

COPYRIGHT NOTICE:

Laura Beth Nielsen: License to Harass

is published by Princeton University Press and copyrighted, © 2004, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

For COURSE PACK and other PERMISSIONS, refer to entry on previous page. For more information, send e-mail to permissions@pupress.princeton.edu

Chapter One

INTRODUCTION

This guy says to me, "I hate women, they're all sluts."
(24-year-old white woman, student, interview #10)

And he said, "I love that smile. I would have liked to have been there this morning when your man put that smile on your face. What did he do to put that smile on your face? I'll bet he fucked you so long you'll be smiling all day."
(field notes 1994)

"Monkey for a dollar!"
(18-year-old African American woman, interview #54)

I get these comments all the time. Mostly because of the fact that I am a lesbian. When I am walking down the street with my girlfriend we get lots of comments like, "Try me and you'll never go back" or "I can show you things that she can't."
(19-year-old Hispanic woman, emergency medical technician, interview #6)

A man says to me, "[H]ey white bitch, come suck my dick." *(26-year-old white woman, unemployed, interview #30)*

WORDS LIKE THESE are spoken on the streets of America every day. To women, such words instill fear as a possible prelude to sexual violence. To people of color, such words bring the sting of racism, a bitter reminder that racial bias lives on and can surface anywhere, anytime, in subtle or blatant forms. To gays and lesbians such words convey a threat of hostility and aggression if they display affection for a same-sex partner or depart from conventional norms of dress and self-presentation. To all these groups, such words are a deep affront to personal dignity. To the courts, such words are protected speech.

This book examines the dilemma that offensive public speech poses for American society, and in that effort probes deeper questions about the relationship between law and society. Why has this society, which has shown increasing sensitivity to the legal protection of traditionally

disadvantaged groups, continued to afford constitutional protection to offensive public speech? What does this policy imply about the relationship between law and social hierarchy in the contemporary United States? Is this policy choice shared by all segments of American society, or do judges, traditionally disadvantaged groups, and traditionally advantaged groups hold different beliefs about the legal status of offensive public speech?

This book pursues these questions through a socio-legal investigation of offensive public speech. In addition to examining the official doctrines of courts and public authorities, it analyzes data from interviews with ordinary citizens about their experiences with offensive public speech, their attitudes about the extent to which it poses a problem for American society, and their beliefs about whether the law should be employed to restrict offensive public speech. These interviews allow systematic comparison of the legal experiences and legal consciousness of different social groups—white men, white women, and people of color.

Important insights into how Americans view offensive public speech and the role that law should play in dealing with it emerge from this analysis. Consistent with other research, I find that white women and people of color are much more likely to personally experience offensive public speech than are white men and that street harassment imposes serious harms on these groups. While experience with the phenomenon varies, there is broad consensus among all social groups that sexist and racist comments in public are serious social problems. There also is considerable agreement that the law should not be deployed to attempt to stop such speech. But the reasons that white women, women of color, and men of color give for opposing legal regulation are significantly different from those offered by white men. Beneath a surface consensus against legal intervention, we see that different groups of Americans have very different attitudes about the law, which are rooted in their experience with the law. In the specific context of offensive public speech, white women and people of color are reluctant to turn to law for help, either because they do not believe the law can help them or because they fear the law would be used against them.

These findings have a larger significance for theories of law and legal consciousness in the United States. Contrary to the popular depiction of Americans as overly litigious, we see here that Americans have a pragmatic skepticism about the law as a remedy for offensive public behavior. In part the attitudes of ordinary citizens about offensive public speech may be shaped by judicial doctrines of free speech. Yet these attitudes seem to be anchored in a lay realism about the law and what it can be expected to accomplish. Only a small proportion of the indi-

viduals I interviewed, most of whom are white men, cite freedom of speech as the principal rationale for exempting offensive public speech from legal regulation.

Thus there is a disjuncture between the constitutional analyses of the courts and legal scholars (both orthodox First Amendment scholars and critical proponents of hate speech regulation) and the views of average Americans. Most of the individuals I interviewed spoke frankly both about the problem of harassment in public and spoke realistically about the difficulties of legal intervention to control it. But the courts have made hate speech decisions with virtually no empirical analysis of the phenomenon or its effects on target groups. Rather than seriously engaging in an analysis of the costs and benefits to society of rules that might limit such behavior, American courts have treated such conduct as “speech,” which can be regulated only if the state offers a compelling justification. This doctrinal treatment in effect grants a license to harass. The judicial protection of offensive public speech works to normalize and justify such behavior. Without acknowledging it, courts have placed a significant burden on traditionally disadvantaged groups in our society. Moreover, the judicial treatment of offensive public speech is not consistent across all forms of offensive public comments. The courts have been more tolerant of legal restrictions on begging than on other forms of public speech. Because begging is the one form of public speech that most often confronts more privileged members of our society and because it often is opposed by merchants and property owners, this inconsistency appears to reflect a class bias in judicial doctrine.

It is only through a combination of legal and sociological analysis that it is possible to consider the relationship between the legal consciousness of ordinary people, the judicial treatment of offensive public speech, and the racial and gender hierarchies that offensive public speech reinforces. Through that inquiry we gain new insights into the relationship between law and social hierarchy in the contemporary United States.

THE LOGIC OF COMPARING DIFFERENT TYPES OF OFFENSIVE
PUBLIC SPEECH: BEGGING, SEXUALLY SUGGESTIVE SPEECH,
AND RACIST SPEECH

I study “offensive public speech.” For theoretical reasons, I chose to ask respondents about begging, sexually suggestive speech, and race-related speech between strangers in public places. The decision to ask

about sexually suggestive and race-related comments is straightforward, given the salience of this kind of speech in urban areas and their clear connection to race and gender hierarchies. The decision to compare begging to sexist and racist speech requires more comment.

By including begging with sexist and racist speech, I do not intend to make a normative judgment about its relative harm or offense. Rather, because the law gives serious treatment to the harms associated with being the target of aggressive begging, begging raises a number of theoretically driven but empirically unexamined questions. First, do people consider begging to be “offensive” public speech? (The answer largely is no). Second, insofar as they do consider it offensive or troubling, do they consider it problematic in the same way that they think of racist and sexist street speech as problematic? (Again, the answer is no—even those who do find begging troublesome think of it as far less “offensive” than racist and sexist street harassment). Third, by including begging, I am able to ask: How is simply being in public different for members of different social groups? If I did not include some form of unsolicited street speech that frequently targets white men, such a comparison would not be possible. Including begging in the study brings out important doctrinal and empirical comparisons about the nature of “offensive” public speech and how that category is constituted in law and in the everyday lives of individuals.

One could make similar arguments about “harmless compliments” made to women on an everyday basis. Some women may find such comments pleasant or flattering. These difficulties associated with defining “offensive” were among the primary reasons that I chose a subjective approach to the phenomenon. That is to say, the category of “offensive public speech” is defined by respondents’ answers to questions about interactions they had with strangers in public places. In the interviews (described in greater detail in appendixes A and B), I prompted respondents to describe pleasant, benign, and offensive interactions. What they reported as offensive is what I counted as offensive. What is offensive to one target may not be to another.

Indeed, my interviews and observations demonstrate that there is a wide spectrum of interactions that are considered problematic by targets and that there is disagreement about what is troubling. One woman may be offended by the same comment that is considered complimentary and flirtatious to another woman. Sexually suggestive banter or flirting may be deemed appropriate when the speaker is of a certain social status or race but deemed inappropriate when the intended suitor is of lower social status or another race. Therefore, conscious and unconscious biases, including racism, that are inherent in targets’ analysis of such interactions, are captured rather than con-

trolled for in the definition of offensive public speech for the purposes of this study.

I made the explicit choice to study the targets, as opposed to perpetrators, of hate speech. This approach to hate speech or any other form of prejudice shifts the concept of prejudice from an objective one to a “subjective phenomenon with differences in perceptions and interpretations occurring between observers and actors, among target groups, and even within target groups” (Swim and Stangor 1998, p. 5). The study of targets’ perceptions of discriminatory acts (as a subjective phenomenon) is said to necessitate “greater emphasis on descriptive and qualitative data,” including “observational approaches in order to fully understand different groups’ perspectives” (p. 6). My interviews were constructed to elicit a fuller understanding of the experiences of offensive public speech.

THEMES

This book addresses three interrelated themes. First, it examines the role that offensive public speech plays in how different social groups experience “being in public.” A second theme of the book is legal consciousness. The study of “legal consciousness” explores individuals’ experiences with and knowledge of the law and legal norms, as well as how this legal experience and knowledge translate into actions and decisions (Ewick and Silbey 1998). Finally, this book engages with debates about free speech and hate speech. The debates of legal scholars, critical race scholars, and even members of the judiciary have been largely uninformed by empirical data about offensive speech and its effects. This project provides needed empirical data about the contours of this debate and the positions of the parties most directly affected by harassing speech.

Being in Public

One objective of this work is to better understand social hierarchy as it is created, produced, and reproduced in public. The stories recounted by my respondents demonstrate that the anonymity people enjoy in crowded public places makes the public sphere an arena that is uniquely amenable to street harassment. As racism and sexism increasingly are becoming socially unacceptable (at least superficially), public places provide an opportunity for the expression of such comments without reprisal both because the target fears further violence and because the speaker and the target do not know one another.

The book demonstrates how simply being in public is raced, gendered, and classed. That is to say, simply being in public is different for white women, people of color, and those in poverty. My findings show how social hierarchies are reinscribed everyday through racist harassment, sexist harassment, and even through begging.

In its broader social context, hate speech is but one mechanism of subordination that “usually includes a complex, interlocking series of acts, some physical, some verbal, some symbolic” (Lederer and Delgado 1995b, p. 5), and creates “an atmosphere of fear, intimidation, harassment, and discrimination” (p. 5). Modern scholars of prejudice understand that prejudice involves more than individual negative stereotypes and actions. Prejudice involves “most centrally a commitment to a relative status positioning of groups in a racialized social order” (Bobo 1999, p. 447). If prejudice is about relative group position, then public hate speech provides a clear example of one of the ways in which such social hierarchies are constructed and reinforced on a day-to-day basis.

The effects of street harassment are significant. It is not simply a reminder of lower status for the target. Instead, as the respondents articulate, street harassment results in precautions people take to avoid being made a target. Taken together, the study of racist street speech, sexist street speech, and begging provide the basis for a sociological inquiry into the nature of being in public.

LEGAL CONSCIOUSNESS

In addition to a study of being in public, this also is a study of the sociology of law generally and of legal consciousness more specifically. The sociology of law traditionally has been concerned with the legitimacy of law, which ultimately is rooted in individuals’ belief in and acceptance of the legal order (Unger 1985). Legal consciousness recently has become an important topic in socio-legal research because it represents the intersection of law as an institutional force and individuals as knowing agents. The contemporary concern with legal consciousness moves away from this traditional emphasis on the acceptance of official power by individuals to the notions of justice, rights, and power carried in the minds and applied in the everyday lives of individuals. Thus, scholars have begun to inquire whether and why people invoke the law in disputes (Bumiller 1988; Conley and O’Barr 1998; Merry 1990; Yngvesson 1985) and in social movements aimed at broader social change (McCann 1994).

The shift in concern among socio-legal scholars reflects a broader shift within social theory. Durkheim, Weber, and Marx were, in different ways, struggling to explain the rise and consequences of modern industrial society. Leading contemporary theorists such as Bourdieu, Scott, and MacKinnon have moved the debate to an examination of the relationship between modern institutions and the fate of individuals and groups. They look at how institutions shape modern life, including the worldviews of members of society. They theorize about the complexity of these interactions, as some groups and individuals develop strategies to improve their position within the social order while others resist it.

How do individuals come to possess knowledge of and opinions about the law and legal norms, and how does this knowledge shape their decisions about their life? This book seeks to move beyond the study of attitudes and opinions about law to examine the cultural schemas available to individuals as they attempt to make sense of the social world. Working from the context of offensive public speech, I attempt to analyze the role that law plays (or does not play) in how individuals conceive of a phenomenon that often deeply affects them.

This project concerns the interplay between race and gender hierarchies, law, and attitudes about the phenomenon of offensive speech. I explore citizen attitudes in depth and ask how their experiences have shaped these attitudes—experiences with the law and experiences in public places. Ewick and Silbey write that “legality [or law] is an emergent feature of social relations rather than an external apparatus acting upon social life” (1998, p. 17). The heart of this project is to understand precisely how this interactive understanding of legality (the personal understanding of law) filters, affects, constructs, and defines individuals’ perceptions of these particular social interactions.

What is legal consciousness? Sally Merry defines legal consciousness as “the way people conceive of the ‘natural’ and normal way of doing things, their habitual patterns of talk and action, and their commonsense understanding of the world” (1990, p. 5). For my purposes, I might add, *their commonsense understanding of the way law works*. Put simply, legal consciousness is how people think about the law. It is prevailing norms, everyday practices, and common ways of dealing with the law or legal problems. It is the product of experience with the law and ideologies about the law.

Offensive public speech is an apt arena in which to study legal consciousness. Notions about law are intimately connected to ideas about offensive speech, although not in a simple or straightforward way. These respondents continually interpreted their experiences through the lens of law even before I posed questions about the law. That is to

say, the law shapes people and their ideas, and people shape the content of law. While it is almost a cliché to talk about the constitutive power of law, this seemed to be the case in my interviews. Yet that did not necessarily mean that respondents favored the use of formal law to regulate offensive public speech. Rather, I found that legal consciousness is contradictory and contingent. The law is present in the everyday thinking of average citizens, and it affects what falls into the categories of redressable social harm versus the private burdens one must endure for a civil society.

The study of legality emerges from and contributes to the study of law in everyday life (Sarat and Kearns 1995), which is specifically designed to “encourage legal scholarship to bridge the separation between the instrumental and the constitutive perspectives and to recognize more fully the interactive character of law’s relationship to society” (p. 21). My project seeks to close this gap because neither an instrumental nor a constitutive perspective provides an adequate approach to the problem of harmful public speech. An instrumental view treats the law simply as a “tool for sustaining or changing aspects of social life” (Sarat and Kearns 1995, p. 23) and is not helpful in the case of offensive public speech because an instrumentalist conception primarily is concerned with law’s effectiveness in resolving a social problem. Since offensive public speech and its effects in reinforcing hierarchies of gender and race domination are not widely recognized, it would be difficult to measure the effectiveness of the law in this area. In other words, because the law renders the problem “invisible,” it is extraordinarily difficult to uncover. Moreover, the instrumentalist perspective simply explores the law as an external social institution and fails to explore the meaning of the law as understood by citizens.

My empirical research demonstrates that street harassment is, in fact, a problem of the magnitude that many scholars claim. The instrumentalist’s next question is how the law can correct this problem. But given the bias in favor of extra protection for speech in public, it is unlikely that this particular form of subordination through speech will be remedied by law. Instead, I turn my attention to people’s conception of social problems to explore how their legal consciousness—that is, their understanding of the law—affects their determination of what is or is not a social problem and when the law is an appropriate medium to address a social problem. Some First Amendment scholars might argue that how people understand the law is not important given the magnitude of the democratic principle at stake. Yet the normative claim should not foreclose the legal sociologists’ interest in the legal consciousness of ordinary citizens. It is interesting and important to learn whether there is a consensus among ordinary citizens about the

legal status of offensive public speech, and further to determine whether their views are consistent with First Amendment doctrine, their own experiences, or something else.

To reveal the contradictory and contingent nature of legal consciousness requires that the researcher view law not as a monolithic institution, but rather in the context of the “entire social environment” (Silbey and Sarat 1987). Law must be “defined less as discrete rules and official decisions than as various modes of knowledge—as specific cultural conventions, logics, rituals, symbols, skills, practices, and processes that citizens routinely deploy in practical activity” (McCann and March 1996, p. 210). To capture this complexity, I asked respondents not only about their experiences with offensive public speech, but also about their experiences with the law, their understanding of the principles that underlie the First Amendment, and how that affects their response to and understanding of offensive public speech.

These data demonstrate that subjects have strong normative reactions against most offensive public speech. They are willing to say that they find it offensive and morally wrong to make racist or sexist comments to strangers in public. Despite this, most people are not in favor of limiting such speech. What explains this apparent contradiction? The answer lies in varieties of legal consciousness: that is, differing attitudes about the law. Some respondents hold staunch First Amendment ideals. Others distrust the state. Still others are unwilling to be defined as victims, which they think would happen if they invoked the law to “protect” them. Moreover, I find that these attitudes are correlated with race and gender. Thus, behind an apparent consensus against attempting to regulate offensive public speech, I find significant variations in legal consciousness about offensive public speech, depending on the race and gender of the respondents.

My results thus lead to a somewhat different perspective on legal consciousness than emerges from previous work. Ewick and Silbey, for example, talk about the capacity to render some information less important than might otherwise be the case as the “hegemonic power of law” (Ewick and Silbey 1992, p. 727). According to a strong model of legal hegemony, the dominant model of legal thought with respect to offensive public speech—the First Amendment model—would control the attitudes of ordinary citizens across categories of race, gender, and class. I find, instead, that there is not so much widespread support for the First Amendment theory of street speech as there are conflicting perspectives on the value of using law to redress the problem of offensive public speech. The First Amendment model controls the law of the street, but more as a product of elite control of judicial doctrine and the police powers of the state, and less out of mass conformity to First

Amendment values. White women and people of color do not appear ready to mount a campaign to use the law to restrict racist and sexist street speech. This position is premised on and reflects skepticism about the law as a remedial tool, based on personal prior experiences with the law, legal institutions, and legal actors, broadly defined. A rejection of law also reflects political realism—the First Amendment theory of street speech remains firmly in control of legal and political institutions.

These systematic variations in legal consciousness that I found have methodological implications for studying legal consciousness. It is important that studies of legal consciousness are crafted to allow us to observe and measure variations in legal consciousness across social groups. To date, studies primarily have focused on the legal consciousness of a particular group such as welfare recipients (Ewick and Silbey 1992) or working-class people (Merry 1990). Instead of limiting my research to particular groups who traditionally have borne the burdens of particular problems (white women or people of color in my case), I interviewed people from different social groups, including white men. As a result, I was able to offer a broader theory of legal consciousness concerning offensive public speech.

A motivating theme in research on legal consciousness is resistance. How do ordinary people resist the imposition of power and the creation of hegemonic stories power imposes on subordinates? Elements of resistance to dominant ideology drive much of this research. My analysis of resistance in this book focuses on resistance to the imposition of race and gender status hierarchies in public places. If racist or sexist street harassment is designed to (re)inscribe social hierarchies based on race and gender, then what do targets do to reject the imposition of these constructions when such incidents occur in public places?

Free Speech

Racist and sexist speech generate much debate about the proper balance between freedom of speech and the protection of historically disadvantaged groups from verbal abuse. First Amendment absolutists argue that speech cannot and should not be legally restricted (Post 1990, 1993; Strossen 1995). Critical race theorists argue that racist speech results in substantial harms for its victims (Matsuda, Lawrence, Delgado, and Crenshaw 1993), perpetuates inequality, and must therefore be legally limited to realize the equality guaranteed by the Four-

teenth Amendment (Lawrence 1990). Cultural theorists contemplate how the performative aspects of speech translate into harms (Butler 1997). Feminist scholars identify sexist street harassment as a source of women's disempowerment (West 1987), investigate the harms associated with sexually suggestive public speech (Gardner 1980, 1995), explore potential legal remedies (Bowman 1993; Davis 1994), and question if pornography is a legally actionable harm (MacKinnon 1993).

Classic studies in public opinion, as well as more recent replications show a correlation between class, education, public participation, and support for the First Amendment (McCloskey and Brill 1983; Stouffer 1992). Concerned about the fate of civil liberties in a democracy, this research focuses on political tolerance. The studies of political tolerance have been large-scale empirical endeavors that survey attitudes and opinions toward the political speech of communists, socialists, and organized hate groups such as the Ku Klux Klan (McCloskey and Brill 1983; Stouffer 1992; Sullivan, Piereson, and Marcus 1982). This work provides a set of hypotheses about attitudes toward the legal regulation of individually directed hate speech, but leaves open questions about how individuals think about and understand the law with respect to everyday incidents of targeted hate speech. Moreover, because it relies on structured attitude and opinion data, it does not capture the more complex and subtle character of legal consciousness that in-depth interviews may provide.

My project builds on this work but differs in several important respects. I sought to investigate the relationship between experience with offensive public speech and legal consciousness. Therefore, instead of asking about organized political speech, I asked individuals about their experiences with and understanding of sexually suggestive speech, racist speech, and begging in public areas, allowing respondents to define what they considered offensive or problematic speech. Interviews were replete with subjects' reports of incidents in which they were made the target of offensive, sexually suggestive public speech, racist speech, and begging.¹ Many of these comments are considered offensive and problematic by at least some of their targets. All have been subject to attempts at legal regulation. Chapter 2 elaborates attempts and failures of regulatory regimes for dealing with these forms of speech.

Although most average citizens have not been party to a First Amendment lawsuit, they have opinions about the First Amendment and what types of speech should (or should not) be limited. The First Amendment and debates about regulating speech attract much attention in the popular media. For example, think of recent debates regarding flag burning, "political correctness," and media coverage of contro-

versial stories. Indeed, even when one is the target of street harassment, the law may be present in one's interpretation of the event. In other words, the way in which average citizens make sense of these sorts of interactions involves ideas about the law. The language of law may be a powerful force in the mind of the individual (Conley and O'Barr 1998).

In addition to saying what this book *is*, it may be useful to say what this book *is not*. This book *is not* an attempt to make a constitutional argument either in favor of or in opposition to the restriction of the forms of speech that I examine. My purpose is to develop a sociological analysis of the experience of being a target of sexist and racist speech, of the attitudes of ordinary citizens about the legal regulation of such speech, and of the official legal status of such speech. One of the lessons of that analysis, however, is that, as a society, we need to understand that the legal regulation (or lack thereof) of offensive public speech is a policy choice. When we make that choice we should do so in light of the empirical data about the nature of the burden borne by those who are frequently made targets. With a detailed understanding of the nature of the harms associated with allowing such speech, legal scholars may remain in favor of allowing such speech. But, these data require recognition that the burden of free speech is dramatic and largely is borne by white women and people of color.

Another lesson of the study concerns the relationship between law and power. The law celebrates "free speech" in public places as a cornerstone of democracy, as a protection from undue concentrations of power. Yet in protecting offensive public speech, the law protects a social practice that reinforces and actualizes hierarchies of race and gender. And, traditionally disadvantaged groups—white women and people of color—are well aware of the reality of the relationship between law and power. These groups already know not to look to the law for help. Thus, my analysis suggests that in its current form, the law grants a "license to harass" white women and people of color in public. At the same time, the law offers formal and informal protection to targets of begging. It is clear that the relative social status of the target of offensive public speech makes a difference in how different types of offensive public speech are legally managed.

NATURE OF THE STUDY

Given my theoretical concerns, I combined field observation, in-depth interviewing, and closed-ended interviewing. The ethnographic component of this study is based on over 120 hours observing street inter-

actions in a variety of public settings (for more on methods, see appendix A). There also is a narrative component to my research method. I attempted to preserve the integrity of the stories that respondents told me by tape recording and transcribing the accounts of street harassment given in the targets' own words. While these modes of data collection follow previous studies of legal consciousness, my research design differs from prior work in a few important respects. First, I conducted semistructured interviews with one hundred people. Second, I chose to interview people from a wide variety of backgrounds, rather than exploring the legal consciousness of particular groups of citizens. This combination of observation, in-depth interviewing, and semistructured questions put to a range of social groups allowed both a qualitative and quantitative inquiry into the legal consciousness of respondents and preliminary testing of hypotheses about the relationship between group characteristics/membership, experience with different varieties of offensive public speech, and attitudes about legal intervention.

An important element of the research design was the use of field observation as a distinct methodology. I conducted planned, systematic observations of interactions between strangers in public places designed to provide me with a better understanding of the nature of such interactions. One of the major advantages of field observation is that the researcher is privy to "unfiltered" information. Indeed, I was able to observe many street interactions prior to and during my efforts to construct and recruit a sample from the streets.

I selected three Northern California cities in which to conduct observations and recruit subjects. I conducted my research in San Francisco, Orinda (a very wealthy suburb of San Francisco), and Berkeley (using Oakland as a substitute during school months so as not to oversample people affiliated with the university). After observing interactions for some time, I used a careful selection process to determine which individuals to approach and ask if they would be willing to participate in an interview. The selection process (described in greater detail in appendix A) was designed to ensure that everyone in the location had an equal chance of being selected to participate in the interview.

Selecting subjects from public places had several advantages. First, I knew that the people I approached were consumers of public space. That is to say, they were willing to venture into public places and had, more likely than not, been party to the interactions about which I would be asking. Second, by "going where the data are" I was able to observe interactions as verification for the stories I was told in the interviews. Third, by approaching people in person, I could establish rapport in a way that would be impossible if contact were initiated via

telephone. Finally, potential respondents were less threatened being approached in a crowded public place than they might have been in some other context.

The dataset analyzed herein has strengths and limitations. The data were collected, analyzed, and presented in accordance with accepted practices for qualitative research. I chose depth over breadth in this qualitative research, but took care to construct a sample that was large enough to include members of different social groups. This allows for simple statistical comparisons across these groups. The data also are confirmed because they comport with findings by several scholars in a variety of disciplines using different methodologies. Finally, the patterns in my data are clear in many respects. Without replication, we cannot be sure they will hold across time and place. Yet they are a plausible account that may well prove robust in other contexts. These and other methodological questions are discussed at greater length in the methodological appendix, appendix A. The limitations of the data lie in the small numbers of subgroups of respondents. The quantitative data about the subgroups are intended to be descriptive for comparison and should be taken primarily as suggestive.

PLAN OF THE BOOK

In the chapters that follow, I study offensive public speech, not just as a social problem, but as a particularly interesting context in which to examine the interrelationship of race, gender, class, and legal consciousness. The primary focus of my data collection was on ordinary citizens moving in public space, particularly those groups who most often are targets of offensive public speech. The questions I put to these ordinary citizens were informed by ongoing debates in law and among legal scholars.

In chapter 2, I elaborate on the theoretical debates that inform my approach to offensive public speech and document the current state of the law regarding offensive speech of all varieties. Chapters 3, 4, 5, and 6 contain empirical results and analysis. Chapter 3 analyzes how frequently people of different races, genders, and classes are the targets of offensive public speech. This chapter elaborates the “detailed calculus for being in public” and demonstrates that those who are not the targets of offensive public speech of a particular variety systematically underestimate how frequently these sorts of interactions occur, as well as their effects on their targets.

In chapter 4, I address three important questions. First, do people consider offensive public speech to be a personal problem? Second, do

people consider the various forms of offensive public speech to be social problems? Finally, I ask if they think the law should intervene to remedy these problems. The answers vary across social groups based on experience. Although a majority of subjects think that offensive public speech is a serious personal and social problem, they do not think it is a problem that should be addressed by law. This pattern is especially striking among women. Women often are the targets of sexist speech, yet they are no more likely than men to favor legal regulation of such comments. Similarly, people of color are no different from whites in whether they favor the legal regulation of racist comments.

Chapter 5 probes the discourses people use in talking about the phenomenon of offensive public speech and its legal regulation. I find that there are four basic paradigms that people invoke when they oppose the legal regulation of offensive public speech. The paradigms vary significantly by race and gender.

Chapter 6 explores reactions and responses to offensive public speech in public places. If, as the respondents suggest, offensive speech is a serious personal and social problem but one that the law should not address, how do targets handle such situations in the moment? As they denounce the use of law, respondents suggest that this is a problem that can be dealt with on the spot. But their own stories suggest that most targets (probably rightly) are fearful and do not address the discriminatory messages during an actual encounter. In examining these various paradigms, I explore themes of resistance and counterhegemonic ideology. In contrast to some other studies (McCann 1994; Merry 1990), in which a protean rights consciousness figured prominently in the minds of ordinary citizens, my informants show surprisingly little interest in using the law as an instrument of resistance against racist or sexist public speech. Indeed, the aspect of law which is more often invoked is the First Amendment. Thus law is referenced in defense of a status quo that does little to regulate offensive public speech.

In chapter 7, the conclusion, I draw out the theoretical and methodological implications of my findings. I suggest that a more complete understanding of legal consciousness requires that we take account of how ideas about the law vary by the experiences and attitudes of individuals, and by the nature of the issues involved. Legal doctrine may not accurately reflect the experiences of various groups in our society. Yet it has practical and ideological effects. In the context of offensive public speech, First Amendment doctrine rejects an inquiry into the effects of such speech on various groups or the relationship of such speech to hierarchies of gender and race in our society. For white males, this is a normative position. Thus, there is a correspondence between legal doctrine and the most privileged position in public

spaces. A First Amendment approach reflects and ratifies white male experiences on the street. Indeed, the only area in which there has been a softening of the First Amendment model concerns begging—the one form of street harassment faced by white men.

While women and people of color would deny that formal doctrine captures their experience, neither do they seem particularly interested in seeking law's protection for this harm. Their reluctance appears to be rooted in their experience with law and with their broader experiences as women or persons of color, rather than in a belief in the value of applying First Amendment protection to offensive public speech. The complexity, indeed the reasoned wisdom of these groups, suggests that it is too facile to assert that there is a pool of rights consciousness among less privileged groups that can be mobilized for legal and social change. White women and men and women of color do not mindlessly accept the harms they face from offensive public speech. Perhaps correctly, they see the law as offering no recourse or worse, as posing an added threat of legal repression. Instead they struggle, as individuals, to resist, avoid, or accommodate to the acts of racist and sexist speech they encounter as a part of their daily lives. Finally, in the conclusion I speculate about law and its limits for social reform.

CONCLUSION

Conventional wisdom suggests that gender harassment in public places is a harmless nuisance that women simply must tolerate as one price for a “free” society. The courts take a similar position in striking down limits on racist speech on constitutional grounds. Feminist and critical race scholars attack this approach, arguing that such speech is intimately connected to broader systems of gender and race inequality that place a special burden on members of subordinated groups. Yet the theoretical and doctrinal debate remains uninformed by empirical data on the nature of this phenomenon and its effects.

Inequality and social hierarchies of race, gender, and class are produced and reproduced everywhere in any number of ways. Unlike the workplace, the family, and in violent encounters such as rape and domestic violence in which scholars have paid careful attention to these processes, public space is mentioned in passing or not at all. Street harassment becomes a site in which to study processes of subordination in raw form. In doing so, this book advances our understanding of hierarchy, power, legal consciousness, and resistance.