Urban Studies
Publication details, including instructions for authors and subscription information:
http://www.informaworld.com/smpp/title~content=t713449163

How to Turn a Beggar into a Bus Stop: Law, Traffic and the 'Function of the Place'

Online Publication Date: 01 August 2007
To cite this Article: Blomley, Nicholas (2007) 'How to Turn a Beggar into a Bus Stop: Law, Traffic and the 'Function of the Place'', Urban Studies, 44:9, 1697 - 1712
To link to this article: DOI: 10.1080/00420980701427507
URL: http://dx.doi.org/10.1080/00420980701427507

should

Routledge Taylor & Francis Group

How to Turn a Beggar into a Bus Stop: Law, Traffic and the ‘Function of the Place’

Nicholas Blomley

[Paper first received, July 2006; in final form, October 2006]

Summary. A review of recent Canadian case law on the constitutionality of legal controls on begging reveals the importance of an unacknowledged view of space and behaviour that I call the traffic code. The paper endeavours to take this code seriously, unpacking its logic and scope. In particular, it explores its legal effects, noting that it deflects rights-based arguments on behalf of the public poor. Its emphasis upon space, use and behaviour appears to be not only illiberal, but curiously aliberal, operating without reference to rights. It is suggested, however, that it may in fact rely upon some deeply liberal notions of rights and space. This, perhaps, allows for a rights-based critique of the traffic code. This, and other possibilities for challenges to the traffic code, are explored in the conclusion.

> The use of laws (which are but rules authorised) is not to bind the people from all voluntary actions; but to direct and kJT*269.7(th)7004(hurnot26216.2.a--46(JT*-)selvules)3218.(

Nicholas Blomley is in the Department of Geography, Simon Fraser University, Burnaby,helpful comments. The author is also grateful for the co

0042-0980 Print/1360-063X Online/07/091697–16 © 2007 The Editors of Urban Studies
DOI: 10.1080/00420980701427507

(h) Sidewalk cafés.
(i) Newspaper boxes.
(j) Bus stops and bus shelters.
(k) Street furniture.
(l) Utility poles.
(m) Parking meters.
(n) Canada Post delivery boxes.
(o) Trees.
(p) Garbage bins.
(q) Water fountains.
(r) Fire hydrants.
(s) Phone booths, etc.

Pedestrians (going from "point A to point B") must navigate an exhaustively listed array of "static elements" that include people as well as inert things. The good street, for Mr Birch, is one which the competition between the static and the moving resolves itself in favour of flow. Static objects are to be "positioned away from the flow of pedestrian traffic". He provides photographs showing the proper placement of lamp standards, benches, newspaper boxes and bus stops. Birch's particular view of the street, for the scholar of law and public space, may appear a curious one (see Valverde, 2003, p. 159). However, I want to suggest that it may be worth more careful attention, as it points us towards some overlooked and, I think, troubling dimensions to municipal law and the geographies of rights.

forms of urban regulation to violate the rights of individuals. Courts have declared that such laws target identifiable groups or persons to discriminatory effect, thus violating equality rights. In 1972, for example, Canada repealed the section of the Criminal Code that made it an offence to beg door-to-door or in a public place, recognising that this constituted a 'status' offence. Consequently, when some Canadian cities, including Vancouver, and the province of Ontario, began introducing legislation to govern begging, they did so in a language that did not appear to target identifiable persons,[2] but prescribed conduct within particular spaces. Vancouver, for example, amended its Street and Traffic By-law in 2001 to limit what it termed 'obstructive solicitation', making it an offence to solicit while sitting or lying on a street so as to impede pedestrian traffic; following a refusal; in groups of more than three; within 10 metres of a bank or ATM; or from the driver of a car so as it impede traffic. Ontario's Safe Streets Act (1999) forbids 'aggressive solicitation'—that is, begging that entails threats, obstruction, 'abusive language' and persistence, and outlaws soliciting at certain sites, such as an ATM or bus stop.

Despite this studied neutrality, civil libertarians and advocates for the poor characterised such regulation as an assault upon the rights of the poor and homeless, and initiated constitutional challenges in Vancouver and Toronto (*R v. Banks*).[3] While part of their argument concerned the division of powers, their central thrust was a rights-based one, relying on the Canadian Charter of Rights and Freedoms. In Toronto, the appellants argued that the Ontario Safe Streets Act violated their: section 7 Charter rights (to 'life, liberty, and security of the person') as it was vague and overbroad, and denied their rights to economic survival; section 2b rights to freedom of expression; section 15 rights to equality; and section 11d rights (the presumption of innocence). In Vancouver, the petitioners argued that the by-law infringed their section 2, 7 and 15 rights.

The courts in both *Banks* and *Federated* ruled against all these rights claims and upheld the respective legislation. In general, they do so with brisk confidence.[4] The argu-

Public forum doctrine, worried Lamer, tends to treat public space in abstraction. What is needed is to balance the interests of the individual wishing to express herself, who has an understandable desire to access public space to that end, with that of the state, which owns public property. Yet state ownership is not absolute. Rather, the state must use its property to meet its quasi-fiduciary obligations to the citizen, argued Lamer. Of course, we might note, the obligations of the state to the citizenry could be defined in a number of ways. So, for example, a theorist of public space might point to the requirement to ensure that public space remained as a space for unprogrammed encounters, in order to foster a culture of civil comportment (Walzer, 1986). The state might be said to be obliged to ensure that public space remain open and accessible to different people. Politics, for Iris Marion Young

> crucially depends on the existence of space and forums to which everyone has access. In such public spaces people encounter other people, meanings, expressions, issues, which they may not understand or with which they do not identify (Young, 1990, p. 240).

Lamer, however, seems less interested in democracy and difference: he tends to a somewhat narrower view of public space. The state can discharge its obligations to the citizen, he argues, if public space operates in accordance with its *intended purposes*. The citizenry benefits, he argues, from the services offered by public agencies such as Canada Post; hence

> the fundamental government interest, and by the same token that of the citizens as a whole, is thus to ensure that the services or undertakings offered by various levels of government are operated effectively and in accordance with their intended purpose (s. 16).

For Lamer

> even before any attempt was made to use [state-owned property] for purposes of expression, such places were intended by the state to perform specific social functions (s. 18).

For Moon (1993), implicit here is the notion that, if the state had not put its properties to public use, they would not have drawn a crowd, so those seeking access for purposes of public communication cannot legitimately complain if their rights are trumped by state purpose.

When balancing these interests, Lamer argues, rights of expression in public space cannot be absolute, but must be

> circumscribed by the interests of [the state] and of the citizens as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.

So, for example, it would be inappropriate for someone to shout a political message in the

> purpose of the safe and efficient movement of pedestrians; although it must not be forgotten that the street plays an important role in providing a public forum for the expression of ideas and thoughts. Streets have always been a forum where those who seek to express themselves have had access, but such access has never been so absolute that the expression would subordinate the dominant purpose (s. 158).

This view of the street is also sustained by the determination of the judges in both *Banks* and *Federated* that the impugned laws are within the jurisdiction of lower levels of government. The *Constitution Act* (1982) sets out the 'heads' of power over which federal and provincial governments have jurisdiction. Opponents argued that Vancouver's by-law and Ontario's Safe Streets Act were really criminal law in disguise, an area over which the Federal government has exclusive jurisdiction. In both decisions, however, begging controls were deemed by the courts to concern the regulation of traffic and conduct on roads, long a matter for local jurisdiction[8]. In *Federated*, the City's submission is approvingly quoted

> [Vancouver] seeks to balance panhandling [begging] with the multitude of other activities occurring on the streets—the most dominant of which is the efficient and safe movement of people along the tn97294(mak0-1.1381TD[(contr90.2(seek)-3)-310.2(and)-3[(mol8

However, Valverde argues, the two rely upon different protocols. Liberal rights rest upon claims of personhood. Thus, people have rights: uses, things and space do not. The regulation of people and spaces through municipal law rests on a logic that is incommensurable with the logic of rights. This makes the translation of rights arguments into the terrain of municipal regulation much harder to make, she argues. So, for example, arguments around urban homelessness often turn into arguments around urban uses: the discourse is not about the rights of the poor to shelter, but about the location of homeless shelters (and thus about density, set-backs and parking spaces). Thus, rights-based campaigns on behalf of the urban poor, if undertaken within the parameters of municipal and planning law, are likely to fail.[11] While municipal initiatives that clearly target identifiable groups hog the intellectual and political limelight, we need also to pay more attention to the everyday protocols and logics of use, she insists

> Governing urban life through 'uses' constitutes a certain terrain and sets out the parameters of the battles that can take place there (Valverde, 2005, p. 54)

This argument would seem to be relevant to the begging cases. As we have seen, after the 'rights revolution' begging law attempted to govern through activity and space rather than identifiable persons. The person of the beggar disappeared: in its place we now see a list of behaviours, named 'solicitation' in the Safe Streets Act,[12] whose objectionability can be determined not by an enquiry into the status or motivations of the beggar, but rather according to their location (near an ATM, for example) or their effects on others. Even here, objectionable (also known as 'aggressive') begging is made visible through actions in space (Were the paths of pedestrians obstructed? Was abusive language used?) rather than by asking the person who is the target of begging.[13] Viewed thus, it begins to be possible to think of the sidewalk as a transport corridor and begging as an activity that must be evaluated in that context.[14]

Now, it is clearly useful for lawyers for the City of Vancouver or the Province of Ontario to characterise panhandling by-laws as forms of traffic regulation, given that criminal law is within the federal domain. It is tempting to read this simply as deceitful sleight of hand on the part of a duplicitous state. Perhaps lawyers for the state did engage in such a tactical maneouvre. However, following Valverde's (2005) lead, I suspect that it may reflect a more pervasive and deeply rooted view of the street, whose roots can be traced back to intellectual fields such as modernism, as well as applied fields such as traffic engineering, which trade in terms such as capacity, productivity and flow.[15] It is clear that modern municipalities have long sought to manage the sidewalk according to a similar logic. Amato's history of walking (2004) reveals the long-standing attempt by local authorities to improve the governing of the street through the regulation of space and use. The early modern street, he notes, was a chaotic one. People in early 19th-century London, for example,

> stopped and crossed streets at random: no order was not yet imposed on how they moved, stood, leaned, or squatted on their haunches, waiting on line. [W]alkers, as individuals and groups, were undisciplined and even unruly (Amato, 2004, p. 162).

In response, the state segregated uses (separating street and sidewalk, for example) and spaces, instructing peddlers and entertainers where and when they could be. Through law, culture and forms of self-government, street users were turned into pedestrians who were

> not to spit, litter, urinate, drink, act drunk and disorderly, or fight on the streets. At the same time, citizens were taught not to loiter and block streets and sidewalks, to stay on the correct side (Amato, 2004, p. 183).

Such regulation cannot easily be explained as motivated only by a sociological concern at dissent, order and social unrest. While

beggars and vagrants were often removed from the street, it seems that this was also prompted by a police-power mentality of space, flow and traffic.

Viewed in this light, the language of spaces and uses found in contemporary anti-begging law may have a broad precedent. Certainly, Valverde (2003, 2005) points to the long history of local police powers which have tended to govern through spaces and uses, and do so below the radar of constitutional rights claims, which tend to focus on the national stage. As expressed by someone such as Rowan Birch, the traffic code is a functional mentality (and thus one that does not need to rely on meta-justification) that seems to have a number of intersecting characteristics. The street and sidewalk are understood as a space of objects, both moving and static. The code does not privilege persons, but rather treats panhandlers and mail-boxes as on the same ontological plane. These objects have particular functions and may be engaged in activities (such as begging, marking bus stops or walking). Objects may thus be in conflict: no two objects can be in the same space. The state is to resolve this conflict with reference to the function of the space within which the objects are located. This function is clear and unitary. Uses and objects that interfere with this primary function are incompatible. Vancouver's Sidewalk Task Force (Vancouver, 2002) relies on a similar mentality. In a section entitled 'Why sidewalks important?', sidewalk space is characterised as limited. Different "sidewalk uses compete for the same limited space", causing hazards and congestion. Photographs show clear examples of good and bad sidewalk space (see Figure 1). Hence it becomes possible to treat begging, like street vending, as a series of more or less obstructive acts within particular spaces.

Now, all this would be interesting, and rather parochial, were it not that a similar 'traffic code' to that found in *Federated* and *Banks* appears in many other North American treatments of municipal public space and disorder, although as far as I know, it has not been explored much by other analysts. Perhaps its very functionality (as compared with more obviously rhetorical devices, like 'broken windows' discourse) makes it uninteresting. As noted, it crops up in many Canadian cases. In *Vancouver v. Burchill* (1932) SCR 620 at 625, 1932 4 DLR 200, Rinfret, J., noted that municipalities are owners of the street but only insofar as they are trustees for the public

> The streets remain subject to the right of the public to 'pass and repass' and that character, of course, is the very essence of the street (see also *Harrison v. Duke of Rutland* [1893] 1 QB 142).

It also appears in American jurisprudence. Kohn (2004; see also Zick, 2006) identifies the ascendancy of what she terms a 'property rights' approach to public space in US First Amendment jurisprudence in which public space is characterised as

> private space owned by the government [that] can be regulated in whatever manner the responsible government agency sees fit (Kohn, 2004, p. 49).

Thus, in *Lee v. Krishna Consciousness* (1992), the US Supreme Court held that government did not intend to create a public forum "in cases where the principal function of the property would be disrupted by expressive activity" (Kohn, 2004, p. 51). She also cites *U.S. v. Kotinda* (1990), in which the US Supreme Court held that the sidewalk outside a post office was not a public forum as the postal service was run like a business. *Schneider v. State* (208 U.S. 147, 160 1939) sees the Court arguing that

> middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic.

The traffic code also plays an important role in cases involving the public poor. In the influential case of *Roulette v. City of Seattle* (850 F. Supp. 1442 1994), the district court upheld a sidewalk use ordinance (which prohibited a person from sitting or lying on a public sidewalk in commercial areas during business hours). The challengers argued that it lacked any legitimate government interest and thus violated substantive due process requirements. The court, however, found the government interest ("protecting public safety by keeping the sidewalk clear of ped-

less tolerant of street disorder, which he categorises as red, yellow, green zones, borrows from the lexicon of traffic, as does his characterisation of informal street etiquette as the 'rules-of-the-road'.

Treating begging as traffic does significant things. In one sense, it seems, *pace* Valverde, to negate very effectively the sorts of rights-based claims made by opponents of begging law. Begging law, the opponents argue, is wrong, because it violates the rights of *persons*. It entails the criminalisation of people forced into poverty. For the Assistant Director of the National Anti-poverty Organisation, Vancouver's by-law "is one component of systemic discrimination against low-income persons": "it has the effect of limiting freedom of speech of individuals who live in poverty" and must be seen as "an attempt to remove individuals who live in poverty from the streets of the City of Vancouver".[17]

No, say the courts. Rights-based arguments around begging law, which time and again insist that identified *persons* are treated inequitably are negated, again and again, by the counter-argument that law is not regulatory of persons, but rather of actions and spaces. The purpose of the law, the courts say, is not to discriminate against *people* who panhandle, but rather to treat panhandling as a spatial *activity* that must be balanced with other activities, according to the overall function of the place. In *Banks*

(indeed, the function of the place is understood in these terms). There is a long-standing association in liberal thought between mobility, individualism and liberty such that "to be free is to be mobile" (Pritchard, 2000, p. 50). So, for example, Hobbes' individualist and materialist account drew on a conception of the geometry of bodies, in which attention is drawn to the vectors of individual action (Macpherson, 1988; Turner, 1984).[23] The essential liberty of the individual (or object: Hobbes makes no distinction between the liberty of water, animals or people) presupposes metaphorical and literal mobility

> Liberty signifeth (properly) the absence of Opposition: (by Opposition, I mean externall impediments to motion (Hobbes, 1651/1988, p. 261).

The Hobbesian individual, notes one observer, is

> an atom hurtling across a flat social plane; that is a landscape without any visible contours of social distinction to bar his path or predetermine any line of action (Wolin, 1960, p. 282).

Laws ("Artificiall Chains", p. 263) are charac-

> people for engaging in certain types of behaviour, such as begging or living in public (Daniels, 1997, p. 729).

Perhaps, then, a better option is to contest the traffic code, whether expressed in court or in other settings. In so doing, rights-based arguments predicated on personhood do not seem to have a lot of traction. Valverde's (2005) suggestion that any informed progressive response needs to recognise and take on the specificity of municipal law, seems worthwhile here. She suggests arguing from within prevailing categories, such as use.

Thus, we could try and rethink mobility and 'traffic' in a more inclusionary and humane way. For example, we could turn to more progressive strains of traffic engineering, such as the work of British urban planner Ben Hamilton-Baillie,[25] who promotes the idea of the street and sidewalk as 'shared space', as well as an extensive body of work that demonstrates the multiple, overlapping and non-state dimensions to the 'function of the street' (Anderson, 1978; de Vasconellos, 2004; Duneier, 1999). We could also try and complicate the idea of walking which the courts seem to regard only as a purposeful, individualised expression of ini45TDtonn24(eem)i5ingini

against explicit expressions of social difference: for example, in *Banks* (2001),

Act are “only remotely connected to secur-

building, to be taken in when closed: no umbrellas are to be permitted.

23. Compare also with Blackstone, who drew a strong association between personal liberty and 'locomotion'. For a related discussion, see Blomley (1994a, pp. 189–222). On the contemporary relevance of a view of freedom as the absence of external physical or legal obstacles, see Taylor (1979). On liberalism and mobility, see Houseman (1979; also Meilaender, 1999; Whelan, 1981).
24. It is tempting here to wax structural about negative liberty, class and capitalism (Bauman, 1988) and the inequalities that formal equality and negative liberty facilitate. Negative liberty, more bluntly, "is good provided you have cash" (Abraham, 1996, p. 63). Experiences of mobility and law are also socially differentiated, whether using the street or crossing a national border. Similarly, mobility rights are also socially differentiated (Blomley, 1994b; Cresswell, 2006).
25. see www.hamilton-baillie.co.uk.

References

ABRAHAM, D. (1996) Liberty without equality: the property-rights connection in a 'negative-citizenship' regime, *Law and Social Inquiry*, 21(1), pp. 1–65.

AMATO, J. (2004) *On Foot: A History of Walking*. New York: New York University Press.

and the Politics of Exclusion in Ontario, pp. 41–54. Halifax: Fernwood Publishing.

PRITCHARD, E. A. (2000) The way out west: development and the rhetoric of mobility on postmodern feminist theory, *Hyapatia*, 15(3), pp. 45–72.

SCHNEIDERMAN, D. (2002) The constitutional disorder of the Safe Streets Act: a federalism analysis, in: J. HERMER and J. MOSHER (Eds) *Disorderly People: Law and the Politics of Exclusion in Ontario*, pp. 77–90. Halifax: Fernwood Publishing.

SMITH, N. (2005) Neo-critical geography, or, the flat pluralist world of business class, *Antipode*, 37(5), pp. 887–899.

SOLNIT, R. (2000) *Wanderlust: A History of Walking*. New York: Viking.

TAYLOR, C. (1979) What's wrong with negative liberty?, in: A. RYAN (Ed.) *The Idea of Freedom: Essays in Honour of Isaiah Berlin*, pp. 175–193. Oxford: Oxford University Press.

TURNER, B. S. (1984) *The Body and Society: Explorations in Social Theory*. Oxford: Basil Blackwell.

VALVERDE, M. (2003) *Law's Dream of a Common Knowledge*. Princeton, NJ: Princeton University Press.

VALVERDE, M. (2005) Taking 'land use' seriously: toward an ontology of municipal law, *Law Text Culture*, 9, pp. 34–59.

VANCOUVER, CITY OF (2002) *Vancouver: a walking city—sidewalk safety, access, and ambience for all pedestrians*. The report of the Sidewalk Task Force, City of Vancouver.

VASCONELLOS, E. A. DE (2004) The use of streets: a reassessment and tribute to Donald Appleyard, *Journal of Urban Design*, 9(1), pp. 3–22.

WALDRON, J. (1991) Homeless and the issue of freedom, *UCLA Law Review*, 39, pp. 295–324.

WALZER, M. (1986) Pleasures and costs of urbanity, *Dissent*, Fall, pp. 470–475.

WARTENBURG, T. (1990) *The Forms of Power: From Domination to Transformation*. Philadel-