

WHAT AMERICAN PEOPLE CAN TELL – FREEDOM OF SPEECH IN UNITED STATES

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Freedom of possessing and expressing own ideas and opinions and their dissemination is one of the fundamental rights, that entitled to each person. In addition to this, the freedom enables searching and getting information. Thanks to it, the right to express your own identity, self-realization and aspiring to truth are guaranteed. It is one of the basic premise and the necessary condition to realize the idea of democracy. In the United States, the cradle of civil rights and modern democracy, the freedom of expression is guaranteed in the First Amendment to American Constitution (Bill of Rights), enacted in 1789 (came into force in 1791). On its virtue, “Congress shall make no law respecting an establishment of (...) the freedom of speech, or of the press (...)”¹ Although the record suggested that this freedom is absolute, (not restricted of any legislation), the later jurisdiction of the US Supreme Court (by case law) isolated categories of utterances that have not been contained by the First Amendment. The essential issues are answers on the following questions: in the name of what values Congress can limit the First Amendment? And where

¹ First text of the Constitution was without *Bill of Rights*. It was added in 1791. *Bill of Rights*.; <http://www.usconstitution.net/const.html#Am1> (31.12.2009).

is the border of freedom of speech? One of the expressions that are not protected by the law is fighting words and hate words. The second are libel and slanders that are understood as a infringement of somebody's rights.²

The issues of these two kinds of expressions are the topic of this article.

Enacting the First Amendment and its extension in the Fourteen Amendment³ guarantees the possibility to express somebody's own opinions (also offensive) for what there is no sanction. One of the forms of expression is *libel*, which is divided into: (1) *insult* (expressing to somebody an unfavorable opinion, gesture or act in public place with the object of his or her humiliation, discredit or destroy his or her reputation); (2) *slander* (humiliating somebody in public by unfair ascription or accusing for things that slandered person has not done). Libel is long-term, cultural and social. The essential issue to penalize these two forms of expression is attendance of the third person (public opinion) and the proof that the author of the opinion was aware in testifying falsehood or telling untrue information without checking its credibility (it concerns both private persons or public figures). Private person has a wider range of protection of law. In spite of this, private person has to prove the author of the libeled opinion that it was untrue and that he (or she) has not preserved so called duty of care when he was checking the information.⁴ The fact is that the author of the libeled statement has full freedom of speech until the victim of the libel has not sued him and not proven that the information was untrue and the author did not check it in a proper way. Moreover, the utterances which aim is *e.g.* to spread the panic or false alarm and to testify falsehood in court are not considered as a manifestation of some-

² Catalogue of the limitation clauses also included: (1) propagating pornography; (2) violating national security. Limitation clauses were borrowed from Polish Constitution art. 31 sec. 3.

³ Fourteen Amendment guarantees that *no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*. It also included the clause of *due process of law* – fair judgment and the right to pleading.

⁴ *Gertz v. Robert Welch, Inc*, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=418&page=323> (31.12.2009). E. Gertz, *Gertz v. Robert Welch, Inc.: The Story of the Landmark Libel Case*, Southern Illinois University Press, Illinois 1992.

body's own views. In the interpretation the First Amendment, the judges of the Supreme Court do not consider it literally but they also take its restrictions into account.⁵

In the United States the range of freedom of speech is very wide. Public figures that were libeled have less protection of the law than the private persons. The consequence of that situation is the possibility to criticize (and even offend) the state, the government, politicians, the nation and the flag. It is because the authors of the First Amendment thought that every person has the right to possess and express its own opinion, also that ones which are critical for the government.

In Poland this order is reverse. Public figures have more protection of the law than private person. The example is the jurisdiction of the Polish Supreme Court: "even if the information announced by journalist is true, his activity can be considered as an illegal because of its demagogic, humiliating person that considered, way of showing."⁶ In Poland public figure⁷ can assert his rights not only by suing in lawsuit (by infringing personal rights) but also by bringing into action the trial (on the basis of art. 216 §2 of the Penal Code).⁸

The idea of freedom of speech is well illustrated by judge Rehnquist: "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense,

⁵ One of the examples is utterance of judge Oliver Wendell Holmes that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The cite comes from the *Schenck v. USA* case (1919). *Schenck v. U.S.*, <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=249&invol=47> (31.12.2009).

⁶ I. Lewandowska, *Informacja niewłaściwie podana*, „Rzeczpospolita”, 28-02-2003 (ed. 2861, p. X1). In the issue of libel and penal liability Polish jurisdiction has to come close to jurisdiction of European Court of Human Rights, especially with the case *Lombardo v. Malta*.

⁷ Polish Criminal Code discerns three categories of public figures and punishes in different way: president (to 3 years), public officer (to 1 year), other persons (including private person, to 1 year). Polish Criminal Code 06.06.1997, <http://isip.sejm.gov.pl/servlet/Search?todo=file&id=WDU19970880553&type=3&name=D19970553Lj.pdf> (31.12.2009).

⁸ *Ibidem*.

that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”⁹

Looking at that interpretation of the First Amendment, burning the national flag (one of the main American symbols) is considered as an expression of one's views. This opinion was pronounced in *Texas v. Johnson*¹⁰ case in 1989. On its basis the Supreme Court acquitted the accused activist of the Revolutionary Party of Communists, Gregory Johnson who in this way wanted to express his negative opinion about Reagan's policy. This act (profanation of the national symbol) was sentenced for one year in jail and the fine of \$2000. Johnson appealed and the case reached the Supreme Court. Judge Brennan delivered the opinion of the Court: “if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹¹

The statement of the Supreme Court in this case is clear: if some of the utterances are offensive but they are not directed to concrete persons (but they concern a group of people), then they are protected by the First Amendment. This interpretation of the freedom of speech gives the opportunity to manifest one's own opinion, even if they are insults or offences for others or

⁹ *Hustler Magazine v. Falwell*,

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=485&invol=46> (31.12.2009).

¹⁰ *Texas v. Johnson*, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=491&invol=397> (31.12.2009). R.J. Goldstein, *Flag Burning and Free Speech: The Case of Texas v. Johnson*, Lawrence, KS: University Press of Kansas.

¹¹ Justifying decision, judge Brennan referred to the case *Street v. New York* from 1966. Afro-American Sidney Street wanted to protest against national policy towards minorities and acting under the emotions, he burned national flag, commenting it *we don't need no damn flag!* Court of first resort punished him, but Supreme Court decided that his words were expression of the freedom of speech (judges spoke only to Street's words not act). Judge John Marshall Harlan II claimed that although Street's utterance was offensive for many, it was protected by the Constitution. *Street v. New York*, http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0394_0576_ZS.html (31.12.2009).

they are in the form of protest against governmental policy.¹² It includes both secular and religion cases. This approach is extremely liberal, because it gives the opportunity of impunity “profane” as well as national symbols and objects of religious worship – also libeled the God.¹³

In analyzing the libeled opinions it is necessary to ask the question about the degree of keeping *duty of care* and the amenability for a person who spreads false information.¹⁴ How can it be proved that the libel or slander destroys somebody’s good opinion and if the measures (in civil case) were sufficient compensation? Is there a need to reach for punitive measures? Answers on these questions can delimit the freedom of speech. The range of libel can be very wide – from making an opinion, through gestures to some behavior (e.g. not shaking hand, turning away from somebody or disregard). What for one is an insult, it can be acceptable for another. American jurisdiction is very liberal for this kind of utterance.¹⁵

The border of the freedom of speech was marked in *New York Times v. Sullivan* case in 1964.¹⁶ L.B. Sullivan, who was a commissioner, felt being libeled by the publication in *New York Times* about the actions against civil

¹² Jurisdiction changed legislation in 48 on 50 states. In the same year brought into effect *Flag Protection Act* whose role was protecting of the flag, especially against profanation, burning or trampling. The law was abolished after the decision in case *United States v. Eichman* in 1990. Eichman burnt flag in protest of the bill that breached the First Amendment. Judge Brennan, author of the opinion of the Court claimed that: “punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering”. *United States v. Eichman*, <http://www.esquilax.com/flag/eichman.html> (31.12.2009).

¹³ Polish legal order forbid libel, damaging national symbols (e.g. flag but also objects of worship) in public places. Polish Criminal Code, art. 137 and art. 138, <http://isip.sejm.gov.pl/servlet/Search?todo=file&id=WDU19970880553&type=3&name=D19970553Lj.pdf> (31.12.2009).

¹⁴ It is so called *chilling effect* or *libel chill*. It is rule agreed in 50’s that depends on “hushing up” journalist’s words or behaviour in a fear of transgression of the law of person or a group (fearing of being accused of libel), It can lead to autocensura. Definition comes from case *Dombrowski v. Pfister*, <http://supreme.justia.com/us/380/479/> (31.12.2009).

¹⁵ Also European Court of Human Rights expressed the opinion about publishing libel information by journalists and their responsibility for it. *Lombardo v. Malta*, <http://vlex.com/vid/case-of-lombardo-and-others-v-malta-27456065>

¹⁶ *Sullivan v. New York Times*, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=376&invol=254> (31.12.2009).

rights protesters, some of them inaccurately, some of which involved the police force of Montgomery in Alabama in 1960.¹⁷ Although in the news there was no information about his surname, he felt responsible for his subordinates and sent a request to newspaper to correct the article. In the opinion of the Sullivan, in the article there was untrue information which libeled him (destroying his good name) as a public officer. The *New York Times* did not publish a correction in response to the demand, so Sullivan sued them. Sullivan won \$500,000 in an Alabama court decision. The *New York Times* appealed in the name of the First and the Fourteen Amendment. In 1964 the case reached the Supreme Court. Judge Brennan, who prepared the opinion of the Court, claimed that the basis to penalize the author of the libeled publication was the necessity to prove that this news was direct to defendant and included false and humiliating information in the eye of public opinion. Additionally it is important to indicate that the person who published libeled news did it with the premeditation because he knew that it was untrue or during checking the information he did it by default (it is called *actual malice*). Because it included a libel of the public figures, Brennan claimed that the defendant had to prove that he had written was true, even if it was critical. This statement of the Supreme Court has made the authors of libeled opinions or publications to take responsibility for their words and acts (the value and the quality of the information could be/have been better). The definition of the libel has protected public figures from lies told or written in *actual malice* and it also has given the possibility to sue every critical and unfavorable information.

The jurisdiction created a general definition of libel public figures and appointed the line of policy for the next decades. Writing his opinion, judge Brennan underlined the aim of the authors of the First Amendment – the freedom of speech and political debate, without the interference of the government. In the famous sentence, describing the idea of the First

¹⁷ Article *Heed Their Rising Voices* describes police actions against protesting Afro-Americans students who demanded exacting their civil rights. According to the authors of the article, policemen were responsible for this situation, because they were shooting to innocent students. The article included a few false information e.g. about numerous arresting of. See: M.L. King. J. Jackson, *Why We Can't Wait*, Copyright Paperback Collection (Library of Congress), Washington 2000.

Amendment, he claimed: “thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁸

However, the definition of *public figures* is quite narrow. The issue that appeared was to describe persons who did not perform public functions but in spite of that they influenced and created public opinion.¹⁹ Among that kind of people was Jerry Falwell, an American evangelical Christian pastor and televangelist. In 1983 erotic magazine, *Hustler*, published information about pastor’s “first time”. It turned out that it was only a parody of an advertisement of alcohol, *Campari*.²⁰ Falwell sued the magazine, with argumentation that publication of his surname and photo in that kind of magazine insulted his good name, libeled him, was an invasion of privacy, and – what was the most important – caused emotional damage. A jury acknowledged that Larry Flint (the publisher of the magazine) intentionally caused a damage, but he did not libel pastor (at the bottom of the advertisement there was information not to take it seriously). In spite of that they awarded Falwell \$150,000 in damages. Flint appealed, invoking the First Amendment. What is more, he considered Falwell a public figure (the person who influenced public opinion) so pastor was less protected by the law.²¹ In 1984 the Supreme Court took the case *Larry Flint v. Jerry Falwell*.²² The author of the opinion of the Court,

¹⁸ *New York Times v. Sullivan*, *op.cit.*

¹⁹ Rule *actual malice* was widened on whole public figures in 1967 in the cases: *Curtis Publishing Co. v. Butts*, http://www.bc.edu/bc_org/avp/cas/comm/free_speech/curtis.html (31.12.2009); *Associated Press v. Walker*, <http://law.jrank.org/pages/12753/Curtis-Publishing-Co-v-Butts.html> (31.12.2009).

²⁰ “First time” was not treated as a sexual experience but as a experience with a drink.

²¹ Flint referred to the definition of libel from the case *New York Times v. Sullivan* (1964). Court of Appeal sustained the decision of the prior court and could not agree with Flint that public figure can be unpunished libelled and offended.

²² E.C. Brewer, *Hustler Magazine, Inc. v. Falwell*, Parker R.A. (ed.). *Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions*, University of Alabama Press, Tuscaloosa 2003.

judge Rehnquist claimed that public figure, without distinction of the fact if it was an public officer or a famous person, had no rights to call for a compensation for emotional damages that were caused by malicious or unfavorable article unless he proved that it included false and libeled information and the author of the opinion was aware that he had published untrue views. The Judge said also that the First Amendment is a fundamental right that each person has. The aim of the freedom of speech is unlimited flow of the opinion and views on public topics. Thanks to guarantees included in the First Amendment, the society has right to independent opinions, without fear that they would be called for criminal responsibility. What is more important, each person has right to criticism that resulted not only from different opinions and views but also from other motives – i.e. basic motives like aversion to second person. The border has to be the truthfulness of the information. Judge Rehnquist confirmed the essence of the freedom of speech in these sentences: “the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”²³ Concerning the main plot of the case, *i.e.* libel of Falwell in Campari’s advertisement, judge claimed that it was extremely difficult to delimit libel, because it was based on “outrageousness in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression, and cannot, consistently with the First Amendment, form a basis for the award of damages for conduct such as that involved here.”²⁴ Rehnquist rejected *false idea* that is the protection in the name of freedom of speech, false opinions and views.²⁵ Referring to that statement the Supreme Court acted in Flint’s favour.

²³ *Larry Flynt v. Jerry Falwell*, http://www.law.cornell.edu/supct/html/historics/USSC_CR_0485_0046_ZS.html (31.12.2009).

²⁴ *Larry Flynt v. Jerry Falwell*, *op.cit.*

²⁵ This idea comes from Thomas Jefferson and was continuing by Olivier Wendell Holmes. Definition comes from the case *Gertz v. Robert Welch, Inc.*, <http://caselaw>.

Resuming the statement of the Supreme Court in the libel's issue, especially including public figures, it is important to pay attention to the following circumstances: these kind of persons have less protection of the law²⁶; published information on their topics are protected by the law, unless they are slanders for things that they have not done and the author of this information gave this information with full awareness that it was untrue.

Public figures have to be aware that he (or she) could be criticised and it not necessary would be nice and cultural. Proving in court own rights could be very difficult (but this person has rights to raise their objections). What the Supreme Court took under full protection of the law were these kind of views which could be unpleasant (*e.g.* caricatures). In this case, what could decide about guilt or its lack are subjective criteria (opinion of other people), which the Court found unacceptable as infringing the idea of freedom of speech.

However, the definition of a libel is not the same in all states. Except for Arizona, Arkansas, Mississippi, Missouri and Tennessee there are other kinds of libel utterances that are understood *per se*. It is not necessary to prove that its character is a libel. It includes: reproaches about trade, business or profession that can cause damages; insults on "impurity" (especially concerning women); insults on diseases (mental, leprosy); accusing of criminal activity.

Reassuming the considerations about libel, it is important to take into account the fact that the Supreme Court interpreted this kind of utterance

lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=418&page=323 (31.12.2009).

E.B. Hindman, *Rights v. Responsibilities. The Supreme Court and the Media*, Greenwood Publishing Group, Westport 1997.

²⁶ Also this decision included information publishing in Internet. Internet-providers are protected by the law against responsibility for information that can be placed on their websites (*e.g.* on popular forums). Judgment included also websites of political parties where could be inserted libelled and falsehood information about competitive parties or popular portals like DontDateHimGirl.com. Very often published opinions are anonymous so it would be very difficult to vindicate own rights. The issue of freedom in Internet are regulated by the *Communications Decency Act* section 230, (1996), <http://www.fcc.gov/Reports/tcom1996.txt> (15.02.2009); *Section 230*, <http://www4.law.cornell.edu/uscode/47/230.html> (31.12.2009).

in an extremely liberal way. Freedom of speech has two sides – an author who wants to manifest his views that could be insulting for others, and the recipient who is insulted has also rights to defend their good opinion and name (but not necessary with compensation).

The second category of utterances include aggressive and fighting words. The featured jurisdictions and the arguments of the judges show that it is still a huge subject of the cases which has caused lot of controversies, especially at our, European point of view. And it is not still forbidden.

“You are a God damned racketeer’ and ‘a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists’ the same being offensive, derisive and annoying words and names.”²⁷

For these words directed to City Marshal, Walter Chaplinsky was arrested and fined. In view of a public prosecutor, he violated state law of New Hampshire which said:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.²⁸

Was it possible in the Unites States, in the country where the freedom of speech is protected by Constitution? Chaplinsky appealed claiming that his rights were encroached (upon the First and Fourteen Amendments). Furthermore, he maintained that public officers were still exposed to verbal attacks and malicious publications, so he treated his utterance as an expression of the freedom of speech. In 1942 the case reached the Supreme Court. Judge Murphy, the author of the opinion, created *two-their theory* for understanding the First Amendment relied on “well-defined

²⁷ *Chaplinsky v. State of New Hampshire*, <http://caselaw.lp.findlaw.com/scripts/get-case.pl?court=US&vol=315&invol=568> (31.12.2009).

²⁸ *Chaplinsky v. State of New Hampshire*, *op.cit.*

and narrowly limited.”²⁹ In this way, the judge explained that although the tenor of the First Amendment suggested that this freedom is absolute (not limited of any legislation), there are some categories of utterances that are not protected by the law. One of them are so called *fighting words*.³⁰ The Supreme Court confirmed that this category of pronouncement is short of ideas and social values. If some utterance is acknowledged as aggressive, it should be fulfilled under the following circumstances: it must be directly addressed to other person or a small group of people; it could cause aggression (towards the author), violence or riots.

Creating the definition of *fighting words* a second category of utterance which was taken out of protection of the First Amendment has been shaped. It is quite narrow because it does not include vulgarisms and the opinions whose aim is to express emotions. These kinds of utterances are fully protected by the law because of a load of emotions that it includes. Also the doctrine of *fighting words* does not contain views and opinions which are uttered in public places but they are not directed to specific people. In this way it was guaranteed that the freedom of speech in almost unlimited, although it is considered unmoral and damned by majority of society.

Accepting in 1942 the doctrine of *fighting words* created the border between the utterances which aim to spread hate (e.g. by propagating Fascist’s and Nazism’s ideologies, calling for aggression) and that which are aggressive because of a load of emotions but they are not directly dangerous to others. Delimitation was extremely difficult because on the one hand, it should be a free space for public debate and, on the other hand, it was necessary to prevent propagating and popularizing the ideas that could cause aggression and lead to hostility – co called *hate speech*. It was necessary to specify this kind of utterance because in that time in

²⁹ H.J. Sullivan, *Civil Rights and Liberties: Provocative Questions and Evolving Answers*, Prentice Hall, New York 2005. Jurisdiction in case *Chaplinsky v. State of New Hampshire*, *op.cit.*

³⁰ So called *hate speech*: it is oral or written utterance that aim is to humiliate, libel, slander or to keep hate to person or group. Polish Association of Legal Education,, *Wybrane zagadnienia*, http://www.psep.pl/pliki/news/obr/wybrane_zagadnienia.pdf (31.12.2009).

Europe “aggressive” ideologies were used by charismatic leaders to explain the necessity of mass extermination of the nations (especially Jews, Gypsies) in the aim of creating a living space (German *Lebensraum*).

In the 1950s the civil rights movement, especially against racial discrimination, had begun. Propagators’ postulates of equality of rights were not always accepted by the rest of the society, especially in the South where they were found as insulting and destroying a fixed public order. There were various attempts to repress manifestations and to block demonstrators who were fighting for rights of Black people in the South. Jurisdiction of the Supreme Court was based on the sentence of the *Terminiello v. Chicago* case (1949).³¹ In this case judges admitted that although the utterances and opinions proclaimed by Arthur Terminiello were racist as well as the results that they could bring (aggression of his listeners), it was still an expression of freedom of speech. The Supreme Court claimed that state law (on the basis of which Terminiello was penalised) was contradictory to the Constitution. Judge Douglas who was an author of the opinion of the Court said that: “the vitality of civil and political institutions in our society depends on free discussion. (...) it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.”³² What is more binding, a political system guarantees a free public debate, especially on the controversial and provocative topics that can cause aggression and anger. The utterance “may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, (...) is nevertheless protected against censorship or punishment, unless shown likely to reduce

³¹ Arthur Terminiello made a racist speech during The Congress of *Cristian Veterans of America*. Police was feared that his speech can cause riots so police officer decided to arrest and fine him \$1000. Terminiello appealed referring to the freedom of speech. *Terminiello v. Chicago*, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=337&page=1> (31.12.2009).

³² *Ibidem*.

a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”³³

This case was a test action. It guaranteed the fighters of the civil rights possibility to manifest their views, which were not infrequently provocative, without fear of being accused of riots or destroying public peace and punished for it. Paradoxically, the freedom of speech that had been guaranteed for racists, a few years later protected the fighters for freedom and civil rights.

On the one hand, cases from 1942 and 1949 gave wide range of freedom of speech but on the other, they could not guarantee a protection of the people whom *fighting words* concerned.

In 1969 a leader of Ku Klux Klan used freedom of speech to manifest his views. He demanded to deport Black people to Africa, Jews to Israel and at the end of his speech he threatened the president, the Congress and the Supreme Court “if they continue to suppress the white, Caucasian race.”³⁴ He was charged in the Court of Common Pleas of Hamilton County for “(...) the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.”³⁵ Brandenburg appealed and the case reached the Supreme Court.

In the opinion of the Court (*per curiam*)³⁶ the decision of the previous courts was illegal and infringed the rights of the First Amendment. The judges claimed that it was not allowed to forbid even this kind of utterances that propagate aggression and violence but they did not cause any

³³ *Ibidem*.

³⁴ *Brandenburg v. Ohio*, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=395&invol=444> (31.12.2009).

³⁵ Ohio’s criminal syndicalism statute, *Brandenburg v. Ohio*, *op.cit.*

³⁶ *Per curiam* (by the Court) means that Court’s decision was a consensus between judges and the aim to create the opinion of the Court, not one of the judge. It is anonymous. *Concurring opinions* and *dissenting opinions* are presented to judicial composition. P.G. Renstrom, *The American law dictionary*, ABC-Clio, University of Michigan, Michigan 1991, p. 278.

direct effects (but only potential ones). It is justified to forbid only this kind of pronouncements that aim to bring out immediate criminal actions and in situations when it is a real possibility to elicit aggression. It is so called "speech brigaded with action"³⁷ and only it could be regarded as a unprotected by the Constitution. Judge Douglas considered that responsibility for acts which are committed under the influence of the denounced words lie on the side of the author of the utterance.³⁸

Jurisdiction in the case *Brandenburg v. Ohio* was quite liberal. It has created a new limiting definition of the "fighting and hate words." Judges admitted that all pronouncements that propagate aggression, violence, racism but do not bring out effects are legal and are protected as an expression of freedom of speech. The basis of this statement was "clear and present danger test." It is not significant if they are unmoral, offensive and condemned by the majority of the society. It is important to emphasize that this opinion was proclaimed in the times of social segregation and discrimination, so it can be considered as a huge act of courage on the Court's part.³⁹

One of the utterances that are protected by the First Amendment are vulgarisms that in the 1971 opinion of the Court could not be forbidden because of their substantial content "that one man's vulgarity is another's lyric."⁴⁰

³⁷ *Ibidem*.

³⁸ David R. Dow and R. Scott Shieldes from University of Houston showed innovative interpretation of the *clear and present danger test*. In their opinion this test is unfinished because it is based on the theory of the casual and consecutive connection and in American society it is variance with freedom of speech (the author of the utterance influenced on audiences' will). First Amendment can be limited only in a basis of three conditions: (1) the aim of author's utterance is causing directly action; (2) directly effect of the utterance is damage; (3) author's intention is to subordinate the listener – he committed crime in the influence of author's words. David R. Dow and R. Scott Shieldes, *Rethinking the Clear and Present Danger Test*, "Indiana Law Journal", autumn 1973.

³⁹ Creating the judgment the Supreme Court referred to the *clear and present dangerous*.

⁴⁰ Paul Cohen was punished by Californian Court for wearing T-shirt with the inscription "Fuck the Draft" in the building in Los Angeles. Court referred to the "California Penal Code" (especially section 415) that forbids "behaviour which has a tendency

In the *Cohen vs. California* case the Supreme Court affirmed that only aggressive utterances that are directed to other person (or a small group) and which can provoke aggression are unprotected by the Constitution. Every other form, including an emotional one, but not directed at specific people is an expression of the freedom of speech. In this way the judges guaranteed freedom of expression not only to intelligent opinions but also to vulgar ones.

A year later, judges affirmed that vulgar words are one of the kind of expressing one's opinion. The Supreme Court reversed the jurisdiction of the State Court of Georgia that penalized a man for riots (he protested against war in Vietnam) and telling a few vulgarisms to the soldier.⁴¹

The range of the freedom of speech in the United States is so wide that it also includes protection of the utterances that propagate totalitarianism, racism and other extremist opinions.⁴² On this interpretation of the First Amendment, the Supreme Court found burning of the cross in front of the house of an Afro-American as a freedom of expression.⁴³ This gesture was racist – in the tradition of the Ku Klux Klan it was the beginning of lynch. The judges claimed that penalizing R.A. V (he was juvenile) by the local court in Minnesota was in conflict with the Constitution.⁴⁴ At the

to provoke others to acts of violence or to in turn disturb the peace." *Cohen v. California*, http://www.bc.edu/bc_org/avp/cas/comm/free_speech/cohen.html (31.12.2009).

⁴¹ *Gooding v. Wilson*, http://www.bc.edu/bc_org/avp/cas/comm/free_speech/gooding.html (31.12.2009). Similar statement was in the case *Lewis v. City of New Orleans*, <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=408&invol=913> (31.12.2009).

⁴² In the case *Collin v. Smith*, Supreme Court affirmed the decision of the prior courts – rules of law that forbidden Neo-Nazi's manifestation in the Jews districts are contrary to Constitution. The case was extremely controversial because Neo-Nazis on purpose chose places where lived Jews that experienced Holocaust. *Collin v. Smith*, <http://supreme.justia.com/us/439/916/case.html> (31.12.2009).

⁴³ *R.A. V. v. City of Saint Paul*, <http://www.enfacto.com/case/U.S./505/377/> (31.12.2009).

⁴⁴ The rule reads as follows: "whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." *R.A. V. v. City of Saint Paul*, *op.cit.* E. Kagan, *The Changing Faces of First Amendment Neutrality: R.A. V. v. St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion*, "The Supreme Court Review" 1992.

same time they emphasised that the boy's behaviour was illegal but the prosecutor, instead of referring to the other law⁴⁵ referred to the doctrine of *fighting and hate speech* (as a form which is illegal). In the opinion of the judges the character of the First Amendment is universal – every person has been guaranteed the right to freedom of speech, also this kind of utterance that expresses aversion and hostility both towards a single person (e.g. a politicians) and the minorities (ethnic, religion, homosexual). As a reasons for the sentence judge Antonin Scalia claimed that “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquess of Queensberry rules.”⁴⁶ On this interpretation of the decision of the Supreme Court, the judges affirmed that it is not possible to forbid the main categories of the utterances (e.g. libel, slander) while at the same time only part of the *fighting words* was allowed, whereas the rest is forbidden by the society and the authority. Referring to the *reason*⁴⁷ courts broke right to freedom of speech, even when the utterance was regarded as an unprotected by the law.

Judges in elaborating a *clear and present danger test* and the definition of the *fighting words* show that they agree to propagate and develop the bad and dangerous ideas that do not necessarily cause direct effects but they can bring indirect consequences (they can create a psychological ground). On the other hand, there is no certainty that forbidding every kind of utterance can prevent any indications of discrimination and hatred towards to minorities. But it can conciliate the group who propagates forbidding this expression.

Compared to Poland, the doctrine of *fighting and hate words* is more limited. According to art. 256 of criminal code “offence is committed by anyone who promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination.”⁴⁸ In Poland any manifesta-

⁴⁵ E. g. about criminal responsibility for threat of violence, attempt of intimidation or damaging property.

⁴⁶ *R.A. V. v. City of Saint Paul*, *op. cit.*

⁴⁷ So called *viewpoint based discrimination*. *R.A. V. v. City of Saint Paul*, *op. cit.*

⁴⁸ *Polish Criminal Code*, 06.06.1997, *op.cit.* Hate and discrimination against religion, race or nation are authorized in many international conventions, e.g. *International Cov-*

tions of totalitarianism and Fascist views is forbidden and condemned by the majority of society and according to art. 257 “offences are committed by anyone who publicly insults a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual (but to sexual minorities).”⁴⁹ The problem of protecting sexual minorities against *fighting words* is still not regulated by the law. In Western Europe (e.g. in Sweden and in Holland) and in Canada it is different. Any kind of persecution and discrimination of gays is penalized.

The freedom of speech is also limited in art. 55 Act of Institute of National Remembrance where it is written that anyone “who publicly and contrary to the facts denies crimes referred to in art. 1, point 1 (the Nazi and communist crimes, other crimes against peace, humanity or war crimes) shall be subject to a fine or the penalty of imprisonment of up to 3 years.”⁵⁰

This rule penalizes any totalitarian and racist utterances and the ones denying facts i.e. Holocaust denial. Similar rules are in force in most of the European countries and conventions. For example, the European Convention on Human Rights in article 17 “provides that no one may use the rights guaranteed by the Convention to seek the abolition or limitation of rights guaranteed in the Convention. This addresses instances where states seek to restrict a human right in the name of another human right, or where individuals rely on a human right to undermine other human rights (for example where an individual issues a death threat).”⁵¹

enant on Civil and Political Rights (ICCPR) – art. 20§ 2, (1966) Convention on the Elimination of All Forms of Racial Discrimination, (1965).

⁴⁹ “Racial discrimination” “shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Convention on the Elimination of All Forms of Racial Discrimination” – art. 4 (1965).

⁵⁰ *Institute of National Remembrance*, http://www.ipn.gov.pl/wai/en/31/327/The_Act_on_the_Institute_of_National_Remembrance.html (31.12.2009).

⁵¹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (31.12.2001).

On the basis of art. 10 and art. 17 the European Human Rights Court has dealt with a few cases that included the questions of freedom of speech and its limitation by doctrine of *fighting words*.

In 2004 in *Norwood v. United Kingdom* case, a right-wing party appealed from the decision of the British court that punished activists of the party for hanging anti-Muslim poster. Representatives of the party referred to the art. 10 of the Convention concerning freedom of speech. Judges stood on position that such attack against a religious group is not in accordance with values which are proclaimed in the European Convention, especially with tolerance and prohibition of discrimination. This act could not be protected in the name of art. 10.

In other case, *Jersild v. Denmark* from 1994, a broadcasting station was punished because of emitting documentary programme about juveniles who propagated racists views so called *Greenjackets*. During the interview “three Greenjackets made abusive and derogatory remarks about immigrants and ethnic groups in Denmark.”⁵² The interviewer was also punished. All of them appealed to the European Court (ECHR) referring to freedom of speech. Judges decided that the author and the station did not breach the law because the character of the programme was documentary and the audience could foresee its form. With regard to *Greenjackets* the Court decided that their opinions were not protected by the art. 10 of European Convention.⁵³

General statement on the *fighting and hate words* the Court came from *Gunduz v. Turkey* case from 2003. The judges claimed that human dignity and respect are the fundamentals of the democratic society. Referring to these values “there could be no doubt that expressions that sought to propagate, incite or justify hatred based on intolerance, including religious intolerance, did not enjoy the protection of Article 10 the Convention. However, in the Court’s view, merely defending the shariah, without calling for the use of violence to establish it, could not be regarded as ‘hate

⁵² *Jersild vs. Denmark*, <http://www.mediator.online.bg/eng/jersild1.htm> (31.12.2009).

⁵³ *Jersild v. Dania*, *op.cit.*

speech'. In view of the context, the Court found that it had not been convincingly established that the restriction was necessary."⁵⁴

The basis of the jurisdiction was the analysis of the context, essence and aim of the *hate speech*.

Looking at presented cases it could be seen that the range of freedom of speech in Poland and in Europe is not as wide as in United States. All utterances propagating Nazism, communism and Holocaust denial are unacceptable and forbidden. Also anti-Semitic opinions are forbidden.⁵⁵ It is insignificant that there is no cause-consequence relationship. All utterances that are *fighting words*, *hate speech*, propagating racism, discrimination are penalized. It does not matter that there is no connection between reason and result. The cause of that thinking is historical experience, related to World War II and war in Yugoslavia (genocide, totalitarianism, crimes committed in the name of ideology). On the other hand, the American history is full of racism occurrences. But it is easy to see that American people do not have such complexes against discrimination and persecution like the Europeans.

The role of the European Courts is checking if there is any abuse of law and if there is necessity to refer to the limitation clause. First of all, European judges take human dignity into consideration and the main rules that they consider are the rules of usefulness and proportionality. Analyzing American cases and jurisdictions in which propagators of Nazism, Fascism and hate speech have won, one can have an impression that the aim and proportion have been lost somehow. The human dignity loses in the confrontation with the freedom of speech.

⁵⁴ *Gunduz v. Turkey*, <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/1d4d0dd240bfee7ec12568490035df05/3afe92916187310741256e1c0046b835?OpenDocument> (31.12.2009).

⁵⁵ In the case *Faurisson v France* (1986), United Nations Human Rights Committee claimed that the utterance of French scientist in which he denied of Holocaust was Anti-Semitic and was unprotected by the international conventions. The Members of the Committee decided that the Israeli nation should be treated with compliments and life without fear. *Faurisson v France*, <http://www.humanrights.is/the-human-rights-rproject/humanrightscasesandmaterials/cases/internationalcases/humanrightscommittee/nr/267> (31.12.2009).

Although the character of freedom of speech in the First Amendment sounds as absolute, it has been limited very fast in the course of history. As a result of social and religion changes, the Supreme Court had to decide in key issues, creating the catalogue of utterances not protected by the First Amendment. A formation of the limitation clauses was not a result of legal rules but came out of specific domestic situation that influenced directly or indirectly the society and forced to take some restrictions. It is important to emphasise that in creating one of the limitation clauses, judges had to many times undermine the decisions of the lower courts or had to revise earlier decisions of the Supreme Court. This process is evolutionary and it can happen that valid statement of the Supreme Court would be changed.

Although the freedom of speech was limited, the main idea of the authors of the First Amendment was not infringed, e.g. right to free public debate, right to criticize the government. That is why the Supreme Court emphasized that the rights of public figures are smaller than private people.

Reassuring considerations of the First Amendment and the limitation clauses it is important to show the fact that the American freedom of speech is still wide. The proofs are tests and definitions that describe what is still treated as a freedom of expression and what is regarded as a illegal. In this way judges created the border for the views that are protected by the Constitution and that which are not.