provide a fair and well-functioning system. The level of protection may differ, firstly from the point of view of nations, and secondly there are certain laws that require that the freedom of speech be restricted. One of the most interesting areas at present seems to be intellectual property, which has become more and more important in recent years. Debates on these two issues have revived more attention in recent months, due to attempts to introduce several ACTA 2.0 articles. However, I would like to focus on the situation of the United States in this area, as they are known to play an important role in international law. For example, they had an essential role in establishing the TRIPS agreement, which is an extremely important legislation, also for European countries. This doctrine also impacted many European directives on which I will focus on later. What is more, their system over the years has been measured with the reconciliation of these two issues, which is clearly seen in the discussion about the doctrine of fair use. It is a doctrine that permits limited use of copyrighted material without having to first acquire permission from the copyright holder. U.S. law constructed the model figure, which later became the foundation for creating such an institution in many countries around the world, including Poland. But what is the connection between this doctrine and the U.S. Constitution or other essential acts? How do they affect each other? Do they help and complement each other or are they contradictory? How much is it influencing continental legislation? And what is more important, is this doctrine even relevant to us, as society, now, considering the rapid changes. I will try to answer all of those questions by analyzing the history and the most important judgments in the U.S., concerning this doctrine. What's more I will later present and compare the American solutions with the European ones.

2. Fair Use and the U.S. Constitution

Speaking about the protection of freedom of speech and copyright, we must start by indicating the current constitution as the main source of protection of the freedom of speech and Copyright Act as the most important act regarding the protection of the second mentioned law. Since the Constitution came into force in 1789, it has been amended 27 times and the First Amendment interests us in this context. It states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

[3] Universal Declaration of Human Rights, United Nations, 1948.

petition the Government for a redress of grievances."[4] Freedom of speech not only prohibits most government restrictions on the content of speech and ability to speak, but also protects the right to receive information.[5] It is consider to be base for a democracy and as Marvin Ammori said "a democracy generally requires institutions of free speech and education that better inform a citizenry of options in making its political and life decisions, thereby serving autonomy."[6] This law has been developing over the past years; many times the principles connected with it have been raised in the highest court, thanks to which numerous limitations have been formed. On the other hand, we have Copyright Act from 1976 that the copyright law of the United States is intended to encourage the creation of art and culture by rewarding authors and artists with a set of exclusive rights. Copyright law grants authors and artists the exclusive right to make and sell copies of their works, the right to create derivative works, and the right to perform or display their works publicly. These exclusive rights are subject to a time limit, and generally expire 70 years after the author's death. Taking into account these two documents, one conclusion can be reached—the First Amendment protects expression while copyright law regulates it. The First Amendment prohibits government actions that restrict people's freedom of speech. Copyright, on the other hand, is a government creation that restricts speech by prohibiting people from using certain words or images in their expression. Thus, we may safely conclude that some amount of speech restriction via copyright may well be tolerable under the First Amendment. Nevertheless, not all restrictions of speech via copyright must be tolerated.[7] The U.S. legislature and doctrine is trying to end this conflict for many years. However, it is impossible to state that they have managed to indicate a clear line that can not be exceeded in the context of these rights. This is confirmed, among others, by numerous court cases, which I would like to introduce in order for a better presentation of this problem.

3. The Beginning of the Doctrine

On November 22, 1963, at precisely 12:30 pm President Kennedy was killed. At the scene of crime was Abraham Zapruder, who so happened to manage to make comprises 26.6 seconds (486 frames) of footage documenting the event. This foot-

[4] First Amendment [online], https://www.law.cornell.edu/constitution/first_amendment, [25.04.2019].

[5] Susan Mart, "The Right to Receive Information," *Law Library Journal* 95(2), 2003, pp. 175–89.

[6] Marvin Ammori, "First Amendment Architecture," *Wisconsin Law Review* 2012(1), 2012, p. 66.

[7] Lee W. Lockridge, "The Myth of Copyright's Fair Use Doctrine as a Protector of Free Speech," *Santa Clara Computer and High Technology Law Journal* 24(1), 2007-2008, p. 19.

age led to the case *Time Inc. v. Bernard Geis Assocscion*.[8] Plaintiff, in this case Time Inc., filed a motion for summary judgment on the issue of liability in plaintiff's action alleging copyright infringement, unfair trade practice, and unfair competition. The reason for this was parts of the film that were published in *Life*, which was a division of Time Inc. The same pictures were used in the defendant's book, "Six Seconds in Dallas" which is a study of the assassination. The Book contains a number of what are called "sketches" but which are in fact copies of parts of the Zapruder film. The court held that the sketches in defendants' book were copies of the plaintiff's copyrighted film, and there was an infringement by defendants unless the use of the copyrighted material in the book was a fair use outside the limits of copyright protection. The court held that the issue of fair use weighed in favor of defendants because there was a public interest in having the fullest information available on the murder of President Kennedy; there was little injury to plaintiff. Another crucial case for understanding the concept of fair use is the matter is *Rosemont Enterprises v. Random House*.[9] Plaintiff-appellee, Rosemont Enterprises, Inc. commenced this action in the district court alleging that copyrights which it owned on a series of articles entitled "The Howard Hughes Story" which appeared in Look Magazine in early 1954 were infringed by a book entitled "Howard Hughes—a Biography by John Keats" that was supposed to be published by defendant-appellant, Random House, Inc.[10] Rosemont tried to stop the publication of the book, but the Second Circuit held that any use which had been made of the articles in the writing of the biography constituted fair use. What is worth mentioning the First Amendment was not explicitly acknowledged but the court did refer to the public interest in 'free dissemination of information'—which is strongly associated with the right to free speech—in its formulation of fair use.[11] Both of these cases were held before the Copyright Act came into force. Now federal U.S. law defines fair use principles in paragraph 107 of this act and states that the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.[12] While creating this provision, it was probably hoped that it would limit some doubts in situations similar to those described above, but it was established with full awareness that it was not possible to create a precise provision that would

[8] *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

[9] *Rosemont Enterprises, Inc., Plaintiff-appellee, v. Random House, Inc.* and John Keats, Defendants-appellants, 366 F.2d 303 (2d Cir. 1966).

[10] Ibid.

[11] Yin Harn Lee, "*Copyright and Freedom of Expression: A Literature Review,*" CREATe Working Paper 2015(4), 2015, p. 57.

[12] 17 U.S. Code § 107. Limitations on exclusive rights: Fair use [online], https://www.law.cornell.edu/uscode/text/17/107 [25.04.2019].

not raise controversy in the coming years. Section 107 is somewhat vague since it would be difficult to prescribe precise rules to cover all situations. Criteria are not necessarily the sole criteria that a court may consider. As we can see the language of section 107 does not provide specific tests by which one can determine with much certainty whether or not a particular use is fair.[13] That is why the discussion continues to these days and doctrine is still changing and reforming in order to adjust and provide the best outcome.

Fair use has a long history and before incorporating it to the Copyright Act was a common-law doctrine. It means that it was evolving for a really long period, and legislators already knew what the challenges that lie with this issue were. It is worth mentioning that the whole process started in 1841, when "fair use" was used for the first time. Judge Joseph Story is considered the creator of this concept. In his opinion for the case *Folsom v. Marsh*, he set forth four factors that are in use today.[14] The case concerned the placement of a fragment of a previously published Washington biography, consisting, among other things, of letters and official documents for the new publication. Defendant argued three points, 3 the most important of which was that the papers were public in nature, and, therefore, not private property, secondly Sparks was not the owner of these papers, they have belonged to the United States, and could be published by anyone and lastly an author has a right to quote, select, extract or abridge another work in the composition of a work essentially new.[15] In Supreme Court opinion defendant violated copyrights, Judge Story believed that "if the defendants may take three hundred and nineteen letters, included in the plaintiffs' copyright, and exclusively belonging to them, there is no reason why another bookseller may not take other five hundred letters, and a third, one thousand letters, and so on, and thereby the plaintiffs' copyright be totally destroyed."[16] This decision has faced a lot of criticism over the next few years. In 1998 Lyman Ray Patterson, a highly respected scholar, described the outcome of *Folsom v. Marsh* as "The Worst Intellectual Property Opinion Ever Written."[17] He also states that judge Story did not create fair use doctrine, while arguing his opinion. Nevertheless, he believes that the four factors that are still used today to determine whether a work was created as part of fair use. We have to take into consideration the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes (1), the nature of the copyrighted work (2), the amount and substantiality of the portion

[13] General Guide to the Copyright Act of 1976 [online], https://www.copyright.gov/reports/guide-to-copyright.pdf [25.04.2019].

[14] *Folsom v. Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841).

[15] Lyman R. Patterson, "*Folsom v. Marsh* and Its Legacy," *Journal of Intellectual Property Law* 5(2), 1998, p. 433.

[16] *Folsom v. Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841).

[17] Access Copyright, Fair Use, *Folsom v. Marsh* [online], https://fairduty.wordpress.com/2011/08/23/summers-end/ [25.04.2019].

used in relation to the copyrighted work as a whole (3), and lastly the effect of the use upon the potential market for or value of the copyrighted work (4). However, it must be remembered that none of the above conditions is absolutely necessary to constitute fair use, but each of them helps while deciding if the work falls into the category of fair use. In subsequent years, each of these conditions was specified, defined, and shaped. There are definitely many judgments that were crucial for the development of doctrine, many of which indicate how the key element of fair use was and still is the freedom of speech. As one of them, is worth mentioning the 1994 case *Campbell v. Acuff-Rose Music, Inc.*, which concerned the parody of a song created by the then famous rap group 2 Live Crew. They have produced a parody of "Oh, Pretty Woman" that began with the original's opening line and then substituted plays on words for the other lyrics. Obviously, the music had to be identifiable as derived from the original. Firstly, the court decided that it was fair use but the Sixth Circuit Court of Appeals reversed on the basis of the copyright act,[18] and that it was necessary to hear the Supreme Court decision. In the Court's opinion, written by Justice David H. Souter stated that the last judgment had excessively focused on the first factor without acknowledging that parody always transforms an original. He wrote, "Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victims (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[19] The Court noted that 2 Live Crew's parody was intended to comment on and critique the original, a critical nexus weighing in favor of fair use. Overall this case established something completely new, and that is transformative fair use. Thanks to that artist, scholars, musicians and many others can create new work by using someone's work as long they add something new, altering the first with expression, meaning or message. The Court's decision is certainly considered a victory for advocates of parody, although not as strong of one as they might have hoped.[20] As noticed by few scholars right after the case was heard by the Supreme Court, ruling in Acuff-Rose "has the potential to advance significantly freedom of expression within the framework of constitutional and statutory copyright."[21] This statement in retrospect can definitely be considered as correct and true. Freedom of speech and expression continues to play a key role and still imprint on copyright. Parody was permanently accepted into the category of the forms of expression protected by the first amendment. What is more this case has shown how much freedom of speech affects the doctrine of fair use.

[18] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

[19] Ibid.

[20] Gary Myers, "Trademark Parody: Lessons from the Copyright Decision in *Campbell v. Acuff-Rose Music, Inc.," Law and Contemporary Problems* 59(2), 1996, p. 191.

[21] Henry R. Kaufman, Michael K. Cantwell, "The Parody Case: 2 Vasims," *National Law Journal*, 16.05.1994, at C1.

4. The Importance of Doctrine in the Present World

With development, the doctrine of fair use has to face new challenges. One of them is the Internet. In practice, this is one of the most important inventions of the modern world, but at the same time leads to numerous conflicts. Best example of this is the case *Lenz v. Universal Music Corp.*, also known as the "dancing baby" case. Stephanie Lenz posted on YouTube a twenty-nine second clip of her 13 month old son dancing to Prince's song "Let's Go Crazy." The audio was of poor quality, and the song was audible for about twenty seconds of the twenty-nine seconds.[22] Universal, the copyright holder for "Let's Go Crazy," sent YouTube a takedown notice in compliance with DMCA requirements. DMCA, which means, Digital Millennium Copyright Act was enacted by the government as an attempt to achieve a balance between the holders of the copyright rights and freedom of speech of the Internet users. Copyright holders can issue a takedown notice in order to remove or disable access to a posted item that the holders believe infringes their property rights. Both before and after the DMCA, commentators expressed concerns about the possible consequences of the DMCA in terms of freedom of speech and the possibility of and the potential for the abuse of the takedown notice provision.[23] Lenz was informed about the actions taken by YouTube and filed a counter notice to get the video restored. Lenz reached her goal and the video appeared again on YouTube. In truth, the Supreme Court declined to grant certiorari in this case, but the Ninth Circuit Court of Appeals judgment should also be considered as important. This case established that Copyright holders must consider fair use in good faith before issuing takedown notices for content posted on the Internet. This decision generally is considered to be the best outcome of this situation and "an appropriate first step towards creating adequate protection for user-generated content on the Internet."[24] Of course there are also some voices that are suggesting that this decision is incorrect. Some argue that because of this decision it is "impossible for owners of large amounts of copyrighted material to protect themselves from large-scale infringement online without exposing themselves to liability."[25] Nevertheless once again fair use became essential for further discussion about freedoms and rights in the new Digital Era. In a sense, this judgment has become a determinant of what can actually be published by users of platforms like YouTube, Facebook and Twitter.

Till these days we deal with cases that are based on freedom of speech, fair use and copyright infringement. Even though parody is a subject of many cases

[22] *Lenz v. Universal Music Corp*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

[23] Rebecca A. Rock, "Fair Use Analysis In DMCA Takedown Notices: Necessary Or Noxious?," *Temple Law Review* 86(3), 2014, p. 700.

[24] Kathleen O'Donnell, "*Lenz v. Universal Music Corp.* and the Potential Effect of Fair Use Analysis Under the Takedown Procedures of §512 of the DMCA," *Duke Law & Technology Review* 8(1), 2009, p. 1.

[25] Rebecca Alderfer Rock, "Fair Use," p. 719.

and already many arguments were made there are still some aspects that raise new problems. As such example we can mention the case *Northland Family Planning Clinic v. Center for Bio-Ethical Reform*. A pro-life video organization created two antiabortion videos by borrowing video clips from a pro-choice video and juxtaposing them with actual abortion footage. At first this case may seem not to be associated with parody in any way, but this is the direction that the court took in its judgment. *U.S. District Judge James v. Selna* has ruled that a parody does not need to be humorous, but may merely comment on, or criticize the original.[26] This statement is definitely supportive of freedom of expression and freedom of expression. It strengthens their position both in relation to new media and forms of communication as well as in this traditional approach. The Internet has become a place where it is so easy to express our opinion. We have a variety of social media such as Facebook or Instagram, which allows us to enjoy freedom of speech not only through words, but also images. We keep up to date with news on the Internet, sharing our opinion with ease by commenting on each information and post. We set up blogs, or even websites, which are another way to enjoy freedom of expression. However, it should be remembered that all of this is very often related to copyrights; hence emerging new problems regarding the doctrine of fair use. Let's look at the case *Righthaven LLC v. JAMA*, as an example. The case concerning the sharing of an article about police discrimination by a non-profit organization on their site. The rights to the article were assigned to Righthaven (third party), which filed the lawsuit. That later influenced the court's reasoning because the court believed it was important that the plaintiff was not in the newspaper business. For that reason, the court reasoned that the non-profit's use was transformative since re-posting of an entire news article was to educate the public about immigration issues. Righthaven definitely had no such purpose for the article, because it was not in the news business. What's more, since Righthaven was not in the news business, it could not show any harm from the defendant's dissemination of the article. Judge James Mahan dismissed this case on the ground of fair use, indicating that the copyright infringement in this case has a chilling effect on free speech and doesn't advance the purposes of copyright.[27] Interestingly, this is not the only case of a similar nature with the participation of the plaintiff. It is worth pointing out such matters as *Righthaven LLC v. Realty One Group, Inc.*[28] and *Righthaven LLC v. Democratic Underground*.[29] Both concerned copyright infringement by copying fragments of articles and placing them on defendants. In both

[26] *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962 (C.D. Cal. 2012).

[27] *Righthaven LLC v. JAMA*, No. 2:2010-cv-01322, 2011 WL 1541613 (D. Nev., April 22, 2011).

[28] *Righthaven LLC v. Realty One Group, Inc.*, No. 2:10-cv-LRH-PAL, 2010 WL 4115413 (D. Nev., October 19, 2010).

[29] *Righthaven LLC v. Democratic Underground*, No. 2:10-cv-01356-RLH (GWF).

cases, when assessing whether there was a fair use doctrine, freedom of speech was of key importance and both were dismissed because of the argument regarding financial benefits. The defendants used these fragments to provide certain information and express their opinion. Righthaven LLC were named copyright troll and theirs action is considered to be an abuse[30] but at the same time they have started an important discussion about usage of news items allowed under the "fair use" doctrine.

5. Impact on World's Legislation

Fair use over the years has become an institution that has been used and recognized throughout the world. Such countries as Singapore or Israel already use the US system, and some are really vocal about their plans to introduce it to their legal system. Thanks to a certain adaptation, its varieties are also used in the continental system. Examples of this are the regulation 2017/1564 and the directive 2017/1563. European regulations in the proposed form reflect the pursuit of constructing general principles of restrictions and exceptions on the basis of fair use instead of a causistic approach to cases of restrictions.[31] It must be remembered that these legislations are the implementation of international commitments adopted by the European Union under the Treaty of Marrakech passed by WIPO, of which the United States are also party and undoubtedly they influenced the shaping of its content. Another example is the 2001 Copyright Directive, which enacted anti-circumvention laws, just like the Digital Millennium Copyright Act (DMCA) of 1998. This once again shows that American doctrine influences European; at the same time this does not mean that the continent system has blindly adopted all US solutions. This is indicated, for example, by the exclusion of the safeguard clause in art. 6 par. 4, as to when a contract is concluded online means European lawmakers want such contracts to prevail on fair use principles. But embedding fair use and other copyright exceptions in the contractual and technical models of the distribution of digital works might seem perfect yet flexible solutions.[32] It does not change the fact that it will be necessary in the coming years to change the EU's closed list of permitted limitations and exceptions to copyright. Opening up the Directive's closed list to allow other fair uses that promote innovation and cultural development should feature high on the European Commission's legisla-

[30] Joe Mullin, "Remember Righthaven? On appeal, copyright troll looks just as bad," *ArsTechnica* [online], https://arstechnica.com/tech-policy/2013/02/remember-righthaven-on-appeal-copyright-troll-looks-just-as-bad/ [25.04.2019].

[31] Hanna Markiewicz, "Niepełnosprawność w społeczeństwie informacyjnym w świetle dalszej harmonizacji wspólnotowego prawa," *Monitor Prawniczy* 22(1), 2019, p. 49.

[32] Séverine Dusollier, "Fair Use By Design In The European Copyright Directive Of 2001," *Communications Of the ACM* 46(4), 2003, p. 55.

tive agenda for the near future.[33] This is mainly due to the need to adapt the copyright law to the extremely rapid changes that occur as a result of the development of technology and changes that have been caused by the widespread availability of the Internet. However, instead, there have been voices about the destruction of fair use in Europe lately, and this would be due to the introduction of ACTA 2.0. It is hard to say whether this is the effect of introducing this regulation, but both sides present accurate arguments while discussing this Act. Nevertheless, this is a matter which requires a deeper analysis in another text, at this point I just wanted to point out what meaning the fair use doctrine has in the international arena.

6. Conclusions

All of the above illustrates that between freedom of speech and copyright there is still a lot of tension and even the elaboration of a doctrine that could, in theory, soften the conflict between these laws, did not have a satisfying effect. Of course, the doctrine of fair use is not only linked to the freedom of speech, even though it can be linked to its origins. Fair use in the modern world plays an extremely important role. One could cite here the issue of e-library and the case related to the huge corporation that is Google.[34] It is also closely related to public libraries and widely understood access to knowledge. Freedom of speech is still an important element and it definitely still needs protection, but there are often voices that fair use is not necessary for such protection. It is noticed that the courts arguing for fair use do not often reach for the arguments related to free speech.[35] On the other hand some believe that without fair use it would be impossible to exercise freedom of speech, since copyright gains so much value and meaning. "Without fair use, a politician could prohibit the dissemination of a speech, a researcher could prevent critics from quoting her research, an artist could charge a museum for every visitor who views his painting, and a publisher could force a school to pay each time a child read a book."[36] With all this in mind, it must be said that this is an extremely important element of American legislation. Thanks to it, there have been numerous historical judgments of the courts. One should also appreciate the fact that this doctrine was created in 1841 can still be used, despite the fact that the reality surrounding us, has undergone numerous changes. Of course, one could argue that it also shows how not very precise the idea is, but nevertheless, thanks to it, citizens can benefit from the cultural heritage. It benefits researchers,

[33] P. Bernt Hugenholtz, "Fair Use in Europe," *Communications of the ACM* 56(5), p. 28.

[34] *The Authors Guild, Inc. and Others v. Google Inc.*, USDC SDNY 05 Civ 8136 (DC).

[35] Lee W. Lockridge, "The Myth," p. 103.

[36] "Fair Use: Protecting Your Freedom of Speech" [online], https://digitalinfolaw.com/fair-use-protecting-your-freedom-of-speech/ [25.04.2019].

students, libraries, and the public generally. At the same time, in the eyes of the public, one of the most important institutions for them, guaranteed in the First Amendment, is still protected.

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Summary. This paper analyzes how free speech as one of the most freedoms influenced the development of legislation and doctrine by creating Fair Use. The author presents key judgments for the creation of the doctrine and how it found its place in federal law. The judgment which shaped the current factors necessary for fulfillment is also cited. Then the author touches on the position of doctrine in the current world and analyzes how the changes affected its significance. The last part indicates the influence of American doctrine on global legislation, both international organizations such as WIPO or the European Union, but also shows examples of countries that have adopted it in their systems.

Key words: fair use, copyright, freedom of speech

Chapter XIII

CORPORATE SUPERVISION IN THE UNITED STATES: THE ORIGIN, DEFINITION AND ROLE OF INDEPENDENT DIRECTORS

Gaspar Kot

1. Introduction

Within the last several decades, independent directors have become one of the basic elements of modern corporate governance in U.S. public companies. Boards of directors previously manned by "insiders," i.e. corporate employees such as, previous CEOs, other senior officers and long-time outside advisors, that had strong ties to the company, have now been taken over by so called "independent" directors,[1] while the criteria for independence have been set by the regulator.[2] Even though in the 1950s almost half of the board members were company insiders, in 2013, the amount decreased to 15%. What is more, in 2013 the CEO was the only insider in more than 60% of S&P 500 companies.[3] With this, the role of the board of directors has also changed. From an advisory body to the management, it has transformed into a monitoring body with the purpose of supervising corporate officers.[4] The rationale behind this change was to ensure that shareholders' interests were properly taken care of in a corporate structure controlled by the CEO and other senior officers. The aforementioned shift and regulatory reforms were hastened by the corporate scandals of companies such as Enron, Tyco and WorldCom in 2002, and then the financial crisis

[1] Kobi Kastiel, Yaron Nili, "Captured Boards: The Rise Of "Super Directors" And The Case For A Board Suite," *Wisconsin Law Review* 2017(1), 2017, p. 25.

[2] At large, an independent director is one that has no general conflicting interest with the company, whereas an inside/interested director may have a conflict of interest with the firm due to any particular reason. See Roberta S. Karmel, "Is the Independent Director Model Broken?," *Seattle University Law Review* 37(2), 2014, pp. 775-76.

[3] Urska Velikonja, "The Political Economy of Board Independence," *North Carolina Law Review* 92(3), 2014, p. 865.

[4] Jeffrey N. Gordon, "The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices," *Stanford Law Review* 59(6), 2007, pp. 1469-73.

in 2008, which have caused a serious governance crisis in the beginning of the twentieth-first century.[5]

This article discusses the origin, definition and the role of independent directors in U.S. public companies in both federal and state law, with the state of Delaware as the chosen example. Some insight shall be given to most important and most recent regulations and case law concerning independent directors as well as the reasons for the regulator's actions. The article also discusses the positive and negative aspects of the rise of independent directors with respect to corporate governance as well as company performance, pointing out some of the most important critiques of the institution of independent directors.

2. Regulation of Independent Directors in the U.S.

In the U.S., corporate regulations are a matter of state law and each of the 50 states has its own specific companies' act. The states actually compete amongst each other in order to be the place of incorporation for companies and thus benefit from the public levies paid by them. The winner of this beauty contest with the most company registrations, including many of the biggest U.S. companies, is the state of Delaware.[6] Therefore, in this paper, it will be the state of Delaware as a point of reference with respect to state regulation and case law on independent directors. Nonetheless, in order to see the full picture, it cannot be forgotten, that the regulation of independent directors has been greatly (or even mainly) shaped by securities law. Contrary to company law, this area of law generally falls under the federal regime, with the Securities and Exchange Commission (SEC) as the driving force behind most major regulatory changes.[7] Therefore, when analyzing the structure of the board of directors and the role and function of independent directors in public companies, both the federal and the state regime need to be taken into account and shall be discussed below.

2.1. Independent Directors in Delaware State Corporate Law

More than 55% of U.S. publicly traded companies are incorporated in the state of Delaware.[8] What is more, Delaware corporate law is a model law, which is fol-

[5] Yaron Nili, "The "New Insiders": Rethinking Independent Directors' Tenure," *Hastings Law Journal* 68(1), 2017, p. 104.

[6] See Jaap Winter, "The Financial Crisis: Does Good Corporate Governance Matter and How to Achieve it?," *Duisenberd School of Finance Policy Paper* 14, August 2011, p. 4 [online], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972057 [30.11.2018].

[7] Ibid., p. 4.

[8] See Lucian A. Bebchuk, Assaf Hamdani, "Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters," *Yale Law Journal* 112, 2002, p. 568.

lowed by many other states and state courts, mainly due to the corporate law expertise of Delaware judges and in order to prevent further corporate relocations to Delaware. For this reason, any corporate law questions in Delaware, including the ones regarding independent directors, are actually of national importance.[9]

What is interesting, Delaware state, wanting to stay manager friendly (and still the most favored place of incorporation in the U.S.), did not react to the crises of 2002 and 2008 and did not introduce any new law regulation with respect to independent directors in order to resolve the probable causes of the corporate governance problems. Delaware law does not require the appointment of independent directors, stating only that "The certificate of incorporation or bylaws may prescribe other qualifications for directors."[10] However, it gives greater deference to decisions taken by boards comprising of independent directors as different standards of review will be applicable to transactions under the duty of loyalty. With respect to boards of directors having more than 50% of independent directors, the business judgment rule and not the entire fairness standard is applicable for transactions with a conflict of interest involving such a director. Additionally, in case of a conflict with a controlling shareholder, the burden of showing fairness is shifted. Furthermore, courts more often tend to dismiss derivative suits which are brought against boards in majority comprised of independent directors.[11]

Under Delaware law, a director is presumed to be independent. In order to rebut this presumption, shareholders need to demonstrate in a lawsuit reasonable doubt with respect to the status of the director. Board directors will usually lack independence, if they receive a material financial benefit from the company as well as due to personal or business relationships with the management of the company.[12] Consequently, board directors that are also employees or officers of the company, as well as those, that are receiving material financial benefits or compensation in their role as consultants or advisors of the company are not independent.[13]

One of the most important cases that has provided insight with respect to the types of business, personal and nonfamilial relationships that disqualify directors from being viewed and treated as independent is *In re Orchard Enterprises, Inc.*

[9] George W. Dent Jr., "Independence of Directors in Delaware Corporate Law," *University of Louisville Law Review* 54(1), 2016, p. 75.

[10] See Delaware Code Annotated tit. 8, § 141(b), Westlaw, 2018.

[11] See Robin Alexander, "Director Independence and the Impact of Business and Personal Relationships," *Denver University Law Review* 92, 2015, pp. 63-65.

[12] Ibid., p. 66, *citing Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1160 (Del. 1995).

[13] Ibid., p. 66, citing *Rales v. Blasband*, 634 A.2d 927, 937 (Del. 1993), In re Ltd., Inc., No. CIV.A. 17148-NC, 2002 WL 537692 (Del. Ch. Mar. 27, 2002), *California Pub. Employees' Ret. Sys. v. Coulter*, No. CIV.A. 19191, 2002 WL 31888343, at *1 (Del. Ch. Dec. 18, 2002), *Orman v. Cullman*, 794 A.2d 5, 30 (Del. Ch. 2002).

Stockholder Litigation decided by the Court of Chancery of Delaware.[14] Pursuant to this ruling, a director may lose his status of an independent director in case of regular business and personal relationships, involving strong, long-standing ties with the family of the controlling shareholder. Social connections which are not only occasional and infrequent, but regular and long-lasting can cause reasonable doubts with respect to the relationship of the director and the controlling shareholder.[15]

2.2. Regulation of Independent Directors in Federal Law

Contrary to the State of Delaware, the federal government is less favorable to the managers' interests and agenda. The change of the role and functions of the boards of directors of U.S. public companies in the U.S. from an advisory body manned with insiders into a monitoring body, comprised of outside and independent directors was strongly promoted by the SEC. The reason for it was the SEC's view that the board of directors should be independent. Its opinion originated from the theory developed by Adolph Berle in the 1930s.[16] This theory stated that due to the fact that the shareholders of public companies have given up the control in the company and passed it over to corporate managers, the need to put fiduciary duties on corporate boards has emerged, so that the loss of shareholder control is compensated. According to Berle, the corporation is managed for the benefit of the shareholders and thus he supported the shareholder primacy theory.[17]

The two main corporate governance reforms that have shaped the current requirements for independent directors, the board structure and role in public companies are the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley)[18] and Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[19] The first one was the response to the 2001-2002 scandals and the later to the financial crisis in 2007-2008. As a result the SEC has gained authority to model the public companies corporate governance to its liking, mainly by allowing the SEC to impose self-regulatory organizations (stock exchanges like the New York Stock Exchange or NASDAQ) to amend their listing rules to fulfill certain criteria or standards.[20]

[14] In re Orchard Enterprises, Inc. Stockholder Litigation, 88 A.3d 1 (Del. Ch. 2014).

[15] See Robin Alexander, "Director Independence," p. 73.

[16] Roberta S. Karmel, "Is the Independent Director," pp. 775-76.

[17] See Adolph A. Berle Jr., "Corporate Powers As Powers in Trust," *Harvard Law Review* 44(7), 1931, pp. 1049-50; Adolph A. Berle Jr., "For Whom Corporate Managers Are Trustees: A Note," *Harvard Law Review* 45(8), 1932, p. 1365.

[18] Sarbanes–Oxley Act of 2002, PL 107–204, July 30, 2002, 116 Stat 745, codified as amended in various sections of 15 and 18 U.S.C.

[19] Dodd–Frank Wall Street Reform and Consumer Protection Act, PL 111-203, July 21, 2010, 124 Stat 1376.

[20] Sarbanes-Oxley Act § 301, 15 U.S.C. § 78j-l (2002).

With Sarbanes-Oxley, public companies' corporate governance issues were made a matter of federal and not only state law and thus increased the scope of the federal domain blurring the line between state and federal law.[21]

Pursuant to Sarbanes-Oxley Act § 301, 15 U.S.C. § 78j-l, new requirements were set with regards to the independence and functioning of audit committees and so, in order to be considered independent, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee (i) accept any consulting, advisory, or other compensatory fee from the issuer; or (ii) be an affiliated person of the issuer or any subsidiary thereof.

The implementation of the Sarbanes-Oxley reforms did not prevent the financial crisis which happened several years later. SEC's answer to this blemish were the Dodd-Frank reforms setting even more stringent regulation onto the board of directors. As a result now also members of the compensation committees in public companies need to be independent. Additionally, Dodd-Frank clarified the requirements for independent directors. In determining the definition of the term "independence," the national securities exchanges and the national securities associations consider relevant factors, including (i) the source of compensation of a member of the board of directors of an issuer, including any consulting, advisory, or other compensatory fee paid by the issuer to such member of the board of directors; and (ii) whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.[22]

Due to the abovementioned reforms, the New York Stock Exchange as well as NASDAQ listing standards now require that a majority of the board members of public companies are independent of management and furthermore, that the audit, compensation, and even nominating committees are comprise only of independent directors.[23] For example NYSE has adopted a new wording for its § 303A.02 of the New York Stock Exchange Listed Company Manual on the qualification of independent directors. Pursuant to this provision "no director qualifies as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company). Furthermore, directors are not independent pursuant to the Listed Company Manual if they or their immediate family members fall under the list of exclusions such as (i) being an employee of the company, (ii) receiving more than USD 120,000 in direct compensation during any twelve-month period within the last three years, other than directors fees, (iii) operating as a current partner or

[21] Roberta S. Karmel, "Is the Independent Director," pp. 784-85.

[22] 15 U.S.C.A. § 78j-3 (2010), Westlaw, 2018.

[23] Kobi Kastiel, Yaron Nili, "Captured Boards," p. 26.

employee of a firm that is the listed company's internal or external auditor, (iv) serving an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee and (v) acting as an employee of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $1 million, or 2% of such other company's consolidated gross revenues.[24] Similar stock market rules have been also adopted by NASDAQ.[25]

3. The Praise and Criticism of the Independent Directors Regulations

The introduction of independent directors has allowed to address several governance problems, such as the protection of shareholder interests, the allegiance of managers to shareholder objectives (mainly maximization of shareholder value), which are commonly opposite to the interests of the managers or of other stakeholders. Furthermore, it made the public disclosures of the company and as a result the stock prices more reliable, allowing investment decisions to be more rational.[26] What is more, independent directors, as they are disinterested, are assumed to be better suited and equipped than inside directors to effectively monitor corporate officers, detect fraud or the abuse of power and authority.[27] Nonetheless, many commentators dispute the rationale of having boards consisting virtually of only independent directors, pointing out several issues arising from this state of affairs.

As already mentioned, the board of directors has changed its role from an advisory to a monitoring body. However, due to the change of the composition of the board of directors with virtually no insiders sitting on it, an information disproportion between executive officers and independent, non-insider directors has emerged. The lack of information can actually inhibit the independent directors from properly executing their functions as manager supervisors. First of all, independent directors are not involved in the day to day business of the company and their only source of information about the company affairs is either the CEO or other top managers, so the ones that are supposed to be monitored. Because

[24] See rule § 303A.02 of the New York Stock Exchange Listed Company Manual [online], http://wallstreet.cch.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F3&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F [30.11.2018].

[25] See rule 5605 of the Nasdaq Listing Rules [online], http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_1_1&manual=%2Fnasdaq%2Fmain%2Fnasdaq-equityrules%2F [30.11.2018].

[26] Jeffrey N. Gordon, "The Rise of Independent," p. 1469.

[27] Kobi Kastiel, Yaron Nili, "Captured Boards," p. 26.

the CEO or other executive officers decide what information is to be passed over to the board, they can be partial, even if not on purpose, provide information in a manner highlighting data which is beneficial to the management and hide the data that is detrimental, give only a piece of the totally available data or provide it manipulated.[28]

Furthermore, independent directors are most often not sufficiently committed to the company and spend little time in their role, as they sit for other boards or their primary professional occupation is elsewhere. Board meetings are rare and directors do not have the means and possibility to deeply analyze and assess the vast amount of information they are overflooded with.[29]

Lastly, independent directors usually do not know how the company operates and do not have the business specific experience and knowledge and, even if presented with appropriate information, might find it hard to make any use of it. Bearing this in mind, it is not hard to imagine that an independent director will not be very useful and keen to question the CEO's ideas and decisions and properly monitor his actions.[30]

4. Conclusions

Undoubtedly, in the last years the role of the independent directors rose significantly. The SEC sees independent directors as the solution to corporate governance and transparency issues in publicly held companies. The SEC with its new weapon wants to secure the interests of the shareholders, detect fraud, and prevent abuses of authority by the managers. In order to do that, the domain of federal law has been expanded, by setting foot into the field of corporate law, previously reserved to each state's regulators. Multiple new requirements with respect to the composition of the board of directors and various committees have been set with independent directors having a pivotal role in them. Nonetheless, the introduced changes resulting in the almost complete ousting of inside directors has also led to several issues. Independent directors are to monitor managers based on information, which may be biased and have no tools to verify it. Furthermore, the lack of industry specific know-how and the little time independent directors devote for the company affairs, very often does not allow them to have a deep understanding of the company business and thus efficiently and effectively assess and monitor any managerial actions. The need for independent directors

[28] See Robert J. Thomas et al., "How Boards Can Be Better--a Manifesto," *MIT SLOAN Management Review* 50, 2009, p. 72, and Kobi Kastiel, Yaron Nili, "Captured Board," pp. 27-28.

[29] Nicola F. Sharpe, "Informational Autonomy in the Boardroom," *University of Illinois Law Review* 29(4), 2013, pp. 1118-20.

[30] Lisa M. Fairfax, "The Uneasy Case for the Inside Director," *Iowa Law Review* 96(127), 2010, pp. 164-65.

seems obvious, however the current regulation requires reconsidering, as it is lacking means allowing the independent directors to fulfill the role they have been assigned with.

Case Citations

California Pub. Employees' Ret. Sys. v. Coulter, No. CIV.A. 19191, 2002 WL 31888343, at 1 (Del. Ch. Dec. 18, 2002).
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Summary. The aim of this article is to discuss the origin, definition and the role of independent directors in U.S. public companies in both federal and state law, with the state of Delaware as the chosen example. Some insight is given to the most important and most recent regulations advocated by the Securities and Exchange Commission, such as the Sarbanes-Oxley Act and the Dodd-Frank Act, the self-regulatory organizations' listing rules, case law concerning independent directors as well as the reasons for the regulator's actions. The article also discusses the positive and negative aspects of the rise of independent directors with respect to corporate governance, as well as company performance, pointing out some of the most important critiques of the institution of independent directors, arguing that the implemented model of corporate supervision is flawed and needs further reforms.

Key words: independent board directors, corporate governance

This monograph is a unique study in the Polish legal literature that presents such a broad spectrum of questions, ideas, and problems in American law and American jurisprudence. All chapters are based on interesting source materials and highly original research. It needs to be underscored that the book may be addressed to people who are professionally interested in broadly understood American law as well as students, providing them with an invaluable teaching material.

prof. dr hab. Przemysław Dąbrowski
(from the review)

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