2011 URBAN GEOGRAPHY PLENARY LECTURE— COLORED RABBITS, DANGEROUS TREES, AND PUBLIC SITTING: SIDEWALKS, POLICE, AND THE CITY[1]

Nicholas Blomley[2]

Abstract: Urban geographers would argue that cities are distinct spaces that need to be treated on their own terms. Yet I fear that we have not given the specificity of urban law its due. My aim is to give one crucial, yet easily overlooked urban legal practice, that of "police," more careful attention. By "police" I mean "the regulation of the internal life of a community to promote general welfare and the condition of good order" (Neocleous, 2000, p. 1). I focus on the sidewalk as a particular police space. I also wish to demonstrate the distinctiveness of police, particularly when compared with rights-based understandings of public space. Yet the two frequently collide, as we can see with reference to a constitutional challenge to a sit/lie ordinance in Seattle. Police won, as it usually does. But to accuse police of an assault upon rights is, in several senses, beside the point, for police operates in a different register. Police thus must be understood on its own terms and not reduced to other governmental logics. [Key words: police, law, public space.]

> Police should … be as important a concept to social and political theory as "sovereignty," "consent," "social contract," "violence" and all of the other concepts regularly used by theorists grappling with the nature of state power. (Neocleous, 2000, p. xi)

> If somebody wants to sell a deep fried Mars bar or whatever, that's their prerogative. But when you are using public streets or public space or land to sell food on, I think you should be using it to promote the goals of the public body and one of our goals is around nutritional outcome. (Lee, 2011, p. A1; Vancouver City Councillor, defending official nutritional requirements for licenced street vendors)

URBAN LAW

Urbanists, geographers included, would argue that cities are distinctive spaces that need to be analyzed on their own terms. When social processes like economies, politics, and

[1]I am honored to have been asked to present this paper at the 2011 Annual Meeting of the Association of American Geographers conference in Seattle. My thanks to Bob Lake of *Urban Geography* and Sarah Elwood of the Urban Geography Specialty Group of the AAG for extending this invitation. Particular thanks to my two discussants, Deborah Martin and Nicholas Dahmann, and to Deborah Martin for the written commentary that follows. I am also grateful for the legal and local reading provided by Steve Herbert. My friend Mariana Valverde is to be credited for blazing the intellectual trail that made my "urban police" foray possible.
[2]Correspondence concerning this article should be addressed to Nicholas Blomley, Department of Geography, Simon Fraser University, Burnaby, British Columbia, Canada V5A IS6; email: blomley@sfu.edu

Urban Geography, 2012, , 7, pp. 917–935. http://dx.doi.org/10.2747/0272-3638.33.7.917

culture unfold in cities, they take on a specific form and character. Yet I fear that we have not given the specificity of urban law its due.

Cities are, of course, governed by a dense network of regulations, codes, by-laws, and ordinances. These include rights codes—whether national or international—state and national statutes, the pronouncements of judges, and so on. More informally, law circulates in urban societies as disparate ideologies, embodied performances, and discursive repertoires. My focus here, however, is law that is produced by local officials, of which the best example is the municipal code (or in Canada and the UK, the by-law). Such regulations are easily overlooked by scholars. It is tempting to view them as pettifogging, anachronistic, and sometimes plain silly. Several websites compile lists of such absurdities.[3] One such regulation suggests that, in Seattle, you may not carry a concealed weapon that is over six feet in length. Women who sit on men's laps on buses or trains without placing a pillow

permit a street clock to incorrectly record the time “unless all dials thereof are covered.” Newsstands must be aligned parallel to the curb, must not obstruct circulation, and may not be fastened to any Metro facility, utility pole, or tree. Sidewalk cafés are allowed but, like many other “private” uses, require permits and are carefully policed. Even while requiring owners to clean their sidewalks of snow, the City stipulates that it is unlawful to wash, sweep or otherwise deposit any matter in the street or gutter. No one is to plant in any public place any maple, Lombardy poplar, cottonwood, or gum, or any other tree that breeds disease dangerous to other trees or to the “public health.” The City may immediately take custody of any personal property in a public place without a permit if it constitutes a hazard to public safety or impedes transportation.

What sort of space is the sidewalk, then, for the Urban Codifier? It is a paranoid one, rife with “hazards” and “obstructions.” Read in the abstract, one would assume that Seattle’s sidewalks were inundated with unlicensed sidewalk cafes, the illicit playing a pubuE HotTaa6(

CIVIC HUMANISM AND THE SIDEWALK

What is a sidewalk for? For many academics and activists, a sidewalk is much more than a traffic conduit. As Jane Jacobs (1961) famously argued, the sidewalk serves a variety of important and valuable ends, shaped by the multiple encounters that occur among strangers. The sidewalk, then, is (or should be) "public space," a site in which publics are made present, constituted, and activated. For mobility scholars such as de Certeau (1984), the walking that occurs on the sidewalk is to be celebrated as a transgressive act. For Solnit, mass walking

> becomes speech in these demonstrations and uprisings, and a lot of history has been written with the feet of citizens walking through their cities. Such walking is a bodily demonstration of political or cultural conviction … [Walking signifies] the possibility of common ground between people who have not ceased to be different from each other, people who have at last become the public. (Solnit, 2000, p. 217)

For an urban designer such as William Whyte (2000), sidewalks are not just for walking but also for static activity such as crowd watching or conversation. Sidewalks should be not be monofunctional or overly regulated but should foster what Whyte memorably dubs the "vital frictions" and "amiable disorder"of urban co-presence. For leftists, sidewalks, as components of public space, are sites for the expression of politics, the manifestation of rights, and the realization of citizenship.

All these are variants of what I have loosely termed a form of "civic humanism" as applied to the sidewalk (Blomley, 2011). By civic, I mean to signal that the sidewalk is seen, ideally, as serving shared or collective ends such as the advancement of citizenship, human flourishing, and public enjoyment. Thus, the goal is not to advance the interests of either the state or self-interested individuals; hence, we see a general suspicion of private actors in public space unless, as with Jacobs, they serve public ends such as creating "eyes on the street." State action in public is also viewed with some level of suspicion. The sidewalk is also "humanist" in that the primary focus of interest are the persons who occupy and use the sidewalk. Encounters between such persons are seen as rich with intersubjective possibility. While such encounters with strangers can be unsettling, many would also argue that such "vital frictions" are ultimately productive of urban public life. Thus, for Sennett (1994, p. 310), "[t]he body comes to life when coping with difficulty."

For these reasons, regulations such as Seattle's sit/lie ordinance are an obvious target for the civic humanist. Such arguments frequently rely upon a rights-based agenda, in which the autonomy of the homeless citizen is central. Not only is urban law seen as a violation of the rights of the marginal but it is also said to be driven by crass, exclusionary, and privatized motivations. Such bans are seen as an attempt at purifying public space of the deviant and different (Collins and Blomley, 2003).

The Seattle sit/lie ordinance, for example, has been characterized as an obvious assault upon the rights of the homeless, motivated by market-based imperatives. For Feldman (2004, p. 43), the ordinance reflects the need to "exclude abject poverty from 'prime' consumption spaces" with sidewalks constituted as exclusively for the free circulation of goods, consumers, and workers in the service of a consumptive public sphere. Don Mitchell identified Seattle, bastion of liberalism, for particular criticism in an important

1997 *Antipode* article, rooting regulation in the uncertainties of globalization and its effects on the urban economy: "The genealogy of these laws in the insecurity the contemporary bourgeoisie feels within the putatively globalizing economy," he insists, "seems clear enough" (Mitchell, 1997, p. 327).

Mitchell draws from the arguments used to justify regulation in Seattle, suggesting that they reveal a naked logic of "prosperity, social harmony and perpetual economic growth" (1997, p. 307). He quotes, in particular, an editorial by City Attorney Mark Sidran (1993) that characterizes public disorder, including sitting on Seattle's sidewalks, as threatening a "dangerous unravelling of the social order."

Now we may wish to read Sidran's editorial as an ideological gloss (with its appeals to community, civility, and so on) that conceals darker, sinister motives, such as a revulsion at the abject (Kawash, 1998) or as an embodiment of more straightforward though no less partial appeals to economic prosperity. Such motivations may, indeed, be at work. Homelessness more generally, and the presence and behavior of the public poor in particular, are clearly suffused with many cultural, social, and economic concerns (Blomley, 2009). As urban geographers, we have done a good job of identifying many of these. However, for now I want to temporarily bracket these considerations and focus on another rationality that may also be at play here, particularly given the fact that Sidran is engaged in the production of (and is presumably imbued with) urban law, particularly in relation to the sidewalk. For several points from Sidran's account demand more careful attention on their own terms.

These include: (a) His emphasis on the city and the sidewalk in particular as sites of legal intervention that, as he notes, are already intensively regulated. Thus, "just as we regulate our sidewalks for everything from newspaper racks to espresso stands, awnings to trees, we need to say that, with a few reasonable exceptions, sidewalks in busy commercial districts are not the place to lie down." (b) His invocation of a series of loosely defined and generalized hazards such as graffiti, lying down on the sidewalks, and public drinking, which are said to usher in broader threats, such as "blight," an "unravelling social order," "public safety," and a "psychology of fear." (c) His characterization of these threats as an assault upon a coherent collective ("the city," "community," "social order"). (d) His view of these threats as entailing a failure to act appropriately according to the "basic rules of civil behavior," hence prompting the need for discipline. (e) His call for preventive mea-

in Canada is termed peace, order, and good government. Neocleous (2000, p. 1) defines it as "the legislative and administrative regulation of the internal life of a community to promote general welfare and the condition of good order." Its key concerns, therefore, are the promotion of order, salubrity, health, well-being, peace, propriety, and safety.

More famously, Blackstone provides a definition that characterizes police order as akin to that of the family: "By the public police and oeconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations" (1769/1979, p. 162). The allusion to the family is, however, more than metaphorical. In an important account, Dubber (2004, 2005) traces the ancient roots of police in Greek and Roman political thought to a long-standing divide between two basic modes of regulation. Autonomy, or the government of the self through law, must be distinguished from police's hetereonomic rule (government of the people by the state).

This divide, Dubber notes, was evident in Greek political practice, with the division between the public sphere of the male/free citizen and the private sphere of the family, in which the household head was to manage the economy (literally, the household and its resources). The household itself was conceived of as a pool of resources, both things and persons, the careful management of which made up the art of household management (later named "husbandry"). The Roman *paterfamilias* was similarly charged with extensive powers to manage and discipline his household.

This conception continued in Medieval European governance, which was also preoccupied with the rule of the household, or *mund*.[7] The householder was to have external authority to protect his *mund* against threats and internal powers to discipline and order his household, all in the service of the welfare, or the "peace," of the unit. The expectation was that all were to be located within individual households, and those outside the webs of household regulation, such as outlaws, vagrants, and masterless men thus posed a special threat. The king, as a householder, had his own *mund*. The expansion of royal power, Dubber argues, is thus simply the expansion of the royal *mund* under the king's peace.[8] The welfare of the king's household was increasingly cast in terms of the welfare of the people as a whole, under the principle *salus populi suprema lex*.

A distinction can then be drawn between different forms of rule: between "law" and "police": "From the perspective of law, the state is the institutional manifestation of a political community of free and equal persons. The function of the law state is to manifest and protect the autonomy of its constituents … From the perspective of police, the state is the institutional manifestation of a household. The police state, as *paterfamilias*, seeks to maximize the welfare of his—or rather its—household" ke T, p. 3(RomBT0 sonomic rule (is the 8ect

person, but … only that which is applied to the general benefit of the people, and is *salus populi*; as the people is the body, and the king the head; and this power is not guided by the rules which direct only at the common law, and is most properly named policy [police] …" (cited in Freund, 1904, pp. 6–7).[9]

As noted, the primary concern of police is the protection of the household from within and without. For one turn-of-the-century American commentator, police's defining characteristic is that "it aims directly to secure and promote the public welfare" (Freund, 1904,

… [Police] is continually employed about minute particulars; great examples are therefore not designed for its purpose" (1748/2001, p. 519).

Early modern Europe saw the formalization of police, particularly in France and Germany, and the publication of multiple primers (Pasquino, 2006). By the 18th century, police—understood as the "regulatory and preventive governance of the internal order of the kingdom" (Valverde, 2008, p. 24)—had attained a settled meaning as one of the key modalities of state power. Yet while police mechanisms were "cleansed of some of their more absolutist features, … police governance was by no means diminished by republican regimes" (Valverde, 2008, p. 21). The American Republic, despite its commitment to self-government, nevertheless made police a central logic of rule: "Ending the king's police power, it turns out, did not mean ending police power altogether … Americans didn't appreciate being policed, but they had no qualms about policing" (Dubber, 2005, p. 83). Indeed, Novak (1996) reveals the remarkable reach of police in pursuit of the "well regulated society," even during the height of laissez-faire capitalism.

An important modern statement on U.S. police was provided by Ernst Freund in 1904 in his highly influential text on the police power that attempted to provide a settled meaning and clarify its relationship to rights of liberty and equality. He defined police as "the power of promoting the public welfare by restraining and regulating the use of liberty and property" (p. iii). A defining characteristic of police is that "it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion" (p. 3). Freund's treatise is important in establishing police power as an independent constitutional basis of extended legislative authority (Novak, 2008). But while Freund's account speaks to modern police priorities, it is still resolutely traditional in its itemization of a remarkable array of threats including dikes and levees, railroad crossings, fog signals, rioters, immigrants,

highway or riverway" (ibid., p. 117). The "legal construction of publicity" was, therefore, a first requirement, Novak notes. Thinkers and jurists such as Thomas Cooley and John Dillon celebrated highways as tools of commerce and communication, serving as the basis for the well-ordered society. As such, transportation was deemed a public responsibility and state rights were asserted over spaces of transportation:

> [P]erhaps in no other area of nineteenth century social and economic life was state power wielded so effectively and unambiguously to define and uphold the rights of the public. By midcentury, court, legislatures, and common councils made it perfectly clear that private claims to public properties and spaces would always be trumped by the great public objectives of regulated and improved transportation, communication, and assembly. (Novak, 1996, p. 118)

The space of the sidewalk—at once a space of the public and of circulation—emerged

simply punished after the event. That the public and its needs are loosely defined through reference to concepts such as civility, or anti-social behavior (cf. Fyfe et al., 2006) is to be expected. Its essential units are not persons, as such, but resources that are to managed and put to work, and threats to those resources. Sidran's fixation with circulation and blockage speaks, perhaps, to a police concern with urban flow. His emphasis upon the need for the disciplining of recalcitrant street users reflects the police imperative to control rather than to govern or persuade: "[P]olicing disposes … rather than influences, persuades, or convinces or commands" (Dubber, 2005, p. 71).

RIGHTS AND POLICE

To object that urban regulation, like Seattle's sit/lie ordinance, violates the rights of the urban poor is, therefore, to miss the point. It is to insist on a framing for which police is ill-suited: for to invoke rights is to center the autonomous, liberal subject. We value rights because we value the autonomy of the Kantian self. Yet police is very different. To compare it to civic humanism is not so much as to weigh apples and oranges as it is to contrast apples to, say, colored fowl. For police "speaks not in terms of rights, but in terms of *salus*, i.e., of well-being or health" (Dubber, 2005, p. 112). The liberal subject is here transformed into the pedestrian, an object in motion or a static obstacle akin to the bus stop that risks impeding that flow (Blomley, 2007). Consequently, traditional constitutional concerns such as *mens rea*, the distinction between omissions and commissions or status and acts, need not apply.

Now, of course, we can certainly try to invoke rights in contesting forms of police regulation. Indeed, it is hard to know where else to go, particularly for us civic humanists. But the problem is that in so doing we have to speak across two solitudes. Rights, of course, are said to be a powerful card to play. But police is also deeply entrenched, providing a "commonsense" (Levi and Valverde, 2001) vocabulary for understanding urban regulation. It becomes easy, then, to imagine rights as an alien interloper from a "higher" scale of law (Blomley, 2012). The terms of debate are thus already constituted by police in ways that may close down political possibilities. As a result, activists may be forced into advocating for painfully impoverished rights such as that of the homeless person to rest on the sidewalk. Urban battles motivated by concerns at social justice and rights can easily become shoehorned into "police" battles over setbacks, zoning, and placement (Valverde, 2005).

The discursive power of police becomes evident when we consider judicial deliberation on the sidewalk. While there are important exceptions, the courts, as noted, have historically played a role in extending police powers and often remain supportive of police-based arguments. Even apparent departures may reflect a police logic. Thus, for example, the influential *Papachristou* (1972) judgment overturning a Jacksonville, Florida vagrancy ordinance certainly invokes constitutional standards and notes the invidious effects of open-ended discretionary powers on the poor and marginal. Yet, one could also argue that its very objections to the ordinance, such that the ordinance does not provide clear directions to the members of the "household" and encourages arbitrary forms of rule by the

U.S. Supreme Court overturned his conviction as an illegitimate restriction of free speech (*Schneider v. State*, 308 U.S. 1939). Yet while the court ruled that the prevention of litter, cited as a justification of the regulation, was insufficient grounds for the abridgment of speech, the courts did make clear that had he been *obstructing*, things would have been otherwise, underlining, in an oft-quoted passage, the duty of municipal authorities to regulate the conduct of street users according to a police logic:

> Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to regulations, and maintain his position to the stoppage of all traffic.… (p. 147)

The tension between such constitutional liberties and the "primary purpose" of the sidewalk remains a crucial one, often adjudicated according to a police logic in which circulation plays a central role. In 1992, three members of the International Caucus of Labor Committees erected card tables on the sidewalk in Montgomery, Alabama to distribute literature and recruit new members, for example. The police moved them on under threat of arrest. The Caucus sued the City of Montgomery, arguing that such a blanket ban violated their First Amendment rights to free speech. The district court agreed, noting that the Caucus did not interfere with pedestrian movement, that pedestrian flow was not inhibited by the presence of the plaintiffs' display table, and that traffic on the streets and in the parking lots went unimpeded (*The International Caucus of Labor Committees et al v. The City of Montgomery*, 1994). The U.S. Court of Appeals, however, sided with the City, holding that the City may impose reasonable restrictions on the time, place, and manner of protected speech in a public forum if such restrictions are narrowly tailored to serve a significant governmental interest. The maintenance of the orderly flow of traffic in the streets and at the street corners and the prevention of pedestrian blockage were seen as a compelling and justifiable concern, it being argued that the first priority of a sidewalk is for the use of pedestrians. Strikingly, the City was not required to provide actual evidence of pedestrian flow on specific sidewalks but, in true prudential police form, was entitled to advance its interests based on common sense and logic.

Such an open-ended commitment to "common sense and logic" would seem to throw into question the view of the sidewalk as a public forum, articulated in the Supreme Court decision, *Hague v. CIO*. Here, Justice Roberts famously invoked the public's right to use streets and parks for assembly and speech, characterizing this as a part of the ancient rights of citizens. Yet, importantly, he went on to qualify this claim, arguing that public speech is not an absolute right, but—in classic police terms—must be "regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order" (*Hague v. CIO*, 1939, p. 516). While the "public forum" doctrine, of course, has proved rhetorically influential, judges have frequently underscored Roberts's "comfort and convenience" coda based on prevailing common law principles of circulation and noted the precedential

on its own terms, does not act against homelessness in general but against obstruction in particular.

This then raises interesting questions, thirdly, about the relation between police and other logics. Having argued, as we must, for the specificity of police, it becomes important to then read back into other legal and urban rationalities. Police does not govern alone, nor is it hermetic and fully autonomous. What happens, then, at the interface of, say, police and "community" (Ramsay, 2008) or police and engineering (Blomley, 2011)? How does police absorb, co-opt, or resist other modalities of urban rule? To what degree does police help constitute social differences through its assessment of urban threats (Neocleous, 2000)?

What, then, of the geographies of police? Which spaces does it help constitute and where is it put to work? What is it about the city, in particular, that makes it a privileged site of police? How does police work *through* space, via a particular logic of—in the case of the sidewalk—circulation, placement, obstruction, and zone? Following the suggestion by Tomlins (2006) that we seek police in its dispersed locales, it becomes important to ask how police manifests itself differently in other legal sites, such as environmental law, international law, urban planning, liquor control (Valverde, 2003, 2005), or criminal law (Farmer, 2006). Is police different when exercised by a municipal engineer, a judge, or an urban politician? How and with what effect does it get taken up by urban residents more generally? How does it work differently in different urban spaces (city centers, suburbs, parks, private space)? How is it manifested in spaces beyond the city?

Either way, when thinking about urban law I think it imperative to take police on its own terms and recognize its specificities. Remarkably wide-ranging, police has been characterized as the "most expansive, least definite, and yet least scrutinized of governmental powers" (Dubber, 2004, p. 101). If we want to take urban law seriously and consider the traction of rights-based claims, urban police demands scrutiny.

REFERENCES

Barrie, D., 2010, Police in civil society: Police, Enlightenment, and civic virtue in urban Scotland, c 1780–1833. *Urban History*, Vol. 37, 45–65.

Berg, W., 1994–1995, *Roulette v City of Seattle*: A city lives with its homeless. *Seattle University Law Review*, Vol. 18, 147–197.

Blackstone, W., 1769/1979, *Commentaries on the Laws of England*, Volume 4. Chicago, IL: University of Chicago Press.

Blomley, N., 2007, How to turn a beggar into a bus stop: Law, traffic, and the "function of the place." *Urban Studies*, Vol. 44, 1697–1712.

Blomley, N., 2009, Homeless, rights, and the delusions of property. *Urban Geography*, Vol. 30, 577–590.

Blomley, N., 2011, *Rights of Passage: Sidewalks and the Regulation of Public Flow.* New York, NY: Routledge.

Blomley, N., 2012, What sort of legal space is a city? Unpublished manuscript.

Collins, D. and Blomley, N., 2003, Private needs and public space: Politics, poverty, and

Neocleous, M., 2000, *The Fabrication of Social Order: A Critical Theory of Police Power*. London, UK: Pluto Press.

Novak, W. J., 1996,

Schneider v. State, 1939, 308 U.S. 147.
The International Caucus of Labor Committees et al v. The City of Montgomery, 1997, 856 F. Supp 1552, U.S. App Lexis 10619.