2011 URBAN GEOGRAPHY PLENARY LECTURE—
COLORED RABBITS, DANGEROUS TREES, AND PUBLIC SITTING:
SIDEWALKS, POLICE, AND THE CITY¹

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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

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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. 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 between them face an automatic six-month jail term. No one may set fire to another person’s property without prior permission. I could find no evidence of such silliness. However, the Code does have a few surprises including the injunction against selling any fowl under three weeks of age or rabbit under three months, it being an offense to “color, dye, stain, or otherwise change the natural color of any such fowl or rabbit.”

What, more generally, does a careful review of Seattle’s Code reveal about the distinctiveness of urban law? The first thing we notice is that the objects of regulation are diverse and widespread and that they include both persons and inanimate things. Potbelly pigs, shared drinking cups, hazardous vegetation, grain elevators, owners of tattoo parlors, and street users are caught up in a promiscuous and seemingly unconnected series of constraints and compulsions. Second, such regulation appears both highly specific (no potbelly pig over twenty-two inches in height at the shoulder is to be kept as a pet) and highly general (with injunctions against “nuisance” and “obstruction”). Third, regulation appears to be aimed at the prevention of potential wrongs and hazards rather than just the punishment of past wrongs. Owners and occupants must remove snow from adjoining sidewalks and prevent its becoming or remaining in an icy, ridged, uneven or humped condition or in a condition that is potentially hazardous to sidewalk users. Fourth, such regulations appear not only open-ended and discretionary but sweeping in their reach. That owners are compelled to work to keep the City’s sidewalks clear of snow and “icy ridges” would appear to be a form of enforced servitude, for example. Fifth, such regulation does not serve the interests of private individuals but is designed to protect and secure a loosely defined collective. Offenses against “public order” and “public morals,” for example, are expressly identified.

While, as noted, the Code ranges over a wide and seemingly open-ended terrain, let me focus on an area of particular concern to many geographers: public space. The Code draws a distinction between parks and “streets and sidewalks.” The latter are intensely regulated, often in highly specified ways. For example, no street clocks shall be constructed within 100 feet of any other clock or within eight feet of any utility pole or fire hydrant; no more than two lines of advertising shall appear on the face of the clock; and no person shall

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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 cafes 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 of games, newsstands out of alignment with the curb, and inaccurate clocks. The sidewalk is also a space clearly governed by the City. Rather than a traditional positive legal logic, whereby all is permitted unless expressly forbidden, a Coded sidewalk appears to require active permissions by the state: all is suspect, or tolerated only in a qualified and conditional sense.

What is a successful sidewalk? It is one that is open to flow and circulation and swept clean of encroachments and obstructions. For example, “pedestrian interference” is forbidden (i.e., to “walk, stand, sit, lie, or place an object in such a manner as to block passage by another person or a vehicle, or to require another person or a driver of a vehicle to take evasive action to avoid physical contact”), with the exception of permitted protests and pickets. It is an offense to “aggressively beg,” that is, to solicit with the intent to intimidate others into providing money or goods. Another section of the Code also makes it an offense to sit or lie down on any public sidewalk in designated zones between 7 a.m. and 9 p.m., except in specified cases.

Now, unlike injunctions on the coloring of rabbits or the placement of street clocks, Seattle’s sit/lie ordinance has received attention, sparking the ire of anti-poverty and public space activists who initiated a constitutional challenge (named the Roulette case after the lead plaintiff, of which more below). Similar regulations have come under general attack across North America. However, while it is tempting to treat such regulations in isolation or to analyze them with reference to other rationalities such as neoliberalism, my aim here is to put the sit/lie ordinance back into the Code and to read it with reference not only to sidewalk law (street clocks, snow removal, newsstands, etc.), but also more generally, comparing it to the Code’s injunctions against such things as painted rabbits, dangerous trees, and improperly disinfected rental shoes. To do so, I will suggest, requires an understanding of police, a remarkably prevalent yet understudied form of legal rationality, powerfully evident in cities. Before doing so, however, let me quickly compare police as it relates to public space with the prevailing orthodoxy.

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6While the establishment of specialized police officers is an expression of a more generalized logic of police, the former is much more pervasive and ancient. Indeed, the reduction of “police studies” to the analysis of the former has overly narrowed the investigation of the latter (Neocleous, 2000).
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 measures rather than just remedial regulation. And (f) a particular concern with circulation and blockage. People sitting on sidewalks offend, it seems, not only because of their economic impact but because they threaten “public safety”: “The elderly, infirm and vision-impaired should not have to navigate around people lying prone on frequently congested sidewalks.”

Policing the City

I wish to suggest that we consider Sidran’s arguments and the resultant regulation as a contemporary expression of a very ancient form of legal rationality—police—that is powerfully present in urban law. As we shall see, the exact nature of police is uncertain: it remains “without authoritative or generally accepted definition” (Freund, 1904, p. iii). “It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its existence” (Commonwealth v. Alger, 1851, p. 82). Its central concern is the production of the well-ordered society, predicated on what
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 heteremonic 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. 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. 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” (Dubber, 2005, p. 3). Bates’s case, in 1606, distinguished between the English king’s “ordinary” power (intended for the benefit of particular subjects, i.e., the common law) and his “absolute” power, defined not as that “which is converted or executed to private use, to the benefit of any particular

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7The mund should be thought of less in terms of the physical household as a discrete entity than the householder’s exercise of a relationship of personal guardianship, predicated on the power of the father (patria potestas) (Stubbs, 1888).

8The peace is essentially an alliance for mutual good behavior. To act against this is to commit a breach of the peace, such that an assault on one is viewed as an assault on all. While originally institutions such as the hundred or the church had their own peace, this becomes concentrated in the royal peace.
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).

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, p. 3). As such, police “assumes the superiority of social over individual interests” (Freund, 1904, p. 11). Father, it seems, knows best. The sovereign is thus charged not only with protecting his realm from external threats but is also required to order the members of his household to ensure the survival and welfare of the household as a whole. Those who are recalcitrant or disobedient, thus breaking the royal peace, are seen as violating their duty of fealty and are thus disruptive of the order of the household.

Police thus came to shape the manner in which certain forms of regulation, and departures thereof, were understood. To kill one’s lord, for example, not only violated the duty to submit to his rule but also destroyed the well-being of the entire household. It thus became imperative not to simply punish it—for once committed, the household ceased to exist—but to pre-emptively prevent it. In English law, to commit treason was not to kill the king, in other words, but “to compass or imagine the death of our lord the King,” in the words of the 1351 Treason Act (Dubber, 2005, p. 22). This preventive, forward-looking logic, is one crucial aspect of police power, as we shall see. For Freund, police “endeavors to prevent evil by checking the tendency toward it” (1904, p. 26). This distinguishes it from the criminal law that “deals with offenses after they have been committed, the police power aims to prevent them” (Freund, 1904, p. 87). This fatherly concern presumes a particular form of prudential wisdom, with “the ability to decide, in the particular instance, which specific measure will best promote prosperity, order, and well-being, without being bound by strict lawlike definitions” (Dubber and Valverde, 2006, p. 5). As noted in the Bates case, police varies “according to the wisdom of the king, for the common good, and these being general rules, and true as they are, all things done within these rules are lawful” (Freund, 1904, pp. 6–7).

Threats to public well-being are, by definition, open-ended. They may include people and their acts as well as inanimate objects. An 18th-century German police scientist described police as “the good order and constitution of a state’s persons and things” (in Dubber, 2004, p. 140). If the “point of police is the suppression of threats to public police” (Dubber, 2005, p. 56), it becomes impossible to itemize such threats in advance. Thus, the objects of police may also appear mundane and lowly, as well as multifarious. As Seattle’s Code governs rabbits, street clocks, and street vendors, so for Blackstone, diverse “nuisances” such as the keeping of hogs in any city, lotteries, eaves-droppers, bawdy houses, and disorderly inns are an appropriate target of police. “The business of the Police,” noted Montesquieu in his *Spirit of the Laws*, “consists in affairs which arise every instant, and are commonly of a trifling nature: there is then but little need of formalities...

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*Dubber (2005, p. 158) distinguishes police and law in terms of interference (prevention and remedy), styles of government (informality and formality, flexibility and definiteness), the scrutiny applied (effectiveness and justice), and the relation between subject and object of government (hierarchy and equality). Novak (2008), however, cautions against too sharp a distinction between law and police.*
… [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, mines, nitro-glycerine, scaffolding, dangerous machinery, syphilis, acrobatic exhibitions, destructive animals and vermin, dead bodies, putrid meat, embalmers, billiard tables, offensive establishments, unsightly advertisements, lack of Sunday rest, lotteries, gambling, intoxicating liquors, sacramental wine, lewd and lascivious conduct, illicit sexual intercourse, brutality, public amusements, vagrants, loitering prostitutes and houses of ill repute, debtors, frauds, combinations of labor and capital, bankrupts, and corporations. One is reminded of The Instructions of Catherine II quoted by Foucault (2007, p. 340): “Police is concerned with little things, whereas the laws are concerned with important things. Police is perpetually concerned with details.”

Freund provides some useful pointers for mapping the geography of police. For as can be seen, police is put to work in multiple spaces. While Freund confines police to the national sphere, we can increasingly think of the policing of the space of the international (e.g., Levi and Hagan, 2006). The colony, both in general, and internally, has also been characterized as a police space (Valverde, 2006), as has the factory or the prison (see Dubber and Valverde, 2008). Most obviously, the space of the national household (Blackstone’s “domestic order of the kingdom”) is clearly evident. As with the ancient

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10A particular police format, as Valverde (2003, p. 246) shows, is the list—a long series of only loosely connected threats and situations—of which Seattle’s Code is an obvious example. The list is revealing of certain characteristics of police power, she notes: “(1) the heterogeneity of ‘mean’ governance objects visualized in great profusion in list form; (2) the simultaneous institution of very broad categories (‘public nuisance’, for example) that create swamps of discretion; and (3) the dearth of theoretical justification for selecting these particular objects and not others and for arranging them in the order given.”
mund, the objects that constitute the national household are to be policed internally and protected from external threats. Dubber and Valverde (2006, p. 7) note that U.S. “homeland security” draws such a connection between state and household and operates according to a “fundamentally preventive logic that enables its officers to govern certain ‘suspect’ people and certain spaces (e.g., airports) in a highly despotic fashion.” For the national household is not undifferentiated.

And thus we come to the quintessential police site: the city. For Tomlins (2006, p. 271), “the city … is a prime locale for police in virtually every regulatory capacity one could imagine” (cf. Barrie, 2010). Formally speaking, this is clearly the case, given that police powers are frequently delegated to municipalities, as is evident in Seattle’s regulatory reach. European monarchs began delegating the powers to police in the Middle Ages, for obvious reasons: Tomlins (2006) notes that the city’s population concentrations demanded a police of sanitation, its economic conditions necessitated a police of markets and supply, and its built form required a police of surveillance. For Foucault (2007, p. 335), the objects relevant to police powers are “urban objects” in the sense that they exist only or are especially significant in towns, existing under conditions of “dense coexistence.” An urban logic of police more generally, Foucault (2007) notes, is central to early police scientists, who extrapolated the police ordering of the town to the scale of the kingdom as a whole.

But the geography of urban police extends beyond the designation of its privileged site. For particular spatialities within the city are central to police, most notably those of circulation, given its effects upon the resources, capacities, and internal order of the state (e.g., Hunt, 2006). For Levi, “[w]hat emerges is a governmental concern with movement in all its forms … It is through its concern with activity and circulation, then, that police governmentality becomes closely tied to the urban itself … City regulations thereby concern themselves with the everyday, with the mundane, and with details, seeking in particular to allow and to interdict flow and movement” (2008, pp. 182–183).

Circulation, Foucault (2007, p. 325) argues, should be understood not just in terms of the material conditions under which it operates (such as the provision of roads and sidewalks) but also as requiring the facilitation of “circulation itself, that is to say, the set of regulations, constraints, and limits, or the facilities and encouragements that will allow the circulation of men and things …” It may be tempting to characterize such concerns as motivated by market-based logics. And there is no doubt that the facilitation of commerce was and remains a concern for police. However, commerce is useful only insofar as it advances the well-being of the household. For Foucault, “with police there is a circle that starts from the state as a power of rational and calculated intervention on individuals and comes back to the state as a growing set of forces …” (2007, p. 327).

Circulation is valuable, therefore, to the extent that it advances public ends. Early 19th-century public officials in the U.S., for example, embracing the rhetoric of the well-regulated society, radically extended police powers so as to create and carve out distinctly public properties and public spaces, in particular those that facilitated circulation, this being “a first object of police and modern statecraft” (Novak, 1996, p. 116). But this was far from straightforward, as “there was, after all, nothing inherently public about a

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11Which is not to say (obviously, I hope) that police is the only manifestation of law within the city.
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:

[Perhaps 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 as a crucial space in this police project. Elsewhere I have traced its emergence as both a physical and legal space in the early modern city (Blomley, 2011). While it could have been governed according to a variety of imperatives such as commerce, esthetics, or democratic engagement, police imperatives of public circulation were central. The sidewalk, therefore, was understood as unequivocally public, to be purged of private "encroachments." The Supreme Court of Michigan, for example, articulated this view in a telling judgment in 1849 concerning the erection of a stairway in Detroit that encroached on the sidewalk in violation of an ordinance that specified limits on porches and other projections (The People v. Carpenter, 1849, p. 273). Chief Justice Whipple concluded with a strong argument for police powers in the name of an abstract public. The authorities cannot grant exclusive uses of the highway to private individuals but have only the power to regulate the streets in the service of the community. It is for the City, he insisted, to "employ all the powers with which they are vested to purify the streets of the city, and to cause all obstructions not warranted by law or necessity to be removed" (p. 294). In a strong defense of the fully public sidewalk, Whipple endorsed such a purification in order to "remedy the mischiefs … by which the rights of the public have been made subservient to the convenience or cupidity of individuals" (pp. 204–205). Such a framing, which views the sidewalk as "fully public," to be scourged of private encroachments, remains. An Edmonton municipal engineer recounted a meeting with news publishers concerning the placement of newspaper boxes on city sidewalks. In order to "get the conversation going," he had asserted that access to the sidewalks to place your boxes is a privilege, not a right … we feel that we have the right to manage. We’re prepared for any challenge to that. We’ll never give up our right to manage without a fight, so if you don’t think we don’t have that right, take us to court. We’re not giving that up in any way, shape or form.12

But what are the rights of the public as they relate to the sidewalk? Freund refers to the public order and comfort attendant upon sidewalk use, predicated on a solemn form of "common use:"

12Interview, 2 October 2008.
This use is of the essence of the purpose for which the street exists, for which it has been dedicated ... and it enters therefore into the very nature of the public highway, and the use is so essential to the functions of social and economic life that the full enjoyment of individual liberty and property cannot be conceived without it. It must, therefore, be looked upon as one of the constitutional rights of the individual, in so far as the individual is part of the general mass of the people which is designated as the public. (Freund, 1904, p. 150)

A civic humanist would point to politics, joy, and sociality as the essence of the “common use” of the sidewalk. Freund differs: “The common use of the street,” he insists, “consists in passing along the street for purpose of business or pleasure, on foot or by vehicle” (1904, p. 152). But what the English courts refer to as the right to “pass and repass” is everywhere threatened, it seems, by private encroachments or static obstructions that impede circulation and thus threaten the welfare of the urban mund. Police must thus govern individual uses of the street in the service of the public:

The common right to use the streets is subject to manifold restrictions in the interest of good order, upon the principle that publicity imposes greater restraints upon individual conduct than privacy, and that the ordinary standards of public conduct require some regard for other persons’ feelings. (Freund, 1904, p. 154)

The duty of the City’s Fathers, therefore, is to prevent nuisances both by abating those that exist and prudentially forestalling future threat. But, of course, the array of possible nuisances is open-ended. Therefore, “[i]t is unnecessary to enumerate the various possible acts of indecency, breach of the peace and quiet, and molestation, that are thus prohibited either by ordinance or the general law” (p. 154). What is required is preventive, forward-looking action on the part of the state: “If the power of municipal regulation is to have any additional value, it must extend to the prohibition of those things that have a tendency to create obstruction, especially the stopping of vehicles, or of numbers of persons, for an undue length of time” (p. 154). Dubber’s comments on early forms of police still apply, it seems: police could be “applied to everyone and everything and everywhere ... Police was an end, the means to that end, and the institution enforcing the means. In other words, police was the goal that the police achieved by means of police” (Dubber, 2004, p. 142).13 Such ambiguity, put another way, is not a problem but an asset.

And so, to come full circle, Seattle’s municipal code or the comments of Mark Sidran in defense of the sit/lie ordinance take on, I hope, a somewhat different hue. Sidran’s appeal to community, the social order, and the “public good,” therefore, may not be empty rhetoric but an expression of the police imperative. His invocation of a slippery slope echoes police’s anxiety at an immanent and open-ended set of threats. His ambiguous appeal to “safety,” “order,” and “blight” reflects the fact that police threats defy final definition but must, of necessity, be left open, particularly if they are be to be forestalled rather than

13This particular urban rationality as it relates to the policing of the sidewalk is the focus of my recent book (Blomley, 2011). While I consider police more generally there, this essay extends the analysis and tries to consider urban police more generally.
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 block-
age 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 regu-
lation. 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 regula-
tion. 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 histori-
cally 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 direc-
tions to the members of the “household” and encourages arbitrary forms of rule by the
state, which threatens the well-being of the household as a whole, rely upon a police argument.14

The constitutional ring-fencing of police becomes clear when we examine the Roulette case, entailing a rights challenge to Seattle’s sit/lie ordinance (see Berg, 1994–1995 for an analysis of the case). Here, a civic humanist agenda is clearly in evidence, as a coalition of interests including the National Law Centre in Homelessness and Poverty and the Freedom Socialist Party sought to strike down the ordinance (and, initially, the aggressive begging ordinance) as a denial of due process, equal protection, the right to travel, and the First Amendment right to free expression. The City’s regulation was characterized as a form of purification, being “nothing more than a thinly veiled attempt to drive unsightly people from Seattle’s commercial core” (Roulette v. City of Seattle, 1996, p. 302). Some dissenting judges concurred, using a civic humanist framing of the sidewalk as a public forum and the act of sitting as rich with intersubjective meaning. One dissenting judge, Norris, observed that “When a dishevelled man badly in need of a bath chooses to sit on the sidewalk where shoppers toss their cigarette butts and other trash, he conveys a message about the degradation that results from society’s failure to accommodate the essential needs of all its citizens. His message addresses what many consider to be the single most compelling problem facing our nation: the growing disparity between the haves and the have-nots” (Roulette v. City of Seattle, 1996, p. 305).

On appeal, Kozinski, for the majority, deftly countered rights with police. The regulation by the City of the conduct at issue (sitting or lying on a sidewalk), he argued, reflects an appropriate exercise of police powers, serving “legitimate state interests.” The state interests advanced by the sit/lie ordinance are made clear at the very outset of his opinion: “The first step to wisdom is calling a thing by its right name,” he avers. “Whoever named ‘parkways’ and ‘driveways’ never got to step two; whoever named ‘sidewalks’ did” (Roulette v. City of Seattle, 1996, p. 302). Sidewalks, it seems, are obviously for circulation and the City’s police logic of the facilitation of flow and the removal of obstacles would appear to be eminently reasonable. He goes on, with more than a touch of sarcastic humor: “Seeing the wisdom of preserving the sidewalk as an area for walking along the side of the road, the City of Seattle passed an ordinance generally prohibiting people from sitting or lying on public sidewalks in certain commercial areas between seven in the morning and nine in the evening” (p. 302). To sit or lie on the sidewalk, by implication, is to engage in suspect activity that departs from the essential function of the space, as evidenced by a sardonic aside characterizing the argument of the plaintiffs as the claim that “it is unconstitutional for the city to curtail their use of the sidewalk as a sideseat or a sidebed” (p. 302).

Such an argument from police is by no means unusual, even in cases where rights claims seem more clear-cut. Consider an influential U.S. Supreme Court decision from the 1930s, cited by the majority in Roulette, concerning the case of one Schneider, who was distributing handbills in Los Angeles advertising a meeting organized by the Friends of the Lincoln Brigade, at which speakers would discuss the Spanish Civil War. Schneider was convicted under a section of the Municipal Code of the City of Los Angeles, which forbade the distribution of any handbill to pedestrians on any street, sidewalk, or park. The

14See also Levi’s (2008) discussion of the dissenting opinions in the Supreme Court review of Chicago’s Gang Loitering Ordinance.
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 precedent
limitations of the public forum principle. So Kennedy, in a 1992 Supreme Court concurrence, characterized the first part of Roberts’s claim as “rather sweeping,” noting that the view that “traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction.” For “the principal purpose of streets and sidewalks … is to facilitate transportation, not public discourse, and we [the U.S. Supreme Court] have recognized as much” (Lee v. International Society of Krishna Consciousness, 1992, p. 2717).15

A POLICE AGENDA

Police is easy to overlook. Operating through seemingly mundane forms of regulation, often enforced by unglamorous state agents such as environmental health officers or municipal engineers (Blomley, 2011), and concentrated at “lower” levels of the state, it is easily ignored or reduced to “bigger,” more exciting dynamics. Indeed, there is a paucity of scholarship on police. To disregard it is mistaken, however. For urban police is prevalent and important.

If urban scholars are to take police seriously, as I think we must, several questions follow. The first, as already pointed to, is to think through the relation between police and rights within the city. Invocations of urban rights in particular or the “right to the city” more generally need to acknowledge the particular power and prevalence of police. One urgent question, as Dubber (2005, p. 211) notes, “is whether police within the limits of law is possible … How can objects of police remain legal subjects?” For, as we have seen, police does not counter rights arguments with its own rights claims but sidesteps rights altogether. As analysts of urban politics, it becomes important to trace how this unfolds and with what effect. To the extent that we are committed to advancing the rights claims of certain interests such as the public poor, we need to be realistic about the relative purchase of such arguments and, perhaps, begin to think through alternative ways of advancing such claims, including attempts to rework police from within. When we do so, however, we must remember that while police may be hierarchical, it need not be conservative and regressive. Novak (2008) demonstrates, for example, the centrality of police to the development of Progressive and New Deal measures that sought to defend and advance “public welfare.”

In recognizing the specificity of police, secondly, we should avoid the temptation to reduce it to other rationalities, whether market-based or cultural. The regulation of the homeless is in an important sense like the regulation of colored rabbits, street clocks, and Lombardy poplars. It needs to be treated on its own terms, not assimilated to other logics. This does not mean, of course, that there are not multiple discourses relating to the homeless, nor does it mean that police cannot be invoked or drawn into such other conceptions. I think it extremely likely, for example, that Seattle’s sit/lie ordinance was introduced following concerted pressure from downtown merchants who sought the City’s help to remove the homeless from view. But the specific way in which such regulation was introduced (via a concern with circulation and blockage), and the language used to justify such law, is of a distinctive form and does quite particular legal work. The sit/lie ordinance,

15On similar Canadian and English judgments, see Blomley (2011).
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.

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