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Book Review

Walking a Gantlet: Nielsen’s
License to Harass


Reviewed by Lynne Henderson†

An African American person walks along a street almost anywhere. A white stranger snarls “nigger,” as s/he passes. A woman walks down the street and hears, “Come sit on my face bitch. Hey bitch, I said come sit on my face! HEY BITCH, I MEAN YOU . . .”¹ A young African American man walking with three friends encounters “this guy” who says, “Oh, one more of you and you’re a gang.”² A white woman walks with her husband and hears a “guy” say

†. Professor of Law, Boyd School of Law, University of Nevada, Las Vegas. J.D., Stanford Law School, 1979. I am honored and thankful that the Berkeley Journal of Gender, Law & Justice a continuation of Berkeley Women’s Law Journal, has invited me to contribute to their twentieth anniversary issue. My warmest congratulations to all who worked so hard for many years to support and make the Journal such a success, and my best wishes for the future of the Journal. Many, many thanks to the patient and supportive colleagues who read earlier drafts and gave me excellent editorial and substantive suggestions: Professors Sylvia Lazos, Steve Johnson, Ann McGinely, and Stephanie Wildman. I also thank my research assistant, Peter Nuttall, for his conscientious last-minute help. In the interests of full disclosure, I need to note that Dr. Nielsen was a student of mine in a sex-based discrimination class I taught as a visiting lecturer at Boalt Hall in 1995. She sent me reprints of two articles that were published in advance of the book, and I have referred to the articles in my Violence Against Women Seminar. I knew of her successful career at the American Bar Foundation and have seen her at Law & Society meetings a few times since the class, but we have not been in close contact over the years.

2. LAURA BETH NIELSEN, LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH 141 (2004). Subsequent references to page numbers will be made parenthetically in

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to her, "you're nothing but a flat-assed white bitch" (p. 53). Another white woman walks with her female partner and fearfully passes a man screaming "fucking lesbians" or "fucking dyke" (p. 47). An African American man riding public transportation reports, "last week, this white guy sits next to me on BART and just starts humming, 'Swing Low, Sweet Chariot'..." (p. 51). People, particularly white women and people of color, must walk a daily gantlet where hurled insults and free speech collide, much of the time they venture from "private," protected spaces into public places, without legal protection or recourse.

Unlike crosses burning on lawns, swastikas spray-painted on buildings or other surfaces, defaced posters, pornography in the workplace, and some of the racist and sexist speech directed at individuals in the workplace, much of what is said on the streets or other public places in this country is unheard by, and invisible to, everyone except the individual to whom it is addressed. It is whispered, it is hissed, it is over before it starts, and the perpetrator melts away. With a hit-and-run attack, spoken insults are a way of "doing power" in public places, of reminding people of their place in the social hierarchy, of frightening them and subordinating them. These "drive-by shoutings," become almost ephemeral, easy to dismiss, deny, or trivialize. In contrast, Laura Beth Nielsen's *License to Harass* takes "offensive" public speech and street harassment seriously, making it the focus of her study.

*License to Harass* is an outstanding book containing empirical and theoretical information about the problem of street harassment. For over twenty years, critical race theory scholars and feminist scholars have decried the sometimes daily insults women and people of color experience in their lives and the role of "hate speech" in perpetuating stereotypes and structures of dominance and subordination in our country. Although some very thoughtful articles and books have argued that "hate speech" should be legally regulated, attempts to

the body of the text.

3. This particular phrasing comes from Professor Martha Mahoney's article on battering. Martha Mahoney, *Legal Images of Battering: Redefining the Issue of Separation Assault*, 90 MICH. L. REV. 1, 53 (1991).

4. The author is grateful to Professor Katherine Porter for this wonderful formulation of street harassment.

regulate such speech, at least outside of the workplace, have run into the brick wall of First Amendment arguments and doctrines.\(^6\) Further, legal scholars criticized critical race and feminist theorists for using anecdote and narrative descriptions rather than empirical studies to support their claims about the frequency and damaging effects of hate speech, including street harassment.\(^7\)

Because many of these insults are "invisible" to those who are unaffected (and this is particularly true with street harassment), it is somewhat understandable why such speech would not be an apparent problem to many, particularly white male legal scholars who are less likely to experience street harassment. Broadly, anonymous insults based on race and gender whispered or shouted from strangers addressed to a person on the street or in a public place constitutes "street harassment." While *License to Harass* uses the term "offensive public speech," which properly encompasses other public spaces in which offensive speech occurs, scholars have also used the general term street harassment to designate offensive public speech as well. This review will use both phrases interchangeably when referring to racially or sexually offensive public speech.

Dr. Nielsen’s book addresses both First Amendment and empirical criticisms in reporting the results of her extensive empirical investigation of offensive public speech. Her ambitious study documents the frequency and effects of street harassment. *License to Harass* examines the role of law in tacitly approving such encounters and surveys opinions of those affected by offensive public speech about the potential for legal action against it. Dr. Nielsen demonstrates that racist and sexist speech is protected by the law, while begging or panhandling speech is routinely regulated (p. 176). Anyone wishing to understand the multiple dimensions of the problem of street harassment and abusive or offensive public speech should read Dr. Nielsen’s book. It is a major contribution to the literature concerning speech and its effects on people in the United States.

This review will first describe the book, with a focus on summarizing the empirical findings and the author's insights about those findings. In Part II, the review covers Dr. Nielsen’s discussion of the First Amendment and other

\(^6\) See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that ordinance prohibiting symbolic and nonspoken verbal communications the perpetrator knows or has reason to know would arouse anger, alarm or resentment on the basis of race, color, creed, religion or gender was an impermissible content-based restriction on speech); STEVEN H. SHIFFLIN, *Disent, Injustice, and the Meaning of America* (1999) (recognizing concerns with racist speech, but arguing that regulation drives racist attitudes underground, making it harder to critique them). Also see W. Bradley Wendel, *The Banality of Evil and the First Amendment*, 102 Mich. L. Rev. 1404 (2004) (reviewing ALEXANDER TSESI, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (2002)), for a recent example of the persistence of the belief that the First Amendment must protect racist hate speech despite its ill effects, at least from criminal sanction.

barriers to regulating street harassment and offensive public speech at this time. In Part II, I also include my own doubts about First Amendment decisions. I examine some social trends which I believe impair efforts to regulate offensive speech as well. The review concludes by arguing that Dr. Nielsen's research indicates that there is much more to learn and to be done to address a practice that harms people on a daily basis.

I. DR. NIELSEN'S EMPIRICAL STUDY OF STREET HARASSMENT

*License to Harass* is a multi-disciplinary book. It provides both qualitative and quantitative sociological data about street harassment gathered in three San Francisco Bay Area locations. The book weaves this data together with literature on social status, social hierarchies, social interaction theories, legal consciousness, and First Amendment doctrines and theories. The book provides statistical summaries of her findings, along with excerpts from extended interviews with the people who participated in the study. Her findings indicate that, of her sample, people of color and white women endure street harassment on a very frequent basis. Some of the harassment is intimidating and frightening; some of it is demeaning and dehumanizing. Almost half of the people of color in her study (Table 3.1, p. 41) and approximately two-thirds of the African Americans reported hearing racially harassing speech *every day* or *often* (p. 49); approximately three out of five women reported hearing sexually suggestive, offensive remarks *every day* or *often* (Table 3.2, p. 43). Women of color reported offensive speech occurrences most often (p. 44). Yet the vast majority of the subjects did not believe that there ought to be a legal remedy for the harassment. The reasons given reveal how much sway First Amendment rationales have in our culture. Additionally, cultural beliefs lead some subjects to question the efficacy and desirability of using law to combat social problems and even disfavor regulation (p. 2).

The book contains seven chapters and two appendices, as well as eleven tables summarizing Dr. Nielsen's data. The ambition of the book becomes apparent in Chapter One, where the author introduces the problem of offensive public speech, discusses research questions on law and legal consciousness among citizens, charts the role of the First Amendment and free speech in influencing attempts to address offensive speech, and outlines her empirical study. Chapter Two outlines the legal doctrines and commentary on regulating speech in public places in a clear and succinct fashion and introduces sociological theories and studies about law, power, people's beliefs, and social interaction. Chapter Two also discusses the relatively few previous empirical studies of street harassment, introducing legal readers to an empirical literature they may not have encountered before.

Chapters Three through Six report the findings of Dr. Nielsen's research, beginning with reports of personal experiences with offensive speech, then moving to people's views of the nature and severity of the problem of offensive
public speech and law, and concluding with legal and individual responses and resistance to offensive speech. In each chapter, Dr. Nielsen relates her findings to claims of other theorists and studies, gives examples from interviews, and presents quantitative information. In Chapter Seven, she discusses explanations for why and how legal solutions to street harassment have failed.

There is a great deal going on in this book; it is quite readable and well-written overall, and it covers a wide range of material and ideas in relatively few pages. In a sense, it is really two books addressing the nature of hate speech: it is a book with original research on street harassment and the effect of street harassment on those who are targets, and it is also a book about the sociology of law, understandings of law, and the influence of law on behaviors and cultural norms with original research that applies and questions some of the most quoted sociological literature on the subject. My focus in this review is on the aspects of the book that are perhaps of most concern to lawyers and legal scholars, as well as the focus of the Berkeley Journal of Gender, Law, & Justice and its readership.

Because Dr. Nielsen is drawing on so many areas of knowledge, working at the intersection of those areas, and doing so with an economy of space, she sometimes juggles too much to explain or develop a theme adequately for a reader who may be unfamiliar with one set of fields, such as sociology of law. With so much going on, Dr. Nielsen does provide helpful summaries, but the summaries can be repetitive rather than helping to move the analysis forward.\(^8\) Despite this, the book is a valuable resource, containing important insights and information for scholars working in numerous disciplines, including law.

A. The Methodology of the Study

The book is based on Dr. Nielsen’s dissertation research, which was undertaken in response to the relative paucity of research on the frequency and effects of street harassment and as an attempt to address gaps in the existing research (p. 5). She studied three types of offensive public speech: “begging” or “panhandling,” “sexually suggestive speech,” and “race-related speech” (p. 3). She chose begging as a kind of control within her analysis because it is a type of speech that targets almost anyone on the streets or in public places. Additionally, begging is a form of “unsolicited street speech that frequently targets white men” (p. 4), who are less likely to be targets of sexually suggestive and race-based speech. Begging is a good choice as a control for legal reasons as well: begging is a form of speech or communication that has not enjoyed consistent First Amendment protection, has not been the subject of high-profile cases or legal arguments, and has frequently been regulated by law (p. 20). Dr. Nielsen identifies “sexually suggestive speech” as offensive speech, although her

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8. There are a few text editing glitches as well. For example, a portion of the text beginning with the statement: “Nevertheless, the laws exist and are enforced because the regulated behaviors . . .” on pages 120-21 is repeated almost verbatim on page 122.
subjects made a distinction between permissible and impermissible sex-based speech (p. 4). "Race-based speech" encompasses any speech referring directly or indirectly to the race of the recipient that subjects found inappropriate and offensive.

The Introduction briefly describes the study method (pp. 12-14); two appendices explain her method in detail (pp. 181-205). The study was carefully designed, following standard social science research methods for sociologists. Dr. Nielsen identified three separate areas in Northern California in which to conduct her study: San Francisco, Berkeley/Oakland, and Orinda (a well-to-do San Francisco suburb) (p. 13). The purpose was to obtain a cross-section of environments in which to observe public interactions and from which to recruit subjects for interviews. She chose various locations in these cities to observe street interactions and establish a base of understanding to assist in formulating her interview questions (Appendix A, pp. 182-83). She observed people on the streets in these areas for about 120 hours, taking notes and attempting to "keep a low profile as a passive observer" (Appendix A, p. 182). At some points, however, she herself became the target of offensive speech (Id.).

In the second stage of the research, she recruited subjects at chosen locations to interview in depth about their experiences and attitudes (Id.). The locations she chose were Bay Area Rapid Transit ("BART") stations and streets, although she reports she had less success recruiting subjects for the study whom she approached on the streets (Appendix A, p. 187). To overcome bias in her selection of people to approach, she used a number of techniques to select subjects (Id.). Although the sample is not statistically random, she did attempt to overcome her own preferences and comfort level about approaching people by using this method (Id.). After identifying herself as a University of California researcher interested in street interactions, she asked subjects if they would be willing to be interviewed by telephone (Id.). Of the 212 people she approached, 112 agreed to participate (p. 188). She ultimately obtained interviews with 100 of them (Id.). She was unable to reach the other 12, either because the phone numbers given to her were inaccurate or the potential participants failed to return her messages (Id.).

While the resulting sample is not proportionately representative of those who frequent BART in the locations she chose, it is diverse. Far more women than men agreed to participate; 51% of the participants in the study were white, and 49% were people of color, including African American, Latino/a and Asian subjects (Table A.1, p. 189). Indeed, Dr. Nielsen indicates she "oversampled white women and people of color for analytic purposes" (p. 188). Although she does not explain this further, oversampling those most likely to be targets of sexist and racist street harassment allows for studying rates and variations on incidents, reactions, and attitudes among those more likely to experience

9. Nielsen was a graduate student at U.C. Berkeley with limited resources, so she chose accessible locations which still varied in income and demographic levels (p. 184).
harassment. The probability of obtaining a range of responses increases with the larger sample.

Using a questionnaire relying primarily on open-ended questions and guided follow-up questions, Dr. Nielsen conducted telephone interviews with the individuals who agreed to be interviewed as subjects in the study (Appendix B, pp. 198-205). Her questions concerned street interactions generally as well as offensive interactions, specifically the frequencies of offensive interactions, and whether the person saw the interactions as a personal problem or a social problem (Id.). The questionnaire also addressed the subject’s attitudes about law and legal regulation of offensive public speech (Id.).

Although it is a well-designed and careful study, the methodology is not without flaws and can be criticized – as can most individual social science studies – on various points. For example, women are overrepresented in the sample, and Dr. Nielsen’s gender and race (female, white) could have unconsciously influenced responses from both female and male subjects. Because the study is retrospective and based on the subjects’ reported experiences, it is vulnerable to criticism for selection bias and bias in recollections. The sample is also “relatively young” and “well educated” (p. 190), and thus is not representative of the population as a whole. In fact, the San Francisco Bay Area is atypical of the United States educationally, culturally and politically. The population of Berkeley is more educated and prosperous than neighboring Oakland, although Berkeley does have poor and minority areas (pp. 184-85). Dr. Nielsen was quite aware that the presence of the University of California could skew her sample and attempted to prevent having too many students represented in her sample by conducting her Berkeley interviews during the summer, although there were still many students in Berkeley during that time (p. 190). Her data also does not reveal much about offensive public speech based on both gender and race in many instances. Thus, although she did find women of color to be the most likely subjects of street harassment, there really isn’t any explanation or further investigation of the problem of intersectionality or multiple sources of subordination, beyond a notation that “the myth of heightened sexuality about women of color” might account for this higher rate (p. 44). Due to some of these concerns, and because the sample size is only 100 people (although large for a study of this type), it is important to caution that making sweeping generalizations from the study is not possible. Nevertheless, her research provides useful and fascinating qualitative and quantitative data on offensive speech.

B. Offensive Public Speech: Economic, Racial, and Sexual Speech

Dr. Nielsen provides a rich exposition with her results, integrating excerpts from interviews with her subjects along with her quantitative observations to illustrate various points and to provide qualitative information about the subjects’ experiences and attitudes. The following summary of her findings
omits the narratives she excerpts from interviews in the interests of space, but for anyone concerned with the issues of offensive public speech, they are well-worth reading.

Of the speech categories she investigated, begging appeared to be the most common form of offensive public speech encountered by her subjects, although most respondents didn’t characterize begging as offensive (p. 40). All reported having been approached by panhandlers, and 87% of those interviewed said that it occurred every day or often in their experience (Id.). Although some subjects felt threatened by panhandlers or had experienced some aggressive panhandling, few viewed begging as personally threatening (p. 40). Few subjects reported that they considered begging a problem for them personally (p. 69), but a majority saw it as a social problem (p. 77).

Dr. Nielsen divided sexual speech into “polite remarks about appearance” and “offensive or sexually suggestive remarks” (Table 3.2, p. 43), relying on the subject’s own definitions of whether public speech interactions were offensive since sexist or “sexual” speech might be perceived as “polite compliments or relatively harmless pick-up lines” (p. 44). The number of offensive remarks exceeded “polite remarks” and 62% of women reported hearing such offensive or suggestive remarks every day or often (Id.). Sixty-eight percent of the women of color reported such remarks as occurring every day or often, whereas white women reported a rate of 55% (p. 44). Only 14% of men reported offensive speech based on gender, and two-thirds of men never or rarely heard offensive or sexually suggestive comments directed at women (Table 3.2, p. 43). Many women also reported physical conduct to Dr. Nielsen, ranging from groping to stalking (pp. 44-46). Slightly over half of the women in the study said sexually suggestive speech was a personal problem, finding it threatening and degrading, while only 15% of the men saw it as a “personal” problem (p. 72). But a full 75% of those interviewed identified it as a social problem rooted in gender hierarchy (p. 78).

Forty-six percent of all the people of color (Table 3.1, p. 41) and 63% of the African Americans in the study reported hearing offensive comments about their race every day or often (p. 49). Less than 5% of whites reported this frequency of comment (p. 49). Offensive speech reported by subjects ranged from “race-related jokes and quips, to subtle hinting that [the person] should ‘go back where they came from,’ to whispers, shouts, and even physical altercations” (p. 49). In many of the interviews Dr. Nielsen excerpts, the offensive speaker appears to be “speaking in code” rather than using explicitly racist speech. For example, a young African American man who was a clerk at a camera store in a “white” area reported a white male customer who was irritated about not being able to cash a check without I.D. and told the clerk, “things sure aren’t the way

10. This may be because the areas she chose were sites she knew were used by panhandlers.
11. Actually, it is not clear whether the percentage is 61 or 62. Table 3.1 indicates 61% said every day/often (p. 41), but Table 3.2 reports 19% “everyday” and 43% “often,” which adds up to 62% (p. 43).
they used to be," with a "real mean look" (p. 51). A large majority, some 89%, saw "race-related" comments as a social problem (p. 80); 51% of the people of color identified it as a personal problem, some finding it to be offensive, hurtful, and dismissive of them as persons (pp. 73-74). Perhaps not surprisingly given a general societal consensus that racist speech is wrong, all of the subjects identified race-related speech as the most serious social problem of the three types of offensive public speech (p. 82).

The interviewees reported different ways of attempting to avoid the harassing speech, with the greatest efforts to avoid street harassment undertaken by women. The main strategy for coping with panhandlers seemed to be "ignoring" or apologizing for not having money to give (p. 161). People of color who were targets of racist speech tended to believe that there was "little, if anything, [they] can do to avoid racist speech from strangers in public places," and therefore took no steps to avoid it (p. 65). On the other hand, in what Dr. Nielsen calls the "detailed calculus for being in public," all the women described a variety of strategies to avoid sexually suggestive speech, including avoiding certain locations, altering their travel routes, considering the time of day, avoiding eye contact, dressing to disguise their bodies, walking "purposefully," and trying to determine the dangers inherent in the interaction (pp. 57-65).

Consistent with the ranking of the seriousness of the problems of the three types of speech, two-thirds of the subjects interviewed did not think that begging ought to be regulated, primarily because of "compassion" or empathy for the speaker's situation and reluctance to punish people for begging (p. 94). Despite widespread agreement that sexually offensive speech and race-related speech are social problems, and despite the restrictions sexually suggestive speech places on women's freedom of being and movement in public spaces, the majority of people Dr. Nielsen interviewed did not favor legal regulation of either form of offensive speech (p. 97). Those for whom begging or racial speech was a serious personal problem were more in favor of regulation (pp. 87-88). But the relationship between views of speech as a problem and favoring legal regulation was reversed for sexually suggestive speech (Id.). A solid majority of people for whom racial speech was a personal problem favored regulations of it (p. 88), while "those who are more often the targets of sexually suggestive speech are less likely to favor legal regulation of these comments" (p. 87). Interestingly, men "were slightly more likely to favor regulation" of such

12. Interestingly, the primary explanation for race-related speech reported by subjects was "ignorance." Subjects identified the social problem in terms of a concern with speech leading to violence and reinforcing existing social divisions.

13. "The detailed calculus" arises from "being on guard" or having "awareness of one's surroundings and not taking safety for granted," thus one adjusts behavior and vigilance when concerned about safety (pp. 55-56).

14. Dr. Nielsen calls it "compassion," but some of the quotes from interviews seem to suggest that subjects considered being in the beggar's shoes, or even had the experience of having to beg.
speech than women, although a majority of both genders opposed restrictions (Id.). Support for regulation rose, however, when Dr. Nielsen asked questions involving more extreme examples of aggressive panhandling and racist or sex-based public speech (p. 84).  

**C. Attitudes About Legal Regulation of Offensive Speech**

Dr. Nielsen explores the reasons given by subjects for not regulating offensive speech. She found the reasons used to explain why they did not favor legal regulation could be placed in four categories of “legal consciousness” (understandings of law and its role in everyday life)\(^\text{16}\) (p. 105). Not surprisingly, the First Amendment was mentioned by many subjects as a reason speech should not be regulated.\(^\text{17}\) The First Amendment was cited as a primary reason by 55% of all the men, including 80% of white men (Table 5.1, p. 106). A total of 46% of whites, but only 33% of people of color, cited the First Amendment as the primary reason to oppose regulation (Id.). In explaining the importance of the First Amendment, people reflected themes embodied in legal doctrine. For instance, subjects raised concerns about the “slippery slope” of censorship, a distinction between speech and conduct, and the concept of incitement (pp. 107-12).

A second cited reason for opposing legal regulation, which Dr. Nielsen designates as the “autonomy paradigm,” appeared in the statements of many women (p. 113). By “autonomy,” Dr. Nielsen does not mean the autonomy of the speaker, but rather autonomy claims made by the targets of sexist speech (p. 105). Twenty-eight percent of women (and only 3% of men) cited “autonomy” as the reason to resist legal regulation (Table 5.1, p. 106). Actually, a number of different rationales, not all manifesting “autonomy” as we commonly think of it, appear to fall into this category. This group indicated that they preferred to handle the offensive speech themselves, because they believed they could control the situation without legal intervention, didn’t want to appear weak and in need of legal protection, or dismissed the problem as “not so bad,” even after

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\(^{15}\) E.g., “An African American is walking on a public street and a white person shouts loudly, ‘I’m going to get you nigger.’ Should this be legal?” (Appendix B., p. 204); “You are on a public street and a man, apparently homeless, shouts, ‘How about some money?’ When you refuse or ignore him, he follows you for about one block, making repeated requests. He does not touch you or block your path. Should this be legal?” (Appendix B, p. 203); “A woman is walking on a public street and a man says, ‘Come suck my dick!’ Should this be legal?” (id.).

\(^{16}\) “Legal consciousness” is a term used by sociologists studying the intersection of law with individual actors. The definition of “legal consciousness” varies according to the theorist and researcher. How people think about law and its role, how they use law, and how law shapes thinking all fall within this phrase. Dr. Nielsen notes that the study of legal consciousness includes individual’s “commonsense understanding of the way the law works” or “how people think about the law” (p. 7).

\(^{17}\) At least this reviewer was not surprised, given the extensive media coverage of First Amendment issues and likelihood of awareness of the First Amendment from media and educational sources, especially given the high educational level of the author’s subjects.
reporting disturbing experiences (pp. 113-19). Indeed, Dr. Nielsen notes, "As soon as the idea of law as a potential remedy is introduced, women discount the harm they have just explained" (p. 117). A few male subjects made cracks about women running to "big daddy court" (p. 118), demeaning women who seek support or legal protection. Nevertheless, female subjects did express a desire to independently assert themselves against offensive speech, rather than involve legal authorities (p. 114).

Another explanation for women discounting the seriousness of offensive speech may be found in women's reports of being flattered when complimented or their enjoyment of being recognized as attractive when they are in public places. The paradox of heterosexuality means that some women may tolerate offensive behavior in order to gain recognition by men; some women may suppress conflict in order to maintain a sense of relationship or attractiveness to men. Reacting negatively to "just a compliment" may seem overly feminist, "too sensitive," or offensive to a possible suitor. In addition, the fact that some women don't mind sexist banter in the workplace has been used as a reason to dismiss the complaints of those women who do mind such talk in sexual harassment cases as hypersensitive and unreasonable. But the fact that some women don't mind and even enjoy remarks about their appearance and sexuality doesn't mean that they do not make distinctions, as the subjects in Dr. Nielsen's study did, between "polite" comments which should be tolerated (or appreciated) and offensive comments (p. 43). Nor should the differences among women be used to dismiss the harm offensive speech has on many women.

The third explanation for opposing regulation is "impracticality" (p. 119). This pragmatic justification appears to draw on both concerns about law enforcement and beliefs regarding allocation of legal resources. Impracticality was the primary reason cited for opposing regulation by 26% of the subjects (Table 5.1, p. 106). In anonymous street encounters, the "sheer impracticality of catching, trying, and punishing individuals who would violate such laws" deterred interest in legal intervention (p. 119). Even if the subjects believed legal regulation would be a good idea, some indicated offensive speech regulations would be difficult to enforce and hard to prove (p. 120). Another reason voiced against legal intervention was that courts and police should concern themselves with more serious offenses or were already overburdened (p. 121). Some believed that regulation would drive racist and sexist beliefs and speakers underground, making racist and sexist attitudes more covert and difficult to correct (p. 123).

Dr. Nielsen characterizes the last justification offered against legal regulation of street harassment as "distrust of authority/cynicism about law" (p. 123).}

19. SHIFFRIN, supra note 6. The distinction between "covert" and "overt" racism and the difficulties in combating the former were addressed by Stokely Charmichael and Charles Hamilton in the 1960s. STOKELY CHARMICHAEL & CHARLES HAMILTON, BLACK POWER (1967).
124). She reports: “Many women report a ‘backlash’ effect when they invoke the law to solve ‘gender’ problems; many African Americans, especially men, report indifference, corruption, and blatant racism in their brushes with the law” (p. 129). Actually, three themes run through the comments offered for this justification. The first is distrust of the legal system based on previous contacts with the system (p. 124). Over half of the nine African American men interviewed indicated distrust of authority as the reason to avoid legal regulation (Table 5.1, p. 106): “African American men tell sadly familiar tales of unjust police action...” (p. 125). The second theme, cynicism or skepticism, relied on past experiences with the law as a basis of opinion (p. 124). One woman reported: “I have been harassed at every job I have ever had and it’s illegal, but it doesn’t do any good” (Id.). The third theme was that “the law cannot and does not change society” (p. 126). Yet in the statements excerpted in the book, there is less cynicism than discouragement: beliefs that claims will be unheard, fear of retaliation, beliefs that help will never come, and resentment and distrust of law enforcement (Id.). One African American man said, “They’re never going to enforce laws like that anyway. Look at affirmative action – it’s all going away anyhow” (p. 125).

A few subjects did favor laws against offensive speech or at least gave reasons for having such laws (pp. 101-02). Other subjects who did not ultimately favor regulation raised similar notions (p. 102). Dr. Nielsen notes, “The ‘right to be left alone’ is a theme that arose often in the interview” (Id.). Although “there is no formal legal ‘right’ to be left alone,” (Id.) it is certainly a “right” which has a long history in American consciousness, and it is revealing that the subjects interviewed believed in such a right. Thus, “a ‘right’ to go out in a public place and... a ‘right’ not to be spoken to in an offensive tone of voice” are more than “politeness norms” for these subjects: these comport with concepts of fundamental rights of autonomy, dignity, and equal concern and respect (p. 103).

These arguments for regulation also appear to reflect a lay version of the legal arguments for prohibiting hate speech (p. 2). Some individuals noted the symbolic effects of law (p. 103). In contrast to despair or cynicism, these people saw the law as “a way to codify social norms and to make the statement that such behavior is socially unacceptable,” even if the law could not be enforced (Id.). Some saw the link of offensive speech to violence, suggesting that the speech could provoke a violent response (p. 104), in line with Chaplinsky’s “fighting words” doctrine (p. 23). Others cited a “right to be free from offense,” (p. 104) and all those who favored “legal intervention to prevent racist and sexist
speech [had] strong feelings that they should not be subjected to it" (p. 105).

If a majority of the subjects who found racial and sexually suggestive speech to be a personal and social problem did not think a legal response was appropriate, how did they think the problem should be addressed? Dr. Nielsen states that many of her subjects believed offensive racist and sexist speech “can and should be handled by its targets” (p. 133). This solution, however, transforms what a large majority of the subjects recognized as a “social problem” into a problem for the individual alone. Placing the burden on the individual to respond in turn raises the question of “resistance.”

A currently popular notion in legal and social theory is that of the “resistance” of the oppressed or subordinated to oppressive regimes, although just what constitutes “resistance” remains elusive (pp. 138-39). With resistance of some form in mind, Dr. Nielsen asked her subjects about their reactions to offensive speech as well as their thoughts about possible countermeasures. Dr. Nielsen identified two possible categories of individual responses: 1) those in which targets of offensive speech responded with speech and active “resistance,” and 2) those in which targets resorted to a variety of non-verbal and internal responses or coping mechanisms. Given that remedies for offensive speech advocated by First Amendment scholars include the argument for “more speech” as the solution on the theory that “more speech” will undermine racist and sexist speech in “the free marketplace of ideas” (pp. 134-35), Dr. Nielsen looked for examples of corrective speech responses in her interviews. Although some engaged in “counter speech,” it was far more common that their “resistance” was internal (p. 164) (and invisible to the one responsible for the offensive speech), which does little to convey a corrective message to the offending speaker. A possible explanation for the internalized responses is in Dr. Nielsen’s observation that “[a]ll targets, whether they reported responding to such speech or not, said that they weighed their options very carefully when deciding how to respond, and the most important factor that determined their response was their own safety in the situation” (pp. 164-65). In other words, the subjects engaged in a detailed calculus in deciding what, if anything, to do when they were confronted by offensive speech.

The fear of violence appears to suppress responses by targets of racist speech (pp. 140-41), although “very few respondents in this study could tell of times when a racist comment actually resulted in a physical altercation” (p. 141). Interestingly, at least in some examples, it appeared the subject had to suppress his or her own urge to retaliate physically in reaction to “fighting words,” rather than the subject reporting a fear of physical retaliation by the offender (See pp. 141-44). Dr. Nielsen found that only “[s]lightly more than a quarter of people of color . . . ever had directly responded to racist comments” (p. 141). And from the examples of spoken resistance to offensive racial speech, it is difficult to tell whether the subjects were responding to racist comments directed at them personally or at another individual (pp. 141, 143). For example, Dr. Nielsen cites an interview with an African American woman who spoke of correcting
slurs against Asians, not slurs that were directed at the woman herself or African Americans in general (p. 141). Those that did speak in response to racial comments mostly reported the response as an effort to educate the speaker, consistent with many subjects quoted throughout the book who characterized racist speech as the product of "ignorance" rather than blatant bigotry (E.g., pp. 74, 146). The most common response reported, however, was to "ignore" the speech (p. 145). The reasons for ignoring varied from the attributions of (hopeless?) ignorance of the speaker to fear of the speaker (pp. 146-147). Other subjects rationalized the statements as being the speaker's problem, which arguably is another form of internal "resistance" to the speaker's message, although it also does little to communicate resistance or facilitate change (p. 145).

Sexually offensive speech did produce spoken responses in 42% of the total of women interviewed, all of whom had "claimed to have been the target of offensive, sexually suggestive speech by a stranger in a public place" (p. 148). In some of the examples given, the nature of the speech in response to a sexist comment is not necessarily "educative," but rather evasive, often drawing on assertions of male protection by claiming a boyfriend or husband to deter approaches from strange men (pp. 151-52). For example, a white woman subject reported that she was buying flowers and "a gentleman" came up to her and said "you know, I'd really like to take you out" (p. 152). She "chuckled kind of at first and said, 'No thank you, I have a boyfriend'" (this didn't deter the man, who ultimately said, "Wow, your legs go from your ass to the ground") (Id.). In fact, "only nine women reported that they had ever responded assertively with more speech..." (p. 148) in ways that might counter or educate the speaker, illustrated by statements such as, "Does your mother know you're here - talking to women this way?" (p. 150). Three women resorted to a well-known hand signal in response to offensive speech (Id.) and others "glared" or "gave... a dirty look" (p. 151). Outside of confronting the source of the speech, some women reported the experience to others with varying results (pp. 153-55). Other women "left," "laughed it off," decided the speaker was "stupid" or had a "problem," and even denied that the remark was directed at them or had occurred (p. 156). While deciding the speaker is stupid might protect the individual from internalizing the insult, it does little to communicate that the remark is offensive. Laughing it off appears to communicate to the speaker that the remark is inoffensive or even appreciated. Ultimately, as with racist speech, the most common reaction to sexually suggestive speech was to "ignore it" (p. 157). Again, "fear of consequences" influenced the decision to ignore, as did a belief that the man was seeking a response and a belief that ignoring was the best possible response (pp. 157-59).

In contrast, Dr. Nielsen found that "the most common response to begging is actually to respond to the person by speaking," although ignoring the beggar was also very common (p. 161). Apparently, most of the subjects saw begging as "trivial and non-threatening" (p. 162), although some had negative
experiences with aggressive panhandlers (p. 140). Dr. Nielsen found that most people tried to be "polite" in refusing requests for money, but a few were aggressive in their responses: "What are you doing asking me for money? You ought to give me what you got" (p. 161).

D. Summary

Dr. Nielsen interprets her data to mean that offensive public speech results in harm to racially and sexually subordinated groups by reinforcing social hierarchies, not only as a "simple reminder of lower status," but by emotionally and psychologically burdening the targets of the speech and forcing them to take "precautions . . . to avoid being made a target" (p. 6). Concerns with the potential for or the actual fear of violence run through the reports of many of her subjects. Difficulties in every day negotiation of public space are disproportionately experienced by women, men of color, and those in poverty, where "hate speech is but one mechanism of subordination" (Id.). Yet, for multiple reasons, most of the subjects in License to Harass say that invoking the law for regulation of any offensive speech is still undesirable (E.g., p. 97).

THE INFLUENCE OF LAW AND THE POTENTIAL FOR LEGAL CHANGE

The data and interviews demonstrate that people in the License to Harass study objected to offensive public speech and street harassment because it created personal problems for them and because many viewed it as a social problem as well (p. 68). Street harassment affects its target's freedom and daily choices (p. 56). Women must change their behavior to avoid begging and sexually suggestive speech far more than men (p. 57). Dr. Nielsen states, "Being in public is gendered in that women are effectively excluded from certain locations . . . [and] experience being in public qualitatively differently than do men" (Id.). Women reported engaging in a number of conscious strategies and adjustments in their attempts to avoid unwanted sexually suggestive speech (pp. 57-65). They reported doing so even in the face of the ambivalence expressed by both women and men about gendered public remarks, designating some as "flattering," "flirtation," "only trying to meet women," and so forth on one side of the spectrum and degrading, insulting, and frightening on the other (p. 44). However, there was widespread agreement that "racial remarks" of any kind are never appropriate (p. 139), consistent with general social norms condemning racist speech and also perhaps with a belief in "color blindness" (that race ought never to make a difference and ought not to be mentioned). People of color in the study did not believe they could avoid racist speech from strangers (p. 64), perhaps because they believed remarks were so pervasive that it would make no difference (p. 65) (and they certainly cannot easily change their appearance), although they did report attempting to avoid it "because it may lead to violence" or "because it is so offensive" (p. 66). Among those who venture into public places, women of color must face racist and sexist street harassment as well as
begging, requiring a more complex detailed calculus to avoid offensive public speech.

The irresistible urge of most legal scholars faced with a social and potentially legal problem is to ask, "What is to be done?" The results of the study do not provide a clear answer. Dr. Nielsen observes,

Scholars on all sides of the hate speech debate can be pleased with these findings. Those who advocate restrictions on offensive speech can point to the empirical data as proof that such interactions are experienced as troubling and having serious effects on targets. Those who advocate First Amendment protection for such speech will be reassured by the finding that most average Americans disfavor the legal regulation of offensive public speech.

(p. 172). Dr. Nielsen also argues that the data is more complicated than these simple characterizations. Perhaps the data was influenced by the location in which the research was conducted, as the San Francisco Bay Area, and not only Berkeley, may be more liberal in its general views of free speech and resistant to legal regulation for many reasons, as residents pride themselves on their tolerance. At the same time, Dr. Nielsen's data also suggests that even in a highly diverse area which considers itself enlightened, liberal, and tolerant of racial and sexual differences, women and men of color endure a considerable amount of harassment from others in public places. Thus the question of "what can be done?" still remains open.

Dr. Nielsen observes that the data does not fit existing narratives in the hate speech debates, and that the arguments given by her subjects are more complex and nuanced than the debates which have engaged legal scholars (p. 167). The position of the author is that racial and sexual harassment in public places is a harmful part of a system of racial and gender hierarchy, and that if the relationship of offensive speech to those structures was more clearly recognized, there might be a change in thinking about whether law should regulate offensive public speech in some way. At times, Dr. Nielsen suggests that eventually consciousness of the harms of offensive public speech will coalesce to produce legal change, as awareness that racist and sexist speech in the workplace led to legal actions under Title VII, but at other times, she seems to concede that nothing can or will be done to regulate offensive public speech (pp. 177-79).

22. Racist and sexist speech, if sufficiently "severe and pervasive" can create a "hostile environment" in a workplace, altering the terms and conditions of employment and creating a cause of action under Title VII. But "mere utterance of an . . . epithet which engenders offensive feelings (sic) in an employee" does not constitute a hostile environment. Harris v. Forklift Sys., 510 U.S. 17, 20 (1993) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986)). There has been a growing sentiment among some legal scholars and lawyers that regulating racist and sexist speech in the workplace via sexual harassment and hostile environment actions also may violate the First Amendment. Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. REV. 1791, 1797-98 (1992) (distinguishing between protected and unprotected racist and sexist speech in the workplace based on whether the speech is "directed" at an individual or not).
Dr. Nielsen offers several explanations for the absence of an organized effort to end or regulate offensive street speech, including a ranking of low priority among the affected groups, the First Amendment, ambivalence about using legal remedies to solve the problem as manifested by the subjects of her interviews, and female "ambivalence about sexually suggestive speech" (p. 165). She notes a failure to see the connection between racist and sexist speech and more formally recognized manifestations of subordination: physical attacks, rape or stalking, discriminatory and degrading treatment in the workplace, lack of opportunities because of discrimination, and in general, trivialization of harms experienced by subordinate groups in the larger society (p. 178). Additionally, larger social themes and beliefs may make the prospects bleak for taking action against offensive public speech in the near future.

Dr. Nielsen sees law as intimately involved in supporting offensive speech and therefore, finds it complicit in maintaining systems of racial and gender hierarchy (p. 168). Law shapes people's thinking and interpretation of experiences and in turn people shape law (pp. 7-8). Dr. Nielsen notes that law plays a role in reinforcing racist and sexist public speech by legitimating it (p. 176). I agree: in a culture which frequently compounds what is legal with what is moral or ethical, law tacitly approves such speech by protecting it against the protests of those who are subject to the insults, fears, and limits such speech imposes on them. In the United States, there is a tendency to believe if something is legal it must be good or appropriate, or at least not bad, even to engage in conduct or speech no matter how hurtful. Given this attitude, legal inaction cannot be lightly dismissed. Accordingly, barriers to legal regulation of offensive public speech should be examined critically.

A. The "Brick Wall" of the First Amendment

First Amendment case law protects a great deal of offensive speech, and freedom of speech is one of the most highly valued, if not the most valued of rights in the Constitution. Yet as Professor Matsuda pointed out in an article in 1989, "First Amendment doctrine is notably confused." Not all speech, even public, "political" speech, enjoys absolute, consistent protection from the courts. A recent example is the Supreme Court's willingness to restrict speech near abortion clinics and health care facilities. In a decision upholding a Colorado law making it an offense to "knowingly approach" a person within a restricted space without her consent in order to communicate anti-abortion messages, the Court held that the restrictions were reasonable. Justice Stevens wrote that the statute was

23. And it may be that the influence of understandings about law and society have led the subjects in this study (who tend to be young and educated) to assume the law simply cannot ever be used to regulate offensive racial and sexual public speech.
24. Matsuda, supra note 5, at 2349.
[A] traditional state exercise of the States' "police powers to protect the health and safety of their citizens." That interest may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests... The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone".

Yet in the well-known case involving attempts by the city of Skokie, Illinois, to prevent a proposed march by the American Nazi Party through a town with many Jewish residents including Holocaust survivors, the courts rejected proposed regulations as violating the First Amendment. The trauma posed to Holocaust survivors by having Nazis march through the city they lived, in a horrid reprise of what they had experienced, as well as the threat of violence posed by a proposed march, were insufficient reasons to enjoin the march, regulate certain forms of communication, or to burden the speakers' right to free speech. Although Skokie's efforts to prevent the march were obvious attempts to suppress Nazi speech, to this day I believe, under the circumstances, such efforts were justified by the tremendous pain the march would have caused so many people. I also realize that most, if not every, leading First Amendment scholar disagrees with my view. I realize the difficulty of regulating speech, as well as concerns about abuse of government power to control democratic discourse and ideas, but if the trauma to unwilling listeners and potential for violence at abortion clinics allows for heavy regulation of public speech, I do not see how the courts can justify allowing racist hate speech in Skokie, despite the Court's previous declaration that such regulations are impermissible content-based restrictions (p. 24).

Indeed, I am sympathetic to arguments that the First Amendment ought to allow regulation of at least some hate speech, if the regulations are carefully

26. Id. at 715 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)).
27. Id. at 716 (quoting Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
29. Certainly my First Amendment professor, the late Gerald Gunther, did not agree with my concerns about the Skokie case, which was developing at the time I was in his class in 1978. Although Professor Gunther was an admirer of Justice Powell's balancing approach to First Amendment issues, Gunther's fears of government regulation of speech themselves stemmed from his early experiences of living as a Jew in Nazi Germany, and he made it clear in class that he viewed the attempt to prohibit the march as similar to the suppression of speech in 1930s Germany. See also Gerhard Casper, Tribute to Professor Gerald Gunther: Gerry, 55 STAN. L. REV. 647, 649 (2002) (quoting a speech by Professor Gunther regarding his opinions about speech and his experience in Nazi Germany). See generally LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986) (protection of speech encourages tolerance of differences necessary in a liberal democratic society).
30. Hill, 530 U.S. at 715-16.
drawn and respectful of the need for robust speech in a democracy. But I am not neutral about sexual street harassment, either, because of personal experience with it. I have found it frightening, degrading, and invasive. I have also been groped and grabbed in public places; two creepy men have felt my elbow in their stomachs as a result, but mostly I have frozen or fled in fear and dismay. I fail to see the democratic value of being called insulting names or being hooted at, and I would argue that absolute First Amendment protection of such speech is as questionable as it is for racist speech. Of course all the arguments for regulating these forms of speech as of today have failed to make inroads against First Amendment protections, but perhaps Dr. Nielsen's book could provide new ideas for successful approaches to the barriers posed by the First Amendment.

*License to Harass* begins by suggesting that empirical information might lead to more informed judicial decisions about protecting offensive racial and sexual speech under the First Amendment (p. 29). Dr. Nielsen suggests that because judges lead relatively privileged economic lives and are mostly male and white, the widespread nature and intense effect of offensive racist and sexist public speech is invisible to them (pp. 26-38, 172). Dr. Nielsen's data also confirms that both categories in the study most judges would fall under (white people and men) underestimated the frequency of offensive racist and sexist speech (pp. 54-55). Judges would appreciate the widespread nature and harmful effects of offensive speech if they were more properly informed about its harms, similar to the acknowledgment of the harm caused by anti-abortion advocates confronting women at health clinics (harms that were in the news and familiar to the Justices in *Hill*). If judges understood the harms, Dr. Nielsen suggests, they would be more aware of a need to balance First Amendment interests against the costs to speech, equality, and individual well-being imposed by offensive speech in public places (pp. 27-28). To illustrate this, Dr. Nielsen compares the relative judicial tolerance of begging regulations to judicial reluctance to punish or regulate hate speech, and provides an illuminating comparison (p. 27). Her argument appears in part to be that, because judges are more likely to have been targets of panhandlers and beggars, they are more likely to empathize with people who are targets of begging, and thus more willing to sustain regulations. Her analysis suggests that if the legal establishment realizes there is no meaningful line to be drawn between different forms of offensive public speech, perhaps regulation of hate speech would be a serious possibility.

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32. For example, Professor Matsuda's careful analysis of factors to consider in regulating racially offensive speech pays close attention to the important values of the First Amendment and the need to accommodate them while restricting at least some racist speech, and suggests a way to avoid undue "suppression of free expression". Matsuda, *supra* note 5, at 2322-23.


34. Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (suggesting that engaging judicial empathy can lead to better judicial understanding of harms to people unlike themselves).
Dr. Nielsen's use of begging as a category of offensive public speech to examine in many ways is brilliant, because begging has not historically had vigorous scholarly defenders or clear First Amendment protection from the courts.\textsuperscript{35} Dr. Nielsen writes that "economic interests" and the privileged status of commercial and economic activity in the United States explains in part why the courts are more willing to uphold restrictions on begging (p. 176). Begging illustrates the selectivity with which "we" and law view the relative values of speech. Dr. Nielsen argues that many ordinances and laws regulate begging, which is unmistakably a regulation of speech (pp. 20-23), while attempts to regulate "hate speech" have been struck down by courts as impermissible content-based restrictions on speech under the First Amendment (p. 25). Dr. Nielsen observes that content-based regulations on begging in public places often pass constitutional scrutiny (pp. 25-27, 176-77). The "perceived social value of the target of begging" (including privileged white men) influences the difference in treatment as well (p. 25). According to Dr. Nielsen, "the law protects people from annoyance and harassment when they are of a certain social status," and "the law favors the powerful" (pp. 26-27). Dr. Nielsen also notes people perceive begging as threatening, and creating "an apprehension of imminent assault,"\textsuperscript{36} (p. 27) but aside from the occasional aggressive panhandler, what is threatening about a beggar? Perhaps the homeless and the poor are just seen as more dangerous and threatening to legal scholars, as a long history of condemnatory attitudes to the poor transforms them from fully human persons to "a moral pestilence"\textsuperscript{37} who are completely other.\textsuperscript{38}

Certainly there has to be some explanation for the varied treatment different types of street harassment receives. Whether it is lack of empathy, social hierarchy, economic interests and pressures, favoring the powerful, or attitudes toward the speaker's and target's statuses, we must be able to explain why it can be a crime to "loiter, remain, or wander about for the purpose of begging,"\textsuperscript{39} but it cannot be a legal offense, criminal or civil, to loiter with the purpose of harassing women on the street or to yell racist remarks at people. But as enlightening as the (lack of) contrast is, it may do little to remove racist and

\textsuperscript{35} This doesn't mean that there have not been local arguments about the First Amendment and begging when cities propose bans or regulations on the practice (p. 137). When the city of Palo Alto considered an ordinance requiring indigent people to keep moving on public streets and forbid them to sit on benches the city had provided along sidewalks for, well, sitting, in order to reduce panhandling by the homeless, there were spirited arguments involving First Amendment and other issues made in papers and to the city council. Freedom of speech arguments also surfaced when Bay Area cities have sought to ban people from standing on median strips with signs asking for money on the grounds that the practice impaired traffic. While the latter seems to be a reasonable time, place, and manner restriction, homeless advocates are still quite active in fighting the bans.

\textsuperscript{36} Quoting Young v. New York City Transit Authority, 903 F.2d 146, 158 (2d Cir. 1990), cert. denied, 498 U.S. 984 (1990).

\textsuperscript{37} New York v. Miln, 36 U.S. (1 Pet.) 102, 142 (1837).

\textsuperscript{38} See generally MICHAEL B. KATZ, THE UNDESERVING POOR (1989) (documenting negative attitudes to the poor and the "politics of poverty" in U.S. history up to the 1980s).

\textsuperscript{39} Young, 903 F.2d at 151 (quoting N.Y. Penal Code § 240.35(1)).
sexist speech from its protected position.

A standard First Amendment argument supporting the regulation of begging is that it is a content-neutral “time, place, and manner restriction” (p. 25). Beggars impede automobile or foot traffic and thus it is the state’s interest in insuring safe travel that justifies the regulation of begging (p. 162). The burden of trying to avoid street encounters of other sorts, of changing one’s route to bypass a construction site in order to avoid sexually offensive remarks, for example, just doesn’t “impede” traffic flow in the same manner. It is the individual’s choice to be on the streets at all, or to sneak out the back of a building to avoid construction workers, or to hitch a ride to school rather than endure taunts. To claim that begging is regulated because it is content-neutral is to ignore the fact that the law is targeting speech, which Dr. Nielsen makes clear (p. 25).

Even if courts recognize begging as speech, they can still downgrade its value to avoid First Amendment problems: Dr. Nielsen observes that in Young v. New York City Transit Authority, the court characterized begging as so-called “low-value” speech, with little social or political import (pp. 21-22). But in my view, the court’s assumption about the worth of the speech breaks down on further examination. Begging sends a powerful message about the distribution of wealth in the United States, the conditions of poverty, the lack of government or social help for the poor, the responsibility for society’s least favored members, the effects of addiction or abuse, and homelessness, including the homelessness of women fleeing abusive partners. Further, “commercial speech” itself now enjoys considerable First Amendment protection. The failure to characterize begging as politically relevant speech is not so much an analysis of the communication as it is an attitude towards beggars.

Of course, if negative attitudes toward beggars and panhandlers justifies regulating their speech, attitudes toward blatant racists should also. And while courts have refused to engage in heightened scrutiny of treatment of the poor under the Equal Protection clause, racial discrimination receives the highest

40. Bowman, supra note 5 at 539 (discussing how street harassment harms women in urban environments by restricting their “physical and geographical mobility,” diminishing their feelings of safety, limiting their everyday choices).
41. Young, 903 F.2d at 146.
42. See Katz, supra note 38, at 186-94 (discussing homelessness in the U.S.).
level of scrutiny and judicial disapproval. Thus, the combination of ranking racist speech as "low value" and the recognition of the harmful effects of racism in our history and culture would seem to merit more regulation of racist hate speech or racially offensive speech. But the result is exactly the opposite: courts and many commentators steadfastly assert that the First Amendment protects racist speech. Regulation of racist public speech that is not an immediate incitement to violence is impermissible, and regulations which specify types of racist speech, even as examples, are unconstitutional viewpoint or content-based discrimination. Many feminist and critical race theory scholars argue that in cases of racist speech, freedom of speech ought to be balanced against anti-subordination and equality concerns. This has failed to find acceptance in the courts and in much of the legal academy. Indeed, as offensive and harmful to individuals and race relations as racist speech is, it still falls within the most protected core of First Amendment political speech.

Sex discrimination also violates the Equal Protection clause, and while the courts have disapproved of various forms of sex discrimination, the use of an intermediate scrutiny "test" has not recognized many forms of gender-based discrimination and unequal treatment. Although bias against females is considered to be (mostly) wrong in this society, the culture does not uniformly condemn sexist speech. In fact, sexually suggestive and explicit speech has staunch defenders. Violent pornography is no exception: the feminist anti-pornography campaigns of the early and mid 1980's produced deep splits among feminists and strong defense of freedom of speech activists, despite social science indications that violent pornography, at least, can and does lead to direct and indirect harm to women. Nor is pornography considered "low value"

45. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), the leading case stating that before the state may constitutionally silence the speakers, the speech must advocate "inciting or producing imminent lawless action and [be] likely to incite or produce such action"; Brandenberg involved a Ku Klux Klan rally. Id. at 445.


speech. According to Judge Easterbrook in *American Booksellers v. Hudnut*, the fact that pornography sends harmful messages about women and perpetuates subordination "simply demonstrates the power of pornography as speech," likening it to protected, political speech and beliefs.

There may be possible approaches to regulation of offensive speech that would not run afoul of content-based restrictions, as Dr. Nielsen suggests early in her book:

[I]t is easy to imagine an analysis that parallels the begging cases — a restriction on speech designed to threaten or terrorize individuals (content neutral), justified on the state interest in maintaining order, that prohibits terrorizing speech (on the reasonable person standard). Such a statute could be considered a reasonable time, place, and manner restriction on racist and sexist speech because it leaves open ample channels of communication such as harassing people in public, crowded places, during daylight hours, or burning crosses in the same circumstances. The law proposed here would eliminate the forms of speech that are, as the respondents indicate . . . the most threatening and frightening, such as when they are spoken to in places with no place to escape . . . or when there is no one else around (presumably to come to the rescue or call authorities if the situation escalates).

(p. 26). The book never discusses this suggestion in any detail, so I am not sure what Dr. Nielsen had in mind in writing it. The suggestion appears to advocate a content-neutral, "true threat" approach to offensive speech regulation. While it is arguably the case that "true threats" may be regulated or punished, even a threat-based approach encounters difficulties under the First Amendment. Under present law, a focus on a threat-based analysis for even the most frightening race-based or sexually suggestive speech would probably encounter the problem of proving "intent" to threaten. As the multiple opinions in *Virginia v. Black* suggest, cross burnings cannot be punished unless the state can prove the actor's intent to intimidate or threaten African Americans (p. 24). Only Justice Thomas, the sole African American on the Court, had the perception that burning crosses are *per se* threatening (p. 172). Presumably, any com-

51. 771 F.2d 323 (7th Cir. 1985), aff'd mem. 475 U.S. 1001 (1986).
52. Id. at 329. Also see, Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 299, 301 (1989), for a good criticism of Judge Easterbrook's opinion noting the failure to recognize the effects of protecting such speech in the interests of democracy.
54. See id. at 366-67 (discussing different meanings and types of cross burnings; arousal of anger and hatred was not a good enough reason to ban them all).
55. Id. at 390-91 (Thomas, J., dissenting).
communication less obvious than burning crosses would make it even harder to prove the speaker’s intent to intimidate another.\textsuperscript{56}

It is unlikely, given current First Amendment doctrine, and the staunch defense of hate speech, that public entities will succeed in directly regulating offensive speech directed at members of groups occupying lower status in race and gender hierarchies in the United States, at least for some time. The contradiction between characterizing begging as low value speech and the racist and sexist speech as protected political speech probably will persist, leaving us with no apparent means of regulating offensive public speech for the time being. But there are other reasons to believe legal regulation will not be forthcoming.

B. Additional Barriers to Legal Remedies

Putting aside the First Amendment, in a conservative era it may still be impossible to muster sufficient support for enacting laws to assist in reducing the abuse of power and status manifested by street harassment and other offensive public speech. As reflected by the subjects in the study who were cynical about regulating street harassment (p. 125), there has been an explosion in literature claiming that law doesn’t change behavior anyway (a resurrection of the old saw, \textit{state ways don’t change folk ways}). Legal reform efforts of the civil rights era have been attacked by scholars on the right and the left as having been counterproductive and harmful. Well-known examples of this literature include Gerald Rosenberg’s \textit{The Hollow Hope: Can Courts Bring About Social Change?},\textsuperscript{57} arguing that \textit{Brown v. Board of Education}\textsuperscript{58} had little impact on race discrimination in the South and little influence generally on racial progress,\textsuperscript{59} and Professor Derrick Bell’s \textit{And We Are Not Saved: The Elusive Quest for Racial Justice}, using allegories to demonstrate the failure of law in the struggle to end

\textsuperscript{56} Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002). A majority of the Ninth Circuit Court of Appeals sitting \textit{en banc} suggested that the speaker’s actual intent was not the primary inquiry in a \textit{true threats} case. \textit{Id.} at 1077. Rather, the majority said the test was whether a reasonable person or reasonable speaker would foresee that the listener would be intimidated. \textit{Id.} The record in the case included considerable evidence of hostility to abortion providers in posters, websites, and so forth, as well as extensive testimony by the plaintiffs about their fears after one doctor was killed. \textit{Id.} at 1063-66. It is hard to imagine that such a record could be made in most cases of offensive public speech.


\textsuperscript{58} 347 U.S. 483 (1954).

Another familiar example is the criticism that *Roe v. Wade* harmed the movement to give women access to legal and safe abortions in the United States, resulting in a backlash which actually empowered anti-choice forces. Furthermore, as Professor Mark Galanter has demonstrated, beginning in the 1970s, conservatives began a successful campaign to undermine the progressive belief that law could bring about social change across a wide range of issues and to perpetuate the myth of a "litigation explosion" which harmed Americans.

Thus, even if one could persuade legislators (and judges) that real harms are perpetrated in public spaces every day against women and people of color, and that street insults constitute threats to the safety and well-being of a considerable portion of our population, the belief that nothing can (or should) be done would probably prevail, especially since in this "post civil rights" age, the subordination of people of color or women is no longer seen as much of a social problem. Those who complain of discrimination are likely to be labeled mere whiners, trying to gain unfair advantage. Just about any response attempting to correct their insensitivity or downright insulting remarks is automatically discounted as "PC" (or enforced "Political Correctness"). The free, everyday usage of "PC" has reached the point that those hoping to induce consideration for the feelings of others may feel and be silenced by this "conversation stopper." The "PC" charge dismisses out of hand all who seek to convey knowledge about, and sensitivity to discrimination. The likelihood of judicial empathy for those who must run or walk the gantlet is diminished even further by the larger society's apathy towards the injustices of racial and gender discrimination and subordination.

Another development which signifies an unwillingness to change the existing system has been the enormous backlash that has emerged against "victims" of even the most severe kind of abuses, not only in right-wing and

60. Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987). *See also* Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* 47-64 (1992) (postulating a racial preference licensing act given failure of *Brown* and civil rights approaches in reducing racial injustice).


64. I first heard this characterization used by Professor Gerald Torres at the Law & Society meetings in 1989.

65. Conservatives, however, began using "PC" as a trope to further their own agenda. See E.J. Dionne, Jr., *Race Bait and Switch*, WASH. POST, Feb. 8, 2005, at A23, for a critique of this strategy discussing recent presidential nominations.
conservative columns and punditry, but also in so-called “anti-victim feminism.” Somehow, pointing to the real, concrete harms rape, abuse, assault, sexual harassment, and sex discrimination cause and calling for the end of these harms and for legal sanctions, robs women of their “power” and their “agency,” as if the actual wrongs done to them have nothing to do with diminishing their feelings of “power” and “choice.” While I don’t believe women are incapable of functioning and acting on their own, I find the anti-victimization arguments often operate to deny harms to subordinated and abused people. Dr. Nielsen suggests the kind of “power” and “agency” women employ when harassed on the street is primarily self-protective (pp. 147-60), what Professor Catharine MacKinnon has termed a “strategy for sanity,” rather than a means of changing the power imbalance created by the harasser or even changing the woman’s view of her own feelings of responsibility for the abuse. It is ironic that when privileged men object to the threat of beggars, no one asserts that they are losing their agency and power by complaining. Thus, the anti-victimization argument actually reinforces gender hierarchy by ignoring the harms victims face.

As with objecting to rape, abuse, and discrimination, complaining about having to endure sexist insults somehow becomes taking on a dreaded “victim identity.” I am not sure what that “identity” is, or why it is so surprising that victimization can and does affect the human personality. From the anti-victim identity view, complaining about insulting words directed at one while one is walking along the street appears to be “over-sensitive,” and a whiny attempt at gaining “victim status.” But viewing offensive speech in isolation, away from

66. The one exception, however, is the political appropriation of “crime” victims (usually homicide victims) in campaigns for “victims’ rights” as part of a conservative crime control agenda. MARCUS DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIM’S RIGHTS (2002); Lynne Henderson, Co-Opting Compassion: The Federal Victim’s Rights Amendment, 10 ST. THOMAS L. REV. 579, 581 (1998).

67. Dr. Nielsen mentions this factor in her book, but doesn’t criticize or examine the development of “anti-victim” feminism (p. 117). See Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 COLUM. L. REV. 304 (1995), for a careful analysis of the issues presented by “anti-victim” feminism and claims of agency. See also Katha Pollitt, Not Just Bad Sex, in REASONABLE CREATURES: ESSAYS ON WOMEN AND FEMINISM, 157, 160-68 (criticizing Katie Roiphe’s highly publicized and well-reviewed book, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS (which attacked so-called “anti-rape” feminists, accusing them of exaggerating rates of rape and portraying women as “victims”) for ignoring facts and realities of rape).

68. Battered women, for example, are at great risk of losing their sense of choice or self efficacy because of the psychological toll taken by being controlled by another. JUDITH LEWIS HERMAN, M.D., TRAUMA AND RECOVERY 33, 42 (2d ed. 1997); MARY ANN DUTTON, PH.D., EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION 51-70, 115-28 (1992). It amazes me that people still fail to see that being denied freedom and living in what amounts to captivity in a totalitarian or authoritarian regime creates feelings of helplessness and hopelessness. See id. at 74-83.


70. I am indebted to Ann McGinley for this observation.

71. I remain mystified about what it is these critics think is the reward or reason for aspiring to this identity, rather than having it intrusively foisted upon one against one’s will by a perpetrator.
the experiences of targets and their knowledge of the dangers and difficulties presented by their particular status in society, does make it appear that offensive speech is less of a problem than it actually is. Seen in isolation, a person's reaction to an offensive remark may seem oversensitive. As Dr. Nielsen suggests throughout her book, however, such speech does not exist in isolation from other forms of subordination. For example, women are raised to fear sexual violence, and according to numerous studies, many have already been victims of rape, sexual abuse, and physical assaults. Dr. Nielsen notes that her female subjects mentioned actual physical assaults, grabs and groping by strangers; these quick "copping a feel" maneuvers occur on mass transit, in lines of people, and on the street (p. 46). Women of color must negotiate a terrain of threats that include risks of racist and sexist remarks and a history of violence from white men, as well as risks from men in their own communities. An outright racist comment directed at a woman, coming from a man, carries with it a sexual threat as well. And as Dr. Nielsen found, even so-called "polite" exchanges can lead to men following women and stalking them, adding to the burdens and fears women already experience in their lives (pp. 45-46). Sexually suggestive speech is therefore heard in the context of real threats of violence and intimidation, threats that women know all too well.

The implicit threat in sexually suggestive speech may explain much of the reason for the "detailed calculus" for going out in public places that many women described to Dr. Nielsen (pp. 57-65). It also lends itself to thinking of sexually suggestive speech as a "true threat," at least from the perspective of the target, although not the courts, at this time. So to assert that women are not victims, but if they complain, they are assuming a "victim identity," is simply a means to perpetuate the denial of harm fostered by the continuation of the status quo. The message is, to be strong and to have agency means to be silent in the face of abuse. Yet silence enables abuse, leaving existing social subordination unchallenged.

Offensive race and gender-based speech in public does harm its targets. A legal solution is beyond the scope of this review, but there are options that should be considered in thinking about regulation. The subjects of Dr. Nielsen's study raised very real pragmatic concerns about enforcement of laws prohibiting offensive public speech. Their views appeared to be influenced by beliefs about using the criminal law rather than civil law remedies, consistent with many, although not all, proposals and attempts to regulate hate speech. Practical considerations do need to be taken into account. Given the hit-and-run nature of much offensive speech, it may be difficult to comprehend how to prove the incident even occurred, much less identify and punish the perpetrator.

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enforcement resources are indeed stretched thin in many areas, although such things as “sweeps” of streets to remove the homeless and/or panhandlers use considerable law enforcement resources. Because there are other, more violent crimes that need attention, police, prosecutors, and the public may not have the time to take speech-based offenses seriously.74

Some form of civil citation might be imaginable, drawing on the idea of the business cards a student in one of my classes handed out announcing messages such as: “You have just insulted a woman.”75 However, fear of violent encounters might limit alternative mechanisms such as this “citizen complaint,” served immediately on the offender. Perhaps the end of formal First Amendment protection might reduce, at least at the margins, the frequency of offensive remarks based on race and gender. And perhaps a symbolic statement of disapproval might have some effect. As Dr. Nielsen notes, simply making the problem visible may lead to some social pressures or actions disapproving of such speech (p. 177). It is at least worth imagining what law might be able to do, and it is worth imagining where we can go from Dr. Nielsen’s study.

III. CONCLUSION

Currently, the law entitles strangers to whisper, speak, or yell insulting and offensive words at people in public simply because they are there. The law gives recipients of these spoken attacks no legal or formal power to remedy the situation, except perhaps to say something back. The law is not neutral, it is an enabler of a harmful practice, because the First Amendment protects free speech. Many individuals might not perceive law as a potential tool for preventing or correcting the verbal assaults they endure when they enter public spaces. Yet as Dr. Nielsen’s study makes clear, even people in one of the most ostensibly diverse, “liberal” and tolerant areas of this country must brave a gantlet of verbal abuse on a daily basis.

Developing our knowledge of the harm produced by such speech cannot end with this book. As well-done as Dr. Nielsen’s study is, it is limited in size and scope. We need more empirical information, including replication of her study’s design, to build a convincing case for the extent and harmfulness of offensive public speech. Now that we have this study, and now that Dr. Nielsen’s research does reveal higher frequencies of harassment of women of color, we need new studies to explore the influence of the intersections of race, gender, class, and disability on rates and types of street harassment, in order to know if there are particular harms and occurrences associated with these statuses. We need to find out more about public views of law regarding legal


75. A student in my Violence Against Women Seminar at U.C. Davis King Hall School of Law made up some wonderfully designed “cards” which she passed out to the class.
remedies for offensive speech. We also need to explore ways to delegitimate the practice of racial and sexual abuse in public places.

Dr. Nielsen's work is an important beginning, and guided by her work, we can encourage more research and investigation in hopes that something many of her subjects admitted was a personal and social problem will find a social, and maybe even a legal, solution. Then, perhaps the public sphere will become less threatening and a more welcoming place for all persons in our communities.