Instrumentalisation of Freedom of Expression in Postmodern Legal Discourses

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I. Introduction: Legal enigma and the *ethos* of deconstruction

This paper is an attempt to summarise and rationalise three dominant academic discourses related to the critical appraisal of freedom of expression, stemming from postmodern jurisprudence, from a transatlantic perspective. This type of conceptualisation of free speech was initially almost exclusively pertinent to the American legal debate. However, in recent years postmodern narratives have also begun to actively penetrate the rhetoric of European jurisprudence. Race, gender, and sexual orientation are the respective deconstructionist markers of these legal movements; namely, critical race theory, feminist jurisprudence, and queer or 'LGBT'[1] legal discourse.

In their introductory article for a compilation of the texts reflecting the impact of Derrida's *déconstruction* on legal writings, the authors aptly observe that the scholars who associate themselves with post-structuralism, and especially the representatives of the critical legal movement, are perceived in legal academia as "cranks and nihilists", if not as outright betrayers of positive law.[2] However, more conservative scholars who adhere to the neutrality of law often disregard the fact that law in general -especially common law, and even more so American constitutional law- is inherently uncertain and inadequately 'textualised' and that it leaves much room for all sorts of *aenigmata iuris*; namely, a spectre, a figure of the absent and invisible or, more simply, distant cause. In this sense, the term deconstruction appears without direct reference to Jacques Derrida as a "talisman, either of heresy, or of enigma and truth".[3] Recently, Peter Goodrich demonstrated that for deconstructionist purposes, legal

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[1] A conventional acronym referring collectively to four sexual identities: lesbian, gay, bisexual and transsexual.

[2] **P. GOODRICH, F. HOFFMANN, M. ROSENFELD and C. VISMAN**, *Derrida and Legal Philosophy*, Macmillan, 2008, pp. 7-14; **B. MATHEWS**, "Why Deconstruction Is Beneficial", *Flinders Journal of Law Reform*, 2000, pp. 105-126; **E. WEBER**, "Deconstruction Is Justice", *SubStance*, 2005, pp. 38-43.

[3] **P. GOODRICH, F. HOFFMANN, M. ROSENFELD and C. VISMAN**, *Derrida and Legal Philosophy*, *o.c.*, p. 7.

enigmas are akin to the residue of forgotten histories, references to lost texts, and marks left by encounters between the law and its now marginal literary and poetic sources.[4]

Taking up this assumption of legal enigmas and embracing the *ethos* of deconstruction, this paper inquires into the rhetorical strategies of postmodern jurisprudence with regard to freedom of expression. In the last twenty years, critical scholars have essentially instrumentalised the right to free speech. This paper puts in light the semantic modes involved into this process. Instrumentalisation, under such an assumption, is not fully synonymous with deconstruction. The former invokes a rhetorical construct of freedom of speech as a right that is created, interpreted or enforced in certain socially established ways and through the use of recognised procedures and agencies. Most importantly, instrumentalisation does not necessarily bear the somewhat negative connotation it is associated with in ethics, akin to an (ab-)use of something or someone for one's own agenda.[5] Consequently, freedom of speech permits several modes of instrumentalisation, including deconstruction, depending on the interpretative conventions and agencies. Thus, the primary mode of instrumentalisation employed by the US Supreme Court positions the speakers as the main agents, whereas critical jurisprudence suggests a rhetorical shift towards the victims. Despite the fact that the critical legal academia is not as distinct in Europe, these rhetorical strategies will also pave the way for the instrumentalisation of free speech in the European environment, giving a voice to the enigmas of legal neutrality.

Subsequently, the central arguments of these three movements are addressed with regard to freedom of expression. Therefore, the structure of this article is simply organised to illustrate the somewhat modestly known, at least in Europe, rhetorical technique of critical race theory; followed by what is perhaps the most widely acknowledged tradition of feminist

[4] In Ancient rhetoric, an enigma is an obscure allegory, an opaque citation or ambiguous reference. The term later became understood as referring to a foreign, absent or forgotten source. Under the assumption of legal neutrality, the law speaks from the space of truth and truth is variously defined as something unseen, unsaid and that one can probably not say. It is mystery, enigma, riddle, and invisible cause. Referring to the *oeuvre* of the Spanish legal philologist Antonio de Nebruja, *Enigmas of the Civil Law*, Goodrich suggests that enigmas of civil law were perceived as misinterpretations, obscurities and paradoxes that could be explained, if not necessarily resolved, at a syntactical level through correct translation and at an interpretative level by returning to Greek and Latin sources, to the context and intention of earlier authors whose works were either cited or implicitly invoked in the letter of the law. See: **P. GOODRICH**, "Legal Enigmas: Antonio de Nebrija, 'The Da Vinci Code' and the Emendation of Law", *Oxford Journal of Legal Studies*, 2010, pp. 71-99.

[5] In this sense, instrumentalisation covers legal spaces beyond legislature and judgements. Roger Cotterrell observes that "law as institutionalised doctrine can be found outside the 'official' legal system of the state" and that "law, in some sense, may flourish in social sites and settings where lawyers or police never venture". See: **R. COTTERRELL**, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*, Ashgate, 2006, p. 1.

jurisprudence; and completing with the ever-active narratives of queer legal discourse. Lastly, the conclusion shall assess some controversies and underline the value of critically deconstructing and rhetorically instrumentalising the right to free speech for Europe.

II. Critical race theory

"*Everywhere the crosses are burning,*
sharp-shooting good-steppers around every corner,
there are snipers in the schools…
I know you don't believe this.
You think this is nothing
but faddish exaggeration. But they
are not shooting at you."[6]

This is one of the numerous quotations included in an article by Mari J. Matsuda,[7] an American lawyer, critical race scholar, and activist of Asian descent who is currently a law professor at the University of Hawaii. The emergence of critical race theory dates back to the mid-1980s, when a group of legal scholars of colour produced a body of related scholarship, and developed a sense of group identity. Critical race theory drew its seminal inspiration from the civil rights movement of the 1960s, which had revealed that dominant conceptions of race, racism, and equality failed to provide a "meaningful quantum of racial justice".[8] A boycott organised by several students of colour at Harvard Law School[9] and an alternative course on "race, racism and American law"[10] finally shaped this sense of "critical race" as a paradigm of academic identity.

[6] **L.D. CERVANTES**, "Poem for the Young White Man Who Asked Me How I, An Intelligent Well Read Person Could Believe in the War Between Races", in *Emplumada*, 1981.
[7] See: Matsuda's Chapter in **M.J. MATSUDA, C.R. LAWRENCE III, R. DELGADO and K.W. CRENSHAW**, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Westview, 1993, pp. 17-53, especially p. 24; **M.J. MATSUDA**, "Public Response to Racist Speech: Considering the Victim's Story", *Michigan Law Review*, 1989, pp. 2320-2381.
[8] **M.J. MATSUDA et al.**, *Words That Wound*, *o.c.*, p. 3.
[9] After the first Afro-American professor, Derrick Bell, left Harvard Law School, only two professors of colour remained there.
[10] Leading scholars and practitioners of colour were invited each week to lecture and lead some discussion on a chapter from Bell's books. Some of the free speech critical race theory pioneers were students at that time, like Matsuda and Crenshaw; the others were invited as guest-lectures, like Delgado and Lawrence. See, for a genesis and current state of this legal movement: **K.W. CRENSHAW**, "The First Decade: Critical Reflections, or A Foot in the Closing Door", *UCLA Law Review*, 2001-2002, pp. 1342-1372.

Critical race theory emphasises the socially constructed nature of race, suggests that judicial conclusions are the result of power imbalances and opposes the continuation of all forms of subordination. It is usually classified as a branch of critical legal studies and as related to issues of power discrimination, such as class, gender, colour, and sexuality. Highly influential scholars in this area include Derrick Bell, Gloria Ladson-Billings, Neil Gotanda, William Tate, Adrienne Dixson, Celia Rousseau, and Thandeka Chapman. As far as free speech critical race theory is concerned, perhaps the most noteworthy contributions belong to Richard Delgado, Charles R. Lawrence, Mari Matsuda, Jean Stefancic, and Kimberlé Williams Crenshaw. Most of these scholars contributed to the leading piece of reference in the field; that is, *Words That Wound*.[11]

The very title '*Words That Wound*' suggests that the authors view expression as a speech act of a perfomative nature, even though they do not frame it explicitly as part of speech acts theory.[12] Thus, free speech critical race theory is based on the assumption that particular types of speech can be harmful to minorities. The emotional distress provoked by hate speech includes offence, uncertainty, discomfort and loss of dignity. If the state fails to protect a vulnerable minority from hate speech, it is in fact failing to provide proper security to its citizens. Free speech critical race theory targets the severe psychological trauma suffered by members of identifiable groups. These scholars claim that the US Supreme Court is so convinced of the value of the marketplace of ideas[13] that it does not take proper notice of the right to speech and non-discrimination as invoked by protection from racial segregation through the First Amendment. The epistemological skepticism of the Supreme Court and its belief in the absence of absolute truth beyond the clear and present danger test, which requires

[11] A somewhat different but substantially close position from the Jewish perspective is defended in **A. THESIS**, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*, New York University Press, 2002.

[12] The discussion on the illocutionary and perlocutionary effect of hate speech is rooted into the speech acts theory, introduced by J.L. Austin in *How to Do Things with Words*, who elaborated the theory of perfomative acts. The concept was further essentially developed by J.R. Searle in *Speech Acts*. See, for a referential analysis of hate speech and pornography through the methodology of speech acts: **J. BUTLER**, *Excitable Speech: A Politics of the Performative*, Routledge, 1997. See also: **W. SADURSKI**, "On 'Seeing Speech Through an Equality Lens': A Critique of Egalitarian Arguments for Suppression of Hate Speech and Pornography", *Oxford Journal of Legal Studies*, 1996, pp. 713-723; who, in his critique of MacKinnon's arguments, focuses on speech acts theory with regard to pornography and hate speech and brings in the argument that illocution is effective when the intention is recognised by one listener.

[13] The marketplace of ideas is a metaphorical concept introduced into the legal discourse in 1919, in Justice Holmes's renowned dissent in *Abrams v. United States*. Its theoretical foundations date back to John Milton's *Aeropagitica* and John Stuart Mill's *On Liberty*. See: **United States Supreme Court**, *Abrams v. United States*, 1919, 250 US 616; which develops that "the best test of truth is the power of the thought to get itself accepted in the marketplace of ideas". See also, for a critical account: **A.I. GOLDMAN and J. C. COX**, "Speech, Truth, and the Free Market for Ideas", *Legal Theory*, 1996, pp. 1-32.

protection under the First Amendment, allows the expression of nearly all kinds of speech; including public racial slurs, Nazi parade in a Jewish district, symbolic cross-burning in an Afro-American family's front yard, and Holocaust denial.[14] The marketplace of ideas is distorted when any group of citizens is threatened. In this sense, the value of free speech as in the First Amendment is symbolically juxtaposed with the rationale associated with non-discrimination as in the Fourteenth Amendment. The discriminatory effect is attributed to an essentially "linguistic pain". A speech act itself may not 'acknowledge' its import and yet still reproduce hierarchies of racial power by virtue of pure utterance, depiction or writing. This suggestion is equally one of the strongest and weakest points of critical race theory. Such power itself remains a legal enigma within positive law -an absent and invisible figure- and is not easy to identify or even to localise within racist speech acts. To perform this 'voicing' of linguistic pain, critical race theory develops a specific rhetoric that is suitable for contextualising power and marginalisation.

Consequently, the distinctive feature of free speech critical race theory is a specific narrative, perhaps unusual for European legal scholarship, that expands pure legal arguments via personal histories, parables, chronicles, dreams, stories, poetry, fiction, and revisionist histories to convey its message. Critical race scholarship expresses scepticism about dominant claims regarding the neutrality, objectivity, colour blindness, and meritocracy of the law. This body of knowledge borrows from several academic traditions, among which are liberalism, law and society, Marxism, post-structuralism, pragmatism, and nationalism.

What is peculiar to the critical race theory methodology is a specific rhetorical strategy of manifestly emotional argumentation that works on legal texts to reshape the focus and reveal the concealment of harm to the victims by the justices of the Supreme Court. Thus, Matsuda and Lawrence argue that the Court de-personalised and contextualised the act of a cross burning in front of an Afro-American family's house in the case *RAV*, which left the victims voiceless.[15] The Supreme Court found the local statute prohibiting symbols of racial segregation contradictory to the First Amendment's rationale regarding the necessity of

[14] While it is clearly beyond the scope of this article to present a detailed insight into First Amendment jurisprudence, I develop an account of the epistemological difference between American and European adjudication in relation to hate speech in **U. BELAVUSAU**, "Judicial Epistemology of Free Speech through the Lenses of Ancient Rhetoric", *International Journal for the Semiotics of Law*, 2010, pp. 165-183. A representative list of hate speech cases before the US Supreme Court includes: *Beauharnais v. Illinois*, 343 US 250, 1952; *Brandenburg v. Ohio*, 395 US 444, 1969; *Collin v. Smith*, 578 F.2d 1197, 1978; *RAV v. St. Paul*, 505 US 377, 1992; and *Virginia v. Black et al*., 538 US 343, 2003.

[15] **M.J. MATSUDA et al.**, *Words That Wound*, *o.c.*, pp. 133-166.

content neutrality in the regulation of speech. Justice Scalia's majority opinion simply omits the victim's story, limiting the reference to a "black family living in the white neighbourhood" to just one sentence.[16] This 'ahistorical' and 'atextual' opinion must be compared with the representation of *RAV* by M. Matsuda; which perfectly exemplifies the narrative style of critical race theory that often balances law and fiction.

> "In the early morning of June 21, 1990, long after they had put their five children to bed, Russ and Laura Jones were awakened by voices outside their house. Russ got up, went to his bedroom window, and peered into the dark. 'I saw a glow', he recalled. There, in the middle of his yard, was a burning cross. The Joneses are African Americans. In the spring of 1990 they had moved into their four-bedroom, three-bathroom dream house in St Paul, Minnesota. They were the only black family on the block. Two weeks after they had settled into their predominantly white neighborhood, the tires of both of their cars were slashed. A few weeks later one of their car windows was shattered, and a group of teenagers walked past their house and shouted 'nigger' at their nine-year-old son. And now this burning cross. Russ Jones did not have to guess at the meaning of this symbol of racial hatred. There is no black person in America who has not learned the significance of this instrument of persecution and intimidation, who has not had emblazoned on his or her mind the image of black men's scorched bodies hanging from trees [...]."[17]

Matsuda notes three identifying characteristics for case law analysis as a prerequisite for opening the "dreaded floodgates of censorship": the message is one of racial inferiority, directed against a historically oppressed group and which displays a persecutory, hateful, and degrading character.[18]

Based on the dominant assumption of legal neutrality, the law speaks from the space of truth. Critical race theory instrumentalises freedom of speech through a rhetorical mode of victimisation, bringing historic context, victim story-telling, and the omitted semantics of oppression to challenge this conception of an unmediated communication between legal text and reader. The aim of constructing the legal text as a piece of literature becomes a deconstructive bridge into the space of legal enigmas. The discursive practices of critical race theory scholars are, thus, comparable to the role of the literary critic. These individuals 'trace' judges who believe that their decisions emerge without mediation from the words of statutes or constitutional clauses. Words and language can certainly be flexible instruments of social

[16] *RAV v. St. Paul*, 505 US 377, 1992.
[17] **M.J. MATSUDA et al.**, *Words That Wound*, *o.c.*, pp. 134-ff.
[18] *Ibid.*, p. 36.

progress; indeed, they can be instrumental in the pursuit of truth, artistic expression, human creativity, and political diversity. However, speech utterances are also perfect instruments of coercion and social constraint, a tool of abuse and intimidation that serves to bolster power and deepen victimisation.

III. Feminist jurisprudence

Critical race theory maintains that "racial oppression is experienced by many in tandem with oppression on grounds of gender, class, or sexual orientation".[19] Similarly, feminist legal scholars focus their deconstruction of law on institutionally inherited patriarchal structures, the subordination of women and a methodology shaped by consciousness-raising narratives. When discussing the influence of feminist jurisprudence on the academic discourse regarding freedom of expression, one can identify two topics that are of particular interest to feminist scholars; that is, sexist speech and pornography.

As far as hate speech is concerned, feminist authors focus on the performative potential of speech, reproducing patriarchal schemes and codes of masculine domination through language. Commenting on *RAV v. St Paul*, MacKinnon presents a similar argument regarding victimisation.

> "Cross burning is nothing but an act, yet it is pure expression, doing the harm it does solely through the message it conveys. Nobody weeps for charred wood. By symbolically invoking the entire violent history of the Ku Klux Klan, it *says*: 'Blacks go out', thus engaging in terrorism and effectuating segregation. It carries the message of historic white indifference both to this message and to the imminent death for which it stands."[20]

In this respect, critical race theory and feminist jurisprudence are very much intersected. Feminist lawyers also argue that words and conduct work hand in hand in creating social oppression. Furthermore, the writings of authors like Kimberlé Williams Crenshaw can be connected with both movements. One particularly pressing issue that Crenshaw addresses is the problem of double oppression that is peculiar to women of colour in American society. She demonstrates the ways in which jurisprudence is constructed to make it necessary to

[19] *Ibid.*, p. 6.
[20] **C. MACKINNON**, *Only Words*, Harvard University Press, 1993.

choose between being black and being a woman, arguing that "separate rhetorical strategies that characterise antiracist and feminist politics frequently intersect in ways that create new dilemmas for women of colour".[21]

Critical race theory not only illustrates its positions *via* victim-story narratives but it also attacks concrete decisions by the Supreme Court related to hateful expressions against racial or national minorities. In contrast, while feminist jurisprudence advances a very strong position within the legal debate on pornography, its stance regarding sexist hate speech seems to be more superficial.[22] Moreover, as will be demonstrated below, the very emphasis on the seminal critique of hate speech among radical feminist scholars like MacKinnon may be just a part of a rhetorical strategy intended to justify their critique of pornography. The specious nature of arguments interpreting pornography as a kind of hate speech have been convincingly noted by Judith Butler.[23]

An Icelandic scholar on free speech, Herdís Thorgeirsdóttir, suggests that generally the mere status of women in the press is indicative of the male control of the public debate and of the silencing effect of discriminatory journalism, in which "women are in minority of those occupying editorial posts within the media, which impinges on their struggle for equality because of the male-biased presentation of social and political issues in the form of the media".[24]

Another important speech issue advanced by the feminist critique is sexism in writing, in which the masculine linguistic forms prevail over the feminine, therefore creating the effect of subordination through language.[25]

Since the appearance of *Only Words* by Catharine MacKinnon,[26] which effectively deconstructed the right to free speech by displaying the coercive effect of pornography on

[21] **CRENSHAW**, in **M.J. MATSUDA et al.**, *Words That Wound*, *o.c.*, p. 112.
[22] However, some interesting insights do emerge. One curious area of focus is the discussion on campus speech codes. See: **N.C. CORNWELL, M.P. ORBE and K.T. WARREN**, "Hate Speech / Free Speech: Using Feminist Perspectives to Foster On-Campus Dialogue", *Journal of Intergroup Relations*, 1999, pp. 3-17.
[23] **J. BUTLER**, *Excitable Speech*, *o.c.*, pp. 82-95.
[24] **H. THORGEIRSDÓTTIR**, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights*, Nijhoff, 2005, p. 187.
[25] See, among others, at the level of the Council of Europe: **Recommendation No (90) on the Elimination of Sexism from Language**; which underlines the particular role of language in the development of an individual's social identity.

women, the feminist legal view has often been erroneously reduced to a virulent critique of pornography.

Indeed, pornography is conceived of by feminist scholars as a socially recreated discourse, along with the categories of gender and sexual identity. However, whereas many lawyers hold the trivial view that all feminists are unanimously against pornography, contemporary feminist jurisprudence is deeply divided on the issue between 'radical' and 'sex-positive' feminists.

Catharine MacKinnon, Andrea Dworkin, Robin Morgan, Dorchen Leidholdt and several other feminist scholars have emphasised the peculiar stigma that the pornographic industry creates for women, noting that females are often explicitly subordinated -if not implicitly raped- to depict the popular fantasies of men. The argument stems from the critique of the male-centred construction of the First Amendment legislation. As Nicola Lacey phrases it, "the feminist critique has brought pornography into the sphere of the public and has insisted upon its political relevance".[27] Starting in the late 1970s, radical feminists began to form organisations such as Women Against Pornography that launched relevant educational events, including slide-shows, speeches, and guided tours of the sex industry in Times Square; all aimed to raise awareness of the harms of pornography.

However, the feminist legal movement is far from presenting a unanimous viewpoint on pornography. The end of the 1980s brought the so-called 'sex-positive' feminists onto the academic scene. In the early 1990s, those feminists were followed by a third generation of feminist scholars and the beginning of the 'feminist sex war'. The sex-positive feminists

[26] **C. MACKINNON**, *Only Words*, *o.c.* See also: **A. DWORKIN**, *Pornography: Men Possessing Women*, Plume, 1991; *Pornography and Civil Rights: A New Day for Women's Equality*, Organising Against Pornography, 1988. Similar examples of anti-porn attacks can be found in Europe. For instance, the German *PorNo* campaign led by a leading second-wave feminist, Alise Schwarzer, very much echoed the claims of MacKinnon. See: **I. STOEHR**, "PorNo-Kampagne und Frauenbewegung", *Zeitschrift für Sexualforschung*, 1989, pp. 199-206; **A. SCHWARZER**, "Weiblicher Masochismus ist Kollaboration!", *EMMA*, 1991. For an example in the Italian context, see: **A. VERZA**, *Il dominio pornografico*, Liguori, 2006.

[27] Lacey continues with the private-public parallel as follows: "this is both because of the interdependence argument -the argument that private oppression inevitably leads to public disadvantage- and because the traditional denomination of pornography as private can itself be shown to be disingenuous; in what might be called a 'no-lose situation' for the producers and consumers of pornography, the production of pornography is seen as a matter of public right and hence protected, whilst its consumption is constructed as a matter of private interest, and hence also protected; both public and private sides of the dichotomy are manipulated in ways which exclude anti-pornography arguments". See: **N. LACEY**, *Unspeakable Subjects: Feminist Essays on Legal and Social Theory*, Hart, 1998, pp. 7-97. See also, for a critique of the private-public binary in human rights discourses: **J.M. AMAYA-CASTRO**, *Human Rights and the Critiques of the Public-Private Distinction*, Ph.D. Thesis, Vrije Universiteit Amsterdam, 2010; see especially, concerning feminist jurisprudence, pp. 133-177.

acknowledge the value of pornography as an intrinsic mode of free speech that is indispensable for women's sexual liberation, therefore contradicting the fundamental ideas of the second-generation feminist movement. Ellen Willis's 1981 essay, *Lust Horizons: Is the Women's Movement Pro-Sex?*, first introduced the term 'pro-sex feminists'. MacKinnon's radical approach was severely criticised from the standpoint of free speech discourse -with freedom of expression reinterpreted as an important element of the emancipation movement- by such scholars as Ellen Willis, Susie Bright, Patrick (Pat) Califia, Gayle Rubin, Avedon Carol, Tristan Taormino and Camille Paglia, among others.[28] The radical feminist strategy is likened to the campaign for censorship advocated by conservatives who were eager to suppress the sexual expression of women and sexual minorities.

The 'feminist sex war' intensified at the particular moment in the US constitutional history in which several states tried to establish anti-pornography ordinances. One part of the feminist movement passionately advocated this form of suppression of the First Amendment for the alleged benefit of women, whereas the sex-positive feminists maintained that anti-pornography legislation would violate women's right to free speech. In this respect, the role of the second generation of (radical) feminists was the most appalling from the standpoint of art liberty. The group seemed to be so exited by its own hypertrophied concept of victimisation that scholars like Andrea Dworkin or Catharine MacKinnon advanced arguments supporting quasi-essentialist claims of binary moral good and wrong.

Mary Joe Frug noted that the value of feminist jurisprudence is not in the *destruction* of pornography but rather in its *deconstruction*.

> "My claim that the advocates should have sought to deconstruct pornography rather than single-mindedly seeking to destroy it [...]. If women's oppression occurs through sex, then in order to end women's oppression in its many manifestations, the way people think and talk and act about sex must be changed. The ordinance campaign was not well organised to change how people think and talk and act about sex. Rather, the ordinance advocates relentlessly utilised and exploited traditional ideas and language regarding sex in all aspects of the campaign."[29]

[28] See, among others: **J. BENJAMIN**, "Master and Slave: The Fantasy of Erotic Domination", in **A. SNITOW**, *Powers of Desire: The Politics of Sexuality*, New York, pp. 460-467; **A. CAROL**, *Nudes, Prudes and Attitudes: Pornography and Censorship*, New Clarion, 1994; **A. ASSITER and A. CAROL**, *Bad Girls and Dirty Pictures: The Challenge To Reclaim Feminism*, Boulder, 1993; (in particular, **G. RUBIN**, "Misguided, Dangerous and Wrong: An Analysis of Anti-Pornography Politics", pp. 18-40.)

[29] **M.J. FRUG**, *Postmodern Legal Feminism*, Routledge, 1992, pp. 151-152.

The third generation of legal feminists usually shares the view that their predecessors exaggerated the dangers of pornography by focusing on the most outrageous examples of pornography -*e.g.*, those of a sadomasochistic character or those simulating rape- and thus essentially takes a pro-speech position.[30]

IV. Queer or LGBT legal discourse

In a certain sense, feminist jurisprudence launched a discussion on gender and sexuality that was seminal to the deconstruction of law from the standpoint of sexual identity. The classic monograph by Gary Minda on *Postmodern Legal Movements*[31] does not mention queer legal discourse among the five leading schools of legal postmodernism; namely, Law and Economics, Critical Legal Studies, Critical Race Theory, Feminist Jurisprudence, and Law and Literature. However, since the end of the 1980s, the ever growing number of relevant texts that have clearly borrowed their deconstructionist strategies indicates that the academic discourse on LGBT rights is an important part of the critical scholarship. On this basis, it is particularly interesting to study the peculiar instrumentalisation of the right to free speech within this movement.

[30] **W. McELROY**, *A Woman's Right to Pornography*, St Martin's, 1997; **C. MATRIX**, *Tales from the Clit*, AK Press, 1996; **N. STROSSEN**, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*, New York University Press, 2000; **M. PALLY**, "The Fireworks at the Sexuality Conference: Whom should feminist Fuck?", *New York Native*, 29 May 1982; http://www.marciapally.com/Pages/fireworks.html; **M. PALLY**, *Sex and Sensibility: Reflections on Forbidden Mirrors and the Will to Censor*, Hopewell, Ecco Press, 1994; **Feminists Against Censorship**, http://www.fiawol.demon.co.uk/FAC; **N. STROSSEN**, *Zur Verteidigung der Pornographie: Für die Freiheit des Wortes, Sex und die Rechte der Frauen*, Haffmans Verlag, 1997.

[31] Nonetheless, Minda himself somewhat briefly mentions that, "by the late 1980s, openly bisexual, lesbian, and gay legal scholarly developed gay and lesbian studies, a new form of critical discourse that has ought to correct the biases and inaccurate views of sexual orientation in Western legal culture" and that "the liberal discourse of rights in American legal institutions is said to have denied the interests and perspectives of gays and lesbians because that discourse is found to be 'rotted in the moral culture of 1950s' liberalism, which marginalised people who differed from the heterosexual stereotype of the 1950s nuclear family; gay and lesbian legal scholars of the post-Stonewall generation have proclaimed their desire to change the worldview of modern jurisprudence", the fifties-liberal culture of pluralism and the melting pot, of law as process and neutral principles, of the Nelsons and Cleavers as the happy nuclear family, by developing a 'gay-law' jurisprudence. The core principles of this jurisprudence are based on the "morality of [gay and lesbian] intimacy, the need to disrupt rather merely reform the interconnected social and political obstacles to such intimacy, and an insistence upon equal citizenship for bisexuals, gay men, and lesbians". See: **G. MINDA**, *Postmodern Legal Movements. Jurisprudence at Century's End*, New York University Press, 1995, p. 196.

The only two free speech cases before the US Supreme Court in which sexual identity has been at stake are *Gay Olympics*[32] and *Hurley.*[33] The latter case did not address hate speech but tackled instead the issue of free assembly, analysing whether the participation of a gay group in a traditional city parade could be restricted if the slogans being used by that group had little to do with the character of the assembly.[34] By opposition, the former case addressed the issue of commercial speech. Since the Amateur Sport Act of 1987, the US Olympic Committee has held the exclusive rights to the use of Olympic designations. In 1981, it refused gay activists the right to entitle an international sport event the 'Gay Olympics'. Subsequently, the Supreme Court, by a vote of seven against two, upheld the exclusive rights of the Olympic Committee. The judgement provoked an intense academic discussion on whether the Supreme Court was essentially influenced by homophobic prejudices.[35]

The LGBT rights discourse, which reveals the homophobic features inherent in legal settings, is capable of reversing mainstream legal reasoning about the First Amendment; moving it in a more affirmative direction and, hence, instrumentalising the right to free speech. William Rubenstein demonstrates that equality for the queer community in the American judicial system has essentially been achieved by means of the First Amendment, whereas the claims based on the Fourteenth Amendment -"which are almost necessarily premised upon the speech acts of 'coming out'"- have largely failed.[36] Rubenstein underlines that the central element of the experience of the queer community in the US is "a resounding, deafening, mind-boggling *silence*". Therefore, coming out is the most important speech act in the context of the legal fight for equal rights. Indeed, "because taking on a lesbian / gay identity involves coming out, society can oppress gay people most directly simply by ensuring that such expressions are silenced".[37] Similarly, anti-gay violence is essentially based on the

[32] **United States Supreme Court**, *San Francisco Arts and Athletics Incorporated v. United States Olympic Committee*, 483 US 522, 1987.
[33] **United States Supreme Court**, *Hurley et al. v. Irish-American Gay, Lesbian and Bisexual Group of Boston et al*., 515 US 557, 1995.
[34] The Supreme Court held that the very goals and messages of the concrete assembly, St Patrick's Parade, would be undermined if the participation of a gay group were enforced. See, for a thorough account: **P.J. WALKOWSKI**, *From Trial Court to the United States Supreme Court: Anatomy of a Free Speech Case; The Incredible Inside Story behind the Theft of the St Patrick's Day Parade*, Branden Publishing, 1996.
[35] See, among others: **R.N. KRAVITZ**, "Trademarks, Speech, and the Gay Olympics Case", *Boston University Law Review*, 1989, pp. 604-656; **C. SYMONS and I. WARREN**, "David *v.* Goliath: The Game Games, the Olympics, and the Ownership of Language", *Entertainment and Sports Law Journal*, 2006, pp. 1-12.
[36] **W.B. RUBENSTEIN**, "Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the Hate Speech Debate from a Lesbian / Gay Perspective", in **H.L. GATES *et al.***, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties*, New York University Press, 1994, pp. 280-199, especially p. 281.
[37] *Ibid.*, p. 283.

stigma of silence because it is rarely exercised until the queer identity is revealed.[38] The *ethos* of speaking out becomes, then, an essential link to the First Amendment rights in the fight against 'invisibility' in the public space. Yet, Rubenstein identifies three main limitations to the full realisation of First Amendment rights by the LGBT community. Firstly, the First Amendment is triggered only in the context of 'state action' and does not have any bearing on private censorship. Secondly, the First Amendment is mostly designed for the protection of political speech, whereas coming out is a personal type of public expression. Thirdly, the First Amendment targets "imminent lawless conduct", and a judicial interpretation of the amendment's purpose may easily focus on the noble fight against obscenity, while essentially restricting LGBT expression.[39]

Rubenstein still maintains that "the First Amendment has been the only consistent friend of lesbian and gay rights litigators since Stonewall; with rare exceptions, when a case is properly framed as a First Amendment case, lesbian and gay plaintiffs prevail".[40]

A more recent example is the attack on the military restrictions on LGBT persons serving in the US army. During the period of Clinton's 'liberalisation', the restriction was reshaped into the 'don't ask, don't tell' policy.[41] This policy maintains that merely being a homosexual does not in itself bar someone from military service but indicates that engaging in or possessing the propensity to engage in homosexual conduct may be. Gilreath analyses the military ban as reverse hate discrimination, the difference being that it silences the victims, who cannot express themselves through manifestation of their sexual identity.[42] Similarly, Judith Butler deconstructs the silencing impact of this speech restriction, drawing a parallel between her objections and the perfomative critique of hate speech within critical race theory.[43]

Referring to *Lawrence v. Texas*,[44] in which the Supreme Court established the off-base private conduct of homosexual relations through absolute decriminalisation, Gilreath presents

[38] *Ibid.*, p. 285.
[39] *Ibid.*, p. 287.
[40] *Ibid.*, p. 288.
[41] The modification is a result of a compromise between the Clinton administration and the Congress.
[42] **S. GILREATH**, "Sexually Speaking: 'Don't Ask, Don't Tell' and the First Amendment after *Lawrence v. Texas*", *Duke Journal of Gender Law and Policy*, 2007, pp. 953-976.
[43] **J. BUTLER**, *Excitable Speech*, *o.c.*, pp. 104-126.
[44] **United States Supreme Court**, *Lawrence v. Texas*, 539 US 558, 2003.

a convincing account of the attack on such discrimination from the standpoint of the First Amendment.[45]

> "The continuation of 'don't ask, don't tell', which allegedly treats an admission of homosexual conduct -through expressive activity or verbal utterance- as an evidentiary indication that the speaker has the propensity to engage in a criminal act ('sodomy'), when the underlying act ('sodomy') can no longer be constitutionally criminalised, shifts the focus of the policy. It now emphasises that same-sex kissing, hand-holding, cuddling, *etc.* sends the message that 'I am gay' and presumes an uncomfortable reception of that message by the majority of heterosexual soldiers. In other words, 'don't ask, don't tell' is no longer afforded its convenient cover as a conduct-based regulation."[46]

The construction of 'don't ask, don't tell' exemplifies a specific vulnerability of the LGBT movement with regard to the First Amendment. The military ban forbids lesbians and gays from speaking in favour of their ability to live honestly and openly while serving their country because, as soon as they reveal their identity, they are fired. The only persons who are permitted to debate are, thus, heterosexuals. The potential of the LGBT discourse to influence judicial and legislative reasoning is arguably even stronger than that of the critical race theory. Ethnic groups and women, when attacked, are -at least, *de iure*- not silenced. Arguably, they can therefore respond to their opponents. Meanwhile, in the American military, lesbian and gay individuals are barred from fair competition in the marketplace of ideas.

The American LGBT narrative reveals a curious potential for debate on so-called 'gay PDA' or legally-accepted manifestation of gay affection in public[47] in Europe. More generally, it has the potential to challenge the academic discourse on homophobia and religious hate speech in Western democracies.[48]

This perspective on gay PDA can be assessed in the light of the work of the French post-structuralist Pierre Bourdieu, who has illuminated the mode in which the language

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[45] **S. GILREATH**, "Sexually Speaking", *o.c.*
[46] *Ibid.*, p. 956.
[47] A conventional acronym for the phrase "public display of affection".
[48] Here, the potential of the LGBT discourse is exemplified by using the one example of a military expression ban. See, for other attempts to assess the First Amendment in terms of sexual-identity-based discrimination: **D. CODE and W.N. ESKRIDGE**, "From Hand-Holding to Sodomy: First Amendment Protection of Homosexual Expressive Conduct", *Harvard CR-CLL Review*, 1994, p. 319; **M.W. MCCONNELL**, "What Would It Mean to Have a First Amendment for Sexual Orientation?", in **S.M. OLYAN and M.C. NUSSBAUM**, *Sexual Orientation and Human Rights in American Religious Discourse*, 1998, pp. 234-257; **J.A. MELLO**, "Balancing Hate Speech, Professional Ethics, and the First Amendment Rights: A Case of and from the Judiciary", *Employee Responsibilities and Rights Journal*, 2006, pp. 21-28.

operates through the notions of *habitus* and *hexis*.[49] Bourdieu explains that an individual is dependent on particular systems of cultural and class signification, history and human memory, and shaped by a set of acquired sensibilities, dispositions and tastes. A certain behaviour or disposition becomes a part of a community structure even when the original purpose of that behaviour can no longer be recalled. Thus, *habitus* covers the totality of learned habits, bodily moves, tastes and other non-discursive practices that 'go without saying' for a particular community. *Hexis*, according to Bourdieu, becomes the embodiment of *habitus*;[50] namely, how various social actors carry themselves through gestures and ways of walking, looking, sitting, sneezing, coughing and, ultimately, thinking. Among others, *habitus* and *hexis* bear a central importance to the visualisation of class attributes as, for instance, in the way people eat. The body for Bourdieu is a mnemonic device in which a group's most fundamental beliefs and patterns of behaviour are embedded. The body incorporates and reproduces history in ways that individuals are largely unconscious of.

The patterns of assumed queer behaviour involve a certain *hexis* -often speculatively stereotypical- in terms of intonation, dress and body language. Consequently, both the alleged queer behaviour and gay PDA perform the role of speech acts that break with the traditional societal *habitus* of hetero-normativity. Based on this socio-legal reconstruction of the discussion of gay PDA, queer *hexis* requires robust protection as part of the effort to defend the right to freedom of expression. The marketplace of ideas is also a merchandise of various *hexes*. The gay *hexis* attracts aggression from homophobes and suppression by the law enforcement machine, which is used to rationalise free speech based on the patriarchal *habitus*.

V. Conclusions

A. Language of postmodern instrumentalisation

"*Insoweit ist es buchstäblich richtiger zu sagen, daß die Sprache uns spricht, als daß wir sie sprechen*."[51]

[49] **P. BOURDIEU**, *Esquisse d'une théorie de la pratique*, Droz, 1972, esepcially p. 282; *La Distinction: Critique sociale du jugement*, Minuit, 1979.
[50] In fact, *hexis* is a Greek correlative of Latin *habitus*, an episteme developed by Aristotle.
[51] **H.-G. GADAMER**, *Wahrheit und Methode*, Tübingen, Mohr, 1990, p. 463; "it's literally more correct to say that language speaks us than that we speak it".

The legal narratives of critical race theory, feminist jurisprudence and LGBT rights discourse are similar to the extent that they address harm done to a vulnerable community. Storytelling by the victims and links to non-discrimination are distinctive features of these accounts of free speech.

Postmodern legal scholarship opposes dominant legal narratives in a manner similar to that of Pierre Bourdieu, who criticises semiological analysis. This earlier structuralist approach draws its inspiration from Ferdinand de Saussure as 'internal' interpretation, later drawn up by Noam Chomsky, which omits the wider context composed of the socio-historical conditions governing the production and reception of texts, conceiving the position of the analyst uncritically.[52] In this sense, postmodern jurisprudence reconstructs a vision of law that is blind to colour, gender and sex -'law neutrality'- as a product of white male hetero-supremacy and embedded legal patterns of power abuse. By their interpretative strategies, critical scholars illuminate both the context and the identity of the analyst, moving beyond the internal rhetorical wording of legal texts. The 'traditional' (structural) academic discourse uses specific language that deviates from an original language through the exclusion of common, ordinary, dramatic or vulgar usages. Postmodern legal narrative either re-establishes the original language or decodes the traces of the excluded original language that remain within juridical texts; thus, revealing new *aenigmatae iuris.*

Postmodern movements entail an anti-essentialist approach to human identities. Race, gender roles and sexual identity are seen as being *constructed* to adjust to the predominant dispositions of the linguistic *habitus* in its wider sense, as invoked by Bourdieu. Men and women, Caucasians and people of colour, straight and gay individuals are carrying themselves differently in the semiotic world of postures, gestures, walking, speech and laughter. These behavioural schemes are encoded in speech acts and reproduced through history by virtue of social organisation and education systems. However, critical movements reveal those hidden *hexes* and *habitus* within the dominant legal settings. They move us to question the adequacy of the legal narratives reproduced by judges to adjust white heterosexual male dispositions. In this sense, the perception of language by critical scholars is essentially post-structuralist.

[52] See: **P. BOURDIEU**, "Authorised Language: The Social Conditions for the Effectiveness of Ritual Discourse", in **P. BOURDIEU**, *Language and Symbolic Power*, Polity, 1991, pp. 107-117.

There is no ideal speaker suitable for legal neutrality. Words are not neutral utterances. Language carries a value as established by a dominant group.

B. Critique of the postmodern instrumentalisation

The label viewpoint neutralist references the opponents of perfomative insights into the harms of hate speech, which are traced back to different legal backgrounds. Such wording tackles their appraisal of speech from an allegedly neutral viewpoint; that is, alienation from content. All of them are critical of the victim-based approach to free speech and, therefore, advocate the rights of the speaker rather than the rights of the audience.[53] Drawing on the *ethos* of Anglo-Saxon utilitarianism and John Stuart Mill's vision of censorship, their position is akin to a de-contextualised interpretation of Voltaire's claimed statement: "*je déteste ce que vous écrivez, mais je donnerai ma vie pour que vous puissiez continuer à écrire*".[54] The underlying idea of such a critique is that it is in the essence of speech to cause embarrassment or even hurt. If we begin singling out specific emotional effects, we may end up by silencing speech through punishment or a kind of chilling effect. It is impossible to speak critically without causing distress to someone.

As illustrated above, the postmodern critique of absolutist free speech also refers to silencing, but that silencing is of the opposite nature. It is akin to the suppression mechanism of speech acts as deeply rooted in the history of discrimination.

As Barendt points out:

> "[Silencing argument] does not make clear how hate speech silences its victims. It makes them less inclined to speak or render their speech less effective, but it does not inhibit their legal freedom to communicate their views, in particular their right to reply to racist abuse. Hate speech does not infringe equality in the same way that a discriminatory refusal to allocate housing or provide education to members of the target group clearly does […]."[55]

[53] Other popular labels include civil libertarians and viewpoint absolutists.
[54] "I disapprove of what you write, but I will defend to the death your right to write it"; whose attribution to Voltaire in his 1770 letter to Abbot le Roch is currently contested.
[55] **E. BARENDT**, *Freedom of Speech*, 2nd Edition, Oxford University Press, 2005, p. 174; which is one of the most referential monographs on the comparative issues of free speech in Europe.

Thus, Barendt seems to be critical of the idea of the inter-changeability of speech and conduct, which is often pertinent to hate speech.[56] Such evidence is, indeed, difficult to establish without specific reference to the context and history of racial, sexual or homophobic oppression. Such an approach shadows the victim-based narratives introduced by critical studies. Hate speech can silence or establish subordination, whether hierarchical, as in the case of a teacher at school or the boss of a firm, or community-based, when a black or gay family is living in a small conservative town in Utah with a predominantly white middle-class population that is adherent to some radical protestant system of beliefs.[57]

Baez maintains that the debate between abstract principles and contexts reduced the question of hate speech to juridical dichotomies: "speech *versus* equality, the First Amendment *versus* the Fourteenth Amendment, injury to victims *versus* injury to democracy, and so forth".[58] Civil libertarians argue that, even if racist speech disappears, discrimination will remain and that, moreover, banning speech may aggravate racism. Others, like Sadurski in his critique of MacKinnon, suggest that "the corollary of [the silencing] argument is that the hearers are not responsible of the views which they form in their mind about various racial groups because they are shaped in that way by the speakers" and that "they are being seen as thoughtless receivers of ideas imposed upon them by speakers".[59]

Richard Posner suggests a curious analogy between critical jurisprudence and non-market behaviour. Consequently, he attacks the language of postmodern instrumentalisation as excessively pragmatic.

> "Postmodernism is what I am calling its historical aspect has affinities with the economics of non-market behaviour, because both disciplines study the effects of material developments on thought and

[56] See, for an account of the complicated dichotomy between speech and conduct as developed by the US Supreme Court: **E. VOLOKH**, "Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, Situation-Altering Utterances, and the Uncharted Zone", *Cornell Law Review*, 2005, pp. 1277-1347.

[57] The subordination arguments are developed by Sadurski. In his book, Sadurski does not present an explicit position on whether hate speech should be justified. His aim is to thoroughly explore the harms of racist vilification. He differentiates between hate speech bans that are "generic" and "specific". For example, the workplace should be given more extensive protection because of its hierarchical nature, which creates a higher potential for the suppression of public discourses; because people at the workplace are restricted in their opportunities to avoid receiving insulting messages; and because moral discouragement may lead to decreases in work efficiency. He also suggests that "an employer should have a higher discretion with respect to content-based prohibitions on speech within the workplace, than should a legislator when designing a prohibition for a society at large". See: **W. SADURSKI**, *Freedom of Speech and Its Limits*, Kluwer, 1999, especially p. 184.

[58] **B. BAEZ**, *Affirmative Action, Hate Speech, and Tenure: Narratives about Race, Law, and the Academy*, Routledge, 2002, p. 45.

[59] **W. SADURSKI**, "On 'Seeing Speech Through an Equality Lens'", *o.c.*, p. 717.

> are sceptical of idealising pictures of social practices, such as language and reputation. [...] Postmodernism is the excess of pragmatism. Postmodernists are not merely anti-metaphysical, which is fine, but also anti-theoretical. Almost all of them are infected by the virus of political correctness, as well. And, though with notable exceptions, they write in an ugly, impenetrable jargon, sometimes with the excuse that to write clearly is to buy into the Enlightenment mythology of unmediated communication between author and reader."[60]

Notwithstanding the rationale behind Posner's position, it is necessary to acknowledge that his 'critique of crits' is at places equally strained and oversimplified. Thus, in establishing a target example of critical legal writings, he trivialises a book on the legal history of Ireland, from which he seems to draw his conclusions on the obscurity and fuzziness of the postmodern style, which he sees as pregnant with meaningless metaphors and oxymorons. This manner of picking and choosing does not prevent the author from abusing metaphorical contextualisation, while remaining irritated with the aesthetics of a new academic language.[61] Besides, Posner's beloved methodology of law and economics is a genetic sibling of the very postmodern movements that he critices.[62] *Quod licet Iovi, non licet bovi?*[63]

Since the middle of the 1990s, there have been a series of curious academic debates about hate speech between the 'crits' or scholars of postmodern deconstructionism and the so-called absolutists or libertarians, their opponents. The most illustrative example of it is to be found in the exchange between Richard Delgado and Steven Gey, in which the latter blames critical scholars for advocating censorship and the former demonstrates that racial insults invite no discourse.[64] The list of the 'critics of the crits' also includes the communitarians with an often quoted piece by Amitai Etzioni[65], whose position can be compared to the adage that

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[60] **R.A. POSNER**, *Overcoming Law*, Harvard University Press, 1995, p. 317.

[61] See, for an account of the rhetorical strategies used in law and economics: **D.N. McCLOSKEY**, "The Rhetoric of Law and Economics", *Michigan Law Review*, 1988, pp. 752-767.

[62] See, for the common genealogy of postmodern movements: **G. MINDA**, *Postmodern Legal Movements. Jurisprudence at Century's End*, *o.c.*

[63] Is what is legitimate for Jupiter not legitimate for oxen?

[64] See: **S.G. GEY**, "The Case Against Postmodern Censorship Theory", *Univeristy of Pennsylvania Law Review*, 1996, pp. 145-193; **R. DELGADO**, "Are Hate Speech Rules Constitutional Heresy?: A Reply to Steven Gey", *Univeristy of Pennsylvania Law Review*, 1998, pp. 146-865; **S.G. GEY**, "Postmodern Censorship Revisited: A Reply to Richard Delgado", *Univeristy of Pennsylvania Law Review*, 1988. See also, for an example of a recent European text with a critical approach towards postmodern instrumentalisation of free speech: **E. HEINZE**, "Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age and Obesity", in **J. WEINSTEIN and I. HARE**, *Extreme Speech and Democracy*, Oxford University Press, 2009, pp. 264-284.

[65] **A. ETZIONI**, *The Spirit of Community. Rights, Responsibilities and the Communitarian Agenda*, Fontana, 1993; who was ranked, in 1982, first of the thirty thinkers who had made major policy contributions in the past decade.

"sticks and stones may break my bones but words will never harm me".[66] Etzioni essentially suggests that the condemnatory communitarian response from civil society -also exercising its First Amendment rights- is sufficient and instead advocates education projects, informal and formal seminars, discussions and film sessions on campuses.[67] On the surface, this position looks quite superficial. Etzioni himself gives the example of a T-shirt that reads "Club Faggots, Not Seals". The resultant question is whether sound communitarians should submit themselves to a community in which they are regularly taunted on the basis of their race, sexual orientation or disability.

An important question that the postmodern deconstruction of the right to free speech introduces is to which degree a racist, sexist or homophobic context is stable over time. If such environments are a distinctive feature of American society, with its 'melting pot' *ethos*, then the marketplace epistemology may be plausible. If the pertinence of racism has been increased by the absolutist viewpoint on free speech, the dominant approach of the Supreme Court in hate speech cases may recall Abraham's willingness to sacrifice his own son, indicating a similar ardour before the godlike altar of the First Amendment.[68] At least, one thing is certain. In the past 20 years, the American free-speech debate has produced a series of legal narratives based on post-Marxist, post-colonial, post-structuralist ideas that are indispensable to the genuine appraisal of the right to freedom of expression in a democracy.

C. Transatlantic perspective: Postmodern language for European law?

Given that the origin of American critical studies is deeply rooted in the history of European social thinking -particularly in post-structuralism and the Frankfurt school-, the postmodern legal techniques are likely to be a part of the contemporary debate on freedom of expression in Europe. However, it may seem surprising that postmodern deconstruction is not as distinctive in European human rights texts as it is in the USA.[69] In addition, the whole school of critical race theory seems absent from the European academic space.

[66] *Ibid.*, p. 193.
[67] *Ibid.*, p. 202.
[68] **U. BELAVUSAU**, "Judicial Epistemology of Free Speech through the Lenses of Ancient Rhetoric", *o.c.*
[69] The only exception, even in continental law, seems to be law and economics, which is the only postmodern discourse to be equally incorporated into European legal settings.

One might advance several explanations for this. First, the whole instruction system in law schools across the Atlantic is different. In the USA, it is common to attend a college at which one majors in literature or social sciences before entering law school. Consequently, a future legal scholar is more likely to employ quasi-literary modes of interpreting legal texts. Secondly, the Anglo-Saxon system of case quotation arguably contributes to a culture of constant literary reinterpretation that is foreign to the civil law tradition. Thirdly, the Reagan and Bush judiciary design has actually provoked an emphasis on critical jurisprudence in law schools. Meanwhile, the European human rights agenda has been essentially driven by the *ethos* of the European Court of Human Rights, whose stance on racism, sexism and homophobia has been based on non-discrimination rather than on absolute free speech. The approach to hate speech in Europe is radically different from its American counterpart.[70] Moreover, in terms of 'parallel constitutional timing', one cannot help but be struck by the thought that the Supreme Court seriously discussed the rationale for interracial marriage bans in the 1960s or finally decriminalised homosexuality as late as 2003, whereas several European countries had already introduced the option of legal partnerships or marriages for same-sex couples. Fourthly, the entire post-war discussion on racism in Europe and the USA is substantially different. In Europe, in the second half of the 20th century, 'race' is almost an instinct notion, a rhetorical device with a quasi-shameful character. The post-war European community remains sceptical to any attempt at revitalising a scientific notion of race and focuses instead on cultural and institutional racism. Contemporary European discussions of racism often address ethnicity, the intersectional debate on immigrants and Muslims, along with traditional themes of anti-Semitism and anti-Roma hate speech. Meanwhile, the history of racial segregation in the USA continues to manifest itself in the rhetorical dichotomies of 'blacks' and 'whites', 'Latinos', 'first nations' and 'Asian Americans' in popular culture, official censuses, statistics, presidential campaigns, and so on. The colour-blindness of American law does not have its explicit analogue in Europe.

Nonetheless, although racist and sexist hate speech seems to have been judicially defeated in Europe, it is far from remaining a danger for American society alone. As Boyle sharply points out, hate speech was once central to European culture.

[70] See, for a detailed account of the European approach to hate speech: **U. BELAVUSAU**, "A *Dernier Cri* from Strasbourg: An Ever Formidable Challenge of Hate Speech", *European Public Law*, 2010, pp. 373-389.

> "There were no 'hate groups' espousing racism and white superiority when it was in fact the official ideology of mainstream idea. Today's racists wear out cast-offs, and we have a responsibility for what is done with those cast-offs."[71]

Similarly, anti-Semitism, which had its apotheosis during the Holocaust, is rooted in centuries of prejudice in Europe. For many years after the Second World War, there was a certain consensus among Europeans regarding the inadmissibility of particular utterances. Nowadays, however, Europe has entered into a vehement debate, regarding such issues as immigration, the status of Muslims, and the integration of the Roma community. The rise of xenophobia is another troublesome sign, with (recently deceased) Jörg Haider in Austria, Geert Wilders in the Netherlands, the *Vlaams Belang* in Belgium, the *Front national* in France, and *Lega Nord* in Italy, to name but a few. Recent elections in the traditionally liberal Netherlands and Sweden also indicated a rise in anti-migration populism. Furthermore, homophobia remains undefeated in both old EU member states and Central and Eastern European countries; in particular, Poland, Serbia and practically all post-Soviet countries. The recent appearance of European texts within the realm of the postmodern instrumentalisation of free speech[72] is, therefore, an exciting indication of the potential for the transatlantic migration of postmodern constitutional ideas.

This leads to the question of what exactly can be incorporated into the European scholarship on human rights from the postmodern instrumentalisation of free speech. The true novelty of the critical jurisprudence stemming from European post-structuralism lies in its form, which can be aptly described as literary. As convincingly demonstrated by Posner, the peculiar 'narratology' of the postmodern legal movement works by means of two rhetorical

[71] **K. BOYLE**, "Hate Speech: The United States *versus* the Rest of the World?", *Maine Law Review*, 2001, at p. 493.

[72] See, among others: **S. BAER**, "Violence: Dilemmas of Democracy and Law", in **D. KRETZMER and F. KERSHMAN HAZAN**, *Freedom of Speech and Incitement against Democracy*, Kluwer, 2000, p. 88; **H. THORGEIRSDÓTTIR**, *Journalism Worthy of the Name*, *o.c.*; **S.M. EASTON**, *The Problem of Pornography: Regulation and the Right to Free Speech*, Routledge, 1994; **M. MÖSCHEL**, "Color Blindness or Total Blindness? The Absence of Critical Race Theory in Europe", *Rutgers Race and the Law Review*, 2007, pp. 57-127; **I. STOEHR**, PorNo-Kampagne und Frauenbewegung", *o.c.*; **A. SCHWARZER**, "Weiblicher Masochismus ist Kollaboration!", *o.c.*; **N. STROSSEN**, *Zur Verteidigung der Pornographie: Für die Freiheit des Wortes, Sex und die Rechte der Frauen*, *o.c.* (A 'European' publication of an American scholar); **J.-F. GAUDREAULT-DESBIEN**, "La *Critical Race Theory* ou le droit étatique comme outil utile, mais imparfait, de changement social", *Droit et Société*, 2001, pp. 581-612 (A 'European' publication of a Canadian scholar); **I.S. PAPADOPOULOS**, "Guerre et paix en droit et littérature", *Revue interdisciplinaire d'études juridiques*, 1999, p. 194-ff; **G. PINO**, "Discorso razzista e libertà di manifestazione del pensiero", *Politica del Diritto*, 2008, pp. 287-306; **G. PINO**, "Teoria critica della razza e libertà di espressione: alcuni punti problematici", in **T. CASADEI and L. RE**, *Differenzà razziale, discriminazione e razzismo nelle società multiculturali*, 2007, at p. 158; **A. VERZA**, *Il dominio pornografico*, *o.c.*

modes; namely, history and literary technique.[73] The literary mode, illustrated by victim storytelling, literary methods of conveying arguments, quotations or even poetry, is combined with a historical account of group subordination and the disadvantages that may accompany the European shift from race to ethnicity. Thus, the rhetorical turn in which American scholars are engaging may have universal implications for human rights narratology and, particularly, for affirmative action and constitutional dialogue agendas. In the context of speech advocacy, postmodern instrumentalisation plays a remarkable role within civil rights organisations like anti-racist, feminist and LGBT organisations. They act as the principal plaintiffs before tribunals with group claims. The academic reception of this peculiar critical narratology in Europe is indispensable to the shaping of a new victim-centred doctrine, a civil rights space and necessary actors for processing free speech cases before courts and revealing the enigmas of law's neutrality.

[73] **R.A. POSNER**, *Overcoming Law*, *o.c.*