RIGHTS OF PASSAGE

Sidewalks and the regulation of public flow

a GlassHouse book

ROUTLEDGE

Nicholas Blomley

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Contents

Chapter 1

Pedestrianism

In 2002, radical anti-poverty activists occupied the site of the former Woodward's department store, located in the centre of Vancouver's impoverished Downtown Eastside, in what became a high-profile protest over gentrification, government cutbacks and homelessness. Forced out of the building, the squatters established an encampment in the surrounding sidewalk that quickly grew in size, attracting many other activists and homeless people (Figure 1.1). 'Woodsquat', as it was quickly dubbed, was many things to many people: a visible expression of radical anger, a deliberate attempt at embarrassing the provincial government and city in the run-up to the bid for the 2010 Winter Olympics, a symbolic space of opposition to private property and an affirmation of the commons, an eyesore and a civic embarrassment, a space of carnival and celebration, an affront to public salubrity and a resource centre and safe refuge for many homeless people. Tents, sleeping bags, posters, couches, dogs and people intermingled. Highly politicized, Woodsquat activists invoked a language of rights, social justice and insurgent citizenship. The City obtained an injunction, compelling the protestors to remove the encampment. Finally, a negotiated settlement occurred, and the protest was disbanded in late 2002.

How are we to make sense of Woodsquat? What analytical frame can be brought to bear? I suspect that for many scholars, the temptation is to fit Woodsquat into prevailing conceptual categories. We can think of the protest and the official response through the lens of social justice and citizenship, for example. Imbued with a language of rights, the protest can be described as a critique of the fairness of a social order and its attendant distributions of rewards and costs. We may also view the protest through the lens of property, as a challenge to dominant forms of private property, and a defence of popular, localized commons. Located on the street, in public view, we may also be tempted to invoke conceptions of public space, appealing to the importance of such sites for the exercise of expressive rights, and the forging of expansionary forms of citizenship. The actions of the city, conversely, could easily be characterized as a manifest injustice, motivated by a desire for the purification of public space.

All of these perspectives are, in their way, valuable and important. Indeed, I have contributed to them myself (Blomley 2008a). But they are, I wish to suggest, partial.

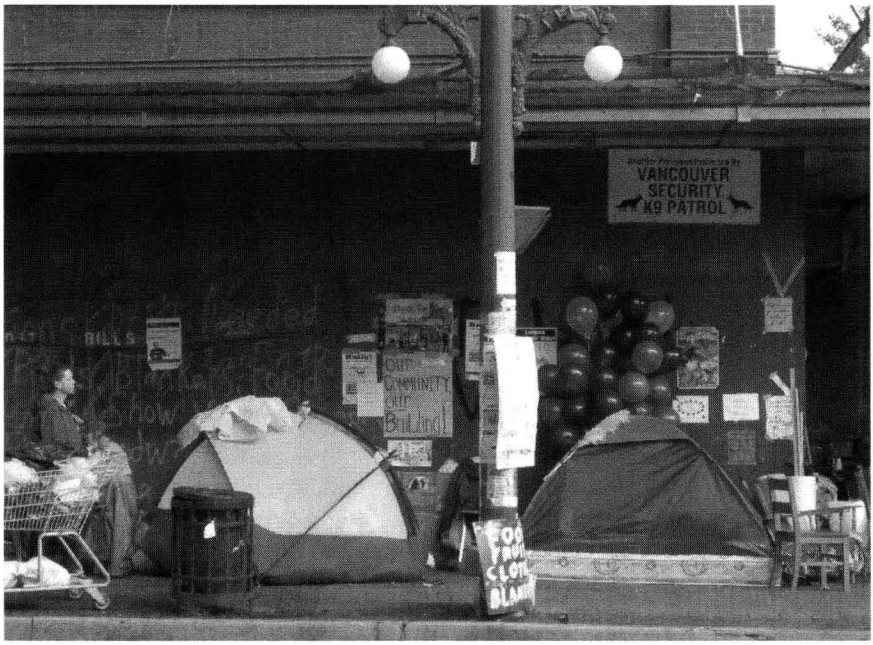

Figure 1.1 Woodsquat, 2002 Photo by author.

Levi (2009) notes a 'law-first' tendency in socio-legal scholarship in which, all too often, phenomena are subsumed within a legal category. When presented with a material phenomenon, such as the gated community (his example), legal scholars tend to reduce and explain it with reference to an 'underlying' legal category (such as private property). Arguably, something similar happens in relation to public space literature: when socio-legal scholars approach the topic, they tend to do so through already constituted legal categories, such as public property, rights and citizenship. Indeed, to invoke 'public space' is to introduce, even if unwittingly, notions such as the Habermasian public sphere. While such legal frames are clearly germane, there is, perhaps, a related danger of missing important realities. If our choice of vocabulary shapes our understanding, we need to be alert as to how the adoption of a priori framing, such as 'public space', not only opens but also closes down scholarly analysis, in much the way as for the hammer, every problem is a nail.

This becomes clearer if, rather than reaching for the hammer of abstraction, we temporarily shelve it, and pay more careful attention to the seemingly mundane details of the dispute, in particular, the quite striking way in which the City argued before the court. The City was quite clear, in its written arguments, that it was not framing the issue with reference to abstractions. The application for an injunction was, it stated, not 'about homelessness and poverty. It is about the right

of the City ... to have a valid bylaw which is presumed to reflect public policy and to balance the competing interests of all citizens. ...'[1]. In response to the British Columbia Civil Liberties Association (BCCLA), who intervened on behalf of the protestors to argue that the City should exercise its authority in a manner consistent with constitutional values, notably the right of the protestors to freedom of expression, the City made clear that as far as it was concerned, constitutional rights were irrelevant to the case. The City owned the streets and had the authority to regulate those streets in public interest. The City insisted that it was not targeting people and their behaviours, but was concerned only about the specific arrangement of a set of material objects in a particular space: 'The injunction sought is directed at structures and objects only. The City is not seeking to enjoin lawful picketing or protest or assembly on the Sidewalks'[2]. Insofar as the City was concerned, Woodsquat was not a site for politics and citizenship, but a series of obstacles, which they dutifully listed ('tents, sofas, chairs, mattresses, tarpaulins, tables, buckets, shopping carts, traffic delineators, traffic cones, wood pallets and other items or objects')[3]. The presence and location of these items were said to be a contravention of municipal law, notably Section 71 (1) of the Streets and Traffic By-law, which forbids any person from placing 'any structure, object, substance or thing which is an obstruction to the free use' of the street or sidewalk. But while the mere unlicenced presence of these objects was objectionable, it was the particular location and spatial arrangement of these things that was deemed more worrisome, as they compromised pedestrian passage. The City characterized the sidewalks as 'very busy pedestrian thoroughfares. The City regulates the placing of structures and objects on its sidewalks with the primary purpose of ensuring safe, efficient and unobstructed pedestrian access'[4].

Moreover, rather than framing these objects as somehow inherently 'public', to the extent that they were components of a form of public speech, or the possessions of a socially disadvantaged population, many of whom were homeless, and thus compelled to live their lives in public view, the City characterized them as a form of *private* encroachment, akin to the unlicenced sidewalk café: 'By placing tents, mattresses and other structures on the Sidewalks, the Defendants have effectively appropriated large portions of the public Sidewalks to their private use and are depriving the rest of the public of the use of those Sidewalks'[5]. As such, they constituted a 'trespass'[6] on City property and an affront to the public good.

The City's framing of Woodsquat is an example of a pervasive and widespread form of urban public space governance. While powerful, it tends to be hidden from view, easily obscured by grander and more visible forms of urban regulation. This book seeks to make sense of the character and effects of this rationality, which I call 'pedestrianism'. Pedestrianism understands the sidewalk as a finite public resource that is always threatened by multiple, competing interests and uses. The role of the authorities, using law as needed, is to arrange these bodies and objects to ensure that the primary function of the sidewalk is sustained: that being the orderly movement of pedestrians from point a to point b.

Obstacles that impede flow are inherently suspect, according to this logic, and are to be limited or placed carefully so as to minimize blockage. Law provides the essential ordering mechanism to ensure structured flow.

The motivation or inner life of the pedestrians is not an issue for pedestrianism, nor is their social standing. Beggars, protestors, commuters at a bus stop or patrons at a sidewalk café are all potential obstructions. Some of those obstructions are manifested as things, such as the 'structure, object, substance or thing' at issue at Woodsquat, and some as bodies, such as people waiting at a bus stop. The bus stop and the waiting transit user are in this sense comparable. Pedestrianism values public space not in terms of its aesthetic merits, or its success in promoting public citizenship and democracy. Rather, the successful sidewalk is one that facilitates pedestrian flow and circulation. Rather than seeking to promote and enhance a Habermasian public sphere that is distinct from the state, pedestrianism views the sidewalk as a form of unitary municipal property, held in trust for an abstract public. The municipality has a formal duty to regulate the sidewalk in the name of the public good. Other sidewalk users – such as the Woodsquat protestor, the beggar or the abutting merchant or homeowner – are not thought of as members of alternative publics, so much as they are deemed trespassers, impinging and encroaching upon municipal space.

Pedestrianism and police

To make sense of pedestrianism requires a few theoretical and methodological tools. The first, following Levi (2009), is the requirement that we recognize and treat pedestrianism on its own terms. Pedestrianism is clearly a form of legal practice and knowledge, but is also distinct, eschewing a rights frame in favour of an attention to placement and flow. Thus, perhaps it is better to think of it as a particular legal knowledge, with its own networks, logic and internal truth (Valverde 2003; Riles 2005). In making sense of such legal complexes, Valverde (2003) suggests that we avoid the temptation to immediately ask the grand questions ('why?', 'what?'), or follow the path of revealing the interests that are being furthered by law. While this is still necessary, she also suggests that we can learn much by studying legal knowledges, such as pedestrianism, through an exploration of their *effects*: that is, by asking 'what a limited set of legal knowledges and legal practices do, how they work, rather than what they are – much less what this all means for globalization, patriarchy, or any other grand abstraction' (2003, 11). To focus on effects, she argues, is necessarily to explore the 'particular effects of particular practices' (2003, 14). In so doing, we are invited to explore 'the particular effects of the techniques used by various organizations and institutions to organize, sort, classify, relate and explain' (2003, 14). Here we can learn from fields such as science studies, in which we are encouraged to 'bracket our familiarity with the object of study', approaching it as an anthropologist would a remote culture (Latour and Woolgar 1985, 277) or the work of political geographers, who encourage us to consider the state as an effect,

produced through a set of mundane and messy bureaucratic practices (Painter 2006; Mountz 2003).

When we take the specific legal practices and knowledges that constitute pedestrianism seriously, on its own terms, it becomes easier to recognize that it entails a very specific and somewhat unfamiliar conception of state power, law and governance. Pedestrianism can usefully be understood as a particular manifestation of a long-established tradition of 'police powers' that seek to promote the well-ordered society through regulations governing such miscellaneous matters as weights and measures, the sale of dangerous goods, street lighting and market opening hours. Remarkably wide-ranging, police powers have been characterized as the 'most expansive, least definite and yet least scrutinized of governmental powers' (Dubber 2004, 101). While police powers are operative at all levels of the state, they are most active at the local level, exercised by minor functionaries such as planning officials, liquor control boards, municipal engineers and environmental health officers. The objects relevant to police powers, Foucault (2007, 335) notes, are 'urban objects' in the sense that they exist only in towns, existing under conditions of 'dense coexistence'.

Police powers, Dubber (2005) argues, have ancient roots, reflecting a patriarchal tradition of governance, premised on the model of the household as a unit of governance. For example, early Frankish law rested on the protection of the *mund*, or household, in which the householder enjoyed authority to protect his household against external threats, and exercised internal powers to discipline recalcitrant members of the household. Such powers were not arbitrary, but were to be wielded so as to ensure the welfare of the household as a whole. The centralization of royal power entailed the expansion of the kingly *mund*, or the royal peace, to the nation as a whole, such that all became, in effect, members of the royal household. The sovereign was thus charged with protecting his realm from external threats, but was also required to order the members of his household to ensure the survival and welfare of the household as a whole. Those who were recalcitrant or disobedient, thus breaking the royal peace, were seen as violating their duty of fealty and were thus disruptive of the order of the household.

This hierarchical membership model, premised on the preservation of the household, continues to underlie modern police power, argues Dubber. So, for example, Blackstone defined nuisance as a police offence, it being 'an offence against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires' (1769/1979, 167). As Dubber (2005) notes, such omissions and commissions entail a failure to perform a duty of orderly conduct, 'of acting according to one's proper place in the community-family. Any violation of this duty amounted to a challenge to the authority of the householder, who bore the responsibility of maintaining order' (96). Police powers seek not to protect identifiable persons, but rather govern in the interests of more nebulous abstractions, such as the public good, the community, or what Blackstone referred to as the 'domestic order of the kingdom' (1769/1979, 162).

Viewed this way, the actions of the Woodsquat protestors entailed a violation of civic duty and a disruption of the orderliness of the larger community.

Police powers, therefore, should be seen as a distinct mode of governance, unlike that operating through prevailing forms of liberal legality, argues Dubber (2005; though cf. Novak 2008). If autonomy, or self-government, underpins law, then police is premised on heteronomy, or government of people by the state. The state itself, moreover, is differently conceived, he points out. From the perspective of law, the state is the institutional manifestation of a political community made up of autonomous equal persons. The function of law is to preserve the autonomy of these subjects. From the perspective of police, however, 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, 3).

Police powers, such as those relating to the regulation of the sidewalk, operate both through the suppression of 'nuisances' (such as sidewalk blockages) and the promotion of desired forms of behaviour and conduct. Rather than a form of remedial regulation, like the criminal law, police powers are also preventive in orientation. In the Woodsquat case, the City not only punished those who had caused an identifiable obstruction that impeded particular persons, but also prudentially sought to forestall future obstructions. For Bentham, while criminal law 'regards in particular offences already committed; [its] power does not display itself until after the discovery of some act hostile to the security of the citizens', police power 'applies itself to the prevention both of offences and calamities; its expedients are, not punishments, but precautions; it foresees evils, and provides against wants' (quoted in Dubber 2004, 136). In that sense, police powers act as a 'hinge articulating the past-oriented punishment of wrongdoing with the future-oriented governance of risks and dangers' (Dubber and Valverde 2008b, 4).

Operative at lower levels of the state, through apparently mundane forms of regulation, police powers are easily overlooked. But this would be a mistake. Police powers are remarkably promiscuous, open-textured, flexible and far-reaching. The objects of police are particularly heterogenous, including people, acts and objects, exemplified by the routine production of long lists of apparently disconnected problems and situations, the selection of which is rarely justified, in the service of remarkably open-ended categories, such as 'nuisance', 'obstruction', or 'morality'. Take, for example, the 1907 Streets By-Law in Vancouver that forbade, *inter alia*, sports or amusements likely to frighten horses or 'embarrass the passing of vehicles', the cutting of firewood, lumber, block, rock, stone and the mixing of mortar, 'or any other act upon the sidewalk' which obstructs pedestrians; required that road users keep to the left side; prohibited indecent exposure, the public display of 'obscene materials' and displays of books and pamphlets devoted to criminal accounts, police reports or accounts of criminal deeds, or 'pictures or stories or deeds of bloodshed, lust or crime'; and banned the use of poison for man, animal or fowl in public places, the throwing of sharp things that may damage trees or injure horse's feet; and the discharge of

'liquids which cause filthy effluvia'. Some of these prescriptions were quite specific, such as the requirement that youths remain under curfew between 9 pm and 6 am, unless with an adult or on an errand, and then to not loiter, shout or yell. Others seemed remarkably open-ended, such as the injunction against 'loitering', 'collecting in crowds' and 'encroaching'[7]. The City's contemporary preoccupation with the offending 'tents, sofas, chairs, mattresses, tarpaulins, tables, buckets, shopping carts, traffic delineators, traffic cones, wood pallets and other items or objects' in the Woodsquat case, and their invocation of 'access' and its negative, 'obstruction', continues this pattern.

Similarly, Dubber (2004) notes that police is comprehensive and universalizing: it 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' (142). The apparently open-ended discretion of police reflects, in fact, its roots in a form of 'practical wisdom that knows which concrete measures will work in the particular circumstances' (Dubber and Valverde 2008a, 5) to promote order and well-being. It is not surprising, therefore, that observers have an extremely hard time defining the essence or extent of police powers. *Halsbury's*, the supposedly definitive encyclopedic treatise on English law, opens its discussion of nuisance, a central concern of police powers, by frankly noting that, as is it used in law, the term 'is not capable of exact definition'[8].

Pedestrianism, in its own right, and as a form of police power, is thus quite distinctive, as the City's argument in Woodsquat reveals. Most immediately, it seems to depart from framings of Woodsquat that rely on categories such as rights, public space and purification. One of my goals is to illustrate how ontologically different pedestrianism is from prevailing scholarly perspectives on the sidewalk, such as that which views it through the lens of 'public space'. Public space is a topic of considerable interest to scholars and students in many fields, including political theory, urban design, geography, law and urban studies. The regulation of public space, like at the Woodsquat protest, has spawned a large literature. Progressives worry that it undermines the publicness of public space to the extent that it excludes and marginalizes. Public space, they argue, is valuable in that it allows certain people and voices to enter into the public sphere. Excess regulation and control, they insist, negates this function, and must be opposed. They worry that cities have been too eager to purify public space, such that the indigent, oppositional or merely different are increasingly excluded, leading to a narrowing of the public.

Yet, despite their ideological differences, both view public space in broadly similar ways. All embrace a form of what we can term 'civic humanism'. First, both regard public space as serving certain valued political and ethical ends, such as expression and democracy. So in the Woodsquat case, for example, the BCCLA argued that the City had erred in its definition of the public interest underlying the regulation of public space, which it had 'exhaustively defined as involving unimpeded access through the streets'[9]. Public space, argued the BCCLA,

was much more than this, and should also be seen as a site for expression and speech, advancing desirable forms of human flourishing and intersubjective engagement. Second, both treat public space as a space, first and foremost, of people. It is the encounters among these people, whether for better or worse, that are at the centre of their analysis. The expression so valued by the BCCLA, of course, requires both speakers and an audience. Not only must the autonomous rights-bearing subject be allowed to speak, but a democratic dialogue between citizens should ensue. Third, the site in which these encounters occur is understood as a space of and for the people, in which the public sphere can be made manifest. Publicness is understood not as synonymous with the state, but distinct and autonomous. Indeed, the state (as well as other 'spheres', such as the market, or religion) is seen as a potential threat to this very publicness.

Pedestrianism departs from civic humanism on all three counts. First, it is less immediately interested in the directly ethical or political dimensions of public space than in more functional concerns – notably flow, placement and circulation, and is at least facially apolitical. The rationality at work here may appear mundane and everyday. Indeed, proponents cite it as an obvious and uncontested goal for urban governments. Its practitioners – notably engineers, but also judges – appear to operate in the realm of the technical and practical, rather than the ideological. Second, pedestrianism is non-humanist in that it does not take the person as its primary focus. Rather, it is interested in both bodies and things, and their interrelationship. On occasion, as in Woodsquat, pedestrianism severs things from bodies, focusing on the objects and structures that are said to impede circulation. At other times, as we shall see, bodies and things are treated as essentially comparable insofar as they can both compromise circulation. Finally, as we shall see, if the sidewalk is public, this is understood as denoting public ownership, in which the state acts as trustee, acting to advance collective welfare and the public good. Its job is to act as an impartial referee between those competing factions that seek to use public property, to prevent the expropriation of property by particular interests (such as protestors) and to ensure that its primary purpose is maintained.

Pedestrianism, people and things

For the civic humanist, then, the sidewalk is a space of people. If objects appear, they tend to be treated as extensions of the human subject. In the Woodsquat case, the protestors and their allies resisted the City's plan to remove the structures on the sidewalk, by framing them as integral to the expressive liberties the protestors were exercising. For the BCCLA who intervened on behalf of the protestors, the objectionable 'structures' were not just obstacles, but themselves media of expression:

> The BCCLA submits that one cannot separate these physical structures, and these physical chattels, from a person's freedom of expression... If you remove these chattels in the case before Your Lordship, you remove the

content of their expression. The content of their expression is precisely the household items.

The message these items deliver, the content of the expression that these ordinary household items carry, is: 'I have no home. That is why the objects you have in your bedroom, or that you have in your kitchen in my case, are here on the public sidewalk. Please do something; please assist me in doing something about this.'[10]

The objects, put another way, were humanized, imagined as extensions of the personhood of the protestors. To remove the objects was to compromise the autonomy of the rights-bearing subject. Pedestrianism, however, is concerned with both people and things, the interrelation of which is a crucial legal concern. In the Woodsquat case, the City neatly severed the protestors from the objects on the sidewalk, noting that they had no objection to lawful protest or speech by persons, only to the blockage occasioned by their objects. These objects were not extensions of the person, but simply obstructions in their own right.

Pedestrianism's attention to the relation between people and things will be a recurrent theme. Police powers more generally focus on what an eighteenth-century German police scientist described as 'the good order and constitution of a state's persons and things' (in Dubber 2004, 140). Police's interest in both things and people is distinctive. For liberal legality, the tendency is to treat things as secondary to law such that '[t]hingness is prior. The law is post' (Madison 2005, 382). Realist property theorists, for example, have long insisted that property is not things, but rights. This tendency relies upon a categorical distinction between society, governed by human subjectivity, and nature, a sphere in which physical causality is the effective principle.

Pedestrianism, however, both reconstitutes this divide in consequential ways, and moves across it with ease. If, at Woodsquat, the City sought to sever things and people, on other occasions, people are essentially assimilated to things. Pedestrianism, like police more generally, is not particularly interested in the motivation of the person: the principle of *mens rea*, for example, does not apply when it comes to the placement of obstructions. Similarly, the alleged motivations of the Woodsquat protestors were irrelevant, the focus being on the nuisance that their objects generated. For police, 'it is a question not of *imposing* law on men, but of *disposing* things' (Foucault 1991, 95, my emphasis). And if policing 'disposes', it need not worry about, act upon or seek to regulate the interior life of the person. In that sense, pedestrianism can treat the person as an object, either in motion or at rest. As we shall see, this is evidenced by the Engineering figure of the abstract pedestrian, or 'ped'. What is important about the body is whether (rather than why) it is in motion or static. Put another way, it is not the 'soul' of the ped that is of interest, but it's size.

Pedestrianism's particular relation to bodies and objects is worth considering, echoing recent scholarship that explores the intersections of people and things (e.g. Pels *et al.* 2002; Pietz 2002; Brown 2001; Pottage and Mundy 2004), and

treats objects not so much as extensions of the self, but as 'actants', with inherent agency. Such theoretical moves signal a rejection of a humanist categorical distinction between materiality and sociality, and related claims that treat material objects as a backdrop to processes of symbolic signification and the production of human meaning. In so doing, the 'modern constitution' that separates things from people is reworked through the gathering of a 'parliament of things' (Latour 1993, 144–45). The goal of such scholarship is to think of the 'mutual involvement of people and materials in an environment' (Ingold 2000, 68). Viewed this way, if the BCCLA sought to characterize the objects on the streets in a style akin to post-structuralism, as dense with human signification, the City relied upon a post-humanist characterization of the objects as exercising (problematic) agency in their own right (cf. Latour 2000). However, while a Latourian might be tempted to celebrate the remaking of the thing/person divide, when pedestrianism convenes the 'parliament of things' the effects can be both productive and restrictive, as I discuss below.

To focus on the things of law, and the way they are produced and made legible and meaningful through legal knowledges, would seem to offer useful insights into pedestrianism. However, the things and knowledges of law have a crucial and unexamined spatiality that also requires more careful scrutiny (Blomley 2008b). Again, rather than starting our conversation with abstractions, such as rights, or 'public space', perhaps it is also productive to focus upon the material space within which Woodsquat, like so many other public protests, engagements and encounters, unfolds: the sidewalk. Given its pervasiveness and mundane materiality, such spaces are easily overlooked, or treated as simply a backdrop for more exciting dynamics. Yet the sidewalk, quite obviously, is a space, upon which certain bodies and objects are arranged. The Woodsquat protest entailed a particular use of sidewalk space, in which people, tarps, dogs, signage and furniture intermingled. The sidewalk, however, is not simply a space in abstraction, but is both produced by and made meaningful through prevailing forms of knowledge and practice. That the protestors were permitted to occupy the sidewalk, once expelled by the police from the building itself, alerts us to the fact that this is a *legal* space, governed by regulations, and subject to oversight by legal actors, such as judges and municipal officials.

By referring to the sidewalk as a legal space, I draw from scholarship that notes that the spaces of social and political life are frequently shot through with and made intelligible by legal forms of ordering and categorization (Blomley 1994a). Such legal spaces, in turn, help materialize and constitute the legal in the social world. The sidewalk, as we shall see, is governed, produced and interpreted according to multiple codes, rationalities and practices, many of which are law-like. Pedestrianism helps constitute particular delineated spaces, worries about relative placement and location, relies upon notions of circulation and fixity, constructs relational spaces, such as the public-private divide and is frequently framed in scalar terms, with reference to notions of jurisdiction, for example. The sidewalk itself is understood as a particular space, owned by the city, in trust for the 'public'. People and things are only problems when, like dirt, they are deemed