
Project

Civil Rights Meet Civil Engineering: Urban Public Space and Traffic Logic

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Introduction

Public disorder takes many forms,

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Yet despite their differences, both converge in embracing a form of "ethical humanism." First, both regard public space as serving certain valued political and ethical ends. On the right of the political spectrum, a scholar such as Ellickson[4] regards public space as "precious"[5] because of its democratic potential, allowing for political "gatherings and mixings."[6] Further, a diverse society such as the United States, he argues, "requires venues where people of all backgrounds can rub elbows."[7] Similarly, a Leftist like Mitchell[8] insists on the value of public space in allowing formally marginalized groups to enter into the public realm. For the Right, the full potential of public space can only be realized through regulation. For the Left, such regulation militates against this potential. Yet both regard the purpose of public space as broadly political. Secondly, both treat public space as a space full of people. It is the encounters among these people that is at the centre of the story. Again,

> A: Yeah. Not in, not in having homeless people be around and whatnot and whatever, but that the way in which they were approaching those individuals, and what subtle kind of things that were happening that made them feel uncomfortable…. You see I believe that sidewalks and plazas and streets and parks and schools, I consider them to be public spaces, spaces in which anybody can go. And what has happened is that folks that would ordinarily make use of the public spaces felt that they couldn't because they felt intimidated by either the drug scene, the panhandling, the urban campers, those sorts of things. So they were saying, "I can't go to a public space now." So public space is important in any community, but I think it's even more important in a densely populated area. I mean, this is—you know, the West End itself is the most densely populated area in the world, I'm told, which is pretty incredible. So public space becomes even more important, you know. And so those folks that were coming to me were, you know, were talking about that. And I had to admit that they had a right to feel safe in public spaces. All public spaces should be safe, should be—well, they should just be safe.[10]

Critics of Mayencourt predictably condemned his advocacy as a form of

view, easily obscured by grander, "higher" and more visible forms of urban regulation.

Seeing Like an Engineer: Traffic Logic at Work

I take as my focus the city of Vancouver, which like most cities, has a wide and overlapping array of permits, policies, and by-laws that govern public space. Thus, the *City Land Regulation By-Law* makes it an offence to "construct, erect, place, deposit, maintain, occupy, or cause to be constructed

when it came to the regulation of streets, although this was characterized as requiring that

> … there are no obstructions that create an unsafe situation. For example, like the situation where you have a display out too far on the sidewalk. People shopping and blocking the sidewalk and then pedestrians getting around having to go out into…a moving lane of traffic. So that, safety is always our prime consideration. Then the second one would be maintaining that adequate flow on the sidewalk for pedestrians to get through.[37]

This view of the street is not often articulated (perhaps because it does not appear to require justification). However, in an affidavit submitted by a Streets Administration Engineer in a constitutional challenge to the section of Vancouver's *Streets and Traffic By-law* governing panhandling,[38] we get a clearer sense of what it means to see like an Engineer. The central object, the Engineer argues, is "the maintenance of a safe passage and a smooth and unobstructed pedestrian traffic flow on the city's sidewalks." Smooth flow, however, is not a given: Streets and sidewalks, he argues, are a "finite public resource that is shared by a number of competing interests" which can be divided into "moving and static elements." He offers a list that begins with people (pedestrians "going from point A to point B," panhandlers, pedestrians waiting for the bus) and then moves, seamlessly, into objects (newspaper boxes, bus stops and so on). Static elements are "to be positioned away from the flow of pedestrian traffic." People and things that may obstruct that flow are tolerated, but only as long as they do not impede. A bus stop is as much a subject of legal scrutiny as the person at the bus stop. Law provides the *Robert's Rules of Order* through which this resource can be shared. But like *Robert's Rules*, public space by-laws are not open-ended, but aimed at facilitating flow and movement. Municipal law can provide the essential order that will regulate the arrangement of things and people on the sidewalk, such that "smooth flow" is realized.

Where does this view come from? Engineers I spoke to were hard-pressed to explain the derivation of this view of the street: it simply appeared to be the way things had always been done. Some emphasized a pragmatic process of "learning together with the stakeholders," as one put it. As new objects or people appeared on the sidewalk, they become the subject of administrative scrutiny. Policy was proposed, laws were passed, and the novel became the normal. Reflecting on the appearance of café patios, one Engineer noted:

> When the first [patio appeared]… it was quite a revolutionary concept. Like, Oh, my goodness, somebody wants to use some of the city's sidewalk for their own business?…Everyone had to have their—its own report to council…And then after experience was gained…we were able to kind of generalize our experience and to

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37 *Ibid*.

38 *Federated Anti-Poverty Groups v. Vancouver*, [2002] BCSC 105 [*Federated*] (Affidavit of Rowan Birch).

generalize some rules in terms of, of, you know, access rights and widths and sidewalks could be maintained. Well, then we were able to generalize some guidelines and council said, "make it a permanent program" then we don't even have to hear about every one. And I think that that's generally, when new street uses come along, that's generally kind of what happens is, that the first one generates a lot of interest and a lot of debate, and then ultimately it becomes an administrative [thing] that happens on an ongoing basis.

A persistent thread of court decisions also appears to embrace traffic logic. Historical English case-law concerning highways often concerned dedications of rights-of-way over private land. Motion was central to allocation: the public was empowered by custom to "pass and repass" along a dedicated or allotted right of way. Judges were reluctant to cede any additional rights to road-users, given the ownership rights of the private landowner. In *Harrison v. Duke of Rutland*,[52] Lopes LJ held that the right of the public on the highway was exclusively that of passing and repassing: "the interest of the public in a highway consists solely in the right of passage."[53] Any other use constitutes a trespass. What, then, when roads are owned by the state? In *Director of Public Prosecutions v. Jones and Another*,[54] Lord Irvine could find no basis for distinguishing highways on

> familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.[59]

This, quite clearly, is not the public space of Ellickson or Mitchell. Public space is not for democratic dialogue and encounters with alterity. Rather, it is for transport and flow. Asked to consider the argument that public space is valuable insofar as it facilitates democracy, citizenship and dialogue, a Vancouver Engineer responded by treating it as an administrative problem that could be solved through locating protests through the permitting process in order to ensure continued flow: "…you'd have to look at the location that you're talking about….And you know, [permits] are worked out in terms of where it's safe to hold assemblies in public areas, so that again, you know, pedestrians aren't pushed out into the middle of the road."[60]

> from the person in *Kmart*. If you remove these chattels in the case before Your Lordship, you remove the content of their expression. The content of their expression is precisely the household items.
>
> The message these items deliver, the content of the expression that these ordinary household items carry, is: "I have no home. That is why the objects you have in your bedroom, or that you have in your kitchen in my case, are here on the public sidewalk. Please do something; please assist me in doing something about this."[65]

The application for an injunction was not, argued the city, "about homelessness and poverty. It is about the right of the city…to have a valid bylaw which is presumed to reflect public policy and to balance the competing interests of all citizens…."[66] The BC Supreme Court agreed with the city. Arguments that the poverty of the defendants was sufficiently exceptional to justify their unlawful conduct were dismissed.[67] Arguments based on freedom of expression were also rejected. *Commonwealth*[68] was cited to argue that individuals are only entitled to express themselves in a public place if that expression is compatible with the principal function or intended purpose of the place. The structures in question were, it appears, a violation of the function of the place which, it seems, was obviously traffic flow.[69] Could it be said, asks the Court rhetorically, that "despite the city's responsibility to enforce the by-laws enacted for the public's orderly use of the streets and sidewalks in the city, the court ought to refuse to grant a

have argued elsewhere,[71] the court adopted traffic logic, and upheld the constitutionality of these controls. Similar logics infuse many other similar judicial decisions concerned with law governing activities occurring on streets and sidewalks (such as solicitation, pamphleting, picketing and so on). In *Federated*, the judge appeared persuaded by the argument of the city. It is these arguments that I focus on here.

The *Streets and Traffic By-Law* forbids begging which causes an obstruction.[72] In its written argument, the city was at pains to situate these regulations as falling within a pre-existent mandate: the proper administration of streets and sidewalks, "reflected in the comprehensive

secure from constitutional challenge: rather, "it was just sort of a logical place to put it."

Traffic logic, by definition, is suspicious of objects that are static and potential obstacles to flow. It does not distinguish between bus stops, news boxes and beggars. While, as noted above, the public poor may be caught up in its workings, it is not, facially at least, overtly inequitable. Indeed, one can find examples of elites whose interests have also been compromised by traffic logic. One telling example is that of newspaper publishers who

A: So that way I'm not getting in anybody's way…So I feel like

Résumé

En dépit de divergences idéologiques, les travaux savants sur l'espace public entendu comme site de rencontre entre les gens ont eu tendance à se centrer sur ses aspects éthiques et politiques. Cela s'est fait au détriment de ce que l'auteur nomme