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Legality Beyond the Scope of Policy

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Diversity and Tolerance in Socio-Legal Contexts

Explorations in the Semiotics of Law

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Introduction

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Legally Beyond the Scope of Policy

Chapter 8

"Seago Legal Courses:"

"...as they are..."
and reconstructed according to the variety of social contexts? Therefore, the study of law according to the limitations of policy formation and impact can be limiting in scope because the restrictive application of policy according to a policy's stated affected groups cannot consider the full range of the policy's impact.

In this chapter, I will assert that the constitutive approach to law includes more than just parties designated by a policy as being affected. Or in other words, the narrow tailoring of law to strictly address those written into policy crucially misses the everyday wielding of power in which many variables of law and legality outside of the stated policy contribute to the experienced interpretation of policy. In doing this, I will look at the nature of a right as disputed in the terrain of the American handicapped parking space in order to examine the local everyday governance of such parking spaces according to American disability policy. I will argue that a truly constitutive approach to law includes rather than discounts the participation of the mass public. The dismissal of the unspecified mass public as the unaddressed periphery of policy actually promotes a level of intolerance in the study of what law and where law can be found. A truly constitutive approach to law is, in contrast, a tolerant approach that can fully examine how policy as law really works, illustrated by the everyday fusion of formal and informal law operating as power. In this sense, the constitutive approach to law considers the reality of unmentioned parties impacted by a stated policy. This expansive view encourages a tolerant approach to the study of law that is not limited in scope by the limitations of stated directives of policy.

To make my argument, I will examine legal scholar Thomas F. Burke's work (2004) on disability policy from his article 'The Judicial Implementation of Statutes: Three Stories about Courts and the Americans with Disabilities Act'. Burke focuses on court involvement with the Americans with Disabilities Act (ADA) of 1990 through the eyes of legal scholars, disability activists, politicians and the disabled themselves. He develops the reactions of the above to the ADA through the themes of backlash, symbolic politics and statutory construction. While a thorough survey of the ADA, Burke's view of the constitutive approach is problematic. Even as Burke insightfully addresses the impact of ADA policy on disabled people, he dismisses the impact on and influence of the ADA on the non-disabled mass public. Arguably, this latter group is ultimately responsible for enforcing disability policy in everyday places where formal law is an immediately absent force. Constitutive law reminds us that law is made by everyday actors interpreting what the law really means. To construct my argument, namely that the non-disabled mass public must be considered in how disability policy is translated as law, I will refer to the work of socio-legal scholars Thomas Dunn (1999), Robert Cover (1992) and Barbara Yngvesson (1993).

In A Politics of the Ordinary, Dunn (1999) asserts that which is ordinary is political (1999). Using this expansive sense of law, I will draw upon Dunn’s illuminating work on the politics of the ordinary to show that the banality of ordinary occurrences is underexplored territory in which structures of power that are less obvious but very telling of how power is wielded, can be revealed. Accordingly then, the mass public are political actors in ordinary spaces involving the disabled, such as the parking lot where both disabled and non-disabled drivers park. Next, I will look at law according to Robert Cover’s idea of the violence of law in ‘Violence and the Word’ (1992). Cover tells us that there is violence in the word of law. Drawing upon Cover’s premise, I will consider the implicit aspect of violence presented by the selective interpretation regarding the impact of disability policy. Lastly, I will examine the context of law created, interpreted and implemented in everyday, ordinary places as Barbara Yngvesson’s work in Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court attests (1993). According to Yngvesson, we can see that the mass public is a constitutive force of law in how law itself is created and constructed in the everyday arena of legality by everyday people. My conclusion will illuminate why prioritising the study of law’s effect to those explicitly targeted by policy is intolerant. This foundational exclusion of those affected by the policy, yet unconsidered by the policy’s scope, creates a problematic tension that the constitutive approach to law demands us to rethink while begging the larger questions of interpretation and enforcement of legality in the everyday.

The mass public: real policy-makers

The full picture of the law involves policy, the interpretation of that policy as rights, and the enforcement of those rights. Although a wonderful approach to the parameters of the ADA, Burke’s constitutive approach to law (2004, 123–39) is limited to the role of policy where the formal construction of and reaction to law prioritises the response of those written into the law. This is problematic because the everyday view of policy as law by people who are not explicitly considered to be part of the policy, can be just as important in constitutive analysis. An example of this would be the ‘eyes upon the street, eyes belonging to those we might call the natural proprietors of the street’ in Jane Jacobs’s (1961, 35) discussion of safety and the uses of sidewalks.

While Burke (2004) does recognise that there is more to law than simply that which is written into policy, the role of interpreting and enforcing law is nonetheless up to the formal realm of legislation and judging. He states (2004, 124):

Indeed for many statues, we must even consider the attitudes of the mass public, who though uninvolved in litigation, may have a decisive impact on processes of implementation. It is the behavior of this much larger cast – litigants, potential litigants, and seeming bystanders – that provides the context in which legislators and judges interact.

Burke (2004, 132) then insightfully speaks of the misplaced focus of interpreting law through formal institutions by saying: ‘but this focus misses perhaps the most important aspects of judicial implementation of statutes, the mechanisms by which
laws and litigation penetrate the larger society, the routines of nongovernmental organizations, and the everyday consciousness of citizens.

His attention to the 'everyday consciousness of citizens' is intuitive in addressing the constitutive approach, although also limiting because of the following premise: 'My chief point is to highlight how many readers of statues there are - not just the judges, legislators, and bureaucrats, who populate most studies of the court-Congress interaction but also defendants, plaintiffs, lawyers, administrators, journalists, and even the mass public' [italics added by this author] (Burke 2004, 136).

Although Burke's central premise alludes to an atypically inclusive interaction with the law by emphasizing the numbers of readers of law that exist, this possibility for expansion stops with the token acknowledgment of '... even the mass public'. This phrasing of '... even the mass public' is a limiting characterization that does not address the views of the non-disabled public as the majority of inhabitants of everyday places, spaces and arenas where law is enforced without the presence of formal persona or procedure. To discount this quotidian fraction of governance is to discount the full constitutive picture of law. In everyday parking lots where disability policy is abstractly present as law, the non-disabled public actually govern the disabled more on grounds of visible legitimacy and less on the dictates of policy per se (Marusek 2005). Furthermore, the symbolism of the ADA is heightened as a form of law for those 'excluded' from its protections, the presently non-disabled. This is symbolic for those who not only passed the actual law and the disabled who are directly impacted, but also for those it less ostensibly but just as tangibly affects.

The presence of handicapped parking spaces is quotidian, yet consistently invokes debates of legitimate occupancy according to parking-based identity and right, temporary claims of property, even murderous rage. Who parks where and why is a source of tension for drivers who repeatedly perform the banal task of finding a place for their cars. The semiotics of this terrain constructs a visual sense of right, where legitimate belonging is based upon the visual representation of proof of rightful occupancy (Johnson, 2005; Silbey and Ewrick 1998; Anderson, 2005). The regulation of that proof, and of the right to park, reveals a sense of law that harkens beyond the confines of the legal text.

In fact, this sense of law challenges the formal law of parking policy by evoking the Constitution as the penultimate protector of equality and equal rights. In a complex tango between the formal law of policy, the heralded law of the Constitution and the everyday unwritten rules of parking, social law as constitutive law emerges triumphant. Expected practices and accepted behaviors dictate law as norm, particularly in such parking spaces as the Handicapped Parking Space where the governance of such spaces is dependent more upon the identity of the parker than on the legality of spatial occupancy and accompanying qualification.

Without recognizing this attention to where law is really, the examination of policy is intolerant of those who are not formally written into the law itself yet informally enforce or resist its implementation. The everyday interpretation of the ADA rests with the mass public, who may include in its ranks both the disabled and the presently non-disabled. Here, the everyday consciousness of citizens is central to the constitutive approach to the ADA where those same everyday people who do not have the least notion of what the policy details of the ADA are find themselves in the position to either support, refute or ignore who parks in a handicapped parking space. The trouble with focusing our attention on formal settings such as the courtroom or litigation-driven organisational setups is that we fail to acknowledge the realities of everyday life where the enforcement of law is put into action. This may be the case when considering the current enforcement of American immigration policies where informal groups, such as the Minutemen Project, who take it upon themselves to enforce who belongs and who does not at the US's southwestern borders.

Therefore, the constitutive approach to law as articulated in Burke's article (2004) is rather intolerant and really not all that constitutive as it places too much emphasis on the formal aspects of law and not enough on the translation of law in everyday spaces by non-policy actors. His approach concerning the impact of law is restrictive because it addresses the reaches of law which are formally constructed through courtroom decisions, policy, and immediately felt as reactions by those directly impacted by the law. I would argue that the law does not end where Burke (2004) thinks it does, but is much more encompassing in its many various interpretations and implementations precisely at the level of the mass public. As socio-legal scholars and political scientists, how diverse are we in our thinking if we do not consider the full impact of legislation on those who are not the stated targets of the legislation but in fact participate, and arguably are those who enforce or resist such legislation each and every day? In other words, we must acknowledge the extent of who is tolerating those who are legally tolerated. Does this tolerance rest solely within the stated parameters of policy?

As Austin Sarat (1990) reminds us, the law is all over. Keeping this in mind, the interpretation of what is law is tied to the unique circumstances of its enforcement. The formal articulation of law is tied to the social agenda of law revealed as the constitutive approach to law. In other words, how law is constituted is through its interpretation and its enforcement in informal settings. Here, Burke's work (2004) is useful not only to illuminate the formal parameters of the ADA, but just as importantly to show the limitations of the reaches of policy in settings where everyday interpretations of that policy by the mass public who, vaguely familiar with the details of that policy, actually change its meaning. It is this version of 'policy-making' that is worthy of further examination. While Burke asserts that 'there is a place for the study of policy and how it is made' in considering the connection between policy and the everyday constitution of law, the study of law should not end with the study of policy.

1 This is from correspondence that I had with Thomas Burke during the summer of 2006.
Power of the everyday

Power can be found in observing the ordinary, as this is where politics can be found 'to the extent that normalisation reduces the unpredictability and unknowability of the ordinary, it operates as a form of politics', as Dunn suggests (1999, 6). The examination of power dynamics intrinsic to both handicapped and non-handicapped parking spaces, it is precisely this banal, ordinary, normalised place that invites observations of a political nature. In parking spaces, identity is characterised by a legal sense of right to park, designated by parking stickers, parking tags or licence plates. In these spaces, right is represented as a physical claim of property. Such physicality invites questions of belonging, be they individual or community-based, as well as of a public/semi-public/private determination. Although the distinctions of these spatial confines are legally reproduced, the social implications of these different types of space beckon further consideration into questions of belonging accentuated by race, class, gender and ability. Discrimination of place through property invokes a sense of identity that exposes the politics of injustice. Accordingly, the meaning of place carries implications of right versus might and raises constitutive considerations of jurisprudence that foster remedies of street-based justice. Dunn further asserts that 'to think about the ordinary as a contested space in which practices of representation occur links it to the forces of normalization and events' (1999, 6).

The representations of belonging presented by and inherent with the parking space render it an ideal place where politics occurs. Therefore, this politics of the ordinary can be found in the everyday interpretation and enforcement of disabled parking policy as the variety and ways in which law is constructed at the local level of the mass public is on city streets and in parking lots. Perhaps in this way, disability parking policy could best be understood in the banality of parking lots. Dunn (1999, 19) reminds us that 'We need to understand that the unevenness of the ordinary is the inevitable ground from which we may come to a better appreciation of events ... [where] the relentless presence of the ordinary, even in, or especially because of, its elusive character, becomes the source of its validity.'

The ordinariness of disability policy is the street sign of reserved handicapped parking space picturing a white figure in a wheelchair upon a blue background. Tied to this is the conflicting ordinariness of the non-disabled driver either affirming this legal reserve of space by parking in a generic space or rejecting the legal command and unlawfully parking in this handicapped parking space. Signals work with signs as important methods and tools of acknowledgment implicated in the 'project of resistance that increasingly identify with the ordinary', as Dunn describes (1999, 161). The recognition of the politics of ordinariness in everyday parking lots actually reveals the constitutive nature of law that changes in meaning as debated by the mass public.

These new perspectives on authority, space and jurisdiction invite consideration of the parking lot as socio-legal apparatus of place, position and occupation operating in everyday practice according to legal premises, but also social observation and political rationale. The parking space is a location of everyday governance. It is this framed social setting that is ripe with jurisprudential implications for property and right. Just as bodies of law both characterise and depend upon a sense of place, in a community, law is a function of the perception of a right and the protection and enforcement of that right. When discussed in terms of belonging, identity and property, the everyday practice of parking a car is a debate between local social practices and formal law. The right to park is a contested act between the driver and the governing power of the parked-upon space. The parking space can be viewed as an estuary of legitimacy, where private rights mix with public notions of occupation. The parked car is an inanimate representation of the driver that invokes aspects of either marginalisation or privilege. The occupation of this contested space is a site of social and legal governance created by formal as well as informal law. Formal law in this sense is law according to the courts, the Constitution and congressional statutes. On the other hand, informal law can be the mimicry of formal law, where everyday people copy the techniques of boundaries, practices and enforcement. This type of governance is used to invoke a notion of power that interprets rights according to social norms. The public knowledge of such norms creates and fosters a sense of law with expectations of enforcement. Both the expectation and the actual enforcement according to this expectation reveal a level of governance that is an extension of law. It is this constitutive approach to law that invites further exploration into the banality of everyday life.

The enforcement of everyday rights is often not according to formal law, but instead often takes on its own character of social law. Tickets, towing and appeals often match more mundane acts — handwritten notes angered by violation, keying, even tire-slaughtering. Resistance to this enforcement of formal and informal parking regulations is law on the streets, and with a nod to Michael Lipsky, with 'parking lot-level bureaucracies' (1980). Often violent, parkers can be victims and aggressors alike, receiving and directing anger at fellow parkers as well as at the personification of parking law, the parking control officer. The parking control officer is viewed as the most immediate presence of formal law that regulates rights while appearing as the face of social law, simply for being human. As a contested form of regulatory enforcement of regulatory design of parking, the control officer is a key aspect in the politics of parking where ideas of public forum, private property, public need, individual entitlement, community protection, legal justification and social need are transformed. This mundane activity of parking invites a new look into where law can be found and what jurisprudence can look like.

Examining the parking space through issues of local enforcement reveals critical notions of property, rights and belonging that the study of law and politics promotes. The semiotics of the terrain carries signs of legitimacy, the designations of property and entitlement, and the construction of identity and belonging. Central to these considerations is the fundamental notion of resistance to enforcement. The constitutive approach to the laws of parking and the enforcement of those laws is a reflection of democracy through the courts as well as in the street. Local forms of jurisdiction contribute to the discussion of where and what law really is. Because
it is not immediately present and is not immediately fully understood (in terms of extent of rights and enforcement), law at this informal level is formal in theory but in practice is constituted by those who enforce it and by those who contest its enforcement. How far does law reach? In this context, law extends to the fingertips of the arm of law and further to what those fingers can grasp. According to Dumm (1999, 18): 'the conflict (between the event and the normalized) shapes strategies of governance and the forms of violence imposed on people in their exercise of ordinary freedom.'

Cover (1992) relates well to Dumm (1999) as he details the relationship between violence, legal interpretation and everyday contexts. Cover (1992, 203) has an astute sense of law in the everyday and states 'legal interpretative acts signal and occasion the imposition of violence upon others'. Here, the interpretation of law is connected inextricably to violence in acts, reactions and responses. Cover (1992, 210) tells us 'every interpretive practice takes place in some context' and broadens the scope of his argument to say 'I would be prepared to argue that all law which concerns property, its use, and its protection, has a similarly violent base' where 'even the violence of weak judges is utterly real – a naïve but immediate reality, in need of no interpretation, no critic to reveal it' (1992, 210, 213). In this sense, weak judges are those drivers not explicitly written into the ADA parking policy for disabled drivers. These non-disabled drivers judge the legitimacy of disabled drivers' claim to handicapped parking spaces. As mentioned earlier, this judgement is based upon visibility.

Using this framework, we can connect the understanding of law to practices of its everyday interpretation. Cover (1992) tells us that institutional context ties the language act of practical understanding to the physical acts of others in a predictable, though not logically necessary, way. These interpretations, then, are not only 'practical', they are, themselves, practices. This idea of practices is important to consider when thinking of the institutional context of policy where the practical understanding of policy becomes law. Cover (1992, 218) speaks further of this understanding 'of the relation, between the interpretation of the judge and the social organization required to transform it into reality, the hermeneutic of the texts of jurisdiction' (emphasis added by this author). Accordingly, 'legal interpretation may be the act of judges or citizens, legislator or presidents, draft resisters or right-to-life protestor' (Cover 1992, 224). Following this combination of attributes, the text of jurisdiction is in the hands of the non-disabled mass public as the social influence and judge of the legal interpretation involving disability parking policy. In this context, legal interpretation may also be the practices of non-disabled drivers protecting or rebelling against disabled parking policy by parking or protecting the specified occupancy of handicapped parking spaces. Cover (1992) makes an important distinction between the experiences of the perpetrator and those of the victim of organized violence found in legal interpretation. He states that 'between the idea and the reality of common meaning falls the shadow of the violence of the law itself' (1992, 238).

The creation of this shadow of the violence of law as Cover suggests can be tied to the reality that policy is interpreted differently in varying contexts. Barbara Yngvesson (1993) perceptively illustrates this reality in her study of how everyday people interpret rights and law in local courts. These boundaries and margins of where law is remarkably illuminates a fluid scope of empowerment both inside and outside the court. Her attentive characterisation of residents of the two neighbouring towns of Turners Falls and Greenfield, Massachusetts, as constitutive members of the community, is adept and powerful. The local translation of power by various members of a local community is a wonderful approach to the self-governing construction and habitation of legal spaces. Yngvesson's purpose (1993, 11) is to show that the court is not solely shaped by professionals but that the law, the court, and legal officials are formed in the exchanges of officials with victims, defendants, witnesses, and others about the meanings of words and actions that bring people to the courthouse. In these exchanges, and in collective practices that develop around them, 'cases' and 'courts' are constituted, as everyday acts and spaces are transformed into legal ones.

She eloquently locates "law", "court", "cases", and "community" in everyday processes of complaint, conflict and cooperation ... channelled in particular ways by dominant communal and legal understandings and practices and speaks of 'agents who are both constituted by the law and who confront the law' (Yngvesson 1993, 12). She also speaks of the "local vernacular of rights", "governing capacity" of court clerks as intermediaries between citizens, and legal power to illustrate the reality of shifting space for legal interpretation in finding law (Yngvesson 1993, 47). She describes local identities which through the courthouse, act as "a vehicle for affirming this identity publicly through the law" (Yngvesson 1993, 31). Yngvesson's attention to the interpretation of policy shows us the breadth of legal interpretation involving the locality of the mass public.

The jurisprudence of the parking space creates a type of governing that by nature is local. In spaces where formal law is evident, yet dominantly absent, social law becomes judge and jury. Right and its regulation are culturally dependent and politically malleable. The right to park is a special right, considered to be a presumption of expectation connected, literally, to the person driving the car. Jurisprudentially, this special right is enacted between individuals in everyday parking environments where social norm operates as "the law" and formal law is distanced. Feeding the meter distances the threat of a ticket. The appeal of that ticket is the pronouncement of right. Yelling angrily at a driver who cuts you off and parks triumphantly in a coveted parking space is a more immediate regulation of right.

In continuing the debate of where the law ends and even how far it reaches, I extend similar questions to my own work. My own work suggests that parking policies are often less than transparent. I have argued that with the consequence in the enforcement of these policies as a form of power wielded intolerantly. The
legal right of reserved handicapped parking spaces for legally disabled drivers is limited in its protection by the ADA. It is the contested right to park in handicapped spaces that shows the difference between formal policy-based law and socially informal law (Marusek, 2005). In this context, formal law dictates that this space is reserved for any driver displaying the formal Blue Wheelchair placard on his/her vehicle. In contrast however is social law, which asserts that this space is reserved for those drivers who visibly appear to be disabled as the legal placard is not necessary proof. The difference between the two types of law can be seen in the everyday enforcement of these spaces designated by the street sign of legal handicap which pictures a white figure of a person in a wheelchair against a blue background, referred to henceforth as the Blue Wheelchair. The Blue Wheelchair sign designates space as a spatial marker. In these handicapped reserved parking spaces, onlookers and drivers themselves act to enforce their version of the law; they base their judgement of legitimate occupancy of that space on whether or not that particular driver looks disabled or not. This legitimising appearance of disability often ignores the legal wording of the Blue Wheelchair displayed on the vehicle. In everyday parking lots where these spaces are located, everyday folks are the actual enforcers of the law in terms of who parks in a handicapped space. Here, they make their assessment on the presence or absence of physical disability. Little attention is paid to the parameters of disability and space provided by the ADA’s legal framework. This visual-based justice is informal law and stands in contrast to the formal policy of the ADA’s legal construction of disability. According to the ADA’s definition of disability, a person is disabled if he/she can be regarded as being disabled. The quality of being regarded as disabled or not is semiotically amalgamated with the legal image of disability found in the Blue Wheelchair image. In a constitutive fashion, this legal picture of disability becomes the social expectation of what disability looks like; this picture is the foundation of informal law in everyday parking lots where the handicapped parking space and its occupancy are socially enforced. This consideration of constitutive justice is important in determining the rights of disabled drivers in common social settings and challenges the formal governance of the ADA as the primary protector of disability rights in everyday parking lots.

Conclusion

What is the meaning of this debate? On tolerance? On diversity? On law and who really counts? Are only those written into law the ones that matter? To look to see if we are tolerant or not, one must only witness the countless handicapped parking spaces that are overwhelmingly vacant, either out of self-preservation and fear of getting a ticket, or out of respect for those who need the closer space to leave it readily available for them. The creation of these spaces is evidence of tolerance through law, both for those who are handicapped and for those who one day may become handicapped. This tolerance is displayed everyday by people who do not