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Conservative Crime Control v. Liberal Due Process and Presidential Elections

Introduction

Delivering the majority opinion in the famous separation-of-powers case *United States v. Nixon*, Chief Justice Warren Burger made reference to one of the core principles of a constitutional state: "The twofold aim [of criminal justice] is that guilt shall not escape nor innocence suffer" (418 U.S. 683, 710 [1974]). A careful analysis of the history of the judicial attitude towards criminal procedure in the United States leads to a similar conclusion, that there has been a twofold way to achieve this aim: a crime-control model (CCM), or a due-process model (DPM). The main difference between the two approaches is visible in the contradictory role of the law enforcement agencies, with the conservative CCM arguing for broader powers of the police, and the liberal DPM emphasizing the necessity of protecting the fundamental rights of criminal defendants.

Criminal justice has never been the most crucial issue of presidential elections in the United States, at least directly. Analysis of the problems raised by various political campaigns that have shaped U.S. history proves, that, apart from economic issues and challenges to foreign relations, the candidates for the chief executive post have indirectly referred to social issues, including criminal justice policy (Boller 2004). Public opinion polls on the most important social problems in America in the past half century make it obvious that crime has always been one of the major dangers and concerns (www.fbi.gov). On the one hand, the United States is considered a punitive state, but, on the other, punishment practices vary from state to state (Frost 2006:

vii). Therefore, it is difficult to derive general conclusions about the character of the criminal justice system without analyzing the laws and judicial decisions of all state jurisdictions. However, it is worth analyzing the directions of the criminal justice policy shaped by the federal government in order to assess whether judicial decisions concerning the criminal justice system have had an impact on presidential campaigns, or, in other words, if there has been a repetitive, ideological factor of particular constitutional precedents on criminal issues connected with candidates' political backgrounds. The results of the analysis would lead to another, more important question: how was the problem of crime control dealt with during the 2012 presidential election, and was it possible to predict possible the future of criminal justice policies based on the outcomes of the election?

There is no doubt that the main constitutional principles of criminal law were shaped by the U.S. Supreme Court, the "national policy-maker" (Dahl 1957), and a "counter majoritarian" institution (Bickel 1962), which has historically played a different role in the process of constitutional adjudication over criminal issues, confirming broad powers of the police, or protecting the rights of defendants in criminal trials. It is possible to notice the highly ideological attitude of particular Justices towards the powers of law enforcement agencies and the scope of defendants' rights: while conservatives have supported the more "get-tough approach" (Beckett, Sasson 2004: 161), liberals have promoted the procedural due process rights of criminal suspects and defendants. Of course, as Lippman argues, the use of "liberal" and "conservative" labels to describe Supreme Court Justices may not be fully accurate in every instance, as their approach to *stare decisis*, the role of the Court, or proper ways of interpretation may vary from case-to-case (Lippman 2010: 14). However, an analysis of their voting behavior and the substance of their opinions reveals their general approach towards constitutional criminal law.

The Supreme Court is a highly political institution (Baum 2009; Hodder-Williams 1980; MacKeever 1997) deciding numerous cases on the basis of either a legal or extra-legal approach (Segal, Spaeth, Benesh 2005), and the ideology of the Justices is one of the most crucial aspects of their decision-making process (Laidler 2011). Therefore, it is worth analyzing whether there exists any direct impact of Justices' ideology on the creation of the most important principles of constitutional criminal law, and which of the two main models of criminal justice, crime-control or due-process, prevails in the 21st-century Supreme Court's adjudication. The analysis should also refer to the attitude of particular presidents towards the problem of crime and crime-related issues. The results of the research may help to understand the attitude of Barack Obama and Mitt Romney towards the interpretation of constitutional criminal justice during the 2012 presidential campaign. Despite the

fact that criminal justice had not been at the center of the political fight between the Democratic incumbent and Republican candidate, it had a significant influence on the ideological background of their programs, and, as the author argues, could be decisive for many conservative and liberal constituents. Furthermore, it definitely reveals the future policies of both candidates towards constitutional issues.

Warren court revolution

It was only in the 1920s when the Supreme Court agreed to protect some of the criminal due process rights of defendants in state courts, and as of 1937 the Justices slowly began to acknowledge broader scope of the rights of the accused in criminal procedure (Dale 2011: 97-135). Before the above mentioned period, the whole catalog of the rights of criminal defendants written in the Fourth, Fifth, Sixth, and Eighth Amendments applied directly to the federal government, along with all other Bill of Rights' guarantees (*Brown v. Baltimore*, 32 U.S. 243, [1833]). It actually meant significant limitation of many fundamental ideas connected with a fair trial, such as the right to counsel, right to trial by jury, privilege against self-incrimination, and protection against unreasonable searches and seizures, which theoretically confirmed the existence of the crime-control model. But the real evidence of an active CCM policy could be observed in actions undertaken by the federal government, especially in the first half of the 20th century. This was connected with certain laws implemented during "extraordinary" moments of U.S. history, such as WWI, WWII and the two Red-Scare periods (1920s and 1950s), when the notion of public safety and national security became the main argument for the Supreme Court to uphold tough regulations against criminals (Tomlins 2005; Dudziak 2000).

Obviously, the enactment of the Fourteenth Amendment in 1868, followed by the interpretation of its due process of law clause by the Supreme Court, since the 1920s and 1930s, began a new era in constitutional adjudication, known as the selective incorporation doctrine. The Justices applied a case-by-case analysis of certain guarantees of the Bill of Rights and decided that state governments were bound by them, whenever they were "essential to a fundamental scheme of ordered liberty" (Justice Cardozo concurrence in *Palko v. Connecticut*, 302 U.S. 319, 1937). However, it was the 1960s and the Warren Court era when the incorporation process embraced the rights of criminal defendants, initiating a liberal approach towards criminal justice policy in the Court, often called the due-process model. As a result, states became sub-

ject to the majority of limitations emerging from the Fourth, Fifth, Sixth, and Eighth Amendments, such as protection against unreasonable searches and seizures, privilege against self-incrimination, right to counsel in all criminal cases, right to trial by jury, and protection against double jeopardy.

There is no doubt that the liberal revolution of the 1960s, which could be observed in a change in judicial approach towards constitutional criminal law, resulted from Supreme Court appointments made by the Democratic presidents, Franklin D. Roosevelt and Harry Truman, who chose liberal Justices, as well as appointments made by Republican Dwight Eisenhower, whose two appointees proved to pursue a more liberal approach than expected. Chief Justice Earl Warren and Associate Justice William Brennan, decided to interpret the constitutional rights of criminal defendants very broadly, which was especially visible in their opinions in *Mapp v. Ohio* and *Miranda v. Arizona*. In the first case, the Court created an 'exclusionary rule' which determined that evidence obtained without a legally approved search warrant had to be excluded from the court procedure (367 U.S. 643 [1961]). A similar effect was brought about by the Court's decision in *Miranda* wherein Justices produced the so-called Miranda warnings. These were constitutional safeguards for suspects and defendants, such as the right to counsel or right to remain silent, which had to be officially presented to them by the police before interrogation (384 U.S. 436 [1966]).

Commenting on Warren's and Brennan's performance, Stuntz argues that if "any of these two surprising votes turned less surprising, the Court might have … [been] tough on criminal defendants" (Stuntz 2011: 243). But both Republican-appointed Justices focused on limiting the power of government in order to protect the rights of defendants, with the Chief Justice's approach visible in his words, that "the prosecutor under our system is not paid to convict people [but to] protect the rights of people" (Patrick 2003: 158). As a result, the DPM began to prevail over the CCM, as the Supreme Court gave a sign that it would not approve of any formal errors made by the police or prosecution, thus protecting the rights of individuals. Such a change in constitutional adjudication led to an active political campaign of conservative presidents to overrule some of the liberal case-law with *Mapp* and *Miranda* as the main threats to the criminal justice system. This could be observed, on the one hand, in Richard Nixon's campaign of 1968, when he argued that some of the judicial decisions had "gone too far in weakening the peace forces as against criminal forces in the country" (Chemerinsky 2010a: 153), as well as Ronald Reagan's presidency, when he introduced over twenty bills referring to CCM, declaring that "government function is to protect society from the criminal, not the other way round" (Beckett, Sasson 2004: 58). On the other hand, the conservative Justices in the Court made efforts to limit

the consequences of the liberal revolution of the 1960s, only partly succeeding, as the main principles of *Mapp* and *Miranda* remained untouched. Nevertheless, the Court ruled, in *Harris v. New York* (401 U.S. 222 [1971]) that inadmissible evidence against the accused in the prosecution's case does not have to be prohibited from use in the trial. In *Strickland v. Washington* (466 U.S. 668 [1984]), the Court ruled that the ineffective assistance of counsel required demonstration of the high deficiency of a lawyer's performance, and in *Herrera v. Collins* (506 U.S. 390 [1993]), it ruled that a claim of actual innocence was not a ground for federal *habeas corpus* relief. All of these decisions only partially eroded the main principles of the DPL, and the United States entered the 21st century with a vast array of precedents defending the constitutional rights of defendants.

Before analyzing the current scope of the constitutional criminal procedure, one must acknowledge two important issues. Firstly, the fact that the Supreme Court's docket has diminished in the 21st century, is mainly visible in the area of criminal justice (Chemerinsky 2010b). Lesser criminal cases in the Court may result from a change in the area of interest of constitutional law (to affirmative action, LGBT rights or immigration issues), but there have also been some significant criminal procedure decisions undertaken by the Justices in the last decade, which are worth analyzing. Secondly, in the 1990s, the crime rate dropped by about 35% throughout the United States, and the process is still ongoing (www.fbi.gov). According to Zimring (2007: 197), the decline in crime was a result of multiple factors, one of which played a leading role in the process. From this perspective one could derive the opinion that the attitude of Supreme Court Justices also did not have any direct impact on the process of decreasing the crime rate. Still, despite this, or because of it, liberals and conservatives in the Court continued to pursue an ideological battle in the 21st century over the proper scope of the constitutional rights of defendants. And such an ideological battle was the backdrop to the political campaigns of future presidential candidates.

After 9/11: CCM or DPM?

There is no doubt that the tragic events of 9/11 must have had an impact on U.S. policy towards criminal justice, especially from the perspective of the status of terrorist suspects. The system of surveillance has dramatically increased (Surette 2011: 167) since the Bush administration initiated, and Congress implemented, the *U.S.A. Patriot Act*, which became a significant step of the proponents of CCM in their mission to limit the constitutional

rights of defendants in federal trials (Pub.L. 107-56 [2001]). However, the Supreme Court did not use its power of judicial review to directly confront the controversial provisions of the *Patriot Act* with the constitution. As a matter of fact, Justices decided to only review cases which referred to the constitutional status of terrorist suspects held in Guantanamo Bay (*Rasul v. Bush* 542 U.S. 466 [2004], *Hamdan v. Rumsfeld* 548 U.S. 557 [2006], *Boumediene v. Bush* 553 U.S. 723 [2008]), where they focused on issues of military and civil courts' jurisdiction, not referring to the broader implications of federal criminal procedure. One of the main reasons for the Courts' restraint in reviewing the constitutionality of antiterrorism measures was the "hydra-headed invocation of secrecy", and the fact that it was impossible to acknowledge, "how many cases have been thoroughly buried in the name of national security" (Herman 2011: 199).

Apart from a narrow discussion on the constitutionality of anti-terrorist measures in the Supreme Court, the Justices agreed to adjudicate in some other issues regarding constitutional criminal law, where they supported a CCM approach. For example, in *Ewing v. California*, a case which reviewed the constitutionality of the famous "three strikes and you are out" law, a 5-4 ruling signed by the conservative Justices, found the California law constitutional. Liberal Justices dissented suggesting the necessity of applying the proportionality principle, referring to protection against the cruel and unusual punishments of the Eighth Amendment (538 U.S. 11 [2003]). Two years later, in *Muehler v. Mena*, the Court modified the rules governing search and seizure procedures, holding, that the Fourth Amendment allowed the detention of a handcuffed suspect while a search was being conducted, and that police officers were allowed not to use the "reasonable suspicion" argument in order to question a suspect about his immigration status (544 U.S. 93 [2005]).

One of the most important CCM decisions was made in *Hudson v. Michigan*, where five conservative Justices outvoted four liberals, stating that the knock-and-announce requirement of the Fourth Amendment did not require suppression of the evidence obtained in the conducted search (547 U.S. 586 [2006]). The decision was the first, but not the last step of the new Roberts Court on the road to overruling the *Mapp* precedent. A similar effort was made by the Court in *Herring v. United States*, when the Justices, consistent with their ideology, voted to broaden the "good-faith exception" to the exclusionary rule. According to the conservative majority, the exception applied when a policeman made an arrest in another jurisdiction, and the warrant proved erroneous, but the error was the fault of the other institution (555 U.S. 135 [2009]).

Meanwhile, proponents of the DPM believed that the Roberts Court could properly review the constitutionality of the lethal injection used to execute

criminals in Kentucky (and many other states), appealing to the highest judicial instance in *Baze v. Rees*. However, only two liberal Justices (Ruth Bader Ginsburg and Stephen Breyer) found the execution procedure unconstitutional, with the majority upholding injection as a proper means of death penalty execution (553 U.S. 35 [2008]). Once again, the CCM prevailed, showing that the Roberts Court would not be likely to liberalize its approach towards the Eighth Amendment's cruel and unusual punishment clause. The last significant case in which the Court applied the CCM was *Berghuis v. Thompkins*, confronting the scope of the right to remain silent, which was formulated in the controversial *Miranda* decision. The conservative majority was of the opinion, that if a suspect did not explicitly waive the right to remain silent, his voluntary statements could be used in a court as evidence (130 S.Ct. 2250 [2010]). There has been significant criticism of the *Thompkins* holding from commentators, who claim that it was a step backwards in the process of protection of suspects' rights (Vander Giessen 2011), arguing that the Court set a "new stage of interrogation" (Morris 2012: 271), and "undermined the original purpose of the Miranda warnings" (Mills 2011: 1195).

One should also include two important Second Amendment decisions of the Court, *District of Columbia v. Heller* (554 U.S. 570 [2008]) and *McDonald v. Chicago* (561 U.S. 3025 [2010]) in the group of highly conservative precedents which refer to the area of criminal law, though it is difficult to apply the principle of the individual right to bear arms to the crime-control or due-process model, as there is an ambiguous relationship between gun control and crime rates. However, both cases fall in the category of clear CCM decisions, supported by conservative Justices and conservative candidates to the White House. The issue of gun control, not directly addressed in either case, has created a major division between Republican and Democrat politicians.

An analysis of the last decade of the Supreme Court's adjudication concerning criminal procedure reveals surprising outcomes for all of the opponents of the liberal approach towards constitutional rights of suspects and defendants. Apart from a few crucial conservative decisions, the Court proved to be a strong follower of some of the principles shared by the supporters of DPM. At the beginning, the Court adjudicated in two important death penalty cases, in which it reviewed the constitutionality of the execution of mentally disabled people and minors. In 2002, in *Atkins v. Virginia*, the Justices admitted that the death penalty for the mentally disabled was a cruel and unusual punishment under the Eighth Amendment, thus liberalizing the judicial approach towards capital punishment (536 U.S. 304 [2002]). Three years later in *Roper v. Simmons*, the Court found unconstitutional the execution of people under the age of 18 who had committed crimes, referring strongly to the practices of particular states, as well as the international community

(543 U.S. 551 [2005]). Another DPM decision made in the 21st century by the Rehnquist Court was *Alabama v. Shelton*, in which liberal Justices determined, that in order to impose a suspended prison sentence, the defendant must be provided legal counsel. The majority decided to broaden the scope of the right to counsel, arguing that the presence of an attorney was important, as the "suspended sentence [was] a prison term imposed for the offense of conviction" (535 U.S. 654 [2002]).

The Roberts Court is also known for at least three liberal decisions concerning the status of immigrants from the perspective of criminal law and procedure. In *Dada v. Mukasey*, liberal Justices declared that complying with a deportation order did not strip an immigrant of the right to lodge an appeal against it (554 U.S. 1 [2008]). Two years later, in *Padilla v. Kentucky*, three conservative Justices backed the liberals and ruled that criminal defense attorneys must advise non-citizen clients that a guilty plea could have an effect on their deportation. Therefore the Court declared that legal counsel should not remain silent on the issue of possible deportation of their immigrant client (559 U.S. 356 [2010]). The last decision concerning the criminal rights of immigrants was *Arizona v. United States*, as the Court struck down some of the sections of Arizona law which required legal immigrants to carry registration documents at all times, allowed the police to arrest people suspected of being illegal immigrants, and criminalized the act of an illegal immigrant searching for a job (567 U.S. 11-182 [2012]).

Among all liberal decisions of the Roberts Court, there is one which unequivocally falls into the category of DPM. In 2011, in *Brown v. Plata*, the Justices confronted the constitutionality of a decision by the U.S. District Court for the Eastern and Northern Districts of California which had ordered the state to reduce its prison population (of more than 40,000 prisoners). In the majority opinion signed by all liberal Justices the Court affirmed that the population limit was necessary to satisfy prisoners' due process of law and the Eighth Amendment's protection against cruel and unusual punishments. The surprising ruling of the Court was dissented by four conservative Justices, with Justice Scalia naming it "the most radical injunction issued by a court in … the Nation's history" (563 U.S. 09-1233 [2011]).

Results of the analysis

The dramatic expansion of the U.S. penal system is primarily a consequence of the politicization of crime-related issues (Beckett, Sasson 2004: 161). Such politicization is more than visible in the Supreme Court, whose politically-

appointed members are responsible for reshaping the policies guiding the criminal justice system. Actions undertaken by the federal government, as well as many policies of particular states reveal a tendency to broaden the scope of powers of the law enforcement agencies, but it does not directly apply to the Court's adjudication. The significant drop in the number of violent crimes, and the rise of the American imprisonment rate, accompanied by the highest-ever threat of terrorist crimes, explain the political and social need for tough criminal laws and effective criminal procedures. At the same time, people enjoy more individual rights and freedoms than ever, and especially in the area of criminal justice, they would hesitate to relinquish them.

An analysis of the 21st century Supreme Court's constitutional interpretation regarding the criminal justice system leads to some observations:

Firstly, there is no dominant model guiding the current politics of crime and justice in the Supreme Court, as there have been both CCM and DPM approaches presented in its rulings. On the one hand, there has been a tendency to increase the powers of law enforcement agencies, especially after 9/11, which could be observed in the decisions of *Hudson*, *Henderson*, and *Thompkins*, but also in the lack of review of the constitutionality of anti-terrorist laws. On the other hand, there have been cases such as *Atkins*, *Roper*, and *Plata* which have broadened the scope of certain procedural rights of defendants by referring to their due process of law guarantees.

Secondly, ideology has played a decisive role in the final outcome of the Court's adjudication in criminal justice case-law. Obviously, liberal Justices have supported the due-process model, ruling in favor of the rights of criminal suspects and defendants by imposing a broad interpretation of the Fourth, Sixth and Eighth Amendments. In contrast, *most* conservative Justices have proven to be proponents of the crime-control model, arguing for the necessity of narrowing the 1960s' holdings of the Warren Court (*Mapp*, *Miranda*). There is no surprise that Scalia and Thomas have been the leading voices of CCM.

Thirdly, the lack of unity among conservatives results from the not-fully-successful judicial appointment process of Ronald Reagan, whose two appointees proved more liberal than the president had expected (Schwartz 1988). It was O'Connor, and mainly Kennedy, whose voting record in criminal cases turned out to be centrist, and even liberal. Kennedy, who may be called 'the weakest link' of Reagan's Supreme Court crusade of the 1980s, has supported more liberal opinions than any other Republican-appointed Justice since John Paul Stevens, who was the backbone of liberalism in the Rehnquist Court, and Earl Warren, the leader of the DPM revolution. Therefore, one can come to the conclusion that similar reasons ("wrong" Supreme Court nominations) caused the success of the liberal revolution of the 1960s and the failure of conservative revolution of the late 20th century. Paraphras-

ing Stuntz (2011: 243), if Justice Kennedy had not turned so surprisingly, the contemporary Court would be more tough on criminal defendants. As Dudziak rightly observes, the "Supreme Court appointments moved the Court to the right, but the lack of common jurisprudence hampered the consolidation of a new conservative constitutional vision" (Dudziak 2010: 39-40). The contemporary Court is not clearly a conservative one, as many argue (Chemerinsky 2010a), but it is centrist, constructed upon a scheme of 4 + 4 + 1. It is all about Justice Kennedy's approach towards criminal justice then, or about the future Supreme Court appointments made by the new/old president.

Views of Obama and Romney

As was mentioned before, criminal justice issues have not been the most significant topic during the presidential campaigns. However, especially since the Warren Court revolution which reshaped the constitutional meaning of criminal procedure in the 1960s, the problem of CCM and DPM has become one of the problems which presidential candidates have had to address. Not surprisingly, it has been conservative politicians who have raised these issues more often, with Richard Nixon and Ronald Reagan at the top of the list. Even if Nixon's reference to criminal justice during his 1972 campaign seemed indirect, it was Reagan who drew attention to the problem. By commenting on the proper role of the federal courts and judges, he stated that America needed strong judges who would "aggressively use their authority to protect families, communities and way of life", and who would "understand that punishing wrong-doers is the way of protecting the innocent", as well as judges who would "not hesitate to put criminals where they belong, behind bars" (*New York Times*, A32). As a devoted CCM follower, Reagan nominated candidates to the Supreme Court whose social and political views were similar, or even more conservative than the American public would accept. One of the reasons for Robert Bork's rejection by the Senate was his ultra-conservative approach towards the interpretation of the Fourth, Fifth, and Sixth Amendments. Reagan's political enemies, followers of the DPM model, deemed the nomination disastrous, as it would lead to situations when "rogue police could break down citizens' doors in midnight raids" (Watson, Stookey 1995: 1), thus influencing Bork's final rejection.

Such a strong approach towards the meaning of constitutional provisions including the scope of criminal procedure guarantees forced the next presidential candidates to have a clear stance on the issues. For example, in the 1988 presidential campaign, George H.W. Bush labeled Democratic candi-

date Michael Dukakis as "soft on crime" (Berman 2012), thus confirming the support of Republicans for the principles of the crime-control model. Although the economy played the decisive role in the next three presidential campaigns (1992, 1996, 2000), the problem of crime was raised mainly by the opponents of incumbents. After the 9/11 events and the outbreak of the war on terror, the focus of the constituents turned towards the issues of foreign policy and national security, and the CCM approach presented in the 2004 campaign by George W. Bush (slightly) prevailed over the more moderate DPM of John Kerry. Four years later, the economic crisis determined the campaign between John McCain and Barack Obama, as politics of crime and justice were not the main interest of American society. Since that moment, however, it has been easier to analyze Obama's attitude towards constitutional aspects of criminal law.

Despite a more moderate attitude towards the death penalty and terrorist crimes, Barack Obama is a clear representative of the DPM, aiming at guarding the rights of individuals against encroachments of law enforcement agencies. In several speeches during the 2008 presidential campaign he presented his views on the criminal justice system, confirming the necessity of enhancing the rehabilitation system, reducing recidivism by providing ex-offenders support, restoring voting rights for ex-offenders, protecting police detainees during interrogation, restricting police entry rules, and applying the death penalty only in the case of mass-murder, rape and murder of a child (www.ontheissues.com). On the other hand, Obama opted for tougher penalties for violent crimes, and, after becoming president, his administration supported the *Berghuis* decision, which was criticized by the liberal electorate. This approach, characteristic for CCM, resulted from the general direction of the U.S. policy towards terrorism. It could also be observed when Attorney General Eric Holder called for legislation to expand the "public safety" exception to Miranda, which allowed the police to question somebody without warning, in order to stop immediate threats of crime (Yoo 2010). Obama's DPM approach also resulted from his statements concerning actions undertaken historically by law enforcement agencies against African-Americans and Latinos, who, in his opinion, were stopped disproportionately to other ethnic groups (www.whitehouse.gov).

In the 2012 campaign it was the economy that played, once again, the most significant role, as American society was deeply concerned about the aftermath of the 2008 crisis. The state of the U.S. economy, despite showing slow signs of recovery, was endangered by a possible recession which would lead to an increase in the unemployment rate, as the rate was still very high in October 2012 (about 8% according to data form the U.S. Bureau of Labor Statistics). It was obvious that such problems as jobs, financial stability,

consumer protection, and the role of the state in pursuing economic programs would become of major interest to voters (Laidler 2012: 114), instead of problems of health care or immigration highlighted for the public by the Supreme Court a few months earlier.[1] According to some analysts, underestimation of the problems of the criminal justice system by the candidates to the White House was a mistake, as these problems had huge consequences for the labor force due to the costs of the system increasing every year (Chettiar 2012). The United States of America had the highest per-capita prison population in the world. Thus addressing such issues by revealing candidates' attitudes towards CCM or DPM would count from an economic and social perspective.

Obama did not focus on politics of criminal justice during the 2012 campaign, but one of the reasons for this could be an issue convergence raised by Damore. As he observed, Democrats often address these issues by "highlighting investments in education or health training", whereas Republicans talk about the problem of crime reduction more directly (Damore 2005: 90). Surprisingly, his opponent, Mitt Romney, also did not provide clear statements on the issues. According to *The Economist*, despite the fact that Romney's campaign was almost silent on criminal justice issues, "he seemed to be a standard law-and-order candidate", who "was the first governor in modern Massachusetts to deny every request for pardon or commutation" (*The Economist*, 2012). In reality, from indirect statements presented during the campaign and from the essence of his program, one could derive the real approach of the Republican candidate towards criminal justice. Romney was not so devoted to the necessity of a conservative revolution in the Supreme Court which would change the attitude of the tribunal towards criminal procedure. He "believed in the rule of law", and aimed at appointing "wise, experienced, and restrained judges who will take seriously their oath to discharge their duties impartially in accordance with the Constitution and laws", putting their own personal policies aside. However, as president, he would appoint judges having a similar constitutional approach to the conservative block serving in the Court (www.mittromney.com). Furthermore, Romney presented himself as a supporter of the death penalty (*Ibid.*). It is clear that the Republican candidate's attitude towards issues connected to criminal law and procedure are closer to the CCM than DPM. Even if Romney underlined his reluctance to appoint "active judges", he would still follow the pattern of his predecessors in nominating clearly conservative Justices to the Supreme Court. An analysis of Scalia's, Thomas's, Roberts's, and Alito's approaches towards the rights

[1] The decisions were made in cases: *NFIB v. Sebelius* 567 U.S. 11-393 [2012], *Arizona v. United States* 567 U.S. 09-1233 [2012].

of criminal defendants leads to the certain conviction, that Republican-appointed Justices fall into the category of CCM followers. No matter if they are called activists or restrained judges, they still serve predictably for the conservative ideology in the Court (Laidler 2011: 330-332).

The future

Referring to the lack of significant changes in the criminal justice system, Berman noted, that "President Romney could be more likely than President Obama to make real and long-term reforms to American criminal justice" (Berman 2012). Such a statement could be true provided that the Republican candidate won the elections and had an opportunity to change the membership of the Supreme Court. The vacancies likely to occur during the next four years could be the posts held by two purely liberal Justices, Ruth Bader Ginsburg and David Souter, both strong proponents of the DPM model. If President Romney had nominated conservative Justices for these seats, he would have definitely changed the current ideological structure of the Court securing the dominance of the CCM for years ahead. The Fourth, Fifth and Sixth Amendments interpreted by a conservative majority would have led to a further increase in the powers of law enforcement agencies on the one hand, and limitation of the scope of the powers of the accused in criminal trials, on the other. Some, such as Eddlem, go even further, suggesting that Romney would have "ignored the … requirement that every person receive a prompt trial by jury and … that all searches be cleared by a judge with a search warrant, probable cause, and a description of what will be searched and found" (Eddlem 2012: 15). In contrast, President Obama would assure that the future Court would consist of liberal followers of the DPM, and such rights as freedom from unreasonable searches and seizures, or freedom from self-incrimination would receive broader constitutional protection. It is difficult to believe, however, that Obama's Supreme Court would forget about the legacy of 9/11, and treat terrorist suspects like any other suspects. Summing up, President Romney would have favored the CCM, whereas President Obama means the coexistence of CCM and DPM that was possible to observe in recent years.

The approach of a state towards the criminal justice system is a crucial element of state's policy, as well as its social legitimacy. The effects of the Warren Court revolution remain unchanged and are not likely to be modified in the upcoming years. The rate of crime has a major impact on social attitudes towards the government, public confidence, as well as on the policy of softer

or tougher crime control. But it is not only a question of CCM versus DPM; it is a choice between safety and freedom. Therefore, the discussion about the proper balance between the rights of suspects and defendants, and the social demand for safety shall continue, with the politically active and ideologically oriented Supreme Court at its center. Future presidents will have an impact on the scope of constitutional criminal law provided that they continue to nominate Justices having as clear an ideological attitude towards criminal justice as those sitting on the bench today. Looking from a historical perspective, there is little doubt the ideological pattern will not be decisive. Thus, the best way to control the future of criminal justice is to win the elections.

References

Baum, L., 2009, *The Supreme Court*, Washington D.C.: Congressional Quarterly Press.

Beckett, K., Sasson, T., 2004, *The Politics of Injustice: Crime and Punishment in America*, Thousand Oaks: SAGE Publications.

Berman, D., 2012, *Obama Hasn't Reformed Criminal Justice. Could Romney do Better?* Retrieved from http://www.thedailybeast.com/articles/2012/04/13/obama-hasn-t-reformed-criminal-justice-could-romney-do-better.html.

Bickel, A.M., 1962, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis: Bobbs-Merril.

Boller, P.F., 2004, *Presidential Campaigns: From George Washington to George W. Bush*, New York: Oxford University Press.

Chemerinsky, E., 2010a, *The Conservative Assault on the Constitution*, New York: Simon and Schuster.

Chemerinsky, E., 2010b, The Roberts Court and Criminal Procedure at Age Five. *Texas Tech Law Review*, 43, pp. 13-28.

Chettiar, I., 2012, *Missing from the Debates: Fixing Our Criminal Justice System*. Retrieved from http://www.cnbc.com/id/49433691.

Criminal Justice: Intelligent Sentences, 2012, *The Economist*. Retrieved from http://www.economist.com/node/21563948.

Dahl, R., 1957, Decision-making in a Democracy: The Supreme Court as the National Policy-maker, *Journal of Public Law*, 6, pp. 279-295.

Dale, E., 2011, *Criminal Justice in the United States: 1789-1939*, Cambridge: Cambridge University Press.

Damore, D., 2005, Issue Convergence in Presidential Campaigns, *Political Behavior*, Vol. 27, No. 1, pp. 71-97.

Dudziak, M.L., 2000, *Cold War Civil Rights: Race and the Image of American Democracy*, Princeton: Princeton University Press.

Dudziak, M.L., 2010, A Sword and a Shield: the Uses of Law in the Bush Administration, in J.E. Zelizer ed., *A Presidency of George W. Bush: First Historical Assessment*, Princeton: Princeton University Press, pp. 39-58.

Eddlem, T.R., 2012, Obama vs Romney: Their Core Beliefs, *The New American*, August 20.
Frost, N., 2006, *The Punitive State: Crime, Punishment, and Imprisonment across the United States*, New York: Scholarly Publishing LLC.
Herman, S.N., 2011, *Taking Liberties: the War on Terror and the Erosion of American Democracy*, New York: Oxford University Press.
Hodder-Williams, R., 1980, *The Politics of the United States Supreme Court*, London: Allen and Unwin.
Laidler, P., 2011, *Sąd Najwyższy Stanów Zjednoczonych Ameryki: od prawa do polityki* (*The U.S. Supreme Court: from Law to Politics*), Kraków: Jagiellonian University Press.
Laidler, P., 2012, The Economic Crisis in 2012 U.S. Presidential Elections: Challenges and Expectations, in M. Grabowski, P. Laidler eds., *World in Economic Crisis: Remarks from the SYLFF Community*, Kraków: Jagiellonian University Press.
Lippman, M., 2010, *Criminal Procedure*, Thousand Oaks: SAGE Publications.
MacKeever, R.J., 1997, *The U.S. Supreme Court: A Political and Legal Analysis*, Manchester: Manchester University Press.
Mills, B., 2011, Is Silence Still Golden? The Implications of Berghuis v. Thompkins on the Right to Remain Silent, *Loyola of Los Angeles Law Review*, 44, pp. 1179-1195.
Morris, M., 2012, The Decision Zone: The New Stage of Interrogation Created by Berghuis v. Thompkins, *American Journal of Criminal Law*, 39(2), pp. 271-299.
Patrick, J.J., 2003, *The Bill of Rights: A History in Documents*, New York: Oxford University Press.
Reagan Aims Fire at Liberal Judges, 1986, *New York Times*, October 9, p. A32.
Schwartz, H., 1988, *Packing the Courts: the Conservative Campaign to Rewrite the Constitution*, New York: Charles Scribner's Sons.
Segal, A.J., Spaeth, H.J., Benesh, S., 2005, *The Supreme Court in American Legal System*, New York: Cambridge University Press.
Stuntz, W.J., 2011, *The Collapse of American Criminal Justice*, Cambridge: Belknap Press.
Surette, R., 2011, *Media, Crime, and Criminal Justice: Images, Realities, and Policies*, Belmont: Wadsworth.
Tomlins, Ch., 2005, *The United States Supreme Court: the Pursuit of Justice*, Boston: Houghton Mifflin Company.
Watson, G., Stookey, J., 1995, *Shaping America: The Politics of Supreme Court Appointments*, New York: Harper Collins College Publications.
Vander Giessen, M.L., 2011, Berghuis v. Thompkins: the Continued Erosion of Miranda's Protections, *Gonzaga Law Review*, 46(1), pp. 189-215.
www.barackobama.com.
www.mittromney.com.
www.ontheissues.com.
www.whitehouse.gov.
www.gallup.com.
Yoo, J., 2010, The Supreme Court's Opinion in Berghuis v. Thompkins is Sensible. Or a Sensible Bow to Post-9/11 Reality, *Wall Street Journal*, June 8.
Zimring, F.E., 2007, *The Great American Crime Decline*, New York: Oxford University Press.