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*HATE: Why We Should Resist it with Free Speech, Not  
Censorship* by Nadine Strossen (review)

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## BOOK REVIEWS

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**Nadine Strossen, *HATE: Why We Should Resist it with Free Speech, Not Censorship* (Oxford University Press 2018), ISBN: 9780190859121, 232 pages.**

Hate is trending. The sitting president of the United States regularly mobilizes his political constituency by vilifying Mexican immigrants as “criminals and rapists” who “infest” America, and by promoting a “zero tolerance” policy at the border that punitively separates children from their parents, including persons applying for asylum. There has been a resurgence in white nationalist ideology globally both in mainstream electoral politics and in ugly scenes on the streets of Charlottesville, Dresden, and Warsaw. In the United Kingdom, hate crimes spiked after the Brexit referendum and in the USA, there has been a steady rise in hate crimes against African-Americans, Muslims, immigrants and members of the LGBT community. Given this current paroxysm of populism, isn’t it high time we re-evaluated our commitment to freedom of expression and start contemplating new legislation to regulate discriminatory speech that targets vulnerable minorities?

In *HATE: Why We Should Resist it with Free Speech, Not Censorship*, Nadine Strossen, former national President of the American Civil Liberties Union (ACLU), offers a resounding defense of free speech and rejects attempts to suppress or ban speech that is constitutionally protected under the

First Amendment. Free speech is the lifeblood of democratic deliberation, argues Strossen, and much hate speech in the United States, while offensive, is protected speech and should remain so. Current US law only suppresses speech that intentionally advocates imminent lawless action that is likely to occur, and even then, the regulation of speech must occur in a way that is consistent with the viewpoint (or content) neutrality principle which inhibits the state from disfavoring some opinions simply because they are disagreeable.

Strossen starts with the observation that there is no clear and consistent definition of “hate speech,” which she puts in scare quotations throughout the book. Hate speech is not a term of legal art and it is simply wrong to assert, as some liberal politicians have, that “hate speech is not free speech.” In Strossen’s view, “the terms ‘hate speech’ and ‘hate crimes’ are simply deployed to demonize views people find offensive and to call for punishing a broad swathe of expression, including political discourse that is integral to our democracy.”<sup>1</sup>

Reviewing hate speech laws in the US and globally, Strossen concludes that it is simply not possible to draft hate speech laws that are not unduly vague, overbroad and counter-productive.<sup>2</sup> Germany, France, and other European countries convict hundreds of defendants a year for offences as capacious as “incitement to hatred,” and Strossen documents a number of cases that seem disproportionately chilling of political

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1. NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* 1 (2018).

2. *Id.* at 13.

speech. They include the 2014 arrest of a British politician for publicly reading a Winston Churchill quote from 1899 that denounced the treatment of women in Muslim countries, and the conviction of a Danish man in 2016 who criticized “the ideology of Islam” on Facebook, and posted the statement, “Islam wants to abuse democracy in order to get rid of democracy.”<sup>3</sup> She reminds us also of the long and repressive history of government censorship in the United States, including how, in the 1830s, Southern states banned abolitionist speech on the grounds that it had the potential to incite violence and rebellion. She observes that the Republican National Committee and some state legislatures have included the Black Lives Matter movement in resolutions condemning hate speech.

*HATE* addresses the lively and fairly acrimonious campus hate speech debate currently taking place in the United States, and Strossen counsels faculty and students to confront provocative speakers at universities with “counterspeech” and vigorous opposing arguments, rather than to silence them with heckling and censorious campus hate speech codes.<sup>4</sup> She points out that all the campus speech codes challenged in the courts by the ACLU have been struck down on First Amendment grounds and recommends that universities permit all speech that the government does not itself censor.<sup>5</sup> Strossen does not countenance the view that merely being exposed to denigrating speech is in itself harmful, and she cites social science studies demonstrating that such speech has no long-term negative effects on members of targeted groups. Indeed, being subjected to denigrat-

ing speech may even foster resilience.<sup>6</sup> Strossen concedes that workplaces may regulate speech to ensure that minority groups do not have to endure a “hostile work environment”<sup>7</sup> and public (but not private) schools may regulate speech, including the Confederate flag and white supremacist slogans, that causes a substantial disruption to the educational process.<sup>8</sup> True threats and incitement to violence are, of course, already illegal in most all criminal jurisdictions worldwide.

Debates about the scope of acceptable political speech are time-honored and date back at least to Aristotle’s *Rhetoric*, but what is new and different about the present political moment is the outsized role played by social media platforms in popular political discourse. Social media companies have responded to the criticism that they are too permissive of online hate speech by creating new algorithms and infrastructures of regulation, including hiring tens of thousands of moderators to review (and often remove) content. Facebook has become one of the biggest regulators of speech in human history, outstripping the reach even of governments, and Strossen notes with alarm Facebook’s admission that it now deletes nearly 288,000 hate speech posts per month.<sup>9</sup> Strossen considers that such censorship is not warranted, and she maintains that social media companies operating in the United States should not ban expression that the US government itself cannot ban.

According to Strossen, we should be very cautious in handing governments overbroad powers to suppress political speech on the basis of vaguely worded hate speech laws, as these are often

3. *Id.* at 96, 27.

4. *Id.* at 34.

5. *Id.* at 31.

6. *Id.* at 152.

7. *Id.* at 56.

8. *Id.* at 58.

9. *Id.* at 32.

used against activists in the very minority communities that they are designed to protect. The United States would not benefit from new hate speech laws along the lines of those in Germany, France, Britain or Canada. Strossen recognizes the need to refute discriminatory bias against minority groups in society, and she notes that she has been personally subjected to anti-Semitic and misogynist speech, but in her view, "the cure is worse than the disease."<sup>10</sup> Government censorship of political speech is likely a greater harm than that of individuals who express discriminatory bias in their speech. *HATE's* thesis can be summarized in three succinct points: 1) There is insufficient evidence that hate speech causes the harms attributed to it; 2) Hate speech laws do not effectively reduce such putative harms; and 3) Even if hate speech laws did reduce the feared harms, the damage to democratic legitimacy and freedom of speech would be too great to justify them.<sup>11</sup>

*HATE* makes a convincing case for unencumbered free speech but there is plenty of sensible middle ground that is left unexplored in the argument. This emanates, it seems, from the initial premise that there are no significant harms resulting from hate speech. Yet increasingly, social science studies have identified tangible harms in hate speech. The preponderance of social science studies conducted during the recent upsurge of right-wing populism pinpoint both direct and indirect harmful effects of hate speech against immigrants and other minorities.

In terms of direct effects, the anti-immigrant and anti-Muslim Twitter posts by Donald Trump correlate with attacks on immigrants and Muslims, and in Germany, anti-immigrant posts on the far right Alternative for Germany (AfD) party Facebook page correlate with actual attacks on immigrants.<sup>12</sup> As for the secondary effects of hate speech, social science and health studies have extensively documented the poor health and educational outcomes for individuals who are repeatedly targeted and harassed because of their ethnicity, race, gender, sexuality or religion. In *Harper v. Poway*, the Ninth Circuit Court of Appeals cited seven such studies to justify upholding the right of a school district to prevent a student from wearing a t-shirt in the classroom declaring, "Homosexuality is Shameful."<sup>13</sup> The existence of a consensus on the deleterious effects of denigrating speech does not in itself decide once-and-for-all the question of regulation, since one might reasonably support free speech for other reasons, but the corroborated social science evidence seriously destabilizes the view that hate speech has little or no harmful effects. It worried this reader that Strossen declares that even if ample evidence were provided showing the harmful effects of hate speech and the effectiveness of hate speech laws, she would not change her view. The fact that hate speech is verifiably harmful ought to trouble us on the grounds that, since Thomas Hobbes, government's most basic function is to protect its citizens from harm or injury. Acknowledging such harm might render our commitment to free speech rather more qualified.

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10. *Id.* at 14.

11. *Id.* at 36.

12. See Stephen Rushin & Griffin Sims Edwards, *The Effect of President Trump's Election on Hate Crimes*, SSRN (14 Jan. 2018).; Karsten Müller & Carlo Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime*, SSRN (21 May 2018); Karsten Müller & Carlo Schwarz, *Making America Hate Again? Twitter and Hate Crime Under Trump*, SSRN (30 Mar. 2018).

13. *Harper v. Poway Unified School Dist.*, 445 F.3d 1166, 1179 (9th Cir. 2006).

Strossen's thesis is that all hate speech laws violate the content neutrality principle that is the bedrock of First Amendment jurisprudence. However, there are exceptions that merit further consideration as a model for future regulation of the most egregious forms of threatening speech (or, in the legal parlance, "true threats"). In *Virginia v. Black*, the Supreme Court reviewed a case in which a Ku Klux Klan leader had been convicted under a Virginia statute for burning a cross on the property of an African-American family.<sup>14</sup> The Court permitted a state to ban cross-burning with intent to intimidate, but invalidated that part of the statute that specified that cross-burning was *prima facie* evidence of intent to intimidate. Crucially, and contra Strossen's thesis, the Virginia statute was not content-based and only made it a felony "for any person . . . with the intent of intimidating any person or group . . . to burn . . . a cross on the property of another, a highway or other public place,"<sup>15</sup> regardless of the offender's viewpoint on race, ethnicity, religion or any other axis of identity. Importantly, the Court confirmed that the First Amendment does not extend to true threats: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black* seems to allow the suppression of true threats against collective groups, including families and racial and ethnic groups. Stated thus, the ruling in *Black* could constitute a charter for how state legislatures could write statutes

prohibiting incitement and threat in order to shield targeted groups from intimidating speech that calls for, or threatens, violent action.

*HATE* declares that the language of hate speech and hate crimes simply stigmatizes and demonizes beliefs we find repugnant, yet there are legitimate uses for these terms that Strossen neglects to mention. The Federal Bureau of Investigation, which collects national data on hate crimes, defines hate crimes partly with reference to the presence of hate language or the display of bias symbols during the commission of a crime against property or person.<sup>16</sup> Therefore, some working conception of hate speech is indispensable to the definition of, and lawful suppression of, hate crimes. By attacking these concepts with such gusto, Strossen's absolutist defense of free speech could hinder efforts to encourage state and federal law enforcement agencies to collect better data on hate crimes, and thereby develop a coherent strategy to prevent and punish them. At present, nearly ninety percent of law enforcement agencies report zero hate crimes to the FBI. It is rather unlikely that this is because there are no hate crimes in their jurisdiction. Mississippi, a state with a checkered history of race relations, reported no crimes at all in 2015, in violation of its obligations under the national Uniform Crime Reporting framework. Meanwhile, fourteen states have passed laws requiring their law enforcement agencies to engage in accurate hate crimes reporting, and a number of human rights commissions in US cities independently collect hate crimes data,

14. *Virginia v. Black* (2003), <https://supreme.justia.com/cases/federal/us/538/343/#tab-opinion-1961221>.

15. *Id.* at 343.

16. Hate Crime, BUREAU OF JUSTICE STATISTICS, available at <https://www.bjs.gov/index.cfm?ty=tp&tid=37>.

and these positive developments might be extended further.<sup>17</sup>

Nadine Strossen has written a doughty defense of free speech that should be read by anyone interested in how to respond to the current challenges of xenophobia, racism, religious chauvinism and extreme nationalist sentiment. Her resistance to increased government regulation of political communication will appeal across the political spectrum, and serve as a touchstone for advocates of the cause of free and unfettered expression, but it left this reader wondering if more might be done within the existing legal and regulatory framework to stem the rising tide of nativist bile and hate crimes.

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**Roman David, *Communists and Their Victims: The Quest for Justice in the Czech Republic* (Philadelphia: University of Pennsylvania Press, 2018), ISBN 9780812250145, 264 pages.**

*Communists and Their Victims* is the product of over two decades of work on the topic by the author. Although, as the subtitle suggests, the book is an important country study, the work's ambition and accomplishments go well beyond that. Professor David's expertise is not merely

in his country of origin, but includes Poland, Hungary, and Croatia, as well as South Africa and South Korea. Unlike some of us who dabble in the topic of transitional justice from an armchair, Professor David has lived in, and conducted empirical research in this wide array of countries. This wealth of experience has added to his conceptual approach to the subject and has sharpened his tools of analysis. The result is a well-informed, nuanced, yet coherent, treatment of the subject of transitional/ transformative justice. Professor David's and conclusions are logical, theoretically sound and compelling, in part because of the enormous amount of research that went into the work, and in part because of his ability to analyze and convey his results to the reader.

This work is not a high-level theoretical treatment of what justice requires in times of transition. He does not begin the work with his transformative theory of justice, and he does not use that theory to evaluate the various mechanisms designed to achieve justice in the Czech Republic. It is not a normative theory in that respect. It is a work of social science and not philosophy, so Professor David does not speak much about "justice" in the abstract, but of the measures taken to achieve justice, and the perceptions of his subjects that justice has been achieved.

This is not to say that there is no normative mooring for the project. He makes clear in his introductory chapter that he, like the "vast majority of scholars" in this area, adopts liberal democracy as the background norm of assessment.<sup>1</sup> Three

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17. See JoAnn Kamuf Ward, *Challenging a Climate of Hate and Fostering Inclusion: the Role of US. State and Local Human Rights Commissions*, 49 COLUMBIA HUM. RTS L. REV. 129 (2017).

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1. ROMAN DAVID, *COMMUNISTS AND THEIR VICTIMS* 10, n.25 (2018).